LORD MURE was absent.

The Court pronounced the following interlocutor:—

"Recal the Lord Ordinary's finding 'that the income derived therefrom till the death of the said Robert Jack is payable to the claimant John Marshall;' and in place thereof find that 'the income derived therefrom till the death of the said Robert Jack' is payable to those of the beneficiaries under the settlement whose interest will be prejudiced by the said Robert Jack claiming and receiving his legitim: *Quoad ultra* adhere to the interlocutor reclaimed against, and refuse the reclaiming note."

Counsel for (Pursuers) Respondents—Kinnear—Keir. Agent—Thomas Carmichael, S.S.C.

Counsel for (Defender) Reclaimer—M'Laren—Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Saturday, February 8.

FIRST DIVISION.

[Sheriff-Substitute of Lanarkshire.

BARR *v.* TOSH (MARTIN & DUNLOP'S TRUSTEE).

Bankruptcy—Public Examination of Bankrupt—19 *and* 20 *Vict. cap.* 79 (*Bankruptcy Act* 1856), *sec.* 91.

At the public examination of a bankrupt by the trustee in bankruptcy the bankrupt may be asked any competent question at the instance of the agent of any of the creditors after the trustee has concluded his examination.

This was an appeal at the instance of James Barr, a creditor on the sequestrated estate of Messrs Martin & Dunlop, civil engineers, Glasgow, against Robert Tosh, the trustee in the sequestration. It appeared that during the examination (but whether before or after the trustee had concluded his examination was not clearly stated) the following question was put to him by Mr Gavin Hamilton as procurator for Mr Barr—"Did you do business for Messrs Cook & Company, Kilbirnie, and did you get payment of any money for that work within the last three years?" The question was objected to, on the ground that the examination must be conducted by the trustee as the statutory representative of the creditors, and that the bankrupt, being bound to disclose the estate to the trustee, such questions were unnecessary and incompetent, and the objection was sustained by the Sheriff-Substitute (CAMPION).

Barr appealed, and argued—The bankrupt was bound under the 91st section of the Bankruptcy Statute 1856 to "answer all lawful questions relating to" his affairs, and the proper object of his examination being to ascertain what his estate consisted of, where it was, and what he had done with it, the question objected to was a legitimate one. It was the universal custom for creditors (themselves or by mandatory) to put questions to the bankrupt after the trustee had concluded his examination.

Authorities—*Delvoitte & Co.* v. *Baillie's Trustee*, 16th Nov. 1877, 5 Rettie 143; *Barstow* v. *Hutcheson*, 21st Feb. 1849, 11 D. 687; *Smyth* v. *M'Clelland*, 23d Dec. 1843, 6 D. 331.

It was answered for the trustee that the question objected to was the first of a written list proposed on behalf of the appellant, and disallowed after inspection by the Sheriff-Substitute, and that the Sheriff's sanction was necessary for any question to be put to the bankrupt by a creditor under section 93 of the 1856 Act.

At advising—

LORD PRESIDENT—I think there is not much difficulty in this case. It appears to me that Mr Hamilton may quite competently put his question provided he does not do so prematurely. The object of the question was to ascertain whether a certain sum of money had come into the bankrupt's hands, and if so what he had done with it, and it is therefore quite a legitimate one. I think we should recal the deliverance of the Sheriff-Substitute, and remit to him to allow Mr Hamilton's question to be put as soon as the trustee has concluded his part of the examination.

Counsel for Appellant — Rhind. Agent — William Officer, S.S.C.

Counsel for Respondent—J. A. Reid. Agents—Ronald & Ritchie, S.S.C.

Saturday, February 8.

SECOND DIVISION.

[Lord Adam, Ordinary.

NORTH BRITISH RAILWAY COMPANY *v.* MOON'S TRUSTEES.

Railway — "*Superfluous Lands*" — 8 *Vict. c.* 19 (*Lands Clauses Consolidation Act* 1845) *sec.* 120.

A railway company under their compulsory powers acquired in 1845 a piece of land, most of which they used for the purposes of their undertaking, which was to be completed in July 1850. In 1854 they sold to M part of the remaining land, being the whole unused except ·212 of an acre which was in the immediate vicinity of a station on the line. The latter portion was occupied by M and his successors along with what he had bought for agricultural purposes until 1877, no rent being paid for it. In answer to a claim by the railway company in that year for possession of the ·212 of an acre, which they stated was required by them for the purposes of their line, M's trustees maintained, *inter alia*, that under the 120th section of the Lands Clauses Act 1845 the ground had fallen to them as "superfluous lands," they being adjoining proprietors.

In deciding in favour of the pursuers, the Court *held* (1) that the *onus* of proving the lands to be "superfluous" lay upon the defenders; (2) that to make out lands to be superfluous it was not sufficient to prove that

at the end of ten years from the time for concluding the undertaking (the time mentioned in section 120 of the statute referred to) the lands were not actually in use, but that this was merely the point of time which was to be looked at for determining whether the lands were or were not superfluous; (3) that in this view of it the defenders had failed to prove the piece of ground in question superfluous, the long unchallenged possession being explained by the fact that they were possessing under a misconception by the railway company of the extent of their rights.

Observations (*per* Lord Justice-Clerk) upon the limits in point of time and otherwise to be used in arriving at the conclusion what are and what are not "superfluous lands."

The object of this action was to have it found and declared that a piece of ground in the possession of the defenders was the property of the pursuers the North British Railway Company. The ground in question was 212 decimal parts of an acre in extent. It lay immediately to the east or north of Springfield Station, parish of Cupar, and county of Fife, on the pursuers' railway.

