Thursday, March 25.

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

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

(In the Court of Session, March 27, 1914, 51 S.L.R. 478, and 1914 S.C. 601.)

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

A railway company in 1867 acquired a certain holding of land lying within the limits of their compulsory powers and took a conveyance substantially in the form prescribed by section 80 of the Lands Clauses Consolidation (Scotland) Act 1845 and Schedule A thereof, but they did not register the conveyance within sixty days of the last date in it, although they did so on the same day on which it was delivered. The superiority interest was not redeemed, and the company paid the annual feu-duty and, on the death of the vassal from whom they had purchased, a year's rent as composition. In a petitory action brought by the superiors to recover a year's rent as a casualty of composition due in 1910, twenty-five years after the previous payment, the company maintained that they had a statutory title, and that that extinguished the superiority and consequently the right to a casualty.

Held that the superiors were entitled to recover the casualty.

Per the Lord Chancellor, Lord Dunedin, and Lord Atkinson on the ground that the company, not having observed the requirement of the Lands Clauses Consolidation (Scotland) Act 1845, sec. 80, as to registering the conveyance within sixty days "of the last date thereof," had only an ordinary title under which, the superiority interest being unredeemed, they were liable for the feudal casualties, and that as this was the second occasion when a composition was being demanded from the company, a petitory action, and not the statutory action of the Conveyancing (Scotland) Act 1874, sec. 4 (4), was appropriate. *Opinions* that the statutory title of the Lands Clauses Consolidation (Scotland) Act 1845 was not an ordinary feudal title in a new form, but was a new species of perfect title which neither required nor enabled the disponee to enter with the superior in the usual way; and *observations* as to the nature of this title.

Per Lord Parmoor on the ground that where lands were acquired within the limits of compulsory powers for a statutory undertaking, the form of the title was merely a question between the disponer and the disponee, and the superiority interest depended upon the provisions of the statute, viz., sections 107-111 and 126 of the Lands Clauses Consolidation (Scotland) Act 1845, "the feudal prestations being kept alive as a basis on which to estimate the amount of recurring payments or of the final redemption or compensation" until such interest was redeemed. *Opinion* that the tenure of such a statutory corporation was fee-simple in its nature, the feudal relationship being extinguished.

The case is reported *ante ut supra.*

The defenders, the Caledonian Railway Company, appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—This appeal is brought against an interlocutor of the First Division of the Court of Session, the effect of which was to render the appellants, who were defenders, liable for the amount of a casualty.

The appellants, the Caledonian Railway Company, in 1867, under the statutory powers conferred by a private Act, which incorporated the Lands Clauses and the Railways Clauses Scotland Acts of 1845, had bought ground, which comprised the entirety of his holding, from a Mr Scott. His conveyance to them was dated 12th August 1867, but it was only registered in the appropriate Register of Sasines on 15th May 1868, a date more than six months after the last date on the conveyance itself. Scott's holding was subject to a small feu-duty, and the entry of heirs was taxed, but the entry of singular successors was untaxed. He died in 1885, and a casualty was then demanded from the company by the respondents, who claimed to be the superiors. The amount of the casualty was agreed at £479, being a year's rent of the ground as at that date. This was paid, and the company accepted a receipt signed by the respondents' secretary, which contained a declaration to the effect that the next casualty should be payable in 1910.

I do not think that the form of this receipt can in itself be taken either as imposing on the company any contractual liability, or as a personal bar against their raising the present contention, which is that no casualty has at any time been exigible from them.

The more serious questions which arise are two. Having regard to the provisions of the statutes under which the company bought, did there of necessity arise such a relation of superior and vassal as to enable the respondents in any case to claim a casualty? Secondly, if the company had the power to obtain a title which would free them from this relationship, did they in fact do so, bearing in mind the nature of the conveyance they took and the circumstance that they did not register it within sixty days, as prescribed by section 80 of the Lands Clauses Act, from its last date?

For reasons which I will state later I am of opinion that the second question must be answered in the negative. But having regard to the fact that the first question has been elaborately considered both by

the learned Judges of the First Division and in the arguments addressed to us, I do not think that under the circumstances we can pass it by, even although, if we agree that the second question must be answered in the negative, such opinions as we express on the first question will not affect the result.

I therefore proceed to deal in the first instance with the question whether it was competent at the date of the conveyance for a company acquiring land under the provisions of the Lands Clauses Scotland Act of 1845 to do so in such a way that a complete title could be acquired independently of the immediate superior of the seller, and that as a result such liability as is sought to be enforced in the case before us did not arise. It is important to bear clearly in mind what the character of the present action is. It is not a proceeding claiming arbitration, or for compensation under section 6 of the Railways Clauses Scotland Act 1845, or under sections 20 or 108 or 126 of the Lands Clauses Act of that year. It is a purely petitory action founded on an alleged statutory right to a liquidated sum.

The learned Judges in the Court below have differed as to the character of this right. According to the Lord President and Lord Skerrington the appellants are the vassals of the respondents, and are liable for casualties to their superiors, with whom they became entered under the Conveyancing Act 1874. According to Lord Johnston, what the company took was not a feudal title, but a statutory fee-simple free from the incidents of feudal tenure, yet subject to a purely statutory liability, created by section 107 of the Lands Clauses Act, for an amount equivalent to what would have been the feudal prestation had a feudal relationship existed.

The point on which this difference of opinion has arisen is one of considerable difficulty. We have had the advantage of listening to arguments from both sides of the Bar characterised by great ability and thoroughness. We have also had before us the diverging opinions of Judges of wide experience in feudal conveyancing. Two feudal lawyers of great eminence, Lord President Inglis and Lord Kinnear, have expressed views on the question, and the general conclusion to which they came was concurred in by another Judge well versed in the learning about heritable rights of the older generation—I refer to Lord Adam. But not only have the majority of the learned Judges from whom this appeal is brought dissented from these views, but they have been the subject of difference of opinion in earlier cases. The question comes before this House for the first time. We are not bound by authority, and we must therefore consider it on principle and in the light of the provisions of the statute on which it turns.

The first point to be determined is whether section 80 of the Lands Clauses Act establishes, as the appellants contend, a new kind of title, the creation of the statute, as an alternative to the old feudal title. I will turn presently to the language of this section, but before I do so I will advert to the nature of what it is said to have replaced by another tenure. For in order to appreciate the significance of the enactment it is essential to bear in mind the character of an ordinary feudal title as it stood under the law of Scotland in 1845. The Crown was, as it still is, the fountain of all feudal rights. The grantee of the Crown was entitled, as its vassal, to hold all that was contained in his grant on the conditions, and only on the conditions, defined in the grant. At that time, and up to the Conveyancing Act of 1874, he could do what a Crown grantee has not been able to do in England since the statute *Quia emptores*—he could without restriction sub-feu to a vassal of his own, who then possessed on the terms of his sub-grant. Since the passing of the Conveyancing Act of 1874 he has still been free to sub-feu, but with this qualification on his freedom, that on infeftment his disponee is, by section 4 (2) of that statute, in contemplation of law and automatically, entered with the nearest superior whose estate would not under the old law have been defeasible at the will of the disponee so infeft. But the changes effected by statute have recognised the broad underlying principle that if any vassal failed to fulfil the conditions of a grant, the land could be resumed by the superior free from all subordinate titles created by the vassal. The real nature of the right of the superior was thus that his grant precluded him from claiming anything but the fulfilment of the conditions he had stipulated for, so long as these conditions had not been violated. But should this have happened, forfeiture of the grantee's title must take place, and the superior became free to claim the right to enter by virtue, not of a new title, but of what was his original and inherent radical right.

The purchaser of land could take a subordinate title by feu from a mid-superior. But if he desired to have a title which was more nearly complete and more free from risk of a forfeiture, he took along with his disposition from his vendor an authority which enabled him to claim entry with the superior of whom the vendor held. For the privilege of such entry he had to pay that superior a casualty or composition, but he got a feudal title from him, yet imperfect in so far as the land might be forfeited through the act of the superior himself. The only way to make a title which was to retain a feudal character really perfect and complete so far as theory went was thus, as it appears to me, to get rid of all mid-superiorities and enter directly with the Crown.

In this state of the law the Lands Clauses Act was passed. Section 80 enacts that feus and conveyances of land to be purchased under the Act may be according to the forms in Schedules A and B, or as near thereto as the circumstances of the case will admit. These feus and conveyances being duly executed and being registered in the specified Register of Sasines within sixty days from the last date thereof are to

"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."

