Thursday, May 31.

FIRST DIVISION.

[Lord Fraser, Ordinary.

THE GLASGOW CITY AND DISTRICT RAILWAY COMPANY *v.* MACBRAYNE AND OTHERS.

Property—A cœlo ad centrum—*Lands Clauses Consolidation (Scotland) Act* 1845 (8 *Vict. cap.* 19), *secs.* 17, 20, 90—*Railway Company—Notice by Company to take Substratum—Arbitration—Interpretation of "House" in Lands Clauses Act.*

A railway company having obtained an Act entitling them to take land for a line of railway which was to be made chiefly in tunnel below the streets of a town, served notices in terms of the Lands Clauses Act 1845 upon the proprietors of houses beneath which the proposed line of railway was to be carried, intimating that a portion of their property "consisting of the substratum underlying" a specified area would be taken by the company for the purposes of the undertaking. The proprietors of the houses gave notice to the promoters, in terms of sec. 90 of the Lands Clauses Act, that they were willing to convey the houses beneath which the railway was to pass as a whole, and required the promoters to take them and compensate them therefor. *Held* that the substratum underlying a house is within the meaning of sec. 90 part of the house, and that the promoters were therefore bound to take and compensate the owners for the whole houses, and not only for the carrying of a tunnel beneath them.

Proof—Relevancy.

Held that any inquiry as to the nature of the substratum, with a view to regulate the rights of parties, was irrelevant, as this was a question of statutory right, and not one of expected detriment to a house.

Section 90 of the Lands Clauses Consolidation (Scotland) Act 1845 provides with reference to the taking by the promoters of an undertaking of any portion of a house or manufactory—"That no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory, if such a party be willing and able to sell the whole thereof."

The Glasgow City and District Railway Company were in 1882 incorporated by Act of Parliament for the purpose of making and maintaining certain lines of railway fully delineated on their plans and sections, and described in their books of reference.

The proposed railway was to be made chiefly in tunnel, and it was provided that the covered way should be made of such strength and durability as should effectually support any buildings presently existing, or which should in the future be lawfully erected, upon any part of the lands through which the said proposed tunnel was to be carried.

In pursuance of the provisions of the Glasgow City and District Railway Act 1882, the Lands Clauses Consolidation (Scotland) Act 1845, and the Lands Clauses Consolidation Acts Amendment Act 1860, and the other Acts incorporated with the first-mentioned Act, notices were served by the company upon J. B. MacBrayne and D. W. M'Kechnie, proprietors of houses beneath which it was proposed to carry the said tunnel, intimating that in virtue of the powers conferred upon them by their Act of incorporation they were authorised to purchase and take certain lands in the city and parish of Glasgow belonging to MacBrayne and M'Kechnie, or in which they were interested; and especially "that a portion of the said land or property consisting of the substratum underlying the area coloured red on the plan herewith delivered to you, extending to 256 superficial yards or thereby, so far as shown on the section also herewith delivered to you," was required and would be taken and used by the company for the purposes of their Act.

The notice further bore that the company were willing to treat for the purchase of the land above mentioned, and were ready also to make compensation for any damage which might be occasioned through the execution of the works authorised by their Act of Parliament.

The substratum referred to in this notice consisted of about 1536 cubic yards, the uppermost part of which was about 20 feet below the surface of the ground belonging to Messrs MacBrayne and M'Kechnie, proprietors of buildings which had been erected thereupon.

MacBrayne and M'Kechnie served a statement and claim upon the railway company setting forth that "Whereas the claimants decline to sell to the company the portion of their property required to be taken under said notices, but are willing and able to sell and convey their whole property to the company as vested in them, and under all the burdens affecting the same, whether described in the title or not, at the price of £7000 sterling: Now therefore the claimants claim the said sum of £7000 sterling, and in the event of the company not agreeing within twenty-one days to pay said price, the claimants desire to have the question of compensation settled by arbitration in terms of the statute, and accordingly hereby nominate James Sellars, Esq., architect and property valuator, Glasgow, as arbiter on their behalf, and hereby require the company in that event to nominate their arbiter."

In answer to this statement and claim the company maintained that they were entitled to purchase the substratum described in their notice; but, under protest and reservation of their right, they nominated William M'Jannet, writer in Glasgow, to be their arbiter, in terms of the Lands Clauses Consolidation (Scotland) Act 1845.