The defenders resisted the action on two grounds—First, That the ground in question was conveyed to their predecessor the late Mr Moon by the railway company, and was included in their titles; and second, if this were not so, yet that the ground vested in and became the property of Mr Moon on 31st July 1860 in virtue of the 120th section of the Lands Clauses Consolidation Act as being superfluous land remaining unsold at that date, being ten years after the expiration of the time limited for the completion of the works, he being the owner of the land adjoining.

In 1846 the Edinburgh and Northern Railway Company acquired from Lady Maitland a piece of ground amounting to 16·176 acres for the purposes of a railway which they were then making from Burntisland to Perth. The Act authorising the making of this railway was 8 and 9 Vict. c. 58, and was dated 31st July 1845, and the period for completing the works thereby authorised was five years from that date. The line was opened for traffic in 1847, and Springfield Station was erected on the ground acquired from Lady Maitland. After this had been done there remained some land which was not then used for the purposes of the railway. This consisted of a field about four acres in extent lying immediately to the north (or east) of Springfield Station, and between the railway and the road from Springfield to Cupar. In 1849 the railway company let this field to Mr Moon, and it was subsequently occupied by him for agricultural purposes.

In 1853 the company had got into pecuniary difficulties, and had adopted an Arrangements Act with their creditors under which it became necessary or desirable that all superfluous lands held by them should be sold and the proceeds applied in extinction of their liabilities. The directors ordered a survey to be made of their lands, and a report to be made to them of such portions of the lands as were not required for railway purposes and might be sold.

In 1854 Mr Paterson, their resident engineer, reported to them that a portion of ground might be sold at Springfield Station, and his report was accompanied by a plan showing the ground which he considered might be so sold. This ground as delineated in the plan was 3·750 acres in extent, and was a part, but not the whole, of the ground which had been let to and was then in possession of Mr Moon.

By disposition dated 30th November 1854 the Edinburgh, Perth, and Dundee Railway Company, which had then come in place of the Edinburgh and Northern Railway Company, and which was at the date of this action represented by the pursuers, sold to Mr Moon all and whole "that portion of ground measuring 3 acres and seven hundred and fifty decimal or one thousandth parts of an acre imperial measure, as laid down on a plan thereof subscribed of even date herewith as relative hereto, which piece of ground lies between our railway on the west or north-west and the road from Springfield to Cupar, where it passes Clushford Bridge and Russelmill on the east, and is bounded as follows, viz., by our said railway on the west or north-west, the said road from Springfield to Cupar on the east and north-east, and the station called Springfield Station of our said railway on the south parts." The plan was produced, and it was admitted that it was the plan which Mr Paterson had prepared as above mentioned. On comparing it with the ground in possession of the defenders, and which was in Mr Moon's possession as tenant at the date of the transaction, it appeared that there was a small piece of ground not included in it. This piece of ground lay immediately to the east or north of Springfield Station, and was made up of a small part of the end of the field let to Mr Moon next to the station, and a narrow strip of ground lying along the line of the railway, part of the same field. It amounted in all to 212 decimal parts of an acre, and was the land in dispute. The whole piece of ground, including the portion in dispute, remained in Mr Moon's possession down to his death in 1876.

It was averred on behalf of the defenders that the measurement in the plan was a mistake, and that it was the intention of parties that Mr Moon should have the whole portion of ground occupied by him, which they alleged was correctly described by the boundaries.

This was denied by the pursuers, who averred that the plan was quite accurate, and that it was their intention all along to retain the piece of ground in question for railway purposes. It was further alleged by them that the engineer who prepared the plan had left their employment before the transaction was completed, and that his successor was not sufficiently well acquainted with the circumstances to detect that Mr Moon had taken possession of more than was conveyed to him, and that it was in consequence of the urgent necessity for increased accommodation at Springfield that inquiries were made in the course of 1877 which led to the discovery that this portion of ground had been retained.

The provision of the statute in regard to superfluous lands (8 Vict. c. 19, sec. 120) was as follows:—"And with respect to lands acquired by the promoters of the undertaking under the provisions of this or the Special Act, or any Act incorporated therewith, but which shall not be required for the purposes thereof, be it enacted as follows—Within the prescribed period, or if no period be prescribed, within the ten years after the expiration of the time limited by the special

Act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands in such manner as they may deem most advantageous . . . and in default thereof all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the lands adjoining thereto in proportion to the extent of their lands respectively adjoining the same."

The pursuers' second plea-in-law was as follows—"(2) The defenders have no right or title to the said piece of ground as surplus land under the statute referred to, in respect—1, That it never was surplus ground in the sense of the said statute, nor dealt with as such; 2, that when the adjoining land was sold to Mr Moon it was appropriated and reserved for station purposes; and 3, that it was required, and would have all along been used as such had it not been for the illegal possession thereof by Mr Moon."

After a proof—the import of which sufficiently appears from the Lord Ordinary's note and the opinions of the Court—the Lord Ordinary (ADAM) on 24th July 1878 decerned in favour of the pursuers the North British Railway Company. His Lordship added the following note:—

"*Note.*—[*After stating the facts ut supra*]—Reading, therefore, the title in connection with the plan alone, it is clear that this is not included in the conveyance to Mr Moon. But the disposition also contains a description by boundaries of the subjects disponed, and they are described as bounded 'by our said railway on the north or north-west, . . . and the station called Springfield Station on the south parts.' It is said that this gives to the disponee a right to the ground up to the railway fence on the north and north-west, and to the station on the south parts. It is the fact that the ground then possessed by Mr Moon extended to and was bounded on the north and north-west parts by the railway, and by Springfield Station on the south. But the Lord Ordinary is of opinion that what was conveyed by the disposition was a limited and specified quantity of ground, amounting to 3 acres 750 decimal parts of an acre lying within the lines shown on the plan, and no more. It is not disputed, and is proved, that the defenders have this quantity of ground without including the land in dispute. The Lord Ordinary is therefore of opinion that the land in dispute is not included in the defenders' titles. *North British Railway Company* v. *Magistrates of Hawick*, December 19, 1862, 1 Macph. 200.

