I think, that the decisions rest upon sound principles, and that the present case is ruled by the previous case of *Beattie* v. *Stark*.

LORD ADAM—There is no doubt that the present case goes further than any of the previous decisions upon the subject, and certainly leads to somewhat startling results. The present case was foreseen and commented upon by the Lord President in the case of *Beattie* v. *Stark*. I can only say that I am unable to distinguish this case from any of the previous decisions, and think, therefore, that we should adhere to the interlocutor of the Sheriff.

LORD DEAS and LORD MURE were absent.

The Court affirmed the judgment of the Sheriff.

Counsel for Defender (Appellant)—Mackay—Wallace. Agent—Adam Shiell, S.S.C.

Counsel for Pursuer (Respondent) — Comrie Thomson—Dickson. Agents—R. R. Simpson & Lawson, W.S.

Tuesday, June 17.

FIRST DIVISION.

ESSON (ACCOUNTANT IN BANKRUPTCY) *v.* DAVIE.

Bankruptcy—Procedure where Trustee Removed—Trustee—Removal of Trustee—Meeting of Creditors to be Called by Accountant in Bankruptcy—Bankruptcy (Scotland) Act 1865 (19 *and* 20 *Vict. c.* 79), *secs.* 159, 161.

On 9th December 1880 James Davie, merchant, Dundee, was appointed trustee on the sequestrated estates of William Ireland, merchant, Dundee. On 24th May 1882 Mr George Auldjo Esson, Accountant in Bankruptcy, reported to the First Division of the Court of Session, under sections 159 and 161 of the Bankruptcy (Scotland) Act 1856, that the trustee had failed to perform his duties—"First, in so far as he has failed for over three years to take possession of the bankrupt's estate and effects, and to realise and recover the same, as provided by section 80 and the other sections of said Bankruptcy Statute." "Second, that he never called a second meeting of the creditors, or prepared and submitted to them a report, in terms of section 96 of said statute."

Intimation was made to the trustee, who lodged answers, but did not appear at the hearing.

The Court, after hearing counsel for the Accountant, pronounced this interlocutor:—

> "The Lords having considered the report of the Accountant in Bankruptcy and heard counsel thereon, remove the said James Davie mentioned in the report from the office of trustee on the sequestrated estates mentioned in the Accountant's report, and decern: Appoint the said Accountant to call a meeting of the creditors for the election of a new trustee, at Dundee, on Friday 27th curt. at 1 o'clock p.m., and appoint the Sheriff-Substitute to preside at the said meeting: Find the said James Davie liable in expenses to the Accountant in Bankruptcy," &c.

Counsel for the Accountant in Bankruptcy—Mackay. Agents—Mackenzie, Innes, & Logan, W.S.

Friday, June 20.

FIRST DIVISION

[Lord Kinnear, Ordinary.

MAGISTRATES OF ELGIN *v.* THE HIGHLAND RAILWAY COMPANY.

Superior and Vassal—Casualty—Railway Company—Statutory Title—Lands Clauses Consolidation (Scotland) Act 1845 (8 *Vict. c.* 19), *secs.* 80, 107, 111, 126—*Conveyancing (Scotland) Act* 1874 (37 *and* 38 *Vict. c.* 94), *sec.* 4, *sub-sec.* 4.

Section 126 of the Lands Clauses Act provides—"The rights and titles to be granted in manner herein mentioned in and to any lands taken and used for the purposes of this Act shall, unless otherwise specially provided for, in nowise affect or diminish the right of superiority in the same, which shall remain entire in the person granting such rights and titles; but in the event of the lands so used or taken being a part or portion of other lands held by the same owner under the same titles, the said company shall not be liable for any feu-duties or casualties to the superiors thereof, nor shall the said company be bound to enter with the said superiors."

Under powers in their Act, a railway company acquired certain lands which were parts or portions of other lands held by the same owners under the same titles. The title of the company to these lands was taken in the form prescribed by the 80th section of the same statute, by which they obtained a complete and valid feudal title. An action at the instance of the superiors of the lands so taken against the company, under sec. 4, sub-sec. 4, of the Conveyancing (Scotland) Act 1874, for declarator and payment of a casualty, *held* excluded by section 126, and *dismissed*.

This was an action under the Conveyancing (Scotland) Act 1874, section 4, sub-section 4, at the instance of the Lord Provost, Magistrates, and Council of Elgin, as superiors of the various parcels of land after referred to, and duly infeft therein, against the Highland Railway Company, incorporated by Act of Parliament, to have it found and declared that in consequence of the deaths of the several vassals last vest and seised in the said various parcels of land, casualties of one year's rent, amounting *in cumulo* to £3300, had become due and payable to the pursuers, and that the defenders should be decerned to make payment of the said sum.

These parcels of land were acquired compulsorily by the Inverness and Aberdeen Junction Railway Company, under powers conferred by their Act in 1856, in which were incorporated the provisions of the Lands Clauses Act 1845, and the Railway Clauses Act 1845, and compensation was made to the owners and occupiers.