The section further provides that it shall not be necessary for the promoters to record in any Register of Sasines any feus or conveyances which shall contain a procuratory of resignation or precept of sasine, or which may be completed by infeftment, and the titles under such last-mentioned feus or conveyances are to be regulated by the ordinary law of Scotland until the feus or conveyances or the instruments of sasine thereon shall have been recorded in the Register of Sasines.

The effect of these provisions is that where the powers conferred by the Act are used for the purchase of lands, whether voluntarily or compulsorily, a title to the lands so purchased may be completed in the statutory form, of which it appears to me to be one of the conditions that the conveyance should be registered within sixty days from its last date. But if the promoters choose they can, as an alternative, refrain from registering, and make up a title on any appropriate procuratory or precept or by infeftment, and in such a case what they obtain is a title regulated by the ordinary law applicable under the feudal system.

The construction of section 80 would not, as I read the language, appear to be ambiguous in its consequences if the section stood by itself. But there are subsequent sections which must be read along with it, and are far from easy to reconcile with what would appear to be the natural interpretation of its words. The Act is badly drawn. The draughtsman seems in more places than one not to have realised clearly the nature of changes which he was seeking to effect. I think it is idle to try to find in the various sections a consistent and harmonious purpose. The only way of dealing with the enactment is therefore to take the words as they stand and to endeavour to interpret them in the way which does least violence to their natural meaning. It is after hesitation that I have come to some conclusions which I now proceed to express, and at these I have arrived only because I cannot satisfy myself that the language adopted by Parliament when it passed the Act of 1845 leaves me free, without doing violence to it, to come to any other.

Confining myself for the moment to the first of the two alternative modes of making up a title offered by section 80, I agree with Lord Johnston, who was on this point in a minority in the Court below, that what the company obtains if it registers is not such an ordinary feudal title as the Lord President and Lord Skerrington thought, but a title of a new kind which is the creature of the statute. The precise character of this statutory title it is not necessary for the purposes of this case to decide. One view is that the title can only be at once perfect and feudal within the language of section 80 if the company is to be regarded as holding immediately of the Crown as superior, for it is to be observed that the language of the section is that the new title is to be feudal. According to this view it can only become a complete and valid feudal title in all time coming, the general law and custom to the contrary notwithstanding, if the rights of all mid-superiors by whom entry can no longer be demanded are eliminated. This construction of the words negatives the notion of an implied entry with the immediate mid-superior. For such an entry would not only have failed to confer a complete and valid feudal title in all time coming, but was itself foreign to the law as it stood in 1845. As Lord Kinnear pointed out in the first of the two Inverness cases which were cited to us—"Entry means nothing more than the recognition or confirmation by the superior of a title which is imperfect until it is so confirmed."

My noble and learned friend Lord Dunedin, in the opinion which he is about to deliver and which I have had the advantage of reading, points out three other possible constructions. The first is that contended for by the respondents, and in substance adopted by the Lord President and Lord Skerrington, that the statutory conveyance is only an ordinary conveyance in a different form, and does not detract from the rights of the superior. I agree with my noble and learned friend in thinking that it is impossible to reconcile this view with the language of section 80. The second is that a statutory title arises, differing from the statutory title according to the view which I have referred to already in this, that the title arising is allodial, so that there is no implied entry with the Crown. A difficulty about this view which presents itself even more strongly to me than it does to my noble and learned friend is that I do not think that the expression "feudal" in section 80 can be satisfied by the hypothesis of an allodial title. The third possible construction which Lord Dunedin refers to is one which would make the section enter the disponee by operation of law with the superior in a manner analogous to that afterwards enacted by the Conveyancing Act of 1874. For the purposes of the present case it is, as I have said, unnecessary to decide which of these four interpretations is the true one. But I desire, like my noble and learned friend, at least to guard myself against being supposed to acquiesce in the interpretation contended for by the respondents and adopted by the majority of the learned Judges of the First Division.

What the section appears to do is to enable the company to obtain a perfect title in a form which neither requires nor enables it to enter with the superior in the usual way. I find myself unable to accept the view of Lord Skerrington that the words of the section can be satisfied by construing them as creating a tenure which is feudal, but which forbids feudal forfeiture just as it forbids voluntary alienation. No doubt the effect of the general legislation of which section 80 forms a part is to enact that as the company acquires for a statutory and

public purpose it cannot freely alienate, either directly or indirectly, land which it has been enabled to acquire solely for that purpose. But it is not section 80 which imposes this restriction, nor has section 80 any bearing on it that I can discover. The section is confined in its object to the form in which a title is to be made up, and there is no reason for giving to its words any other than their natural significance. It appears to me that the reference made by the learned Judge to what has no concern with the completion of title, but really belongs to the application of the principle of *ultra vires*, is not relevant to the only question which arises under section 80. Nor does what he says about the assumption being that the granter of the disposition possesses, not only an undoubted right to the subjects, but also a valid progress of titles showing, *inter alia*, that the lands are not in non-entry, appear to carry the matter further. No doubt as a general rule the seller has to make out a good title even when the sale is made under the Lands Clauses Act. This rule is indeed subject to certain exceptions referred to in section 74. But assuming it to hold, I am unable to see how it makes any difference to the question before us, for it is in the language of section 80 and not in any of the earlier sections of the Act that the answer to the question which arises must be sought.

Whichever of the three constructions of section 80 to which I have alluded as possible is adopted, the subsequent sections, notably sections 107 to 111 and section 126, are of importance. The group of sections 107 to 111 inclusive belongs to a part of the Act which has the heading—"And with respect to any lands which shall be charged with any feu-duty, ground annual, casualty of superiority, or any rent or other annual or recurring payment or encumbrance not hereinbefore provided for." Section 107 confers on the promoters the right to enter without redeeming any of these charges unless called on to do so, provided they pay the amount of the annual or recurring payment and otherwise fulfil all obligations.

It may well be that, the principle of the Act being the provision of an equivalent in money for rights in land taken, the section is to be read as referring to the state of things existing when the land was taken, and as imposing, as the condition of the right to enter on it, a statutory obligation to make payments equivalent to any annual or recurring liabilities then existing. A feu-duty may come within the words. Possibly a casualty of ascertained amount which the disponee would have had the right to tender may also fall within them, notwithstanding that the disponee is regarded as having been automatically entered. Moreover, this may be the result where the transaction is one to which section 5 of the Act of 1874 applies, so that where the automatic entry is that of a corporation a liquidated sum is made payable every twenty-five years. But I am wholly unable to see how, in a transaction prior to 1874, section 107 can impose any liability in the case of a conveyance to a corporation. For a corporation had no right to an entry, and it was only by special bargain that it could obtain one, usually by agreeing to pay a composition which might or might not have been recurrent. It seems to me that in such a case the superior is thrown back for his remedy on other sections which provide for compensation for loss of title. The latter part of section 126 may possibly be read as covering such a case, or it may be that it is covered by earlier sections. No question of compensation is before us, and I refrain from speculation as to what ought to be the answer to such a question were it to arise. What I am concerned to say is that in my opinion a petitory action could not have been brought under section 107 for a composition claimed because a corporation had obtained any one of the three possible varieties to which I have referred of statutory title under section 80.

These considerations would have led me, had the appellants when they actually registered their conveyance in 1868 registered it in time, to hold that all right to a declarator of non-entry was gone, and that no right to bring this action under section 107 had been conferred by the Act of 1845. As the present proceeding is not one for compensation that would have disposed of the appeal. But the question does not arise. For the appellants did not register within sixty days from the last date of the conveyance. I think, after consideration, that it is impossible to regard the date of delivery as the last date of the conveyance. I think it equally impossible to treat compliance with the requirement as anything short of a condition of obtaining the new kind of statutory title. I am unable to hold with Lord Johnston that the Infeftments Act of 1845, or the Titles to Land Act of 1845, repealed this condition. Whether or not the original reason for its introduction became obsolete, the condition remained unaltered in the statute, and I see no way out of the difficulty in which failure to comply with it has placed the appellants. As the result of this failure their conveyance had in my opinion the effect only of a disposition under the common law. I think it was sufficient as such a disposition.

If this be so, then the effect of the Act of 1874 was that the appellants were automatically entered with the respondents as their superiors, and became liable to the action for declarator and payment which that Act provides. It is true that the summons in the present action is not in form declaratory but is confined to a purely petitory conclusion. But the appellants paid a casualty in 1885 after they had become entered by force of the Act, and a declaratory conclusion such as this Act prescribed would have been on the second occasion of payment unnecessary and inappropriate.

