of employment as a manual labourer. He has to consider in each case what kind of employment a man is fitted by his previous training and by his physical attainments to follow, and to confine his attention to such employment as the man might reasonably adopt if he lost his situation in the particular employment which he had hitherto followed. He has held as matter of fact that this man's chance of employment in his former line of work and in any other line of employment which he might reasonably hope to follow has not been impaired.

That being his conclusion in fact, which we cannot review, I do not see how he could do anything else but end the compensation. Had he found otherwise it might have been proper to have pronounced a suspensory order even although the man was earning as high or higher wages in some form of employment than he had earned before, but in view of the facts which the arbitrator has found, and which I think were just the facts it was his duty to consider, he arrived at a right result in law when he terminated the compensation.

LORD GUTHRIE — I am of the same opinion. Mr Robertson argued alternatively either for a suspensory order or for a remit. I agree with your Lordships that he is not entitled to either. In regard to his crave for a suspensory order, one keeps in view that the injury here was to the left hand. I think the right hand cases which were mentioned to us involved very different considerations. One also keeps in view that so far as the present position is concerned there has been complete recovery, because the face of the stump, for what it is worth, is not tender, and the stump is freely moveable towards the other fingers or in extension.

Coming to the arbitrator's findings, Mr Robertson admitted that when the arbitrator found that the loss of the left thumb at the metacarpophalangeal joint did not impair his chance of employment in his former line of employment, he must have had before him direct evidence on that particular point. But he said that the other limb of the finding, namely, "or in any other line of employment which he might reasonably hope to follow," necessarily involves a purely conjectural element. That depends on what is meant by any other line of employment. I take it that the Sheriff must have proceeded on the view which Mr Horne maintained, namely, that he was bound to consider such work as a brakesman's work or any analogous work, and certainly was not bound to consider such work as Lord Salvesen referred to, such as the work of a clerk. If you take it in that limited sense in relation to his chances in the open market or labour market, then the conjectural element is reduced to a minimum, and the Sheriff must have had before him evidence which enabled him, without entering into the sphere of conjecture at all, to come to the conclusion at which he has arrived.

Mr Robertson maintained the proposition which I think Mr Horne was correct in saying was not a universal one, namely, that wherever an injury was not only permanent—using the expression of the arbitrator—but also patent and serious, then a suspensory order was the proper course to follow. I think Mr Horne was well founded in distinguishing between these three words. "Patent injury" and "permanent injury" are absolute terms; "serious injury" is a relative term, and the Sheriff has found in this particular case that although the injury was permanent and patent, it was not serious *quoad* the chance of this man getting employment in the open market in the limited sense in which I have defined it.

I agree with your Lordship that the way in which it is proposed to use the case of *Green* v. *Cammel, Laird, & Company*, [1913] 3 K.B. 665, 6 B.C.C. 735, and Lord Justice Kennedy's opinion, is not justifiable, because that opinion while stating a general rule, in terms excludes the notion that it was meant to be universal.

As to the other point — the proposal to remit—it seems to me that there is nothing to remit. The Sheriff was not entitled to narrate the evidence of opinion, he was bound to state the facts, and he has done so. His duty was to state what the result, in his view, was of that evidence of opinion taken along with the facts, and he has done so and is final.

The LORD JUSTICE-CLERK was absent.

The Court answered the question of law in the affirmative.

Counsel for the Appellant—Crabb Watt, K.C. — Graham Robertson. Agent — E. Rolland M'Nab, S.S.C.

Counsel for the Respondents — Horne, K.C.—Hossell Henderson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Thursday, May 28.

FIRST DIVISION.

[Junior Lord Ordinary.

BLYTHSWOOD *v.* GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

Expenses — Railway — Compulsory Purchase of Land—Application of Purchase Money—Entail—Lands Clauses Consolidation (Scotland) Act 1845 (8 *Vict. cap.* 19), *sec.* 79.

In a petition by an heir of entail, part of whose estate had been taken by a railway company under compulsory powers, to uplift the money consigned as the price of the lands and to apply it in payment of certain fee-simple lands which he had acquired, and which he proposed to settle as part of the entailed estate, the petitioner was found entitled to expenses against the railway company.

Held that the company was liable for the expense of a remit to a man of skill

as well as of a remit to a man of business. *Held further* (by the Lord Ordinary) that the company was not liable for the expense relating to the service of the petition upon the next heirs of entail.

