on a sound construction of the words used. There is a very important difference between interference with transactions in licensed premises between licence-holders and their guests or customers and interference with the consumption by those guests or customers of liquor which they have personally brought into the premises or which they have purchased and caused to be supplied to them from outside. This difference seems to me so essential that I do not think the word "supply" in the Act of Parliament and in the Order in Council is sufficiently elastic to include import for consumption, or that the words "such incidental and supplemental provisions" would enable the Board of Control to enact provisions against consumption.

There is no difficulty if it is desired to bring about this result to say so in plain language. I do not think any such plain language has been used here as would reasonably justify the view presented for the appellant.

The Court answered the first question in the affirmative.

Counsel for the Appellant—Blackburn, K.C., A.-D.—C. H. Brown, A.-D. Agent—W. J. Dundas, W.S., Crown Agent.

COURT OF SESSION.

Friday, March 16.

FIRST DIVISION.

[Lord Cullen, Ordinary.

NORTH BRITISH RAILWAY COMPANY *v.* BIRRELL.

Railway — Statute — Construction — Superfluous Lands—Lands Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 19), *secs.* 120 *and* 121—*North British Railway Act* 1913 (3 *and* 4 *Geo. V, cap. lxxxix*), *sec.* 41.

The North British Railway Act 1913, sec. 41, enacts—"And whereas lands have from time to time been purchased or acquired by the company . . . adjoining or near to railways or stations belonging to the company . . . but such lands are not immediately required for the purposes of the undertaking of the company . . . and it is expedient that further powers should be conferred upon the company . . . with respect to such lands, Therefore, notwithstanding anything contained in the Lands Clauses Consolidation (Scotland) Act 1845, or in any Act or Order relating to the company . . . the company . . . shall not be required to sell or dispose of any such lands or any lands acquired under the powers of this Act which may not be immediately required for such purposes, but may retain, hold, or use, or may lease or otherwise dispose of, the same in consideration of such rent or on such other terms as the company . . . may think fit."

The North British Railway Company agreed to grant a lease of 17 acres of land acquired under statutory powers, but not being used for the purposes of their undertaking. The prospective lessees were a coal company, and the purposes of the lease were for the sinking of a pit and the laying down of lines and sidings connecting the pit with the railway. The railway company and the coal company brought a declarator against a singular successor of the person who owned the lands from which the lands in question were severed when they were acquired, concluding for decree that the defender had no right or title to object to or prevent the railway company from granting the lease. *Held* (*rev.* Lord Cullen, *dis.* Lord President) that the action should be dismissed; *per* Lord Skerrington (Lord Johnston concurring in *opinion*) as irrelevant, in respect that, assuming that section 41 of the Act of 1913 applied to the land in question, that section did not give the railway company an absolute right to alienate these lands, and did not deprive the defender of his right of pre-emption under the Lands Clauses Act 1845, sec. 121; *per* Lord Johnston that the action was incompetent and irrelevant in respect that it was a bare declarator without operative conclusions, negative in effect, and without any specification by the pursuers of their rights under their statutes; *dis.* the Lord President on the ground that section 41 of the 1913 Act displaced the application of the Lands Clauses Act 1845, sec. 120 *et seq.*, from the lands in question, and the Railway Company was entitled to the declarator asked.

The Lands Clauses Consolidation (Scotland) Act 1845 (8 Vict. cap. 19), secs. 120-1, enact—"And with respect to lands acquired by the promoters of the undertaking, under the provisions of this or the Special Act or any Act incorporated therewith, but which shall not be required for the purposes thereof, be it enacted as follows:—120. Within the prescribed period, or if no period be prescribed within ten years after the expiration of the time limited by the Special Act for the construction of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands in such manner as they may deem most advantageous, and apply the purchase money arising from such sales to the purposes of the Special Act; and in default thereof all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the lands adjoining thereto in proportion to the extent of their lands respectively adjoining the same. 121. Before the promoters of the undertaking dispose of any such superfluous lands they shall . . . first offer to sell the same to the person then entitled to the lands (if any) from which the same were originally severed; or if such person refuse to purchase the same, or cannot after dili-

gent inquiry be found, then the like offer shall be made to the person or to the several persons whose lands shall immediately adjoin the lands so proposed to be sold, such persons being capable of entering into a contract for the purchase of such lands; and when more than one such person shall be entitled to such right of pre-emption such offer shall be made to such person in succession, one after another, in such order as the promoters of the undertaking shall think fit."