On 20th January 1883 a note of suspension and interdict was raised by the railway company against MacBrayne, MacKechnie, Mr Sellars, and Mr M'Jannet, praying for interdict against the two former prosecuting and following forth the statement and claim already referred to, and against the two latter from acting as arbiters and issuing any award.

The railway company averred that the substratum could be removed and used for the purposes of their line without touching or causing any damage to the buildings on the surface.

It was averred by MacBrayne and MacKechnie, the proprietors of the tenements, that the sub-

stratum being largely composed of muddy sand, could not be removed without causing serious damage to their buildings; and further, that in terms of sec. 90 of the Lands Consolidation (Scotland) Act 1845," above quoted, they were not bound to sell to the company the portion of the property described as the substratum, seeing that they were willing and able to sell the whole thereof.

The complainers pleaded that in virtue of their private Act of Parliament and the Acts incorporated therewith, they were authorised to purchase the substratum, and were not bound to purchase the whole property situated above the same and the buildings erected thereon.

The respondents pleaded—"(1) That sec. 90 of the Lands Clauses Consolidation Act 1845 was incorporated in the complainers' private Act. (2) That as they were able and willing to sell the whole buildings and pertinents, they were not bound to sell a portion."

On 20th February the Lord Ordinary allowed a proof of the averments of parties.

"*Opinion.*—The complainers are authorised to make a railway which is to be partly above ground and partly carried through tunnels. One of the tunnels which they propose to form runs through property belonging to the respondents, on the surface of which they have built certain houses. The roof of the tunnel is intended to be 20 feet from the surface of the ground on which the respondents' buildings are. The complainers have served upon the respondents a notice in terms of the Lands Clauses Acts, intimating that they are willing to purchase 'a portion of the said land or property, consisting of the substratum underlying the area coloured red on the plan herewith delivered to you, extending to 256 superficial yards or thereby.' The respondents have met this by a counter notice, intimating that they decline to sell the substratum, 'but are willing and able to sell and convey their whole property to the company as vested in them' at the price of £7000. The question now is, whether the company are bound to take and pay for the whole property of the respondents, including the buildings on the surface, or are only bound to pay for the substratum which alone they need? This turns upon the construction to be put upon the 90th section of the Lands Clauses Consolidation (Scotland) Act 1845, which enacts 'That no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory, if such party be willing and able to sell and convey the whole thereof.' The complainers say that by taking the substratum they do not take any part of houses, buildings, or manufactories belonging to the respondents.

"The general question as to whether a railway company authorised to make a tunnel, and nothing else, must buy the whole land up to the surface, with all the buildings thereon, has not been determined either by the Scotch or English Courts, although there are *obiter dicta* of judges bearing upon the subject. Thus, Lord Justice Lord Cranworth, in *Sparrow* v. *Oxford Railway Company*, 21 L.J., Chan. 731, expressed himself as follows:—'The only remaining question (which has now been raised for the first time—it came upon us entirely by surprise) is that although they had given notice in the ordinary way that they meant to take the land, they are now entitled, if they cannot take the land, to burrow under it as it were, to make a tunnel, which they say they are able and willing to do without taking or touching any part of the surface. It is a sufficient answer to that argument to say that it has been raised since the matter was before us and since we granted the interim injunction. The notice is a notice which entitles them to take the land if they are not restrained from proceeding under that notice. Many arguments were urged to show the title of the defendants to make a tunnel. It was said, suppose the manufactory was at the top of a hill and you were burrowing under it at the distance of 1000 feet, are you then taking part of the manufactory? I do not feel myself called upon to answer that question; but if I were, I rather believe that you are, on the principle of the maxim, "*Cujus est solum ejus est usque ad inferos.*" Do you mean to say that if you were an inch below the surface you would not take a part of the manufactory? It might all fall down if you undermined any portion of it; and I am rather inclined to think that, however deep below, it would be within that enactment. If that has been a *casus omissus*, I think it ought to be construed in a way most favourable to those who have been seeking to defend their property from innovation. I do not think that arises, because here is a notice to take the land, and upon that notice they are proceeding to take it in the ordinary way.' Thus the point did not require determination in this case, nor did it in the case of *The Metropolitan District Railway Company and Cosh*, February 5, 1880, L.R., 13 Ch. Div. 612, where Mr Justice Fry thus expressed himself—'I think considerable light is thrown upon the question by the language used in other sections of the Lands Clauses Consolidation Act with regard to land required for the purposes of the railway, because with regard both to land taken by agreement, and land taken otherwise than by agreement, the only lands which the company can take are such lands as are required for the purposes of the Act. In the case of a tunnel they are required to take the land in the ordinary sense from the very centre of the earth to the heaven above. They cannot take less than that. That seems to me to be the result of the decisions, and it shows that the whole of the land (in the ordinary sense of the word) so taken is land required for the purposes of the Act, although a portion of it only is occupied by the tunnel. And, by parity of reasoning, it seems to me to follow that the company cannot say that any land above or below the land actually used for the purposes of the railway is not land required for the purposes of the Act.' This decision also turned upon a different point altogether, and neither of the cases can be cited as furnishing anything else than the opinion *obiter* of very eminent judges.