The Lands Clauses Consolidation (Scotland) Act 1845, section 79, enacts—"In all cases of monies deposited in the bank under the provisions of this or the special Act . . . it shall be lawful for the Court of Session to order the expenses of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the promoters of the undertaking, that is to say, the expense of the purchase or taking of the lands . . . and the expenses of the investment of such monies in Government or real securities, and of the re-investment thereof in the purchase of other lands, and of re-entailing any of such lands and incident thereto, and also the expense of obtaining the proper orders for any of the purposes aforesaid. . . ."

On 3rd April 1913 the Reverend the Right Honourable Baron Blythswood, heir of entail in possession of the estate of Blythswood and others in the counties of Lanark and Renfrew, presented a petition under the Lands Clauses Consolidation (Scotland) Act 1845 and the Entail (Scotland) Acts setting forth that certain portions of the said entailed estate had been acquired by the Caledonian Railway Company and by the Glasgow and South-Western Railway Company for the purposes of their undertakings, that the purchase money or compensation payable therefor had been consigned in bank, and that he was now desirous of uplifting the same and of applying it towards the purchase and acquisition as part of the entailed estate of certain lands held by him in fee-simple, and which he proposed to settle as part of the entailed estate.

On 11th July 1913 the Lord Ordinary (HUNTER), after considering a report by a man of business and also a report by a man of skill, authorised the petitioner, upon executing a conveyance of the said lands in favour of himself and of the heirs of entail, to uplift the said sums and to apply them as proposed. Thereafter on 1st November 1913 his Lordship approved of the conveyance, interponed authority to the proceedings, and found the railway companies liable to the petitioner in expenses so far as they were liable therefor in terms of the Lands Clauses Consolidation (Scotland) Act 1845 in the proportions of one-half respectively.

The Auditor having lodged his report on the petitioner's account of expenses, objection was taken by the railway companies to the following items which he had allowed as proper charges, viz., (1) the charges, amounting to eleven shillings, incidental to the service of the petition upon the next heirs of entail, (2) the expense incidental to the remit to a man of skill, (3) the charges made in connection with the employment of a man of business in so far as these were applicable to the employment of a man of skill, and (4) the fee charged *ad valorem* for drawing the conveyance.

On 4th March 1914 the Lord Ordinary (ANDERSON) sustained the first objection, reduced the amount of the account by eleven shillings, the amount of the charges involved in said objection, and *quoad ultra* approved of the Auditor's report.

Opinion—"This is a note of objection taken by the respondents, the Glasgow and South-Western Railway Company and the Caledonian Railway Company, to the Auditor's report on a taxation of the account of expenses of the petitioner the Reverend The Right Honourable Baron Blythswood.

"The matter arises in connection with a petition presented by Baron Blythswood for authority to uplift and apply certain consigned money. It appears that Baron Blythswood is the heir of entail in possession of the estate of Blythswood and others, and that the railway companies I have mentioned acquired from him certain portions of the entailed estate. In payment of the land so acquired the railway companies deposited on deposit-receipt in bank certain sums amounting in round figures to £1300. The petition which the petitioner presented for authority to uplift and apply this money sets forth that it was brought in terms of the Entail (Scotland) Act, 11 and 12 Vict. cap. 36, sec. 26. It also makes reference to the provisions of the Lands Clauses Consolidation Act 1845, section 67, which provides that the purchase money or compensation which shall be payable in respect of any lands or any interest therein purchased or taken by the promoters of the undertaking from any heir of entail and paid into the bank shall be applied under the authority of the Court of Session, *inter alia*, in the purchase of other lands to be conveyed, limited and settled upon the same heirs and the like trusts and purposes, and in the same manner as the lands in respect of which such money shall have been paid stood settled.

"The petitioner purchased certain fee-simple lands at the price of £1966, 2s. 9d., and he proposes that as these lands lie into the entailed estate, and as the acquisition of the lands will permanently improve the estate, they should be settled upon the series of heirs of entail mentioned in the destination; and what he desires to do is to apply the consigned money *pro tanto* in payment of the price of the lands so purchased by him and so proposed to be settled as entailed lands.

"The Court granted the prayer of the petition, and authorised the petitioner to uplift the money so consigned in bank in order that he might apply it as he desires to do. The petitioner was found entitled generally to his expenses against the respondents, and he lodged an account of expenses, which has been dealt with by the Auditor, and the objections now stated have reference to the report which the Auditor has made upon the taxed account of expenses.