I think that the appeal fails and must be dismissed with costs, and I move accordingly.

LORD DUNEDIN—The general question, which has been argued in this case with conspicuous care and ability, is as to the rights of a superior against a Railway Company which has taken, in virtue of compul-

sory powers given in a Special Act, a piece of ground belonging to a vassal of the said superior. I use the phrase "in virtue of" compulsory powers because it has not been doubted that, assuming the land to be within the limits as to which compulsory powers are given by the Special Act, it makes no difference whether the actual acquisition is effected by private bargain or by notice to treat, followed by arbitration or jury trial. This question has been frequently discussed, and has given rise to much diversity of judicial opinion. While the fact may be regretted, it can scarcely perhaps be wondered at. For the real cause of trouble is to be found in the faulty phraseology of the Lands Clauses Consolidation (Scotland) Act 1845 in so far as it deals with this topic.

None of the cases which have dealt with the matter have been before your Lordships' House, so that as far as binding authority goes the matter is open.

Let me first state a few uncontroverted propositions. By the Special Act a Railway Company—what follows is equally true of any statutory promoter, but I take the specific case of the Railway Company for convenience—is empowered to make and maintain certain works, and for that purpose, and that purpose only, is given power to acquire lands within certain limits. The exact extent of the lands to be acquired is usually left to the judgment of the promoters. The lands are to be taken from the owners thereof, and the method of taking is regulated by the provisions of the Lands Clauses Act, which is incorporated in the Special Act. "Owner" in Scotland is the proprietor of the *dominium utile*, that is to say, the vassal and not the superior. Consequently the superior never receives a notice to treat.

Now the conception of the Lands Clauses Act is to provide for the taking of the land from the owner thereof, and then to deal by separate provisions with the burdens affecting the land so taken; and the radical error which has pervaded the mind of the draughtsman of the Act is that one of these burdens on the property is the superiority, whereas if you had asked a Scottish lawyer of the eighteenth century if the superiority was a burden on the *dominium utile*, he would infallibly have answered that, so far from that being the case, the *dominium utile* was rather of the nature of a burden on the superior's title. That this is no mere form of words, but represents something that may have a practical effect, is well illustrated by the case of *Edmonstone* v. *Jeffray*, 1886, 13 R. 1038, 23 S.L.R. 646.

It is, however, but a short step to be able, in this case I think with absolute certainty, to put one's finger on the *origo mali*. The statute is there and has got to be dealt with, and the duty of a court of law, in my opinion, is if possible so to interpret a statute as to allow of its spirit being fulfilled, provided only that in order so to do it does not read into the statute provisions which are not there.

The provisions of the statute which deal directly with the position of a superior whose vassal's lands, or a portion of them, have been acquired by the Railway Company are the *fasciculus* of sections beginning 107, and the isolated section 126. But there falls also to be considered the indirect effect of section 80, which, though not dealing directly with the superior, yet deals with the title to the land in a way which on interpretation may affect the superior's rights and the superior's remedies.

Let me now state the precise question for determination in the present case. The Caledonian Railway Company in 1866 by Special Act obtained powers to enlarge their terminal station at Edinburgh, and for that purpose to acquire certain scheduled lands. Among them was a piece of ground held by one Isaac Scott off the Governors of Heriot's Hospital as superiors. The feu-duty of said lands was 1s. 3d., and the entry of heirs was taxed at double the feu-duty, but the entry of singular successors was untaxed. On 12th August 1867 Mr Scott granted a conveyance of the whole of the ground held by him in favour of the Railway Company. This conveyance was registered in the Register of Sasines on 15th May 1868. Since that date the Railway Company has regularly paid the feu-duty of 1s. 3d. Mr Scott died in 1885, and thereupon the Governors of Heriot's Hospital made a claim for a composition of £479, being a year's rent of the subjects as at that date, which was paid on 26th October 1885, the receipt granted for it having in it the following clause:—"Declaring that the next casualty shall be payable and exigible on the 28th day of October 1910." The 28th October 1910 being passed, and no further payment having been made, the respondents, the Governors of Heriot's Hospital, raised the present action, which is a simple petitory action for £1576, 10s. 4d., being the sum which they allege represents a full year's rent of the subjects after the usual deductions.

It is an arguable point whether the conveyance by Isaac Scott in 1867 is in such a form as to make it a conveyance in the form specially authorised by section 80 of the Lands Clauses Act, or whether it is a conveyance habile as a common law deed to effect infeftment by the registration in the Register of Sasines in 1868, and entry so soon as the Conveyancing Act of 1874 had passed, in virtue of section 4 (2) of that Act.

The Lord Ordinary held that though in such a form as to satisfy the requirements of section 80, yet inasmuch as it was not registered within sixty days of the date of its execution it could not claim the privileges, whatever they were, of the statutory form. He held, however, that it was habile as a common law conveyance, and he accordingly held that under the provisions of section 5 of the 1874 Act a composition was due, and he remitted for proof as to the true amount of the rental and proper deductions in order to fix the sum for which decree would fall to be given.

The learned Judges of the First Division adhered to this judgment, but on entirely different grounds. Lord Skerrington and the Lord President held that the form of

title was immaterial; that the actuality lay in the fact that the ground now belonged to a railway company and was held by them for the purposes of a statute-prescribed undertaking; that the result of that was that the relationship of superior and vassal still existed between the respondents and the appellants, but that the respondents' remedies, so far as these remedies could result in eviction, were gone. In so holding they incidentally went counter to the opinions of the majority of the Judges of the same Division in the four decided cases of *The Magistrates of Elgin*, 11 R. 950, 21 S.L.R. 640; the two *Inverness* cases, 20 R. 551, 30 S.L.R. 502, and 1909 S.C. 943, 46 S.L.R. 676; and the case of *Fraser* v. *Caledonian Railway Company*, 1911 S.C. 145, 48 S.L.R. 76—and also, I humbly think, to the judgment in the second *Inverness* case—which opinions had laid it down that if a statutory title in the form sanctioned by section 80 was made up and registered the effect was to extinguish the relationship of superior and vassal *quoad* these lands.

So far, it will be observed, the conclusion at which the learned Judges arrive is, so far as action is concerned, negative. When it comes to where the authorisation is to be found for the positive claim sought to be enforced by the present action, I confess the judgments, after repeated perusal, have left me in great perplexity—a perplexity which the very able counsel for the respondents were unable to remove. Let me assume that the position is as said—that the relationship of superior and vassal remains, but the remedies so far as involving eviction are gone. A personal action for feu-duty will remain competent, for it exists in respect of the relation of superior, and decree given in it could never *per se* involve eviction. But what is it that gives a petitory action for a composition, such petitory action being quite impossible under the old law? The words of the Lord President, though not explicit, are consistent with the idea that the right is created by the 107th section of the Lands Clauses Act. Lord Skerrington, however, with whom the Lord President says he agrees, expressly repudiates this view when he says—"I cannot construe section 107 as creating a statutory right of a pecuniary character in lieu of a feudal right which did not exist in the year 1866, when the Special Act was passed." If this be so, then the only two views I have been able to put to myself are either that the relationship of superior and vassal existing and the remedies so far as involving eviction being gone, there springs into being a sort of equitable right to have a petitory action for the sum of money which, if the remedies had been extant, would have been made available by means of eviction; or else it is a right to be found in the terms of the fifth section of the Act of 1874, which applies to the case of a railway title in whatever form the title may be, provided, I suppose, that there has been infeftment. I am inclined to think this later view is the more probable. I regret if it is so it was not made clear by a mention of the section.

Lord Johnston's opinion is quite easy to follow. That learned Judge pronounces the conveyance in the present case to be a statutory conveyance under section 80. That being so, he accepts the authority of the older cases—and I think not only accepts it as such, but agrees with it on independent consideration—that in such a case, to use his own words, what the company obtains is "not a feudal title in the ordinary sense of that term, but a statutory title, fee-simple in its nature, the feudal tenure being abolished while the feudal prestations are preserved and protected;" and then, quoting the *fasciculus* of sections beginning with 107, he comes to the conclusion that until redemption or compensation the feudal prestations remain payable. In other words, he really rests the right to this action on the terms of section 107.