"But this gives rise to the second question, whether on 31st July 1860 the ground in question was 'superfluous land?'

"It appears to the Lord Ordinary that the question to be decided is, whether, although the lands were not in actual use by the railway company, there was at the time a reasonable prospect of their being ultimately required and used for the purposes of the railway? *Hooper* v. *Bourne*, May 8, 1877, 2 L.R., Q.B.D. 339; Dec. 18, 1877, 3 L.R. Q.B.D. 258. *Betts* v. *Great Eastern Railway Company*, June 6, 1873, 8 L.R. Excheq. 294; Feb. 25, 1878, 3 Excheq. Div. 182. *Great Western Railway Company* v. *May*, June 25, 1874, 7 L.R. E. and I. Appeals 283.

"It is material to notice that the land in question is of very small extent, and is contiguous to the railway and station. Further, the Lord Ordinary does not doubt that it was *bona fide* and purposely retained by the railway company in the year 1854, in the view that it would be ultimately required and used for the purposes of the railway. The Lord Ordinary does not think that evidence that the land was intended to be included in the disposition by the railway company to Mr Moon is admissible for the purpose of construing the deed, but it seems to be quite admissible for the purpose of showing that the land was then considered by the company to be superfluous land, and as such was intended to be sold by them. Mr Paterson, their local engineer, who reported to them on the subject, states that he was perfectly well aware of the law on the point, and advisedly retained the land.

"Mr Moon was allowed to continue in possession of the whole ground just as before, probably because the company did not require the ground immediately, and because they did not consider it worth their while to resume possession of so small a piece of ground until they should require to use it. From the fact of Mr Moon being in the possession of the ground, and in consequence of Mr Paterson having left their employment soon after the sale, the company seem to have lost sight of the fact that the whole ground had not been sold to him. The true state of matters appears, however, to have been known to their local officials. It appears from the evidence of Mr Harkness, their station-agent, that this very ground was pointed out to him by a former station-agent as being the property of the company. It would also appear that Mr Moon was himself aware that part of the ground was not included in his titles. It is proved that about five years ago the railway, acting on the information of Mr Harkness, moved back their fence from 2½ to 3 feet into the ground possessed by Mr Moon, for the purpose of laying an additional line of rails. Mr Moon was aware that this was done but he made no complaint. It is more than probable that he would have done so had he thought the company were taking his land.

"The Lord Ordinary therefore thinks that it may be safely assumed that the railway company in 1854 advisedly retained the land for the purposes of the railway, and he thinks that they exercised a sound judgment in that respect.

"But the question is, whether, if a claim had been made to the land by Mr Moon in 1860, the company would have been entitled to retain it as being required for the purposes of the railway, or whether it would have been held to be superfluous land, and so vested in him? It appears to the Lord Ordinary that, having regard to the small extent of the land, and its situation with reference to the railway and station, it could not then have been affirmed that there was no reasonable prospect of its being required and used for the purposes of the railway, keeping in view the ordinary development of traffic which might be expected to take place.

"It appears to the Lord Ordinary to be material to keep in view, that when this question has to be considered, the compulsory powers of purchase by the company have expired, and that they have no means of providing for the future development of traffic except by retaining land for the purpose, although such land may not at the

time be actually required for present use. The judgment of the company is not so conclusive as to whether or not land ought to be retained for future use; but it appears to the Lord Ordinary that unless there is some reason to suppose that the company are not acting *bona fide* in the matter, but are seeking to retain the land for some other purpose, it ought not to be taken away from them unless it be very clear that there is no reasonable prospect of its being ultimately required for railway purposes. The company have bought and paid for the land, and they cannot replace it should they afterwards come to require it.

"But it is said that the question must be regarded with the light which the facts of the case now known throw upon it. It is said that the land has not been required for use for nearly twenty years; that it is not reasonable that a company should be allowed to retain land unused for so long a time in the expectation of its being ultimately required: and that therefore it could not, or at least that it ought not, to have been affirmed in 1860 that the land was required for the purposes of the railway. Now, no doubt, if when the question is tried a considerable period has elapsed, and the land is even then not being used for the purposes of the railway, it may perhaps be inferred, with more or less force, that it could not have been predicated of the land that it would be required for the purposes of the railway within a reasonable time. But if, as in this case, the land is actually required at the time the question is tried, that seems to the Lord Ordinary to be nearly conclusive the other way, unless, indeed, the necessity for its use is to be attributed to something *noviter emergens*, something which could not have been foreseen or anticipated at the expiry of the ten years.

"If accordingly this case had been tried in 1860, and it had then been admitted or proved that the land in question would certainly be required for the purposes of the railway at the present time, the Lord Ordinary thinks that the company would have been entitled to retain it. It would not have been the case of the company attempting to retain land for an indefinite time.

"The peculiarity of this case is, that the defenders and their predecessor have been in possession of the land since 1854, and the action takes the form of the company endeavouring to recover the land from the adjoining proprietor, and not of the adjoining proprietor seeking to get possession of the land from the company. That circumstance, however, does not seem to the Lord Ordinary to affect the law of the case. If the Lord Ordinary is right in holding that the land is not included in the defenders' titles, then the defenders are in possession without a title, unless their statutory title is good. Whether their statutory title be good or not depends on the answer to the question of fact, whether or not the land was superfluous land in 1860. But the fact that the land has been in possession of the defenders does not make it the more or less superfluous, or the more or less likely to be required for railway purposes.