"In the present case the complainers aver positively that 'the substratum can be taken and used for the purposes of the complainers' railway without touching and without detriment to the buildings on the said respondents' property.' But this averment is met on the other side by the respondents, who aver 'that the said substratum forms part of the ground on which the respondents' buildings are erected. Said ground is largely composed of muddy sand, and the sub-

stratum referred to cannot be taken and used for the complainers' railway without serious injury to the buildings belonging to the respondents.' If this last averment be true, then it is clear that the complainers must buy the whole property of the respondents, and it is for the purpose of ascertaining how the fact stands in regard to this that the proof has been allowed. If that proof shows, as was represented to the Lord Ordinary, that the tunnel is to be carried through rock, which could be excavated without moving any of the strata above, the case would present somewhat of the character of the case of the manufactory on the top of the hill referred to by Lord Cranworth, in regard to which he declined to offer an opinion. The general question would require then to be determined, whether a railway company entitled to make a tunnel, but nothing else, is, notwithstanding, obliged to buy all the strata up to the surface, and all the buildings upon the surface, though the tunnel affects these in noway."

The respondents (M'Brayne and others) reclaimed.

On the same date upon which the notice had been served upon M'Brayne and MacKechnie requiring them to sell their lands, which were entered as Nos. 42, 46, and 47 in the book of reference, there was also served a notice of the same kind by the company upon Thomas Gemmell and others, whose property was marked Nos. 66 and 67 in the book of reference. No. 66 was there described as a green, and No. 67 as a dwelling house and outhouses and entrance. The substratum referred to in this case contained about 1120 cubic yards, and its uppermost part was situated about 35 feet from the surface. Gemmel offered to convey the whole subjects and maintained that he was not bound to part with a portion of the subjects when he was able and willing to sell the whole.

On 10th February 1883 the railway company raised an action of suspension and interdict against Gemmel for the same purpose as they had raised a similar action against MacBrayne, viz., to prevent him from prosecuting the claims of which he had given notice by requiring arbitration under the Lands Clauses Act.

On the 28th February 1883 the Lord Ordinary (Lord M'Laren) pronounced the following interlocutor:—"Repels the reasons of suspension and interdict; Recals the interim interdict formerly granted, and decerns; Finds the respondents entitled to expenses; allows an account," &c.

"*Opinion.*—I am informed that my colleague Lord Fraser has heard a case raising the same question which is raised by this case, and I was moved on the part of the railway company to defer the hearing of this case until the final decision of the case before Lord Fraser. But on referring to Lord Fraser's judgment I find that his Lordship has not given any opinion on the legal question, but has allowed a proof. As I was asked by the respondents to hear this case, and as the question has been fully argued, I shall deal with the case before me on its merits. The claim of the railway company, as expressed in their notice, is to take under their compulsory powers a portion of the land or property numbered 66 and 67 in the book of reference, described as 'consisting of the substratum underlying the area coloured red on the plan delivered with the said notice.' In the book of reference No. 66 is described as a 'green,' and No. 67 is described as 'dwelling-house and outhouses and entrance.' The claim of the respondent is, that the railway company shall purchase from him the dwelling-house and pertinents, of which the subjects specified in the notice form a part, being, as I understand, the whole subjects numbered 66 and 67. This claim is founded on the 90th section of the Lands Clauses Consolidation (Scotland) Act 1845. which provides that the owner shall not be required to sell or convey to 'the promoters of the undertaking a part only of any house, 'or other building or manufactory, if he is willing and able to sell and convey the whole thereof.'