I confess I am quite unable to concur in the view held by the learned Judges of the majority, that the question is solved by the consideration that the Railway Company hold the lands after they have taken them for a public statutory purpose, and that it is that fact which ties the superior's hands as to eviction, or as it is expressed by their Lordships, that the only title a railway company has is "a statutory title." Such a statement, to my mind, really confounds the two uses of the word "title." In one sense a railway company has only a statutory title. It is a creature of statute, and can only hold lands or anything else for the purposes for which it is created. Any other use of what it has is *ultra vires*. In this sense its "title" is the Special Act. But "title" has another meaning, viz., *titulus transferendi dominii*. "Title" in this sense flows from the person from whom the company acquires the lands and is not the Special Act. The measure of the particular right will be found in the instrument of conveyance, and cannot be found in the Special Act. It is therefore, in my judgment, absolutely necessary to consider in a question with the superior the title which the company gets from the vassal who held the lands before he conveyed them to the company. Further, I do not think it is at all to the point to cite the opinion (which I agree to be a sound one) that lands held by a railway company for the purposes of the undertaking cannot be adjudged for debt. That is a perfectly different proposition from holding that the moment there is transference to a railway company all powers of eviction are gone. The motto *assignatus utitur jure auctoris* is good here as elsewhere. The best proof of this is to be found in the Lands Clauses Act itself, in the elaborate provisions as to "mortgages." If lands conveyed by a person to a railway company are burdened by bond and disposition in security in ordinary form with power of sale, then undoubtedly the company could get rid of the bond in the way pointed out in the Act; but if it did not do so I think it perfectly clear that the creditor in the bond and disposition in security could operate sale, which is eviction. I have as little doubt that a superior could evict for payment of his dues, except only in so far as may be found on a perusal of the Lands Clauses Act

that such action on his part is prohibited or made of no avail by some procedure authorised by the Act on the part of the company.

I will revert to the general scheme of the Act, but before doing so I think it may be convenient that I should state the grounds on which I think this particular case ought to be decided.

Whatever is the correct view of the effect of a conveyance made according to the provisions of section 80 (which I shall for clearness sake call a schedule-conveyance), it is, I think, quite clear that the effect of it is conditional upon the provisions of the section being strictly adhered to, and, in particular, conditional upon the conveyance being registered within sixty days of its date in an appropriate Register of Sasines. This conveyance was not so registered, for it is impossible in my view to hold that "the last date thereof" means anything except the last date to be found on the face of the conveyance itself. Therefore, whatever may be the privileges of a schedule-conveyance, this conveyance did not obtain them.

The conveyance, however, was registered in a Register of Sasines, and this was in 1868, when registration of a conveyance in a Register of Sasines effected infeftment in virtue of the Conveyancing Act of 1858. Was this a conveyance which in form admitted of being so registered, so as to effect the result of infeftment? I think it was. In the words of Lord Kyllachy in the first *Inverness* case—"By that time the statutory form had become, under the Titles Act of 1858, indistinguishable practically from the new common law disposition, and all that was required to make a good common law title was that a warrant to register should be added, signed by the disponee or his agent, which warrant being recorded with the disposition, infeftment was duly constituted." That the appellants themselves at one time took this view may be inferred from the fact that the agent did adhibit to the conveyance a warrant for registration.

In short, I entirely agree with the Lord Ordinary in the view he has expressed. But I propose to carry on the matter with a little more explicitness than he has done, though in so doing I believe I am only expressing what he has left to be inferred.

Being infeft in 1868, the company became entered in 1874, by force of the Conveyancing Act of that year. In 1885, Isaac Scott, the last-entered vassal, died and the lands fell into non-entry. But by section 4, subsection 4, of the Act of 1874 no lands are henceforth to be "deemed to be in non-entry," and the superior is given the statutory action for payment of his casualty, not, however, a petitory action but an action decree in which entitles the superior to possess the lands until the casualty is paid.

Now in order to make clear what I think is the true view, let me suppose there was no fifth section in the Act. What would have been the result? The company or corporation would have been entered by virtue of section 4, and on paying a year's rent, the composition due for the entry of a singular successor, no other composition would have ever become due. For nothing thereafter would ever have happened to make the lands fall into non-entry (although not to be "deemed" non-entry) and to open the way for the statutory action under section 4. For be it observed that under the old law, although a superior could not be forced to enter a corporation, and could therefore make his own bargain as to the terms on which he was to grant a charter, yet if he did grant a charter on terms, however inadequate, he could not go back on it, for his only remedy was to withhold the charter. An illustration of how a superior might lose his remedy by granting an entry for an inadequate payment will be found in the decided case of *Lord Advocate* v. *Drummond Murray*, 21 R. 553, 31 S.L.R. 432. The same thing will be found in the long series of cases dealing with the enfranchisement of taillied destinations. This would have been unfair to the superior, for he would have received a composition of only one year's rent for entering a vassal who would never die. Accordingly section 5 was passed. That section practically imposes on the parties a bargain which under the old law they might or might not make, and to the same effect as if that bargain had been expressed in a clause in a charter of confirmation. What, however, is its effect as regards action? It enacts a direct liability—"Shall pay at the date at which the first composition would have been payable if this Act had not been passed, and every twenty-fifth year thereafter, a sum equal to what but for the passing of this Act would have been payable on the entry of a singular successor," *i.e.*, when there was a taxed entry, the sum so taxed, otherwise a year's rent.

Now it seems to me that although the statutory form of action under section 4 is the only form appropriate to the *first* payment, such payment being due because the lands are in non-entry through the death of the vassal (though deemed to be not in non-entry by force of the statute), yet that when you come to the second payment, the warrant for which is only to be found in the direct obligation under section 5 that the composition shall be payable at the end of every twenty-fifth year, then an ordinary petitory action such as we have here is the proper method of proceeding. I am therefore of opinion that the original judgment of the Lord Ordinary was not only the right judgment in the case, but was put upon the right grounds.

Though these considerations are sufficient for the decision of this case, yet in view of the discussion which has taken place, and of the really chaotic state to which the judgment of the First Division in this case has reduced the authorities, it is, I think, necessary to express an opinion on the statute as a whole.

Your Lordships are aware that I took part in the case of *Fraser*. In that case, however, sitting in the First Division, I felt myself bound—I still think rightly—by the cases which had been decided in my own

Division. Now in all these cases the opinion had been expressed—and in the first *Inverness* case as regards Smith's lands the opinion went to the root of the judgment—that a title if taken in the schedule form extinguished the relationship of superior and vassal. I therefore took that proposition for granted. But in your Lordships' House I am not only entitled, but I think bound, to consider the proposition on its own merits. I do so with much reverence for the authority of the learned Judges who laid it down, and I cannot for a moment accept the suggestion made in the judgment under review that these learned Judges must have overlooked the fact that a valid progress of titles in the hands of a disponer includes the necessity of showing that the lands are not in non-entry. Such a lapsus is to my mind inconceivable on the part of Lord President Inglis, who had an unrivalled practical acquaintance with the law as it stood before 1845—not to mention the authority of Lords Adam and Kinnear. It is true that on the proposition Lord M'Laren differed, and Lord Kyllachy in the Outer House took it, as he was bound to do, as settled for him. Yet my respect for the authority is so great that if this were what I may call a pure feudal question I should bow to it however great my doubts. It is, however, not really a purely feudal question. It is a question of statutory construction, and accordingly I feel bound to approach it to the best of my ability from that point of view.

I said in *Fraser's* case, and I venture to repeat it here, that the genesis of the 1845 Act is plain enough. It is a copy of the English Act of the same year, the copy being adapted to Scottish needs by a person with a very hazy notion of Scottish real property law. Indications of ignorance crop up all through the statute, in small things as well as great. What, for instance, is the sense of heading a set of sections "Lands in Mortgage?" There were no mortgages in Scotland; and in the enumeration which follows, while wadset, which by 1845 was practically extinct, is mentioned, no mention by name is made of the bond and disposition in security, which had really become the ruling form of heritable security. Yet notwithstanding all this the scheme seems clear enough. The Act begins by authorising the acquirement of land by voluntary agreement, and confers on those who, by reason of non-age or limitation of title (*e.g.*, entail) would be unable to enter into agreements, power so to do. It then provides the methods for compulsory taking in the case of those who will not agree, and deals with the application of compensation money, and then it comes to the heading "Conveyances," and proceeds to enact section 80. Now up to this time no one is, so to speak, thinking of the superior. And the reason is, as I stated at the beginning, that although on a sound view of the feudal system as developed in Scotland the superior was truly the *dominus* of the land subject to the *dominium utile* being in the vassal, yet in the view of the framer of this statute the vassal alone was the owner, and the superior was a creditor-incumbrancer in respect of the feu-duty and of the casualties.