"No doubt, if the company had been all along aware that the land in question was their property, and had nevertheless allowed the defenders to continue in undisturbed possession of it, it would be a very material fact in the case, because it might reasonably be inferred therefrom that the company had abandoned the land to them as superfluous land. But, on the other hand, if the fact be, as the Lord Ordinary thinks it is, that the company had lost sight of the fact that the land was theirs, it furnishes a reason why the land was not sooner used. It is proved that several years ago plans were made for the purpose of improving the station, which showed the land in dispute was required for an access to the station, and the land would undoubtedly then have been used had the company known it was theirs, or if they had funds to acquire it. In point of fact a part of it has actually been taken, and is now used for railway purposes. On the whole matter the Lord Ordinary is of opinion that in the year 1860 there was a reasonable prospect that the land in question would be required and used within a reasonable time for the purposes of the railway, and that therefore the land was not superfluous land at that date, and therefore did not then vest in Mr Moon."

The defenders reclaimed, and argued—The state of the facts as regarded the possession for the last twenty years raised a strong presumption against the company, and the *onus* lay upon them to prove that the defenders were not properly in possession of the piece of ground. (1) The ground was conveyed to them by the company, and was properly described in the conveyance by boundaries; the measurement and the plan were wrong as the description by boundaries showed. (2) Even if that were not the case, they and their authors were in lawful and proper possession of the ground as being superfluous land since 1860, ten years after the time when the company's undertaking was to be finished. By the Statute (8 Vict. cap. 19), sec. 120, no transference was necessary, the ground passed *ipso facto* if when the time expired it was not made use of, or if there were not a reasonable prospect of its being made use of. There could be no such prospect here, for the time expired in 1860, and it was only in 1877 that the railway company found they required the ground, and the reasons that had made it necessary for them had arisen unexpectedly, long after 1860. The ground here in question was clearly "superfluous" ground in the words of the statute, more ground having been taken for the execution of the work than was needed—Lord Chancellor (Cairns) in *May* v. *Great Western Railway Company*, June 1874, 7 L.R., Eng. and Ir. App. 283, (292); *Hooper, &c.* v. *Bourne, &c.*, L.R. 3 Q.B. Div. 258; and cases quoted in the Lord Ordinary's note, *supra*.

Argued for respondents—The sale by the railway company to the defenders' author in 1854 was so to speak a sale by picture, for the plan was expressly referred to. The plan excluded the piece of ground in question, and it corresponded with the measurement which also excluded it. There was no doubt therefore that the piece of ground in dispute had been retained by the company, and advisedly retained. On the second point the Legislature, while giving large powers to railway companies to take land, and not making the proof of the essentiality of the land asked for very stringent in the first instance, had provided safeguards to proprietors of land so as to prevent land being taken, or at all events kept, by railway companies which was not actually necessary. This explained how this question had

arisen, and the main point to be determined was what was the meaning of superfluous lands under the statute. In the corresponding English Act, which was in the same terms as the Scotch Act, the lands were said to be "lands which shall not be required," and these words were future and prospective in their meaning. It was therefore not necessary that the lands should be actually required at the end of the ten years, but that there should be a reasonable prospect of their being needed, which there undoubtedly was here, and it was only the fact of the company being ignorant of their own rights which prevented their being claimed before there could be any vesting in the adjoining owners. The Court would require to be satisfied that there had been a breach of duty or a default on the part of the company in not offering the lands for sale to the adjoining proprietor. The land had never been used for any special purpose, as *e.g.* a garden. Mr Moon had merely been allowed to work it, the company not requiring it at the time. The fair tests proposed by Lord Cairns in the case of *May* v. *Great Western Railway Company* (quoted *supra*) were conclusive and exhaustive, and the ground in question could not fairly be included in any of them.

Authorities—*Stockton & Darlington Railway Company* v. *Brown*, 9 Clark and Finelly H. of L. Cases, 246, and cases quoted *supra*.

At advising—

Lord Ormidale—Although the dispute in this case relates to a piece of ground extending to no more than 212 decimal parts of an acre, and of little value in itself, the questions of law upon which it depends are important, and not unattended with difficulty.

In 1846 the Edinburgh and Northern Railway Company, in whose right and place the present pursuers the North British Railway Company now are, acquired 16·176 acres of ground situated in the proximity of the Springfield station of their line. Under their Acts of Parliament the company had till the 31st of July 1850 to complete their line of railway, and ten years thereafter, or till 31st July 1860, to dispose of their surplus lands. But prior to that date, viz., in 1854, the Company, being in pecuniary difficulties, sold Mr Moon, whose testamentary trustees the defenders are, and granted to him accordingly a disposition to, a certain portion of the 16·176 acres of ground which they had acquired in 1846.

These are the leading circumstances in which the pursuers have brought the present action to have it declared that the 212 decimal parts of an acre of ground referred to belong to them, and to have the defenders Mr Moon's trustees ordained to cede possession to them of that ground.

In defence, it is maintained by Mr Moon's trustees—First, that the ground in dispute belongs to them in respect that it is comprehended by the disposition executed in their favour in 1854; and secondly, that if not so, it must, as superfluous land not required for railway purposes, be held to have fallen to and become vested in Mr Moon on the 31st of July 1860 in terms of section 120 of the Lands Clauses (Scotland) Act. The Lord Ordinary has repelled the defences, and given judgment in favour of the pursuers—as I think rightly, for the reasons now to be stated.