"It is not pleaded in the record, nor was it contended at the bar, that the superficial area comprised in Nos. 66 and 67 includes subjects other than the house and pertinents belonging to the respondent. The contention of the railway company is, that their notice does not include any part of the superficial area here referred to, but that, as they, the railway company, only desire to take a substratum underlying the house and pertinents, the respondent is not entitled to the benefit of the 90th section. The question, therefore, is narrowed to this, whether a notice claiming to take a substratum of land underlying a house is a requisition to the owner to sell and convey a part of the house, in terms of the 90th section of the Lands Clauses Consolidation Act? It will not be disputed that a conveyance of a particular house in unqualified terms is in general a conveyance of the *solum* on which the house is founded. This is indeed the proper mode of conveying the *solum* of land which has been built over, and I do not remember that I have ever seen in conveyances of house property a separate conveyance of the *solum* of the house itself, unless, perhaps, in the case of tenements divided into flats, where it is desired to give the *solum* in property to the owner of one of the flats, to the exclusion of the other or others. I may add that, in missives of sale and agreements of any description in which a heritable right is given in or in relation to a house, the word 'house' comprehends the *solum* or land on which the building rests. No reason has been suggested for giving to the word 'house,' as used in the Act of Parliament, or its congeners 'building' and 'manufactory,' a less extensive meaning than would be given to such words in a private deed, missive, or agreement. The 90th section of the statute is an enactment treating of sales of house property, and the words used ought to have the same significance as similar words when used in instruments relating to such sales. The series of decisions upon the 90th section which have determined that the word 'house' includes garden and pertinents, all proceed on the assumption that the expressions in the statute have a meaning not less extensive than would be given to them in the deeds of private parties.

"In the next place, I must hold it to be clear in law that a conveyance of any land in unqualified terms gives a right of property in the substance or solid contents of the land without any assignable limit. This is what is meant by a conveyance being *a coelo ad centrum*. There are no limits in the vertical direction except such as physical conditions impose. These are the two

propositions on which the question, in my opinion, depends. Property described by the name of a house in a deed, contract, or statute, relating to the conveyance of heritable estate, includes the *solum*, and the *solum* has no limit in the vertical direction. It follows, in my opinion, that the substratum underlying the respondent's house, which the railway company proposes to purchase, is in law a part of the house, and that the respondent is entitled to require the company to purchase the whole property. It does not appear that the Company's Special Act gives the company any power to purchase the particular substratum, except in so far as such a power is implied in the power to purchase the lands. By the 5th section of the Special Act, the complainers are empowered to make and maintain the railways there referred to, and to take and use such of the lands delineated on the plans and described in the deposited books of reference, as may be required for that purpose.

"If the substratum in question is within the description in the book of reference, then it is part of the respondent's house, because no other property except a house and green is described in the book of reference under the numbers 66 and 67. If the substratum is not part of the house and green, then it is not within the book of reference, and the railway company has no power to purchase it. I do not see how the company can avoid this dilemma, except by admitting the application of the 90th section of the Lands Clauses Act 1845.

"It is contended by the railway company that the question which falls within the description of a house is a question of fact on which they are entitled to a proof. This is undoubtedly true, when the subject in dispute is a pertinent—that is, not the building itself, but something adjacent to it, and which may or may not be included in the words of description.

"But, in my opinion, the *solum* underlying the building necessarily and invariably passes with the building itself, where the subject of sale is a house or building; and if this opinion be well founded, there is no question as to which a proof could be usefully directed.

"It was further contended that the words of the 90th section should be subject to reasonable limitation where the operations of the company are confined to tunnelling, and the stability of the building in question is not endangered. The case has been suggested of a tunnel under a mountain, where the enjoyment of the surface is not diminished in any degree. If such a case should occur, it would no doubt be considered by Parliament; but in the meantime the Lands Clauses Act 1845 has been made applicable by Parliament to the operations of this company; and I do not think that a tunnel only 25 feet under the foundations of buildings in a city offers any analogy to the case supposed, or furnishes the elements for such an equitable restriction of the meaning of the 90th section as contended for, supposing such a restrictive construction to be within the powers of the Court, which I greatly doubt.

"For the reasons stated, I shall refuse the prayer of the note of suspension and recal the interim interdict which has been granted."

The complainers (the railway company) reclaimed.

The two cases were heard together on the reclaiming-notes.