Now the general purpose of section 80 is, I think, clear enough. The framer wished to give a form of conveyance which should be simpler than the common law conveyance, and which if taken advantage of should secure the company in possession of the lands without more ado. He did not advert to the fact that according to the law of Scotland a complete title could not be given without the interposition of the superior. But the words used being of statutory effect must be construed, and the question therefore came to be, what sort of title is it which is in the words of the Act "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 . . . any law or custom to the contrary notwithstanding?"

There seem three suggested interpretations to be considered.

It was argued by Mr Murray that the meaning of the words was just such a title as a disponer would naturally give, *i.e.*, that the schedule form duly registered must be considered as the equivalent of an ordinary disposition with an *a me vel de me* holding containing procuratory and precept and followed by infeftment. If that were so, then the schedule conveyancing is only an ordinary conveyance in other form, and the relation of the superior to it is the same as his relation to common law dispositions. He can get his feu-duty by personal action or (till the passing of the Protection of Rolling Stock Act) by poinding of the ground, and when the lands fall into non-entry he has his declarator of non-entry to force an entry.

I have mentioned this suggestion as it is due to the very able argument with which your Lordships were favoured, but I confess that the objections to it seem to me unanswerable. It gives no value to the word "complete," for it is not in itself a complete title; it only becomes so when it is used to obtain a complete title by the intervention of the superior. Further, it does not square with what we find in section 74. That section deals with refusal to convey, and provides that on deposit of the purchase and compensation money the promoters may expede a notarial instrument containing a description of the lands and also other particulars, and "thereupon all the estate and interest in such lands of, or capable of being sold and conveyed by, the party between whom and the promoters such agreement shall have been come to or compensation shall have been obtained . . . shall vest absolutely in the promoters of the undertaking, and such instrument being registered in the Register of Sasines in manner hereinafter provided in regard to conveyances of lands, shall have the same effect as a conveyance so registered." Now a disposition with an *a me vel de me* holding, followed by infeftment on the indefinite precept, does, until that infeftment becomes public by confirmation, leave

a mid-superiority which is an estate and interest in the lands in the person of the disponer. In other words, it fails to satisfy the condition of vesting absolutely in the disponee all the estate and interest which was capable of being conveyed by the disponer.

The next suggestion is the one that was adopted by Lord President Inglis and Lords Adam and Kinnear in the *Elgin* and first *Inverness* cases, and that is expressed by Lord Kinnear in a single sentence, thus—"A title which is not good against the superior is not a complete or valid title, and when the statute says that the registration of the conveyance to which the superior is no party shall constitute an undoubted right and complete and valid feudal title, I think it means a title which shall be good against the superior and against all the world."

The development of this argument is, that as the title is to be a good title against the superior, and without his intervention, his estate of superiority is swept away, for there is now a person with unassailable title to the land in question who has never become his vassal or derived title from him

I shall deal presently with the objections to this view which have been urged by Lord Skerrington.

There is, however, one other suggestion which I feel bound to make, because I admit it is the one which if I had to approach the question for the first time would most commend itself to my mind. It is to hold that the effect of the schedule title duly registered is to give the company by force of statute a public infeftment. In other words, it is no more than a forecast of what was in the matter of common law titles afterwards effected by the Act of 1874.

This idea is not really so much before its time as might appear at first sight. In the year 1838 there was published the report of the Royal Commission on Conveyancing, under the chairmanship of George Joseph Bell, and in the forefront of the recommendations (which will be found in Duff's "Feudal Conveyancing," p. 520, paragraph 9, p. 521) stands that of effecting entry without the personal intervention of the superior by charter of progress. This solution at least gives full effect to the words "complete" and "feudal"—it squares with the idea of the complete divestiture of the granter and the giving to the company the exact estate held by the granter, as shown by section 74—and it is consonant to the express declaration of the inviolability of the superiority in section 126.

Let us now see how these two suggestions will fit with the remaining portions of the statute.

I revert to the Act and begin after section 80. After dealing with entry on lands, intersected lands, and common lands, it comes to the heading "Lands in Mortgage." This, notwithstanding the inaccuracy of its title, then proceeds to deal with lands which are subject to any security of the kind which can be paid off at the will of the owner of the lands under burden of the security. Section 99 clearly envisages the possibility of lands being conveyed under the burden of the existing securities, and it and the following sections make clear provision for the company getting rid of the burden. But there is no compulsitor on the company to do so, and if they do not, it is I think quite clear that the security-holder would have his ordinary remedies, for the statute gives him no others. It is these sections that to my mind demonstrate the unsoundness of the view which Lord Skerrington has put in the forefront of his opinion, viz., that the protection against eviction rests on the Special Act alone.

Having finished with lands under burdens which can be paid off at the will (though there may be a time bargain) of the burdened proprietor, the Act next proceeds to deal with the case of lands which are affected with permanent burdens, under the heading "Lands subject to rentcharges, &c." Had this been kept to such things as rentcharges, ground annuals, and other real burdens, all would have been well. Had the adapter understood his business he would for the superior have had a separate set of clauses corresponding analogously to the set of clauses which dealt with copyhold tenure in the Act he was adapting—copyhold tenure being, as your Lordships are well aware, the form of tenure in England which is most analogous to the feudal forms of Scotland. But unfortunately he was permeated by the idea that, as I have already expressed it, the superior was the creditor-incumbrancer for his feuduties and his casualties, and accordingly the superior's rights are dealt with under this *fasciculus* of sections. Yet again, though faulty in conception and expression, the scheme is clear. It is intended that he shall be paid off and that his pecuniary claims disappear. The right of the superior to be paid off is given by the concluding words of section 107, and the right of the company to get rid of the superior by sections 108 and 110. But though this paying off may be insisted on by either party—the amount to be paid if not agreed on being, as in all other cases, to be settled by arbitration—it is not made obligatory, and till he has been paid off things are to go on as they were—that is to say, the company is to pay the annual or recurring payments when due (section 107). It is, I think, quite permissible to read section 107 as giving action to the superior to force the company to pay if it continues to occupy. It is a condition of the company remaining in possession (not having paid compensation to the superior) that the company should pay to the superior the recurring payments. That is tantamount to giving a petitory action for the payments which would have been exigible if matters had remained as they were, *i.e.*, if the schedule title had not operated as a schedule title.

It will be observed that when I say the superior it does not matter whether he is still in the feudal sense a proper superior with a vassal entered to him *nolenti volenti*, as would be the case under my suggestion, or whether he is what I may call the *quondam* superior under Lord President Inglis's

view. For the Lord President clearly laid it down in the *Elgin* case that section 107 applies when a schedule title has been taken and imposes a liability on the company to pay recurring charges till compensation is paid and total redemption effected. I say a schedule title, for it is evident that if a common law title is taken the superior will have his ordinary remedies. In other words, section 107 in the case of a common law title is only needed in so far as it gives the superior the right to call for redemption—it is not necessary so far as giving action for the recurring payments before redemption is effected.

Reverting then to the petitory action given by section 107 in the case of the schedule title, it suits very well in the case of feu-duty. Feu-duty is a liquidated sum due at specific periods. It can be sued for by ordinary petitory action, and it could be enforced, *inter alia*, by poinding of the ground until that remedy, in the case of railways, was interfered with by the specific statutory provisions of the Protection of Rolling Stock Act, which, however, was not passed till the year 1867. But when you come to the consideration of the composition due on the entry of a corporation, then you get a state of affairs which the provisions of the statute are not adapted to fit.

I am not taking a narrow view of the section itself, though if the words were taken strictly there would be an end of the matter, for the preamble bears—"With respect to any lands which shall be charged with any . . . casualty of superiority." Now the lands never were charged with the casualty of composition. It is there that composition differs from relief in its nature, apart from its amount, and the reason is the historical one, that in real truth and strictness composition is not a feudal casualty at all. I do not propose to detain your Lordships by a history of composition. I refer for that to the leading case of *Cockburn Ross*, decided in 1808 and affirmed by your Lordships' House, 2 Ross's Leading Cases 193, 6 Paton 640, or if something rather shorter may be referred to I would beg to be allowed to do so to my own judgment in *Governors of Heriot's Trust* v. *Paton's Trustees*, 1912 S.C. 1123, 49 S.L.R. 852—a judgment which was agreed to by six other Judges, and which I believe sets forth the matter with historical accuracy. Notwithstanding all this, I am content to interpret "recurring payment when due" as including composition.