In 1865 the Inverness and Aberdeen Junction Railway Company was amalgamated with the Inverness and Perth Junction Railway Company, and the two companies were formed into one under the name of the Highland Railway Company.

The titles to the various parcels of land were taken in the form introduced by section 80 of the Lands Clauses Act 1845. That section provides that "Feus and conveyances of land so to be purchased as aforesaid may be according to the form in the Schedules (A) and (B) respectively to this Act annexed, or as near thereto as the circumstances of the case will admit; which feus and conveyances being duly executed, and being registered in the Particular Register of Sasines kept for the county, burgh, or district in which the lands are locally situated, or in the General Register of Sasines for Scotland kept at Edinburgh, within sixty days from the last date thereof, which the respective keepers of the said registers are hereby authorised and required to do, shall give and constitute a good and undoubted right and complete and valid feudal title in all time coming to the promoters of the undertaking, and their successors and assigns, to the premises therein described, any law or custom to the contrary notwithstanding." Each of the parcels before the company acquired it was a part or portion of other lands held by the same owners under the same titles.

The defenders pleaded—"(4) The action is excluded under the 126th section of the Lands Clauses Consolidation (Scotland) Act 1845."

Section 126 provides "that the rights and titles to be granted in manner herein mentioned in and to any lands taken and used for the purposes of this Act shall, unless otherwise specially provided for, in nowise affect or diminish the right of superiority in the same, which shall remain entire in the person granting such rights and titles; but in the event of the lands so used or taken being a part or portion of other lands held by the same owner under the same titles, the said company shall not be liable for any feu-duties or casualties to the superiors thereof, nor shall the said company be bound to enter with the said superiors: Provided always, that before entering into possession of any lands, full compensation shall be made to the said superiors for all loss which they may sustain by being deprived of any casualties or otherwise by reason of any procedure under this Act."

The Lord Ordinary (KINNEAR) on 14th March 1884 repelled the 4th plea-in-law for the defenders (quoted above).

"*Opinion.*—The parties are agreed that the fourth plea-in-law for the defenders should be disposed of on the assumption—*first*, that the title of the railway company to the various parcels of land in question has been taken in the form prescribed by the 80th section of the Lands Clauses Consolidation Act; and *secondly*, that each of these parcels before the company acquired it was a part or portion of other lands held by the same owners under the same titles; and upon these two assumptions being conceded to them, the defenders maintain that their liability for casualties is excluded by the express terms of the 126th section of the Lands Clauses Act.

"If the clause in that section upon which the defenders rely could be separated from the context and construed literally, it would appear to support their contention. But there is a series of enactments with respect to lands subject to feu-duties and casualties which must be read along with the 80th and 126th sections in order to ascertain the true intent of the statute.

"The 80th section introduces a novel form of conveyance, to which it gives a statutory effect. It leaves the promoters of the undertaking at liberty, if they think fit, to take feus or conveyances in the ordinary form then observed, with precept of sasine, or procuratory of resignation, upon which they might obtain infeftment; and the effect of a title completed in that manner is to be regulated by the ordinary law. But it also authorises feus or conveyances in a new form, of which examples are given in the schedules, without either precept or procuratory; and it provides that such feus or conveyances being registered in the General or Particular Register of Sasines, as the case may be, 'shall give and constitute a good and undoubted right, and complete and valid feudal title, in all time coming to the promoters' and their successors and assigns. It is said that this was a mere anticipation, for the special purposes of the Lands Clauses Act, of the system of conveyancing which has now been made universally applicable in the transference of lands by a series of subsequent statutes ending with the Act of 1874; and in some respects that may not be an inaccurate way of describing the effect of the enactment. But at the same time it is to be observed that there is no provision, as in these statutes, that the registration of the statutory conveyance shall be equivalent to infeftment or entry with the superior; and the conveyance itself afforded no means to the disponees for obtaining either entry or infeftment. At that date it is unnecessary to say that the owner of the *dominium utile*, although he might create a base fee to be held of himself, could not transfer the land as he held it, so as to infeft his disponee in his place, without the intervention of the superior, or, in other words, he could not, without the superior's intervention, give a complete feudal title except to a sub-feuar. But the registration of the statutory conveyance gives the promoters not merely an undoubted right of ownership for the purposes of their undertaking, but also a complete and valid feudal title, not as it appears to me by making registration equivalent to infeftment or to entry with the disponers' superior, but by dispensing with the necessity for infeftment or entry at all; and therefore it seems to me that the promoters taking such a title were to acquire a right of ownership for the purposes of their undertaking, not to be placed in the position of vassals in room and place of the vassal from whom they had bought.