Argued for the respondents (owners of the houses)—Sec. 90 of the Lands Clauses Act of 1845 provided that no party was to be bound to sell to the promoters of any undertaking a part only of any building, manufactory, or house; for the interpretation to be put upon the word "house" see Deas' Law of Railways," p. 174 *et seq.*, and the case of *Grosvenor* v. *Hampstead Junction Railway*, 1 De G. & J. 446. If a "house" be taken by the promoters of any undertaking, that must include all the ground underneath it. The ground on which the house stood was in this sense part of the house. *Whyte* v. *Lee*, February 22, 1879, 6 R. 699; and *Falkner*, L.R., 16 Eq. 458. The contention of the promoters that they could purchase compulsorily a right of tunnelling was clearly untenable. What they really wanted was a servitude or easement of tunnel. Neither their private Act nor any of the incorporated Acts could give them that right. *Pinchin* v. *London and Blackwall Railway Company*, 24 L.J. Ch. 417. The company could only take the lands described in the book of reference and the accompanying plans, and the power to acquire compulsorily necessitated the taking of the whole in property if so required by the vendors. *Oswald* v. *Ayr Harbour Trustees*, 26th January 1883, 20 Scot. Law. Rep. 327. Sec. 90 of Lands Clauses Act 1845 was incorporated into the company's private Act, and its provisions applied to all cases except to "roads, streets, and lanes." The notice served by the railway company was clearly defective.

Argued for the railway company—The whole question was, whether in certain cases the promoters of an undertaking might not be permitted to take part of a subject, and whether this was not such a case, or must they always acquire *a cœlo ad centrum*? It must be admitted that sec. 90 of Lands Clauses Act was incorporated, but as to what was included in the word "house," that was always a question of circumstances, for clearly the surface can be feudally cut up into slices or layers. See *Duke of Hamilton* v. *Barnes Graham*, 9 Macph. (H. of L.) 98; Hodge's Railway Cases, 164 *et seq.* This case differed from all others reported, in respect that the proprietors were told exactly what was wanted to be taken. *Sprot* v. *Caledonian Railway Company*, 16 D. 955, 2 Macq. 449 An analogy might be derived from the case of superfluous lands—*Mulliner* v. *Midland Railway Company*, 21st January 1879, 11 Ch. Div. 611.

At advising—

Lord President—We have two cases before us both raising practically the same question, and I propose to deal with them together. In both of them the Glasgow City and District Railway Company are the complainers, and the object they have in view in coming to the Court is to prevent certain persons whose property they invade in making their railway from prosecuting claims of which they have given notice by requiring arbitration under the Lands Clauses Act. The property belonging to one of the parties here, as numbered upon the Parliamentary plan and in the book of reference, is 66 and 67. No. 67 is

described as a "dwelling-house and outhouses and entrance," and 66 as "green," which single monosyllable "green" I take to mean—as it was assumed in the argument to mean—a drying-green attached to the dwelling-house. In the other case the property is described as Nos. 46 and 47, and also 42 I think. No. 42 is described in the book of reference as "dwelling-honse," 46 as "workshops, dwelling-houses, and outhouses," and 47 as "back court," and the back court there, like the green in the other case, is just part of the house property belonging to the respondents.

Now, the notice which the railway company have given is thus expressed in the latter case—and the form of the notice is exactly the same in both—the notice is, that the company are desirous to take certain subjects, naming them 42, 46, and 47, and that "a portion of the said land or property consisting of the substratum underlying the area coloured red on the plan herewith delivered to you, extending to 256 superficial yards or thereby, so far as shown on the section also herewith delivered to you, is required and will be taken and used by the company for the purposes of the Act." The proposal therefore is not to take any part of the surface of the property belonging to the owner, but only a portion of the substratum—in other words, they propose to drive a tunnel under the owner's property, but not to take any part of the surface.

The owners of these properties, on the other hand, put in a claim in which they say that "whereas the claimants decline to sell to the company the portion of their property required to be taken under the said notice, but are willing to sell and convey their whole property to the company as vested in them, and under all the burdens affecting the same, whether described in the title or not, at the price of £7000 sterling: Therefore the claimants claim the said sum of £7000 sterling, and in the event of the company not agreeing within 21 days to pay the said price the claimants desire to have the question of compensation settled by arbitration in terms of the statute." Now, this claim of the owners of these properties plainly has reference to the 90th section of the Lands Clauses Act, by which it is provided that if the promoters of the undertaking take any part of a house, and the owner desires them to take the whole, and is able and willing to convey the whole, they are bound to do so. The railway company maintain that what they do propose to take—the substratum as they call it—is not part of the house, and that is the single and simple question I think for consideration in the present case.