"I have had occasion before in dealing with cases of this character to advert to the

general policy of the Lands Clauses Consolidation Act of 1845. The scheme of the Act, shortly stated, was just this, to saddle the promoters of the undertaking with the expenses to which the seller of the land has been put in connection with the reinvestment of the purchase price which he received for the lands taken by the promoters. I think that under the Act of Parliament I am bound to find that all expenses reasonably incurred by the owner of the land must be borne by the promoters of the undertakings who acquired the lands. Now applying that principle to the objections in question, I have to consider the four objections which were taken to the Auditor's report by the respondents. The first objection has reference to the charges, amounting only to 11s., relating to the services of the petition upon the next heirs of entail. That amount is, as I have stated, a small sum, but the principle is not unimportant which regulates this charge. The petitioner is, as I have stated, entitled to all reasonable expenses incurred by him in reinvesting the money consigned in bank; but it is not necessary that the reinvestment should be entailed land, and accordingly the Court, as I understand the decisions, have determined that where the reinvestment falls to be made in entailed land the petitioner in such a case will not be entitled to obtain from the railway company the expense of service upon the next heirs of entail. That seems to me to be decided in terms by the case of the *Baroness Willoughby de Eresby* in 13 R. at p. 70, because it was there held that no advertisement of the petition or service thereof upon the next heirs of entail being required by the Lands Clauses Consolidation Act the expenses connected therewith fell to be borne by the petitioner and not by the promoters of the undertaking; and the reason is that it is not necessary that moneys obtained in the way I have suggested should be reinvested in entailed estates; and if the investment falls to be made in that particular way, then it is only right that the petitioner should bear the special expenses which are necessarily incurred in making such an investment. Accordingly I decide, as I must do, holding that the decision is perfectly applicable to the present case, that the objection which is directed against the charges made for the service of the petition is well founded and must be sustained.

"But then when I come to the next objection, which has reference to the fee paid to a man of skill, I think the situation is quite different. This charge has been considered by the Auditor, and has been sustained by him; and it seems to me that although it is the case that by statute there must always be a man of business appointed in connection with those entail petitions, it does not necessarily follow that it is an unreasonable thing to employ a man of skill in connection with a matter of this sort. That is a matter which is entirely for the Auditor, and I must assume that he has considered the case upon that footing, that the land which the man of skill was examining was proposed to be entailed. Accordingly I do not see my way to interfere with the decision which the Auditor has pronounced upon this matter, and I do so simply upon this ground, that it has not been made out to me that it was an unreasonable thing on the part of Baron Blythswood to employ a man of skill in connection with the purchase he proposed making.

"All that I was asked to do in connection with the charges in the account in connection with the employment of a man of business was to say what portion, if any, of the charges were applicable to the employment of a man of skill and what were not. I am not going to attempt to enter into such an examination of the charges made in connection with the employment of a man of business, even if I had thought it was unreasonable to employ a man of skill. But as I have decided in connection with that matter that it was not unreasonable to employ him, the charges in connection with the man of business' employment must be sustained *in toto* on this ground of decision.

"The fourth objection had reference to conveyancing charges, but that has not been insisted in, and I therefore repel that objection.

"The result of the whole matter is that I sustain the objection to the extent of 11s., and *quoad ultra* I repel the objections, with modified expenses of two guineas against the respondents."

The Railway Companies reclaimed, but did not insist on the objection to the charge made for drawing the conveyance. *Quoad* items 2 and 3 they argued—An heir of entail was not bound to reinvest consigned money in entailed lands, and if he did so the expense fell to be borne by him and not by the company. *Esto* that he was entitled so to reinvest it, the company was only liable for such expense as had reasonably been incurred—Lands Clauses Consolidation (Scotland) Act 1845 (8 Vict. cap. 19), sec. 79. That being so the Lord Ordinary was in error in allowing the expense of the remit to a man of skill. The following authorities were cited—*Erskine* v. *Aberdeen Railway Company*, November 29, 1851, 14 D. 119; *Drummond Hay* v. *North British Railway Company*, November 12, 1873, 1 R. 180, 11 S.L.R. 81; *Lady Willoughby de Eresby* v. *Callander and Oban Railway Company*, October 24, 1885, 13 R. 70, 23 S.L.R. 48; *Stirling Stuart* v. *Caledonian Railway Company*, July 8, 1893, 20 R. 932, 30 S.L.R. 812.

Argued for respondent—The Court was entitled before granting the application to know that what was proposed was a fair and proper arrangement, and to order such inquiry as it might think fit—Entail (Scotland) Act 1882 (45 and 46 Vict. cap. 53), sec. 23 (6). The expense of a remit to a man of skill was a reasonable charge in the sense of sec. 79 of the Lands Clauses Act (*cit. sup*). That section was very wide and clearly covered such expense. Practice, since at least 1892, was in conformity with what the Auditor had done—Smith on Expenses, 357.