"But the creation of a right so anomalous made it necessary to regulate by special enactment the liability of the promoters for the feudal obligations affecting the ownership of the *dominium utile* under the existing charters, and that is done by a series of enactments from the 107th to the 111th sections, which are introduced by the general heading, 'And with respect to any lands which shall be charged with feu-duty, ground annual, casualty of superiority . . . or other annual or recurring payment . . . it is enacted as follows.' The 107th section provides

that it shall be lawful for the promoters to enter upon and continue in possession of the lands without redeeming the charges thereon, provided they pay the amount of such annual and recurring payment when due, and otherwise fulfil all obligations accordingly, and provided they shall not be called upon by the party entitled to the charge to redeem the same. The 108th provides that the compensation for the discharge of lands taken, from such charges—that is, such charges, *inter alia*, as feu-duties, ground annuals, or casualties of superiority—shall be determined as in other cases of disputed compensation. The 109th provides for the case of a part only of lands charged with feu-duty, ground annuals, casualty of superiority, or other payment being taken, and for the apportionment of such charges, by agreement between the party entitled to the charge and the owner of the lands on the one part, and the promoters on the other, or by the determination of the Sheriff. The 110th provides for the failure of the superior to give a discharge on tender of the sum awarded; and the 111th section saves the superior's rights over the remaining lands not affected by the discharge. When these sections are read along with the 80th the result appears to be perfectly clear. The promoters are to obtain a good and complete title to the lands taken, but in a form which neither requires nor enables them to enter with the superior. If the lands are 'charged,' in the words of the statute, with 'recurring payments' of the kind specified, the promoters may voluntarily redeem these charges, or they may be called upon by the party entitled to redeem them, or, if they are not so called upon, they may enter upon the lands and continue in possession of them without redeeming the charges, provided they pay the amounts when due. It is not, perhaps, a very accurate definition of the casualty of relief, or of the superior's claim for composition on the entry of a singular successor, to speak of them as recurring payments charged upon land. But in their practical operation these rights result in recurring payments; and if the purpose of the enactment is to save the superior from being prejudiced as regards the money value of his casualties, by the compulsory taking of the *dominium utile*, the language employed seems to me to be sufficiently clear and appropriate for that purpose. I cannot think it doubtful, therefore, that the casualties sued for are charges of the kind specified, or that the superior is the party entitled to such charges in the sense of the statute; and therefore if these sections regulate the matter, and if the pursuers can show that the casualties sued for are due to them as superiors, the defenders must either pay the amount due or redeem the casualties on payment of compensation in the manner prescribed by the statute.

"The question, therefore, comes to be, whether these provisions of sections 107–111 of the statute are overruled, or the construction I am disposed to put upon them displaced by the 126th section? That is certainly a very difficult enactment to construe. In the case of the *Monkland Railway Co.* v. *M'Farlane*, 2 Macph. 530, the Lord President points out that the original purpose of such provisions in the earlier private Acts, from which the clause in the Lands Clauses Act was probably borrowed, was to prevent the disturbance of freehold qualifications by the compulsory acquisition of lands for the statutory undertaking; and if that be so, there is great force in Mr Mackintosh's argument, that superiorities in the sense of the 126th section must be taken to mean the rights of proprietors holding of the Crown, which alone are proper superiorities as distinguished from the rights of mid-superiors. But I cannot say that this suggestion enables me to give any consistent or even intelligible meaning to all the provisions of the section. On the contrary, it appears to me open to observations made by the Lord President in the case I have referred to, upon the clause then under consideration, that the person who framed it 'had but a very misty conception of the relation of superior and vassal.' It may be that the provision in the Lands Clauses Act, that that acquisition shall not 'affect or diminish the right of superiority in the same,' may have a more intelligible purpose than the similar provision in the case of the *Monkland Company*, because in that case the promoters of the undertaking were not to obtain anything like a feudal title, whereas by the Lands Clauses Act they are to obtain a complete feudal title without the superior's intervention, and therefore it might be intelligible enough to provide that the feudal title they were to obtain without reference to him was not to affect or diminish the right of superiority. But then the observation which the Lord President makes upon the next part of the clause is directly applicable, because it goes on to say that the 'rights of superiority shall remain entire in the person granting the said right and titles;' that is to say, as his Lordship points out, 'in other words, the right of superiority shall remain entire in the person of the vassal, who never had it, and never was, except in the imagination of the draftsman, his own superior.' But it is said that the words which follow, and upon which the defenders rely, are clear and unambiguous. 'But in the event of the lands so used or taken being a part or portion of other lands held by the same owner, under the same titles, the said company shall not be liable for any feu-duty or casualties to the superior thereof, nor shall the said company be bound to enter with the superiors; provided always, that before entering into the lands full compensation shall be made to the said superiors for all loss which they may sustain by being deprived of any casualties or otherwise by reason of any procedure under this Act. Now, if that meant that the superior was in any event to lose his feu-duties or casualties in respect of land taken by the railway company, it would be quite inconsistent with the first part of the clause, which enacts that his right of superiority shall be in no way diminished. But the defenders say that their reading of it involves no such inconsistency, because as I understand the argument the effect according to them is, *first*, that the railway company shall not be liable for any part of the feu-duty affecting the land of which they have taken a portion, because the whole will still be exigible from the vassal who continues to hold the remainder, and he upon his part will suffer no prejudice from being called upon to pay the whole, because his liability to do so will have been taken into account in fixing the compensation for the land taken; and *secondly*, that although the company may be required to make compensation before entering upon the land, for the diminution of casualty that may be con-