Now, as I entirely agree with the view taken upon the subject by Lord M'Laren, I have very little indeed to add to his Lordship's judgment. It appears to me that so long as land is unbuilt upon the word 'land' is the proper description of the property. It may be described no doubt according to the use that is made of the land, as being a 'garden,' or an 'orchard,' or an enclosure for some particular purpose, or a 'farm'; but still 'land' is the proper name of the estate so long as it remains unbuilt upon. But this ground is built upon, and the *solum* on which the house rests is never described as 'land.' The owner thereafter becomes the owner of a house property instead of a landed property, and if he conveys his estate, the form and manner in which he conveys it is by disponing the house without the slightest reference to the soil upon which it stands. Now, where there is no question about minerals, and no division of the surface and the underground estate between two different owners, there can be no doubt of the application of the general rule that the owner of the surface is owner *ad centrum*, or, as Lord M'Laren very properly expresses it, the vertical measurement of his property is indefinite—it knows no limits. And therefore while in the case of land it might probably be quite competent to a railway company to take an underground portion of a landed proprietor's estate—about which, however, I give no opinion at present, as it does not occur for decision here—it seems to me abundantly clear that where the property belonging to the owner is a house, the ground upon which that house stands is just as much part of the house as the walls or the roof of it, and the ground upon which it stands is not a few inches or a few feet or a few yards in depth from the surface, but it is the entire underlying strata as far as imagination can carry you. In short, the only subject, after the house is built, which belongs to the proprietor is the house, and the house includes not only all its ordinary adjuncts upon the surface, but the whole underground below the surface. And upon that plain and simple ground I am of opinion with Lord M'Laren that the railway company cannot, under the 90th section of the Lands Clauses Act, take any part of the ground under the house without taking the whole property if the owner requires them to do so, and is able and willing to convey the whole.

In the case which has been decided by Lord Fraser, his Lordship has not taken the same course as Lord M'Laren, but has allowed a proof; and his reason for doing so is expressed in his note in this way. He says—"In the present case the complainers aver positively that the 'substratum can be taken and used for the purposes of the complainers' railway without touching, and without detriment to the buildings on the said respondents' property.' But this averment is met on the other side by the respondents, who aver 'that the said substratum forms part of the ground on which the respondents' buildings are erected. Said ground is largely composed of muddy sand, and the substratum referred to cannot be taken and used for the complainers' railway without serious injury to the buildings belonging to the respondents.' If this last averment be true, then it is clear that the complainers must buy the whole property of the respondents, and it is for the purpose of ascertaining how the fact stands in regard to this that the proof has been allowed. If that proof shows, as was represented to the Lord Ordinary, that the tunnel is to be carried through rock, which could be excavated without moving any of the strata above, the case would present somewhat of the character of the case of the manufactory on the top of the hill referred to by Lord Cranworth, in regard to which he declined to offer an opinion. The general question would require to be determined." Now I confess I do not sympathise with the view thus stated by Lord Fraser. I do not think it matters in the slightest degree whether the carrying of this tunnel under the house would be injurious to the house or not. It is not a question of ex-

pected detriment to the house that we are dealing with here. It is a question of the statutory right of the railway company to take a part of the house without taking the whole of it, if the owner be able and willing to convey the whole of it. And accordingly I think the averments on both sides to which Lord Fraser has referred are in this question entirely irrelevant. I desire to decide this case, as far as I am concerned, upon the simple ground that the railway company cannot under the Lands Clauses Act take a part of a house without taking the whole of it if required to do so, and that the whole substratum, as it is called, underlying a house is within the meaning of that section of the statute part of the house.

As to the extravagant cases which have been supposed, and one of which is noticed by Lord Cranworth as Lord Fraser says, I confess I do not feel in the slightest degree embarrassed by them. If a railway company chose to propose to drive a tunnel through the bottom of Ben Lomond or Ben Nevis, I suppose it is hardly to be expected that the Legislature would pass an Act authorising such an operation without making some very special provisions to meet so extraordinary a case. And therefore I do not think any case of the kind will ever come before a court of law for adjudication. It is in vain therefore to consider such cases, and the conclusion which I come to is that we ought to adhere to the interlocutor of Lord M'Laren in the one case, and that we ought to recall the interlocutor of Lord Fraser in the other, and repel the reasons of suspension and refuse the interdict.