1. The disposition of 1854, upon which the first plea in defence is founded, appears to me to be clearly and beyond all reasonable dispute a bounding title. It not only describes the ground conveyed by precise measurement, but also refers to a plan which is in strict conformity with that measurement. And it was not disputed, but on the contrary admitted by the defenders, that neither according to the measurement or the plan had they any right to the piece of ground consisting of 212 decimal parts of an acre now in dispute. I cannot therefore see how, taking the disposition of 1854 as it stands, the defenders have under it any right to that ground. But then it was argued by the defenders, as I understood them, that the measurement and plan must be so far disregarded as to let in the correspondence which passed and the negotiations which took place prior and preparatory to the disposition being granted, to the effect and extent of showing that the parties had truly intended that the 212 decimal parts of an acre of ground in question should be conveyed by the disposition. But I am very clearly of opinion that this is wholly inadmissible, as being contrary to well-established principles or rules of law.

2. The second or alternative ground of defence is of quite a different character, and is in some of its aspects attended with considerable difficulty. It is also a novel one in our Courts, at least no Scotch precedent was cited by either party at the debate. The English cases, however, to which the Lord Ordinary refers in the note to his interlocutor are important, and in my view of them suggest principles sufficient to lead to a sound and satisfactory judgment in the present case.

The 120th section of the Lands Clauses (Scotland) Act incorporated with the special Act is that upon which the defenders rely as entitling them to the piece of ground in dispute as superfluous land. The object of that enactment is obviously to prevent railway companies from acquiring and retaining lands which are not necessary for their undertaking, and in that way, in place of confining themselves to the objects for which alone they were invested by Parliament with compulsory powers of acquiring ground, becoming landowners, or, to use the expression of one of the English Judges, land jobbers.

Accordingly the clause of the Act referred to requires that where no other specified time is mentioned all superfluous land shall be sold within ten years after the time allowed for the completion of the railway, which in the present instance were the ten years immediately preceding the 31st of July 1860, and in default thereof it is enacted that "all such superfluous lands remaining unsold at the expiration of such period shall vest in and become the property of the owners of the lands adjoining thereto in proportion to the extent of their lands respectively adjoining the same." Now, it appears to me to be obvious that the first question in the present, as in every case of the kind, is one of fact, viz., whether the lands in question are superfluous lands, for it is only to superfluous lands that the defenders can have any right at all under the statute. The ascertainment of this fact, again, must depend upon the evidence laid before the jury, or the Court as in the place of a jury, by whom the case is tried. And further, in the ascertainment of the fact the onus of showing that the lands are superfluous must, I think, be held to be upon the party maintaining that they

are so. It appears to have been so held in the English cases, and to hold otherwise would, in my opinion, be altogether unreasonable, for, as was remarked by Baron Martin in *Betts* v. *The Great Eastern Railway Company*, 8 L.R., Exch. 302—"This being an enactment of the Legislature it ought to be carried out fairly and properly, but it still is an enactment of forfeiture. It takes from the owners of the land that which they have bought, and it gives that land to a man who has paid nothing for it. Therefore it seems to me that it ought to receive a strict but nevertheless a fair construction." In these remarks—and they are applicable to the relative position of the parties in the present case equally as in the case referred to—I entirely concur. The defenders by holding and refusing to cede possession of the piece of ground in dispute are asserting a right of property in lands for which they have not paid or given any consideration whatever, and in order to accomplish this they necessarily require to maintain that the pursuers have forfeited their right to ground which they had purchased and paid for at a presumably high rate, seeing that it was only by virtue of the compulsory powers of their Act they were entitled to do so.

Keeping these considerations in view, it must be held, I think, to be clear, as well from the obvious and reasonable construction of the statute as upon the authority of the English cases, that it is not enough to make out that lands are superfluous merely to show that they were not actually applied and used for railway purposes at the time when on the assumption that they were superfluous they required to be disposed of as such by the railway company. On this point the defenders relied—and indeed it seemed to be what they chiefly relied—on some expressions of Lord Chancellor Cairns in the case of *The Great Western Railway Company* v. *May*, 7 L.R., Eng. and Ir. Apps. 283, which they represented to be to that effect. But this is a mistake. What the Lord Chancellor meant was, not that the lands said to be superfluous must be actually in use for railway purposes at or before the end of the ten years, but merely that that was the point of time which was to be looked at for determining whether the lands were or were not to be considered and dealt with as superfluous. This is made very clear by the decision in the case of *Hooper* v. *Bourne*, December 18, 1877, 3 L.R., Q.B. Div. 258, where the Lords Justices, while they expressed their concurrence in the views of the Lord Chancellor in *The Great Western Railway Company* v. *May*, took occasion to explain what the true meaning of the Lord Chancellor was. Thus, Lord Justice Bramwell, after referring to two classes of cases where it might be held that lands were not superfluous in the statutory sense, goes on to remark (p. 275)—"But I think that there is a third class of cases where land may properly be said to be "required" for the purpose of the undertaking, that is to say, where at the expiration of the period the land although not in actual use will be, owing to the growing traffic of the line, wanted for the railway within a reasonable time which it is not possible to specify." Lord Justice Brett, again, says (p. 282), in reference to what fell from the Lord Chancellor in *The Great Western Railway Company* v. *May*—"In my opinion the real meaning is, Can the tribunal which has to try the case say at the time when it is tried that if all the facts existing on the last day of the ten years had been known to a reasonably skilful and careful person he would have said at that time that the lands in question would by the ordinary development of the railway or neighbourhood be required to be actually applied to the purposes of the railway within a reasonable time? And in order to enable the tribunal which is trying the case to determine that question, they have a right to receive evidence of facts which have become known since the last day of the ten years." And Lord Justice Cotton (pp. 286-87) states his opinion to the same effect. He says that it is not necessary that the disputed lands should be in actual use for railway purposes, but that "it is quite sufficient if, having regard to the ordinary development of the railway, it may be reasonably said of the land that it will be required for the purposes of the undertaking." And in the subsequent case of *Betts* v. *The Great Eastern Railway Company*, 25th February 1878 (L.R. 3 Excheq. Div. 182), Lord Justices Bramwell, Brett, and Cotton, while they all expressed their concurrence in the views of the Lord Chancellor in *The Great Western Railway Company* v. *May*, were unanimous in holding that land not immediately available for or actually used at or within the ten years after the time allowed for the completion of the undertaking, but held or retained by the company in the reasonable expectation of its being afterwards required and used for railway purposes, is not in the sense of the statute superfluous, and does not consequently accrue to the adjoining proprietors. Lord Justice Bramwell observed with reference to the pieces of disputed land in that case, which lay contiguous to the railway, just as the disputed piece of ground in the present case does, that it was "difficult to see how very small pieces of ground lying alongside of a railway can ever become superfluous." Lord-Justice Brett takes the same view, and among other remarks he (p. 190), after referring to the facts as found by the jury, says—"The only matter therefore which remains to be determined is,"—not whether the disputed lands had at the expiry of the ten years after the completion of the line of railway been actually applied and in use for railway purposes, for that as the report shows was not the case, but—"whether it could have been reasonably foreseen in 1861, when the period of ten years expired, that the lands would be required for the purposes of the railway." And Lord-Justice Cotton, following in the same strain, observes (p. 192)—"What Lord Cairns in my opinion meant was, that the expiration of the ten years is the period to which the tribunal is to look when it has to decide whether the land in dispute is superfluous, and the tribunal may take notice of facts which have since become known for the purpose of deciding whether it could then have been foreseen that according to the ordinary development of the railway and the neighbourhood, the land would be required for the purposes of the railway within a reasonable time after the expiration of that period."