Now if the case were the entry of an ordinary individual it would be easy. But it is not. The entry is the entry of a corporation. This at least seems certain, that section 107 contemplates the payment or the requisition of a known sum as liquidated debt. There is no provision in section 107 for an arbitration. Now no man can tell what is the composition due on the entry of a corporation, a corporation being a vassal which a superior could not be forced to receive, for that was a matter of bargain, and the bargains varied.

It is absolutely necessary here for the moment to exclude from one's ideas the fifth section of the Act of 1874, for the interpretation of the Statute of 1845 must be sought as at its date. The application of the subsequent Statute of 1874 to it is another matter, but clearly the Act of 1845 cannot be interpreted in the light of the state of affairs in 1874.

As I have said, the composition payable was a matter of bargain and varied. Sometimes it was a slump sum greater than one year's rent—see for an instance of this *Campbell* v. *Orphan Hospital*, 5 D. 1273. Sometimes a life of a third party was taken, and it was stipulated that another casualty should be paid on the determination of that life. Sometimes a bargain was made for a casualty to recur at a fixed period of years, such as the bargain which was subsequently embodied in the 1874 Act. But the point is that it was always bargain—a payment on one side and a charter on the other; and if parties could not agree the matter worked out in this way—The superior could not be forced to accept a composition; and he had his declarator of non-entry which would admit him to possession of the lands. If therefore no terms could be come to, the corporation's remedy was either to find the heir of the deceased and put him forward, in which case the superior had to enter him for relief duty, or if that could not be done, then to dispone to an individual as trustee for the corporation, in which case the superior could be compelled to enter that individual on payment of the usual year's rent, with the certainty of getting another composition when that individual died and the lands again fell into non-entry, unless his heir could be found and put forward, in which case the superior would only get relief.

It is therefore clear to my mind that from 1845 to 1874 there was no petitory action possible for the superior against a corporation in respect of composition founded on section 107. On the other hand the parties could come to terms if they chose, but if they did not, what then? The superior had no longer a declarator of non-entry. He had not in Lord President Inglis's view because he was no longer a superior; he had not in my view because the fee was full by operation of statute. In both views his only remedy was to call on the company to redeem.

But then eventually came the Act of 1874. I think that Act in this matter did two things. It not only made obligatory the reception of a corporation as a vassal of a superior, because it allows the vassal corporation to get an entry by the mere fact of registering the disposition in its favour, but it also made for both parties in all cases the bargain which prior to that it was in their own hands to fix. After that Act was passed it became in my view possible to say what was the composition which a corporation was bound to pay, just as after the Act of 20 Geo. II, cap. 50, it became possible to say what composition was payable by an ordinary singular successor. In other words, the composition due in the case of a corporation became just as certain as in the case of an ordinary individual, and capable therefore of being sued for, just as a feu-duty

might be sued for in respect of the condition expressed in section 107.

I have discussed section 107 upon the assumption that the whole lands held by the vassal under the superior are taken. That, however, is not the common case—indeed, it will only happen practically in towns. In the long stretches of line through the country it is only a strip which is taken, which could never coincide with the totality of the lands held from the superior. It is not wonderful, therefore, that the statute goes on to deal with such cases in section 109. Here again, however, the procedure is not absolutely obligatory though obviously intended. The matter, however, is not left to stand on this *fasciculus* of clauses, for we find the detached section 126.

Now section 126 is doubtless a blundered section, but still, so far, it is explicit.

The first clause expressly reserves the superiority; but when we come to the second clause, this is so explicit that I do not think it can be disregarded, and it abolishes, in the case to which it applies, all rights of the superior to both feu-duty and casualties. There is no room here for the application of section 107.

As regards the second clause I am following what was actually decided in the case of *Elgin*. The only difference so far as this section is concerned is that if my suggestion be adopted the first clause may be taken as it stands (subject to the blunder of the words "in the person granting such titles"), while the other interpretation necessitates the view that it is totally blundered, or at least unnecessary, being with the object of conserving the franchise to Crown vassals.

What is the result? If it is worth the while of the proprietor of the remaining lands he can get an apportionment under section 109 so as to reduce the burden which would otherwise entirely fall on him, and if he does so the superior can claim compensation for the amount of the apportioned piece which effeired to the land taken, and which has as a burden been extinguished by the section. If an apportionment would be so infinitesimal as to be worth nothing—as would obviously be the case of, *e.g.*, a small strip taken for the West Highland Railway through the Breadalbane estates — then matters remain as they were, the superior getting his feu-duty and casualty out of the lands that remain.

I now revert to the criticisms which are made by Lord Skerrington on Lord President Inglis's view of the eightieth section. They are mainly two, and I do not think either of them are fatal. The first is that the view contradicts the word "feudal." Now if "feudal" necessarily connotes a feudal holding with all the feudal incidents, that is so. But the word "feudal" may well be loosely used to express as in fee absolute property, as opposed to any more limited kind of right.

The second is that it is not easily conceivable that the statute should introduce an allodial tenure. But the introduction of an allodial tenure, *i.e.*, an allodial tenure which is not that of the udal lands of Orkney and Shetland, is neither impossible—for a statute to which the Crown is a party can do anything—nor is this a unique example. There is first the case of the original glebe lands—Stair, ii, 3, 40; and another instance may be found in quite a modern Act, viz., the Burgh Police Act of 1892—*see* the case of *Young's Trustees* v. *Grainger*, 7 F. 232, 42 S.L.R. 171.

Let me now re-state the situation. All are agreed that where only parts of the lands are taken section 126 rules the position —the superior can have compensation, but he can never sue for a feu-duty or a composition. When the whole lands are taken, then in the case of schedule titles since 1874, until compensation is demanded and paid, or offered and paid, there is in virtue of section 107 a direct action for feu-duty and for composition, and that whether the view taken by Lord President Inglis or myself is preferred. Before 1874 in the same position there was an action for feu-duty but not for composition, and that again whichever view is taken. It seems to me therefore quite academic to settle which is the better view, though I have thought it right to express mine in order to prevent some future Judge discovering it for the first time.

I think the appeal falls to be dismissed with costs. There can be no real hardship, for the company has it always in its power to put an end to the whole matter, not to speak of what may be the effect of the provisions of the Act of Parliament of last year which provides for the abolition of casualties altogether.

LORD ATKINSON—I have had the pleasure and the advantage of reading the two judgments which have just been delivered by my two noble and learned friends as well as that which is about to be delivered by my noble and learned friend Lord Parmoor. I agree *in omnibus* with the judgment of the Lord Chancellor, and in so far as the two other judgments differ from his I feel myself obliged to dissent from them. I wish, however, to state expressly that where all the land of a vassal is conveyed to a statutory corporation such as a railway company by an instrument which satisfies all the requirements of section 80 of the Lands Clauses (Scotland) Act 1845, all superiorities in that land up to that of the Crown are in my opinion terminated and cease any longer to exist; and that where only part of the vassals' lands are conveyed to such a company by a similar conveyance all similar superiorities in the part conveyed in like manner cease to exist. The words of sections 80 and 126 are, I think, too strong to admit of any other construction. I wish in addition to express my dissent from the proposition that a railway company acquires a statutory title, if by that phrase is meant a title such as is described in section 80, whatever the nature of the conveyance by which the disponer conveys his land to them may be. In my view that proposition confounds the power given to the company by statute to acquire lands with the means by which that power is executed. These are wholly distinct and different things. If a

railway company should choose to take from its disponer an ordinary common law conveyance of the land conveyed to it, that instrument has, I think, no greater potency in itself in this case than it would have in the case of any other disponee who took a similar conveyance and does not invest the company with the special right and title described in section 80.

I wish further to say that I dissent from the proposition that section 107 applies to a casualty, the liability to pay which immediately or at some future date or on some given event does not exist at the time that the land of the vassal is acquired, and can only be brought into being by a bargain which a superior may make with the disponee but has not made and can never be compelled to make.

As your Lordships all agree in the ultimate result brought about by the operation of the Act of 1874 on the facts established in this case, this appeal will of course be dismissed with costs.

LORD PARMOOR—This is a petitory action in which the respondents seek to recover from the appellants the amount due as on a casualty of composition. The case raises important points on the construction of certain sections of the Lands Clauses Consolidation (Scotland) Act 1845.