Lord Deas—The railway company in this case do not propose to take any part of the surface of this ground, but they propose to take only a portion of the substratum by driving through that substratum a tunnel, thereby turning that tunnel to their own uses and purposes. Now there are houses upon that surface, and the question really comes to be whether the surface under the house or houses is part of the same subject with the house or houses themselves. I think the whole point in dispute is determined by the well-known law of Scotland, which is that he who is proprietor of the surface is the proprietor also of the substratum, or as it is phrased in the institutional writers *a cælo ad centrum*. If the surface upon which a house stands is part of the house, then unquestionably the railway company in appropriating the substratum under the house are appropriating and taking a part of the house itself. I think there can be no doubt whatever of the soundness of that law, and I think that law is conclusive of the whole of this case. They are taking a part of the substratum upon which the house stands, and thereby they are taking a part of the house itself. I see no occasion for going further. I see no necessity for bringing in any other principle but the undoubted principle of our law in order to arrive at the conclusion that the railway company having taken part of the substratum of that house or of those houses, must take the house or houses themselves under the express terms of the enactment referred to.

Lord Mure—I have come to the same conclusion, and I so entirely concur in the grounds upon which Lord M'Laren has decided the case before his Lordship, and in the views which your Lordship has explained as to what the meaning of the word "house" is with reference to the application of the 90th section of the statute, that I have no more to say than this, that I entirely concur in the reasoning upon which your Lordship has arrived at the conclusion, and in the reasoning upon which the Lord Ordinary has arrived at the conclusion, that the 90th section applies.

Lord Shand— I am also clearly of the same opinion. The argument of the reclaimers was rested entirely on the supposed analogy between such a case as the present and cases where the enquiry is, what is the meaning of the term house or building or manufactory in a question as to the extent of ground laterally or on the surface to be included. I do not think there is any true analogy between such cases and the present, where the question is, what ground vertically is included under the term house, manufactory, or building. In the former case, from the nature of things, inquiry is absolutely necessary. In its primary sense the term house, manufactory, or building would include the building alone, but obviously that is too narrow a construction, and accordingly the term has been held by a series of decisions to include whatever ground surrounding and adjoining the house, building, or manufactory is in a reasonable sense necessary for its use and enjoyment, and is used in connection with it. Such an enquiry obviously, from the very statement of it, requires that in each case the special circumstances shall be considered. It would be the same thing whether the question arose under a conveyance of a house, manufactory, or building, or under the provisions of section 90 of the Act. It depends upon the particular facts in relation to the use and enjoyment of the house, what ground laterally in addition to the house itself is to be included. It would be, I think, a strange and a very difficult investigation if any such inquiry were to be made as to ground vertically situated with reference to a house—ground on which the house and pertinents stand—the inquiry, namely, what extent of substratum is necessary for the reasonable use and enjoyment of a house, manufactory or building, and is used in connection with it; and I should see very great difficulty indeed in finding any principle which would guide the Court in coming to a decision on such a matter. But I think any such inquiry is entirely excluded, for the reasons stated by the Lord Ordinary, and which your Lordships have adopted, for it is quite settled that whatever difficulty there may be in certain cases in determining the extent of ground laterally included in the term house, manufactory, or building, there is included the whole substratum so far as that substratum belongs to the proprietor of the building. It would certainly be so in a question of conveyance or title, and I see no reason for holding that a different signification is to be given to the term as it is used in section 90 of the statute. As therefore the railway company are here proposing to take the substratum which within the meaning of the law, either in the case of a conveyance or with reference to section 90 of the statute, is part of the house, manufactory, or building, they cannot do so without taking the whole, if the proprietor re-

quires that they shall do so. On that ground I am of opinion with your Lordships that the interlocutor should be adhered to. Of course the case does not decide, nor does it touch, any question such as was put in the course of the argument, of a company proposing to carry a tunnel through a seam of coal or other mineral belonging to a different owner from the owner of the house and the immediate substratum on which the house rests. Probably in that case, if the seam was not the property of the owner of the house, it would be difficult to maintain that it was part of the house within the meaning of the statute. It would certainly not be carried in property by any conveyance that might be given of the house. Again, as to the case which has been figured in the argument, of a tunnel passing through a hill, I can only say, agreeing with what your Lordship has observed, that such a case as that would probably be a very proper occasion for the Legislature allowing the property necessary for the tunnel to be taken without the ground lying above it. But it appears to me that even in that case if the railway company desired to relieve themselves from the obligation to take the superincumbent ground, they could only do so by having special provisions which would entitle them to take ground in that way. Such special questions as I have now alluded to are however to be considered and dealt with as they arise. On the general question involved in this case I have no difficulty.