sequent upon the alienation of a part of the feu, they cannot be required to pay any casualty after they have been allowed to enter upon possession. But then that construction, if it were otherwise admissible, is inconsistent with the enactment which I have already considered with respect to land subject to feu-duties and casualties. The statute must, if possible, be construed in such a way as to reconcile its various enactments with one another, and I think that is to be done by giving due effect to the proviso to which the enactment of the 126th section is subject. It had already been provided that the company might redeem feu-duties and casualties before entering upon the lands, but that if they did not do so they were to be liable for the recurring payments as they fell due, until they should be redeemed. It is quite consistent with that to provide that they shall not be liable for feu-duties or casualties, provided they have made full compensation for the loss the superiors may sustain by being deprived of causalties or otherwise. But if they have made no such compensation, then the 126th section, so far at least as it relieves the company from the payment of casualties and feu-duties, does not come into operation at all, and their liability continues to be regulated by the 107th and immediately following sections. I do not know that that exhausts the meaning of the 126th section, or that there may not be some further intention which I have not been able to elucidate. But it is enough for the purposes of the present case that it does not displace the clear and distinct enactments in the previous part of the statute for regulating the liability of the promoters in respect of any casualties that may be payable for the lands taken. Whether the present pursuers can establish their claim for such casualties is a different question. But the argument was confined to the question raised by the fourth plea-in-law for the defenders, and for the reasons stated I am of opinion that that plea must be repelled."

The defenders reclaimed, and argued — The first part of sec. 126 refers to cases where the whole lands are taken, which is not the case here. The second portion is expressly applicable to the present case, and relieves the defenders of liability for casualties. If the provisions of secs. 107 and 111 are inconsistent with those of sec. 126, the latter being later must rule, according to the ordinary rule of construction. But neither sec. 107 nor sec. 111 imposes any obligation inconsistent with sec. 126. Section 107 only deals with cases where the whole lands are taken. The pursuers could not prior to 1874 have raised a declarator of non-entry, because the relation of superior and vassal did not subsist between them and the defenders, and therefore the terms of sub-sec. 4 of sec. 4 of the Conveyancing Act do not apply. This was a question as to a casualty, not as to compensation. That question the pursuers might raise in any competent form—*Macfarlane* v. *Monklands Railway Co.*, January 29, 1864, 2 Macph. 519; *Inspector of St Vigeans* v. *Scottish North-Eastern Railway Co.*, May 9, 1870, 8 Macph. (H. L.) 53; *Wardlaw* v. *Glasgow and South-Western Railway Co.*, February 28, 1883, not reported.

The pursuers replied—Secs. 107 and 111 declare that unless the charges upon the lands taken are redeemed the company is to remain liable, and by sec. 110 it is only thereupon that the casualty is to be extinguished. Sections 107-111 form a code regulating the matter, and the question is whether sec. 126 repeals these. The first part of sec. 126 refers to the case of Crown vassals—*Macfarlane* v. *Monklands Railway Co.*, *supra cit.* That is not applicable here. The proviso in the latter part of sec. 126 is, that no casualties shall be due, only in the case when compensation shall have been made. The action was none the worse for being in the form prescribed by the Act of 1874; it was an appropriate declaratory and petitory action. This was not an interest which the company had omitted to purchase through mistake or inadvertency, and therefore sec. 117 would not apply—Deas on Railways, 168. Railway companies in Scotland were in use to pay casualties in such circumstances—*Hill* v. *Caledonian Railway Co.*, December 21, 1877, 5 R. 386.

At advising—

Lord President—This is an action brought by the Magistrates of Elgin as superiors of the lands in question, against the Highland Railway Company as their vassal. It is a statutory action brought under the provisions of the Conveyancing Act of 1874, sec. 4, and sub-sec. 4. Now, before proceeding to consider whether this action is excluded by the terms of the Lands Clauses Act, I think it is very necessary to have in view what is the precise nature of the action. It is an action which is described thus—"A superior who would but for this Act be entitled to sue an action of declarator of non-entry against the successor of the vassal in the lands, whether by succession, bequest, gift or conveyance, may raise in the Court of Session against such successor, whether he shall be infeft or not, an action of declarator and for payment of any casualty exigible at the date of such action, and no implied entry shall be pleadable in defence against such action; and any decree for payment in such action shall have the effect of and operate as a decree of declarator of non-entry, according to the now existing law, but shall cease to have such effect upon the payment of such casualty, and of the expenses, if any, contained in the said decree; but such payment shall not prejudice the right or title of the superior to the rents due for the period while he is in possession of the lands under such decree nor to any feu-duties or arrears thereof which may be due or exigible at or prior to the date of such payment, or the rights and remedies competent to him under the existing law and practice for recovering and securing the same." Now, it appears to me that if the relation of superior and vassal does not subsist between the pursuer and defender, this action cannot be maintained. The effect of the decree in this action if pronounced will be to entitle the Magistrates of Elgin to enter into possession of the lands and draw the rents—I mean in the case of non-payment—until the casualty is paid; and it is quite obvious that that is a remedy altogether unsuitable, unless the relation of superior and vassal exists between the parties. Now, the title of the railway company is made up under the 80th section of the Lands Clauses Act. The Lord Ordinary informs us that the parties are agreed that the discussion is to be taken on the assumption that the title of the railway company to the various parcels of land in question has been taken in the form prescribed by the 80th section of the Lands Clauses Act. Now, what