The appellants purchased under their statutory powers the whole subjects held by Isaac Scott off the respondents by a conveyance dated August 12th 1867. This conveyance was not delivered until May 15th 1868, and on that date was registered in the Register of Sasines. It does not appear, and in my opinion it is not material, whether the transaction was carried out by agreement or under compulsory process. It is sufficient that the subjects came within the area over which the powers of compulsory purchase extend. On the death of Isaac Scott the appellants, on October 26th 1885, paid the sum of £479 to the respondents, being a year's rent of the subjects at that date as adjusted between the parties. A receipt was given declaring "that the next casualty shall be payable and exigible on the 26th October 1910."

The respondents have also claimed and regularly received from the appellants the sum of 1s. 3d. per annum since Whitsunday 1868 on account of feu-duty. In the present action the respondents claim as on a casualty of composition a year's rent of the subjects on the 26th October 1910. In my opinion the respondents rightly claimed and received the sum of £479 in 1885, and the annual sum of 1s. 3d., and are entitled to succeed in the present action. I do not base this opinion on the transaction of 1885, and the whole question is open on the present appeal.

This appeal depends on the application of certain sections of the Lands Clauses Consolidation (Scotland) Act 1845 to the system of land tenure prevalent in Scotland. There has been a difference of judicial opinion in Scotland as to whether the statutory tenure of the purchasing company under the Act is a feudal tenure from a superior. In the present case the Lord President and Lord Skerrington adopt a different view from Lord Johnston. For reasons given hereafter I agree in this respect with Lord Johnston, but I think that there would be the same result whether the statutory tenure is feudal or not. The reason of this is that where lands in Scotland have been purchased and taken by the purchasing company, the statutory rights of the superior depend, not on section 80, but on the *fasciculus* of sections 107 to 111 and section 126. In construing the relevant sections it is necessary to keep in mind the general scope and purpose of the Act. The purchasing company acquire the *dominium utile* of the vassal, whereas the rights of the superior are subject to redemption or compensation, and finally cease or are extinguished. The owner from whom the purchasing company acquire lands, and who is entitled to receive a notice to treat, is defined to mean "any person or corporation or trustees or others who under the provisions of this or the Special Act would be enabled to sell and convey lands to the promoters of the undertaking." An owner within this definition is the vassal and not the superior. The provisions relating to the form of feus and conveyances apply only to feus and conveyances between the vassal as disponer and the purchasing company as disponee.

Apart from any special conditions or arrangements, which do not exist in the present case, the feu and conveyance from the vassal to the purchasing company is outside the power and control of the superior and completed without any notice to him. When a feu or conveyance is completed the purchasing company hold by statutory tenure all the estate and interest in lands of, or capable of being sold or conveyed by, the party between whom and the purchasing company an agreement has been made, or purchase money or compensation has been determined, and this estate and interest vests absolutely in the purchasing company (section 74). The superior, as distinct from the vassal, is not entitled to a notice to treat, and his rights are not the subject of purchase under the Act. He is in the position of a person whose rights have been injuriously affected, and until he has been compensated it is equitable that he should be paid the same amount as he would have received for feu-duty or casualty of superiority before the purchasing company had become infeft of or had entered upon the purchased lands. There is no doubt as to the conditions necessary to found a claim for compensation for injury to any right occasioned by the exercise of statutory powers under an Expropriation Act incorporating the Lands Clauses Consolidation (Scotland) Act 1845. The loss for which compensation is claimed must result from an act made lawful by the statute, and such as would have been actionable but for the statute. In other words, the claim for compensation is an alternative for a right of action made incompetent when the act, which occasions the loss, has been legalised. The loss must be injury to an interest in land, and not merely a per-

sonal loss or injury to trade, and must be consequent on the construction of the authorised works as distinct from their user.

All these conditions co-exist in the case of the interest of a superior. Before the feu or conveyance of the *dominium utile* to the purchasing company he could have enforced his right to feudal prestations by a competent form of action. If the effect of the feu or conveyance to the purchasing company is to deprive the superior of a competent form of action, the alternative remedy provided by the statute comes into force. The statute authorises him to call upon the purchasing company to redeem his interest in the lands purchased or to pay compensation, and, until the redemption, places upon the purchasing company an obligation to pay the annual or recurring amounts which he was entitled to receive had the old conditions of tenure not been changed. Whether the feudal prestations exist as such until redemption is an issue in the present case, but I should come to the same conclusion whether I adopted the reasoning of Lord Johnston, or of the Lord President or Lord Skerrington.

Section 20 and the subsequent sections, which supply the machinery for ascertaining the value of lands or of any interest therein, if no agreement is come to between the purchasing company and the owners, are made applicable to the case of a superior whose interests in lands have been injuriously affected by the terms of the Special Act and the incorporated Acts. There is no difficulty under this head, and it is not necessary to refer to any further sections before section 80.

Section 80 provides three forms of feu or conveyance in favour of the purchasing company which may be optionally adopted. I have no doubt that outside any form sanctioned by the statute it is open to the parties to use the ordinary common law form of feudal conveyance, but the difficulty in the way of the appellants is to show that the statutory rights of the superior under the relevant sections are in any way affected by the form of conveyance, or that the purchasing company can have any other than a statutory tenure. The first form of feu or conveyance under section 80 is that contained in Schedules A and B, or as near thereto as the circumstances of the case admit. This form requires to be registered under the General Register of Sasines at Edinburgh within sixty days from the last date thereof, and when registered gives and constitutes a good and undoubted right and complete and valid feudal title in all time coming to the purchasing company, their successors and assignees, any law or custom to the contrary notwithstanding.

A second form is contained in the proviso which makes it unnecessary for the purchasing company to record in any Register of Sasines any feu or conveyance in their favour which shall contain a procuratory of resignation or precept of sasine or which may be completed by infeftment, and so long as such feu or conveyance is not recorded in a Register of Sasines it is regulated by the ordinary law of Scotland. This form was appropriately referred to by Mr Clyde as a common law form of conveyance.

A third form is the recording of the second form in the Register of Sasines. In the argument of Mr Clyde much reliance was placed on the form of conveyance as affecting the rights of the superior under section 107. On this point I agree with the forcible argument of Mr Murray, that the form of feu or conveyance only regulates the relationship of the vassal as disponer and of the purchasing company as disponee, and does not affect the statutory rights of the superior.

The first question which arises on section 80 is whether the conveyance was registered within sixty days of the last date thereof. This condition was not complied with unless the date referred to is the date of delivery as distinct from the date of signature. I can find no sanction for any such interpretation under Scottish law, and see no way of avoiding the conclusion that where a special form of statutory conveyance is provided which was not known to the common law such conveyance must comply with the attached statutory conditions, one of which is the registration of the conveyance within sixty days of the last date thereof. On this point I agree with the opinion of the Lord Ordinary, but having regard to the wide scope of the argument it would be unsatisfactory to rest an opinion on this narrow foundation.

The phrase "shall give and constitute a good and undoubted right and complete and valid feudal title in all time coming . . ., any law or custom to the contrary notwithstanding," has given rise to a difference of judicial opinion. Apart from authority I should not have construed this phrase as constituting the feudal relationship under the statutory tenure, since this relationship is not consistent with a title held by a purchasing company who have entered upon and are in possession of lands in execution of works of public utility.

There is, however, a preponderating weight of authority that under the statutory form of conveyance the purchasing company holds by force of the statute and not by tenure under a superior. But for the judgments of the Lord President and Lord Sherrington in the present case I should have held that the matter was no longer open to discussion in the Court of Session. Lord Kinnear expresses the position in precise language in *Magistrates of Inverness* v. *Highland Railway Company*, 1909 S.C. 943, on p. 949—"The effect of the statutory title is quite settled. The railway company has a complete and valid title to the lands, and it holds by force of this statute and not by tenure under a superior." Lord Johnston says in the present case—"I have no hesitation in concluding that the company never were, by their recorded conveyance and the effect of the Conveyancing Act 1874, impliedly entered with the Heriot Trust as their superior."

If this statutory form of conveyance and the words "complete and valid feudal title in all time coming" do not constitute a

tenure under the superior, I am unable to follow the argument that it will make a difference if the common law form of conveyance was used. The same general arguments apply, and there is no longer the difficulty which the special words relating to feudal tenure introduce. It comes back to the same point, that whatever may be the form of conveyance the rights of the superior are now regulated by the statute.