The Court pronounced these interlocutors :—

In the case of M'Brayne and Others—"Recal the Lord Ordinary's interlocutor; recal the interim interdict formerly granted; repel the reasons of suspension; refuse the interdict, and decern."

In the case of Gemmel and Others—"Adhere to the interlocutor of Lord M'Laren, and refuse the reclaiming note."

Counsel for M'Brayne and Others—Solicitor-General (Asher, Q.C.) — Dickson. Agents — Paterson, Cameron, & Co., S.S.C.

Counsel for Gemmel—Ure. Agents—J. W. & J. Mackenzie, W.S.

Counsel for The Railway Company—Mackintosh — Murray. Agents — Millar, Robson, & Innes, S.S.C.

Friday, June 1.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

MITCHELL *v.* SCHOOL BOARD OF ELGIN.

School—Schoolmaster—Tenure of Office—Dismissal—Education (Scotland) Act 1872 (35 *and* 36 *Vict., c.* 62), *sec.* 60—*Interdict.*

A teacher in a burgh school appointed prior to the passing of the Education (Scotland) Act 1872 may be removed by the School Board if they are satisfied on reasonable grounds of his incompetency or inefficiency for the discharge of his office.

The School Board of a burgh adopted a resolution that a teacher in the burgh school, which was a higher class public school under Schedule C of the Education (Scotland) Act of 1872, was incompetent, unfit, or inefficient, and thereafter obtained a report from an inspector of schools regarding the teacher and the school. This report declared the teacher to be "incompetent, unfit, or inefficient." The teacher then presented an application to have the School Board interdicted from acting on the report, and from proceeding to dismiss him from his office, on the ground that (1) the proceedings were in the pretended exercise of section 60 of the Education (Scotland) Act 1872, which did not apply to higher class public schools, and that assuming it to apply, the statutory requirements had not been followed; and (2) that the tenure of a burgh schoolmaster appointed prior to 1872 was *ad vitam aut culpam*. Interdict *refused*, on the ground that the School Board, as coming in place of the magistrates and town council of the burgh, had power to dismiss the teacher if they considered there was reasonable cause, and that in forming their opinion they were entitled to take the advice of a competent person.

Opinions reserved as to whether sec. 60 applies to higher class public schools, which are specially dealt with by secs 62 and 63.

The Act 24 and 25 Vict., c. 107 (Parochial and Burgh Schoolmasters (Scotland) Act 1861) provides by section 22—"From and after the passing of this Act it shall not be necessary for any person elected to be a schoolmaster of any burgh school to profess or subscribe the Confession of Faith as the formula of the Church of Scotland, or to profess that he will submit himself to the government and discipline thereof, nor shall any such schoolmaster be subject to the trial, judgment, or censure of the presbytery of the bounds for his sufficiency, qualifications, or deportment in his office, any statute to the contrary notwithstanding." . . .

The 24th section of the Education (Scotland) Act 1872 (35 and 36 Vict. c. 62) provides—"Every burgh school shall be vested in and be under the management of the School Board of the burgh in which the same is situated from and after the election of such School Board, and the said School Board shall thereafter, with respect to school management and the election of teachers, and generally with respect to all powers and duties in regard to such schools now vested in the town council and magistrates or other authorities in whom the school management and the election of the schoolmasters and teachers is at present vested, supersede and come in place of such town council and magistrates or other authorities."

By section 60 of the Education Act of 1872 "any teacher of a public school appointed previously to the passing of this Act may be removed from his office in manner following . . . (sub-section 2)—"If the School Board of any parish or burgh shall consider that any such teacher is incompetent, unfit, or inefficient, they may require a special report regarding the school and the teacher from Her Majesty's inspector charged with the duty of inspecting such school, and on receiving such report the School