The LORD PRESIDENT intimated that the

Court would consult the Auditor before disposing of the matter.

At advising—

LORD PRESIDENT—Although none of the cases cited to us was directly in point, all of them afford capital illustrations of the rule by which our decision must be governed. That rule was never better laid down than in the language of the Lord President (Boyle) in one of the earliest cases, *Erskine v. Aberdeen Railway Company* (1851, 14 D. 119, at p. 120), where he said—"We can award no expenses that the statute does not award. . . . . We have no power to award any expenses against the company except those of a question with the company." If, therefore, the statute expressly warrants the charges which are here challenged, they must be allowed. If the statute does not expressly sanction these charges, they must be refused. I proceed then to consider whether or no the items in the appendix, which were made the subject of controversy here, are authorised by the statute.

The petitioner, who is heir of entail in possession of the estate of Blythswood, asks the authority of the Court to uplift and apply a sum of money due to him by the Railway Company as compensation for a portion of the Blythswood estate taken by virtue of their compulsory powers. His proposal is that the money be applied in the purchase of a heritable property of which he is the fee-simple proprietor, to be settled when purchased upon the same series of heirs and in the same manner as the remainder of the Blythswood estate.

Now this proposal is directly sanctioned by the Lands Clauses Act 1845 (8 and 9 Vict. cap. 119), for by section 67 it is provided that compensation money may be applied "in the purchase of other lands to be conveyed, limited, and settled upon the same heirs, and the like trusts and purposes, and in the same manner, as the lands in respect of which such money shall have been paid, stood settled." There is therefore express authority for this mode of applying the compensation money, and if the petitioner's proposal is carried into effect then the statute expressly provides that he shall have from the Railway Company all expense necessarily incurred thereby, because by the 79th section it is provided that it shall be lawful for the Court of Session to order the expenses of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the promoters—that is to say, the expenses of the reinvestment of the compensation money "in the purchase of other lands, and of re-entailing"—that, of course, ought to be entailing—"any such lands, and incident thereto, and also the expense of obtaining the proper orders for any of the purposes aforesaid."

The Railway Company, however, challenged certain items here as not in practice incurred when compensation money is applied as is proposed under this petition. They direct special attention to charges incident to a remit to a man of skill, and say that while a remit to a man of business is ordinary and proper expenditure sanctioned by practice and principle, remits to a man of skill fall outwith the ordinary practice. We thought it necessary to confer with the Auditor before giving any opinion upon this question. He assures us that in an application such as the present it is the regular practice to remit not only to a man of business but also to a man of skill, and if that is so, then the statute expressly warrants this expenditure and we ought to allow these items. I come to the conclusion, therefore, that the objections stated by the Railway Company ought to be repelled, and for different reasons, no doubt, that the interlocutor of the Lord Ordinary ought to be affirmed.

I should say that I have formed no opinion, and express no opinion, upon the small item, which may raise a question of principle, disallowed by the Lord Ordinary, with regard to which we have heard no argument, an item as I understand not challenged, at all events at the debate before us, by the Railway Company.

LORD MACKENZIE—I concur.

LORD SKERRINGTON—I agree.

LORD JOHNSTON was absent.

The Court adhered.

Counsel for Petitioner — C. H. Brown. Agents—Strathern & Blair, W.S.

Counsel for Respondents (Reclaimers)—Blackburn, K.C.—D. P. Fleming. Agents—John C. Brodie & Sons, W.S. — Hope, Todd, & Kirk, W.S.

HOUSE OF LORDS.

Wednesday, April 22.

(Before the Lord Chancellor (Haldane), Lord Kinnear, Lord Atkinson, Lord Shaw, and Lord Parker.)

MARQUIS OF LINLITHGOW AND OTHERS *v.* NORTH BRITISH RAILWAY COMPANY.

(In the Court of Session June 11, 1912, 49 S.L.R. 804, and 1912 S.C. 1327.)

Mines and Minerals—Canal—Reservation of Minerals—Support—Compensation to Landowner.

The Union Canal Act 1817, authorising the formation of a canal from Lothian Road near Edinburgh, to join the Forth and Clyde Navigation Canal near Falkirk, *inter alia*, enacts—Section 112—"Provided always and be it further enacted that nothing herein contained shall extend to prejudice or affect the right of any owner or owners of any lands or grounds in, upon, or through which the said canal or any towing paths, wharfs, quays, basins, tunnels, feeders, trenches, sluices, passages, watercourses, or other conveniences