Applying these principles to the present case, I can come to no other conclusion than that arrived at by the Lord Ordinary, viz., that the piece of ground in dispute does not belong to or

has ever become vested in the defenders as superfluous lands, but still belongs to the pursuers for the purposes of their railway. All the material facts of the case appear to me to support this view. There is—(1) the circumstance that the ground is contiguous to the Springfield Station of the pursuers' line, and that it is required in consequence of the development of traffic as additional accommodation at that station; (2) that this is shown by the pursuers' witnesses, and especially by Mr John Walker and Mr William Paterson, to have been foreseen before the expiration of the ten years after the completion of the line; and (3) that in consequence of this having been foreseen, the piece of the ground in dispute in place of being sold in 1854 when the company were in pecuniary difficulties, and did for the purpose of raising money sell all the lands which after full inquiry they were advised could be safely parted with, was purposely retained in order to be ready to be used for railway purposes whenever required, as is, I think, sufficiently proved by Mr Walker and Mr Paterson.

In opposition, however, to all this the defenders put forward and rely upon the circumstance that they were allowed without challenge to take the use of the piece of ground in question from 1860 till it was actually required by the pursuers, shortly before the raising of the present action. But I cannot hold this circumstance to be sufficient to support the defenders' alleged right. They did not obtain any express title to the ground at the end of July 1860, nor can I see how it can be fairly, and on reasonably sufficient grounds, held that the railway company had then abandoned the ground or parted with the control of it. That, however, is the point of time which according to the authorities must be looked to in order to determine the rights of parties. Unless the defenders can show that at that date, looking to the state of matters then existing, and as then might be purely predicated from the development of traffic and other circumstances, the ground was superfluous, and as such had become vested in them, they cannot succeed in their contention. If the defenders' alleged right to the ground in dispute had been tried on the 31st July 1860, they could not, in my opinion, have succeeded, and if so I am unable to see any grounds which have subsequently emerged to put them in a more favourable position. On the contrary, the subsequently emerging circumstances appear to me to operate very strongly against them. There is the circumstance, very distinctly established, that the ground in question is now, and has been since 1870, very urgently required by the pursuers, in consequence of the development of traffic, for increased accommodation at the Springfield Station of their line, and there is also the circumstance established by the proof, and in particular by the evidence of James Harkness, that a few years ago the pursuers being pressed for accommodation did in point of fact take possession of a part of the very ground in dispute, and that in the time of Mr Moon, without objection on his part.

For these reasons, the interlocutor of the Lord Ordinary is in my opinion well founded, and ought to be adhered to.

Lord Gifford—I am of opinion that the Lord Ordinary's opinion is right and should be adhered to.

There are two questions—the first is, Whether the piece of ground now in dispute was sold and conveyed by the North British Railway Company, or their predecessors the Edinburgh, Perth, and Dundee Company, by disposition of 30th November 1854? and the second question is, assuming that the ground in question was not so conveyed —Whether it has since become the property of the late Mr Moon, and of the defenders as his trustees, under the provisions of the Lands Clauses Act regarding superfluous lands?

On the first question I have no doubt whatever. The subject sold to Mr Moon in 1854 is specially laid down upon a plan signed as relative to the disposition, and forming part thereof. The ground conveyed is exactly measured as containing 3·750 acres, and this exactly corresponds with the actual measurement and with the ground shown upon the signed plan. Under this disposition Mr Moon got the measured quantity disponed as delineated on the signed plan, and he is in enjoyment of everything shown upon the plan. I think it is quite plain he got nothing else. The ground now in dispute is expressly excluded — and I think it is proved was advisedly and intentionally excluded — from the disposition and from the plan, and although previous to the sale Mr Moon was in possession as tenant of the railway company not only of the ground purchased but of the additional angle now in dispute, this disputed angle was not sold and conveyed, but, on the contrary, was expressly reserved and retained by the railway company. It was so just as effectually as if there had been an express reservation of it in the disposition. So far as the disposition of 1854 therefore is concerned, I think the defenders have no claim whatever to the piece of ground in question.