does that section provide? It provides that "Feus and conveyances of land so to be purchased as aforesaid may be according to the form in the Schedules (A) and (B) respectively to this Act annexed, or as near thereto as the circumstances of the case will admit; which feus and conveyances being duly executed, and being registered in the Particular Register of Sasines kept for the county, burgh, or district in which the lands are locally situated, or in the General Register of Sasines for Scotland kept at Edinburgh, within sixty days from the last date thereof, which the respective keepers of the said registers are hereby authorised and required to do, shall give and constitute a good and undoubted right, and complete and valid feudal title, in all time coming to the promoters of the undertaking, and their successors and assigns, to the premises therein described, any law or custom to the contrary notwithstanding." Now, the only phrase in that clause which at all suggests the constitution of the relation of superior and vassal between the vendor and vendee of such lands is that which describes the title completed under the section as constituting a complete and valid feudal title. But I quite agree with the Lord Ordinary that that cannot be understood in the ordinary sense of the constitution of the feu under the relation of superior and vassal. His Lordship says in his note—"The registration of the statutory conveyance gives the promoters not merely an undoubted right of ownership for the purposes of their undertaking, but also a complete and valid feudal title, not as it appears to me by making registration equivalent to infeftment or to entry with the disponer's superior, but by dispensing with the necessity for infeftment or entry at all, and therefore it seems to me that the promoters taking such a title were to acquire a right of ownership for the purposes of the undertaking, not to be placed in the position of vassals in room and place of the vassal from whom they had bought." Now, if that be sound reasoning upon the construction of the 80th section of the statute, it would seem to me to afford a conclusive answer to this action. I am quite aware that that is not the form of the plea which is maintained on the part of the defenders, and which is the only plea disposed of by the Lord Ordinary; and therefore I do not state this for the purpose of suggesting that we should deal with any other plea, but only for the purpose of making it clear at the outset that this is a superior's action, and that the relation of superior and vassal does not subsist between the pursuer and defender; for I think that has a great deal to do with the consideration of the plea which has been disposed of by the Lord Ordinary—the 4th plea-in-law. I proceed therefore to a consideration of the other clauses of the statute with this assumption, not only that the title of the defenders has been made up under section 80 of the Lands Clauses Act, but that the effect of that title is to give an independent right, so to speak, to the railway company without any relation to the superior at all—I mean as regards the matter of title. There may be a relation to the superior as regards a liability for money. That is another affair altogether, but as regards the matter of title I conceive that the railway company have nothing to do with the superior at all. Now, the section which is founded on by the defenders—the 126th section of the statute—consists of two parts, and I am sorry to say that like some other sections in this Act there is a good deal of trouble in construing it, because it is so expressed as to be at first sight almost unintelligible to a Scottish lawyer, and deals with the relation of superior and vassal in such a way as is quite inconsistent with the ordinary principles of feudal law. The first part of the section enacts "that the rights and titles to be granted in manner herein mentioned in and to any lands taken and used for the purposes of this Act shall, unless otherwise specially provided for, in nowise affect or diminish the right of superiority in the same,"—so far the language of the statute is perfectly intelligible—and the clause, "unless otherwise specially provided for," of course refers to those cases in which the railway company take a common law title, in which cases the relation of superior and vassal of course will be constituted according to the principles and rules of common law. But unless the title is in a common law form, the effect of the sale of the land shall in nowise affect or diminish the right of the superiority in the same, "which," the enactment goes on to say "shall remain entire in the person granting such rights and titles." Now, in one view, and the most literal view of the meaning of these words, this amounts to nonsense, because a man having the *dominium utile* of land, and selling a portion of it to the railway company, cannot possibly have his superior's rights reserved to him, the vassal. That is all plain enough, and therefore that cannot be the meaning of the section. I think the meaning of it is that which I took the liberty of suggesting in regard to a similar clause in a private Act, in the case of the *Monklands Railway*—that it is intended to apply to the case of Crown vassals, and that the right of mid-superiority which the Crown vassal has is not to be diminished or affected by the selling off of a portion of the lands, the object of the introduction of these clauses for the first time being really to prevent interference with titles made up for political purposes. Now, passing by that, which accounts I think for the appearance of these words in this part of the section, the enactment goes on thus—and it must be admitted that there is no very plain coherence or direct connection between the first and second part of this 126th section; but still I cannot think that the words in the second part of the section admit of any construction but one—"But in the event of the lands so used or taken being a part or portion of other lands held by the same owner under the same titles, the said company shall not be liable for any feu-duties or casualties to the superiors thereof." Now, about the meaning of these words I cannot see that there can be any dispute. In the event of a portion of the land taken by the company being part of an estate held by the same owner under the same titles, the railway company are not to come into the position of vassal, and are not to be liable for any feu-duties or casualties to the superiors thereof—"nor shall the said company be bound to enter with the said superiors; provided always, that before entering into possession of any lands full compensation shall be made to the said superiors for all loss which they may sustain by being deprived of any casualties or otherwise by reason of any procedure under this Act." It is quite