The next sections to consider are sections 107 to 111. These sections define the position and rights of a superior where lands are taken by a purchasing company within the area over which their compulsory powers extend, and except so far as they may be modified by section 126 determine the rights as between the appellants and respondents. Their general object is to provide a money equivalent to the superior for the loss of his feudal prestations so soon as the statutory tenure has taken the place of the feudal tenure. The heading of the section is important. The draftsman includes feu-duties and casualties of superiority within the category "charge," and as annual or recurring payments. A casualty of superiority is not in the ordinary sense a charge, and may only be a sum ascertainable by bargain at some future date. This, however, is no reason why, for convenience of drafting, a general definition should not be used, and there is no resulting confusion in the subsequent sections. The words "feu-duties" and "casualty of superiority" under the heading apply to the conditions as they existed in the old feudal tenure before the purchasing company had put into force its powers of purchase and acquired a statutory title. In the subsequent section these feudal prestations are transmuted into a money payment.

It was argued on behalf of the appellants that a limitation should be placed on the terms of section 107, which does not apply to sections 108 to 111. I am unable to follow this argument or to see how it can be made consistent with the words of the section, which is one of a series all dealing with the same subject-matter. It would be less difficult to understand the argument of Mr Clyde if he had said that none of the sections 107 to 111 are applicable to a statutory form of conveyance, but for good reasons he refrained from pushing his argument to this extent. Section 107 authorises the purchasing company to enter upon and continue in possession of land purchased by them without redeeming the feu-duty or casualty of superiority thereon, provided they pay the amount of such feu-duty or casualty of superiority as a recurring payment when due, and otherwise fulfil all obligations accordingly, and provided the company shall not be called upon by the superior to redeem the same.

A more difficult question is whether a petitory action is a competent remedy, where the corporation have not paid the amount of the feu-duty or casualty as a recurring payment, and there has not been redemption or compensation. I speak with much hesitation on this point. My difficulty is to appreciate how the tenure under which the corporation hold affects the question of a liability which arises in reference to the conditions before compulsory powers had been put in force and the corporation had entered upon or had completed title. It is, however, unnecessary to further consider this point of procedure, since I agree with Lord Dunedin that if the difficulty did exist up to 1874 it is met in the terms of the Conveyancing Act of that year.

Mr Clyde also relied in support of his argument on the words "all obligations accordingly." These words do not, in my opinion, present any difficulty. They direct that until redemption the obligations, if any, of the feudal relationship shall be duly fulfilled according to the old conditions of tenure. In the present case no such obligations were referred to in argument, nor were any such sought to be enforced in the action.

Section 108 provides that in case of a difference arising in the settlement of compensation in reference to the subjects comprised in section 107, such difference shall be determined as in other cases of disputed compensation — that is to say, under section 20 and the following relevant sections. Section 109 provides for apportionment, and in certain cases places the whole charge on the remaining lands if their security is sufficient. Section 110 stands in contrast to section 74. Under section 74 on payment or deposit of the purchase money or compensation all the estate and interest of the vassal vests absolutely in the purchasing company, and there is a transmission of title. Under section 110 there is no vesting of property and no transmission of title, but on payment or tender of the compensation, or on deposit of the amount in the bank, or by executing an instrument under the hand of the notary-public, the feu-duty and casualty of superiority, *inter alia*, or the portion thereof in respect whereof such compensation shall so have been paid, ceases and is extinguished.

Mr Murray based a very forcible argument on the latter words of section 110, as showing that the feudal relationship and the feudal prestations did not cease and were not extinguished until the conditions in the latter part of the section had been complied with, and that up to that point at least the statutory tenure was a tenure from a superior.

I think that the feudal prestations are kept alive as a basis on which to estimate the amount of recurring payments or of the final redemption or compensation, but this does not change the nature of the tenure. On this point I have already expressed my concurrence with the view taken by Lord Kinnear and Lord Johnston.

The only remaining section to which it is necessary to refer is section 126. The first part of this section has for its object to preserve certain superiority franchises. On this point there is the authority of Lord President Inglis in the Monkland case (2 Macph. 519) and of Lord Chancellor Hatherley in *Inspector of Poor of St Vivian's* v. *Scottish North-Eastern Railway Company*

(8 Macph. 53). The second portion of the section is closely connected with the first. It appears to have been apprehended that the maintenance of a right to superiority franchises might be construed as involving the maintenance of a right to feu-duties and casualties where the land which was taken was part or portion of other lands held by the same owner and under the same titles. It is enacted that in this case the purchasing company shall not be liable for feu-duties or casualties or bound to enter with the superiors. So far the section is in accord with the general principle of the Act, which substitutes a statutory tenure for tenure from a superior. The proviso at the end is in form general, and applies to any lands, whether the whole are subject of the same title or whether they are a part or portion only of the lands held by the same owner under the same titles. It enacts that before entering into possession of purchased lands the purchasing company shall make full compensation to the superiors for all loss which they may sustain by being deprived of any casualties or otherwise by means of any procedure under the Act.

This does not mean that a superior cannot claim any remedy after entry into possession, but that he is entitled to claim the compensation before entry into possession if he insists on his rights. This proviso was probably inserted *ex abundanti cautelâ*, but it does no more than state in different language a right which the superior has under section 107. Under this section the purchasing company cannot enter into possession of purchased lands without redeeming the charges thereon if they are called upon by the party entitled to the payment of feu-duties or casualties to redeem the same. Assuming that either redemption or compensation falls to be assessed at the same time, that is to say, before entry upon the land by the purchasing company, I think it is obvious that the superior should receive precisely the same amount under section 107 or section 126. The computation in either case would be made on the same data and the application of the same principles. The same initial figure would be the basis either of redemption or compensation, and the capitalisation would be in either case computed on the same table, since the security on which the superior holds his rights is wholly unaffected whether redemption or compensation is applied in fixing the payment to be made as a condition of the discharge.

I do not propose to attempt to analyse in any detail the judgments given in the former cases to which special reference is made. I have read and re-read these judgments several times. No doubt there is difference of opinion, but there appears to me to be a preponderance of authority in support of the following propositions, which suffice to determine this appeal in favour of the respondents:—That the purchasing company, whatever may be the form of feu or conveyance, holds, subject to the statute, that the rights of the superior are independent of the feu or conveyance from the vassal as disponer to the purchasing company as disponee and depend on the terms of the statute; that sections 107 to 111 provide the general code under which a superior whose rights have been injuriously affected is compensated for his loss; that all these sections refer to the same subject-matter, and that there is no warrant to make an exception in the case of 107; that there is no inconsistency between the general scheme of redemption under sections 107 to 111 and the proviso to section 126; that until the payment of redemption or compensation the superior can claim as a money payment a sum calculated as equivalent to what he would have received from his feudal prestations if there had been no expropriation of the *dominium utile* of the vassal under statutory powers.

In my opinion the appeal should be dismissed.

Their Lordships dismissed the appeal with expenses.

Counsel for the Appellants—Clyde, K.C. —Blackburn, K.C.—Wark. Agents—Hugh R. Buchanan, S.S.C., Glasgow—Hope, Todd, & Kirk, W.S., Edinburgh—Grahames, Currey, & Spens, Westminster.

Counsel for the Respondents — Murray, K.C.—Chree, K.C.—Muir Thornton. Agents —Peter Macnaughton, S.S.C., Edinburgh— John Kennedy, W.S., Westminster.

Thursday, April 22.

(Before Earl Loreburn, Lord Kinnear, Lord Dunedin, Lord Atkinson, Lord Parker, Lord Sumner, and Lord Parmoor.)

ANDERSON *v.* DICKIE.

(In the Court of Session, May 26, 1914, 51 S.L.R. 614, and 1914 S.C. 706.)

Property—Real Burden—Servitude—Construction of Deed — Identification of Ground.

S. feued a piece of his ground to M., the feu-contract containing this clause —"Declaring . . . that it shall not be lawful to the said S. or his aforesaids or the other disponees to sell or feu any part of the said ground now occupied as the lawn between the ground hereby feued and the said present mansion-house of E. P., and as marked numbers . . . on the said sketch or plan endorsed hereon, excepting under the express conditions and declarations that there shall be no more than one dwelling-house, with suitable offices, on any two acres of the ground so sold or feued, and that each of the said dwelling-houses attached thereto shall be of the value of at least nine hundred pounds sterling, and be maintained in good condition and of such value in all time coming, which restriction shall also be a real burden affecting the said lands, and shall operate as a servitude in favour of the said M. and his foresaids in all time coming."