The second question raises the only real difficulty in the case. Have the defenders or their author Mr Moon acquired right to this angle of ground in virtue of the Lands Clauses Consolidation Act of 1845 as superfluous land? I think they have not.

In this question we start with the fact that the ground now in dispute did not originally belong to Mr Moon at all, but was the exclusive property of the railway company, and was never sold or conveyed by them. It lies upon the defenders to show that, as at 31st July 1860, being ten years from the date of completion of the railway, the angle in question had become "superfluous land," and as such passed as at that date to Mr Moon by force of the statute. I think the defenders have not succeeded in showing this. On the contrary, I think it is sufficiently instructed that neither at 31st July 1860, nor at any other date, was the angle in question ever superfluous land in the sense of the statute, but that it was expressly retained and reasonably and rightly retained by the railway company as necessary for the purposes of their undertaking. In short, it never was, and apparently it never will be, superfluous land, and accordingly it never passed to the defenders, who can only claim it under the statute as adjoining proprietors.

The first material fact is that in 1854 the railway company deliberately took into consideration by their engineer and by their directors, on the report of the engineer, the very question

whether or not this angle of ground now in dispute was superfluous land, and whether or not it should be sold as such, and they deliberately decided that it was not superfluous land, that it was necessary for their undertaking, and that it should be permanently retained. It is true we have no minute of the directors to this effect, but I think the fact is clearly and abundantly proved. It is proved by the then engineer of the company, Mr Paterson, who left their service in December 1854, and although, as is most natural at this distance of time, he has forgotten some of the details, he is quite clear that he expressly and intentionally excluded the ground in dispute from the ground sold to Mr Moon, because the ground so excluded was, and would be, required for railway purposes. Even without Mr Paterson's evidence the plan prepared by him is quite conclusive on the subject. It shows how much of the railway property is to be sold to Mr Moon, and how much is to be reserved, and the purpose of the reservation was, and could only be, that it was reserved for railway purposes.

The year before (1853) the Edinburgh, Perth, and Dundee Railway "Arrangement Act" was passed, by which, *inter alia*, it was expressly enacted that the company should sell and dispose of its whole surplus lands in order, *inter alia*, to pay its debt. The statute bears that the company was then in pecuniary difficulties. In obedience to this enactment it became the duty of the company to fix in 1854 what were superfluous lands, and what were not, although under the Lands Clauses Act this matter might have stood over till shortly before 31st July 1860. The sale to Mr Moon therefore was really a statutory sale, by which the railway company, considering the whole land which they had lying between their railway and the public road, amounting in all to 3·962 acres, decided that 3·75 acres were superfluous lands, and that the remainder, amounting to 0·212 acres, being about a fifth of an acre, must be retained as necessary for the undertaking. The sale of the larger portion proceeded accordingly, and the result is precisely the same as if it had been expressly declared in the disposition to Mr Moon that the portion of land excluded from his plan was necessary for the purposes of the railway, and was retained as such, —words could not have made the transaction more explicit than it was.

Now, if the present question had arisen in 1854 —that is, immediately after the sale to Moon—it could hardly have been maintained that the company were not entitled to retain this angle of land. They were bound to sell all their superfluous lands at that date, for the Arrangement Act of 1853 virtually curtailed the ten years to which they would otherwise have been entitled, but it would have been impossible to say that this fifth of an acre lying close to and really part of the Springfield Station was not reasonably retained for railway uses. The very shape of the retained land speaks volumes as to the purpose of its retention. It consists of a small quadrilateral area at the end of the loading bank, having a long narrow strip or tail attached thereto, which strip or tail six or seven times as long as the quadrilateral area runs alongside of and close to the railway obviously for the purpose of enabling a siding or additional line of rails to be constructed thereon. It is utterly inconceivable what a piece of land of this shape could be retained for except for railway purposes. It is, and can be, of no other use.

Now, if this tailed angle of ground was properly retained for railway purposes in 1854, when did it become superfluous? It has been growing more and more indispensable ever since, for the traffic has been continually, though very slowly, increasing, and it seems to me that it would have been just as hopeless for Mr Moon to claim the ground on 31st July 1860 as it would have been had he attempted to do so on 1st December 1854, being the day after he received his disposition.

Nor has anything happened since to make the land superfluous now, if it was not so on 31st July 1860. No doubt the traffic has developed only slowly, but the increase has been steady, and we have it on the highest authority that the company are entitled and bound to look far ahead as to the requirements of their undertaking. They must not be put, and ought not to be put, to the necessity of getting new Acts and new compulsory powers to enable them to reacquire lands which they have already bought, and they ought not to be compelled to pay twice over for ground which they originally purchased at a full compulsory price.

Indeed, so far from there being any ground for maintaining that this irregular area, with its long projecting strip or tail, has been improperly retained by the railway company as superfluous, I think it is proved that the railway company, under the guidance of their engineer Mr Paterson, did not reserve enough. I think in the circumstances they might have justifiably and reasonably reserved a great deal more. It is in evidence that a great deal more than this angle is now needed for the convenience of the station, and the explanation of their having sold Mr Moon so much is found in the then distressed condition of the company, who were anxious to raise every farthing they could to meet the then overwhelming claims of their creditors.