just and consistent that as the superior is to lose his security for feu-duties and casualties in so far as regards the subjects conveyed to the railway company he should be compensated therefor. That is a principle that runs through the whole of these statutes. But then it is contended that it is a condition of the enactment that full compensation shall be made before the railway company enter into possession of any land, and that if that condition is not purified before they enter into possession of the land, then they will be liable to casualties and feu-duties. Now, I cannot accept that construction; and it is here that it appears to me to be so important to ascertain, as I have done in the outset, that the relation of superior and vassal is never constituted between these parties. There may be money liabilities arising out of it, but there can be no relation of superior and vassal; and here, in the case of small portions of an estate being taken, there is to be no liability for these either. That is to be converted into compensation, and therefore the right which the superior has under this 126th section is under no circumstances a right of feu-duties or casualties, but only a right to compensation. What ought to have been done before the railway company entered upon the lands in question I shall have to inquire immediately when I look back to those clauses of the statute upon which the Lord Ordinary specially founds his argument, but in the meantime I think it is clear upon this 126th section itself that under the Lands Clauses Act as applicable to such a subject as we are dealing with here—a small strip of land in the middle of an estate—there can be no casualties or feu-duties demanded from the railway company in respect of these small portions of land. Compensation is the only right the superior has. But then this section deals only with the case of a portion of land being taken out of an estate held by the seller under the same titles. There are other cases in which the railway company acquire the entire estate held under one title; and that is dealt with by the 107th section of the statute. And the provisions of that section I think are very clear. I ought to say that the introductory words to that and the immediately succeeding sections are important also. They are these:—"And with respect to any lands which shall be charged with any feu-duty, ground-annual, casualty of superiority, or any rent or other annual or recurring payment or incumbrance not hereinbefore provided for, be it enacted as follows." That is the class of lands therefore that the sections are dealing with. Section 107 provides—"It shall be lawful for the promoters of the undertaking to enter upon and continue in possession of such lands without redeeming the charges thereon, provided they pay the amount of such annual or recurring payments when due, and otherwise fulfil all obligations accordingly, and provided they shall not be called upon by the party entitled to the charge to redeem the same." I say this applies to the case of the whole lands held under the same title, being taken by the railway company; and this is made more clear when we come to the 109th section, which I shall read immediately. I assume in the meantime, however, that this 107th section really applies to the case that I have stated. Now, here again it is not in the least degree contemplated that the relation of superior and vassal shall be created. On the contrary, the 80th section seems to me to override all this; but there is this peculiar provision, that when the railway company take the whole of an estate held under one title, they may enter into possession and go on paying the superior everything that is due to him or that was due to him by his vassal, in whose place they have come. But that is not intended to be a permanent arrangement. It is quite obviously the contemplation of the statute that one or other of the parties shall proceed to make an arrangement for converting these charges into a money compensation. They are to be entitled to enter upon the lands and pay these charges without redeeming them, but that is only "provided they shall not be called upon by the party entitled to the charge to redeem the same." So that it is obviously open and competent to either party—either to the superior of the lands or to the railway company—to take proceedings for redeeming these charges, or, in other words, for converting them into a money compensation. And the 108th section accordingly proceeds to provide how this is to be done—"If any difference shall arise between the promoters of the undertaking and the party entitled to any such charge upon any lands required to be taken for the purposes of the Special Act, respecting the consideration to be paid for the discharge of such lands therefrom, or from the portion thereof affecting the lands required for the purposes of the Special Act, the same shall be determined as in other cases of disputed compensation." There, again, it is made perfectly clear that the ultimate arrangement is to be a conversion of the superior's rights into a money compensation. In passing, it is necessary to observe that this 108th section provides that the compensation is to be ascertained according to the usual way, not only in the case provided for by section 107, but also in the case where only a portion of the lands have been taken for the purposes of the undertaking. Now, that is the part of section 108 which really is intended to provide for the case dealt with in section 109; because section 109 proceeds to deal with the case of "part only of the lands charged with any such feu-duty, ground-annual, casualty of superiority, or any rent, payment, or incumbrance" requiring to be taken for the purposes of the Special Act; and it provides in that case that "the apportionment of any such charge may be settled by agreement between the party entitled to such charge and the owner of the lands on the one part, and the promoters of the undertaking on the other part, and if such apportionment be not so settled by agreement the same shall be settled by the Sheriff;" but if the remaining part of the lands be a sufficient security, then an arrangement may be made with the owner of the remaining part of the lands to subject his remaining estate to the whole claims of the superior. Now, this section 109 appears to me to be imperative. Where a charge of any kind, such as is here described, extends not only over the land taken by the railway company, but also over the whole of the rest of the estate of the vendor, then there must be and shall be an apportionment, and the parties may agree how that apportionment is to be made, but if it is not settled by agreement then the same shall be settled by the Sheriff. There is no option there; and then apportionment is an absolutely essential

preliminary to the settling of the compensation, because until the apportionment is made the extent of the liability of the portion of the lands taken by the railway company cannot be ascertained; and consequently there are not the *data* for settling the amount of the compensation. So that, taking these three sections together, I think the effect of the enactments is this—in the event of the entire land held under one title being taken, the charges are to be redeemed and compensation is to be made; but in the interval, if the railway company choose to enter upon the land without having made that arrangement, they must go on and pay the charges until the arrangement is made; in the event of a portion only of such estate being taken, the charges extending over the whole estate, then there must be and shall be an apportionment of the charges as between the land taken and the land not taken, and when that apportionment is made, then there come to be the necessary *data* for settling the amount of compensation to be paid to the superior. Now, just to go back for one moment to section 126, let us see what ought to be done in the case which we have before us when the railway company take such a fragment of land as they have taken here. The superior ought to say—"You shall not enter upon these lands until you make an arrangement with me, and the arrangement you have got to make is this—you must have the charges apportioned so as to see what proportion of them is a proper burden upon your piece of ground, and when that has been done we will go to arbitration or to jury trial and settle the amount of compensation." But if the superior does not do that, which is his undoubted right, he has himself to blame. If he allows the railway company to enter into possession of the ground without having made compensation to him, and without having gone through these necessary preliminaries to enable the compensation to be fixed, it is his own fault. He could have interdicted them from entering on the ground till they paid compensation. But if he chooses to lie by and allow them to enter upon the ground he cannot fall back on section 107, because section 107 does not apply to the case. Section 107 applies only to the case where the whole estate under one title is taken. He must look to section 126, which deals with the very case in hand, namely, the case of a part only of an estate subject to charges being taken, and there the words are unambiguous—the railway company shall not be subject to pay any feu-duties or casualties. Compensation and nothing else is the remedy of the superior. Now, for these reasons I find it impossible to concur in the judgment of the Lord Ordinary. I think that portion of the 126th section applies and excludes this action, and excludes it all the more clearly because it is really, as I said at the outset, a superior's action against his vassal, whereas not only section 126, but all the other provisions of the statute, clearly declare that that relation shall not subsist between the parties. I am therefore for recalling the interlocutor, sustaining the fourth plea, and dismissing the action.

Lord Mure—I concur in the result at which your Lordship has arrived. The title, as I understand the case, on which the lands were here acquired did not truly constitute the relation of superior and vassal as between the pursuers and defenders. It is the statutory title obtained by the defenders under the Lands Clauses Act; and parties situated as the pursuers are in such a case as that can only demand the feu-duties or casualties applicable to the position of superior in so far as these are made payable under the provisions of the Lands Clauses Act, in virtue of which this peculiar statutory title was taken. There is a distinct admission made before the Lord Ordinary on that point, to which your Lordship has referred. It is an admission that the title was taken in the form prescribed by the 80th section of the statute, and that each of the parcels of land was part or portion of other lands held by the same owner under the same titles. The question then is, what are the provisions of the 126th section of the Lands Clauses Act relative to the right of the original superior in a case of that sort? and I agree with your Lordship that the whole matter turns on this 126th section. And however confused the first portion of that section may be, the clause which we have here to deal with is distinct and explicit. It says—"But in the event of the lands so used or taken being a part or portion of other lands held by the same owner under the same titles, the said company shall not be liable for any feu-duties or casualties to the superiors thereof, nor shall the said company be bound to enter with the said superiors." There is a distinct provision that the company acquiring the ground, which is part of the lands held under the same superior by a vassal in the position of being still vassal of that superior, cannot be called upon to pay any feu-duties to that party. And if the clause had stopped there it does not admit of any possible construction other than the one maintained on the part of the defenders. I was at first sight a little startled by the proviso at the end of the clause, which it is maintained operates adversely to the views contended for by the defenders—"Provided always that before entering into possession of any lands full compensation shall be made to the said superiors for all loss which they may sustain by being deprived of any casualties or otherwise by reason of any procedure under this Act." Now, I do not read the settlement of the compensation as a condition of the application of the earlier part of the clause. I think the proviso saves the rights of the superior in that way by the company being obliged to go into some arrangement with him under the other provisions of the statute; and if the pursuers of this action have not taken these steps, and cannot take them now, that is the misfortune of the position in which they stand, but I do not think it can affect the operation of the distinct provision in the earlier part of this clause that that compensation has not been settled. On these grounds I concur with your Lordship.