The only circumstance which in my view creates any difficulty in the case is the fact that from 1854, or at least from 1860, down to 1876 the railway company allowed Mr Moon to retain possession of this angle along with the ground sold to him, and without charging him any rent therefor. If the land had been lying waste and unused—if it had been fenced off from Mr Moon's ground in 1854, and had been unoccupied since —there would have been no difficulty in the case at all, but some embarrassment is undoubtedly created by the fact that Mr Moon was allowed to possess it so long. It is a piece of evidence strongly pointing to its superfluity that the land was never claimed by the company all that time. I cannot hold, however, that this circumstance is sufficient to deprive the railway company of their ground.

Mr Moon was a mere precarious possessor. He had no title whatever so far as the angle of ground in question is concerned. His only title excluded that angle. If rent had been levied, however small, the objection would have been obviated, but in one point of view the non-payment of rent is a circumstance in favour of the railway company, and not against it. The railway company are not entitled to take land for the mere purpose of letting it, and it is in favour of its being purely railway ground that the ground

subsequent to 1854 was never let. Then it is not immaterial to notice that about ten years ago the railway company actually used a part of the ground for railway purposes—that is, for the purpose of making a siding. They actually shifted the fence and placed it back far enough to enable them to construct the siding. Now, Mr Moon himself saw this done, and made the remark in reference to the shifting of the fence,—"Well, see you don't take any more than your own;" to which the answer was—"Oh no, we'll try and not do that, but we have a good piece along that slope." All this was acquiesced in at the time and ever since, and yet Mr Moon and his trustees are now claiming as superfluous the very ground upon which the siding was constructed ten years ago.

Lord Justice-Clerk—I concur without any difficulty in the result at which your Lordships have arrived, but I think it necessary to guard myself upon some matters that may come to be of considerable importance in other cases which do not present exactly the same features.

I am of opinion, in the first place, that Moon's title is a bounding title. There can be no question about that. The plan shows quite plainly what it was he got and what it was he did not get, and it shows clearly enough that he did not get this small plot at the side of the bit of ground which he bought.

The next question is, Whether, if he did not get it by the title of 1854, which is within the ten years, he gets it by the operation of the clause in the statute making a presumed statutory transfer of superfluous land? There are some conclusions which have been drawn in this discussion from which I entirely and absolutely dissent. In the first place, I attach not the slightest importance to the fact that during the ten years the company retained the land, and did not part with it—in other words that it was not considered superfluous within the ten years that the statute applies. All the land purchased by the railway company is presumed to be required for the purposes of the line, but the Act says that after ten years land which is not required for the purposes of the railway line shall revert to the adjoining proprietor. It is manifestly perfectly idle and irrelevant to say that within the ten years the land was not sold, and not parted with, and not superfluous, because it is only to land in that position that the Act applies. During the currency of the ten years the presumption is that none of the land taken is superfluous, and the presumption is only reversed—clearly reversed—by the statute, unless there are circumstances to prevent it, when the ten years have elapsed without the land being required or used for railway purposes. Now, no doubt an exception has been allowed in a certain class of circumstances, namely, where land has not been used within the ten years for the purposes of the railway, but where from its position and its value and its vicinity the probability is that it will be used or required for the purposes of the railway, and where the company have continued to retain the possession and control of it. There is not one of these cases in which the possession was not retained, and I imagine the *dicta* that have been quoted, some of which are in my opinion not as precise as might be desired, only apply to cases where the company have shown their intention, or at all events their contemplation, of using the land by retaining it in their own possession. But these decisions and *dicta* I imagine are entirely inapplicable to a case in which the possession and control have been surrendered by the company after the expiration of ten years, and I should be very sorry to give any sanction to the doctrine that at any distance of time ground which has perhaps passed through five or six different hands can be claimed by the railway company on the pretence that although at the time the ten years expired they had no use for it, it was possible that in the course of time emergencies might occur which might render it desirable to have it.

I have thought it right to say these things, because it appears to me that any other construction of the statute would neutralise this provision altogether, and in the present case if the bit of ground had passed into the hands of a third party I should not have had the slightest doubt that the railway company were completely divested under the operation of the clause in question. But I am disposed to take the same view as your Lordships, on the ground last alluded to by Lord Gifford, and which appears to me clearly consistent with the justice of the case, and the only result of the proof of the facts. The railway company, it is true, have not been in possession of this ground for twenty years, and it is also proved that Moon has been in possession of it. But it is important to attend to the footing on which possession was averred, and the title to which it is ascribed, for that is the important point. I will not say how the question of right would have stood if Moon had parted with the ground in question to a singular successor, but it is manifest that in this case the possession by Moon commenced under a misapprehension that the ground in question was included in his title, which it certainly was not. He had previously paid rent for the land, and he continued to possess without paying rent clearly upon the idea that the purchase had transferred it to him, which it certainly did not do. It turns out that it not only was not conveyed, but that it was specially excluded from the conveyance, because it was not superfluous land, and because it would or might be required for the purposes of the railway. The company's engineer, by whose advice the sale of the remainder was made, left their service immediately afterwards, and the fact of the small plot being excluded seems to have been overlooked. My opinion therefore is, that the ground is still in the same hands, and that it is not too late now to rectify the error; that Moon has no title to it; that the statutory transfer did not take effect, seeing that the company must be held to have been in possession from that time forward; and that therefore Moon has no right to succeed in his demand.

I am therefore for adhering with your Lordships to the interlocutor of the Lord Ordinary.

The Court adhered.

Counsel for Pursuer (Respondents) — Lord Advocate (Watson)—Balfour—Strachan. Agent —Adam Johnston.

Counsel for Defenders (Reclaimers)—Asher—H. Johnston. Agents—Leburn & Henderson, S.S.C.