Lord Adam—I never could understand how this action could be maintained unless it could have been predicated of the lands that they were in non-entry, and I could not well understand how that could be, when the statute provided that the titles which have been made up here by the railway company should constitute a complete and valid feudal title in the railway company. How an action of this sort could be

successfully proceeded with against the parties who had a complete and valid feudal title to the subjects in their possession, I have never been able very well to understand. But that is not the ground on which the case has been disposed of by the Lord Ordinary. He has disposed of it upon a construction of the 126th section, in connection with the 107th and subsequent sections. Now, I am not going to read again the 126th section, but that part of the section which bears on this particular case is perfectly clear; and it provides that in the event of the lands used or taken by the railway company being a part or portion of other lands held by the same owner under the same titles, the said company shall not be liable for any feu-duties or casualties to the superiors thereof, and whatever other difficulty there may be in this section, I think these words are perfectly clear and distinct, and are not capable of interpretation. I do not understand that the Lord Ordinary thinks they are capable of interpretation in any other sense than that maintained by the defenders here, because he avoids the words rather than says that they bear no other meaning—for the ground on which he has disposed of it is this, that this last proviso of this section, that before entering into possession of any lands full compensation shall be made to the superior, means that that is a condition precedent to the prior part of the section coming into force at all, and he grounds that upon the connection of the 107th and subsequent sections. Now, I think he is wrong in that. I think what the statute meant was that where parts only of lands are taken—small bits taken here and there from large estates—the policy of the Act was that the railway company shall not be obliged to pay a few shillings or a few pence of feu-duty to the superiors for such lands, and it is provided by this section that instead of that full compensation shall be made to the superior once for all for the lands so taken. That is the meaning of the section. Now, I think the course here was clear enough. It was in the power of the superior, if the full compensation had not been made to him, to have prevented the railway company from entering into possession of the lands; that was his course. I am far from expressing any opinion as to whether or no he may still recover his compensation under the 117th and other sections which provide for the purchase of rights in land omitted to be purchased. It may be—I have no opinion on the matter—that the superior may still recover his full compensation under these and other clauses of the Act. But I am very clear that this provision, which provides that before the company shall enter into possession they shall make full compensation, does not apply as a condition precedent to the previous part of the clause coming into effect. I agree with your Lordship that these other sections referred to by the Lord Ordinary do not apply. I am quite clear that the 107th section applies (and applies only) to the case where the whole lands are taken, and in that case there is no difficulty, because it is just the same payment that used to be made by the vassals before. The railway company comes entirely into their place, and there is no difficulty. If they prefer going on paying, and if the superior chooses to allow them to continue to pay the feu-duties and casualties payable before, there is no difficulty about the matter, but that section is totally inapplicable to a case where only a portion of lands are taken, and nobody can tell till they come to the 109th section what amount of feu-duty or casualty is payable on it. It appears to me that the 107th section was quite inapplicable to this case. The clear course was, as your Lordship has pointed out, to go under the 109th section, to have the feu-duty apportioned, and if the parties agreed that the rest of the land should continue liable for it, well and good; if they did not, they could go under the 108th section and ascertain the money compensation payable for the discharge of the right.

The Court pronounced this interlocutor—

"Recal the interlocutor; sustain the defender's fourth plea-in-law; dismiss the action, and decern."

Counsel for Pursuers and Respondents — Mackintosh—Orr. Agents—Philip, Laing, & Trail, S.S.C.

Counsel for Defenders — Trayner — Patten. Agent—J. K. Lindsay, S.S.C.

Friday, June 20.

FIRST DIVISION.

[Lord Fraser, Ordinary.

EARL OF KINTORE *v.* COUNTESS-DOWAGER OF KINTORE AND OTHERS.

Parent and Child—Legitim—Exclusion of Legitim by Antenuptial Contract of Marriage—Provision—Heir of Entail—Personal Bar.

By antenuptial contract of marriage an heir of entail in possession of entailed estates bound and obliged himself, and the heirs of entail who should succeed to him in the entailed estates, to make payment of certain provisions to the child or children of the marriage other than and excluding the heir who should succeed to the entailed estates. There was no provision in favour of the eldest son, the heir who should succeed to the entailed estates. The contract contained this declaration—"Which provisions before conceived in favour of the children of this marriage are hereby declared to be in full satisfaction to them of all bairns' part of gear, legitim, portion natural, executry," &c. The eldest son of the marriage succeeded under the deed of entail to the entailed estates on the death of his father, and raised an action against his mother, brother, and sisters for payment of legitim. *Held* that as the marriage-contract contained no provisions in favour of the eldest son, his right to legitim was not excluded by the clause of exclusion.

Circumstances which were held not to bar a claim for legitim.

Opinion (*per* Lord Fraser, Ordinary) that a claim for legitim cannot be excluded by an antenuptial marriage-contract which debars legal rights without making a provision for the child.