The North British Railway Act 1913 (3 and 4 Geo. V, cap. lxxxix), sec. 41, is quoted *supra in rubric.*

The North British Railway Company and the Fife Coal Company, *pursuers*, brought an action against Alexander Birrell of Tyrie, *defender*, concluding for declarator "that the defender has no right or title to object to or prevent the pursuers the North British Railway Company letting to the pursuers the Fife Coal Company, Limited, the lands at Seafield, Kirkcaldy, extending to seventeen acres or thereby, belonging to the pursuers the North British Railway Company, or any part or parts of said lands, for the purpose of the pursuers the Fife Coal Company, Limited, sinking and working a new coal pit or mine thereon and laying down thereon lines, sidings, and other works in relation to said coal pit or mine."

The parties *averred*—"(Cond. 3) The pursuers the North British Railway Company, in the exercise of the powers conferred upon them by the section 22 of the North British Railway (General Powers) Order Confirmation Act 1904 (4 Edw. VII, cap. cxxxiv) and section 41 of the North British Railway Act 1913 (3 and 4 Geo. V, cap. lxxxix) have agreed (subject to the adjustment of details and a formal agreement) with the other pursuers the Fife Coal Company, Limited, to let to the latter the said lands extending to 17 acres or thereby. It is the intention of the pursuers the Fife Coal Company, Limited to sink a coal pit or mine on the said lands and to construct and lay relative railway sidings thereon, and the said lands have been agreed to be let to them by the pursuers the North British Railway Company for those purposes. It is part of the arrangement that the pursuers the North British Railway Company shall construct a line of railway or branch or siding to connect the new colliery sidings with the adjoining Auchtertool branch of the North British Railway, and that the coal raised at the new pit shall be forwarded as far as possible by the railways of the pursuers the North British Railway Company, and shipped at docks belonging to or served by them. The defender's averments in answer are denied. The proposed new connecting line or branch or siding will be, unless and until Parliament shall constitute and declare it a public railway or part of the undertaking of the North British Railway Company, a private branch or siding. The North British Railway Company are entitled to construct the said line or branch or siding. In any event the defender has no right or title to object. Further, the North British Railway Company are in virtue of the provisions of their Acts of 1904 and 1913 entitled to dispose of the said 17 acres or thereby of land or to lease the same on such terms as they may think fit. In any event the defender has no right or title to object. The said 17 acres are land adjoining or near to the railways of the pursuers. They are likely to be required for the purposes of the undertaking of the pursuers the North British Railway Company. (*Ans.* 3) Not known and not admitted what agreements, if any, have been made between the two pursuers. *Quoad ultra* denied. Explained that the North British Railway Company have no power to construct the line of railway referred to in this article of the condescendence. The Act of 1913 does not apply to the land specified in the summons, and the North British Railway Company have no power to grant a lease thereof to the other pursuers. The said land is not land adjoining or near to railways or stations belonging to the company, and cannot, without additional statutory powers, be required for the purposes of the undertaking of the company. Apart from the Act of 1913, the proposed agreement is entirely *ultra vires* of the pursuers, and would seriously prejudice the defender's rights. The sinking of a pit and construction of the relative works specified would be an inversion of the purpose for which the lands were acquired, and would produce a serious and permanent alteration in the character of the subjects in which the defender has a material interest. Further, the proposed use would materially injure the defender's surrounding lands. The defender is proprietor of a large bleaching work which is situated about 460 yards from the furthest point of the lands referred to in the summons, and the establishment of a colliery on any portion thereof would render the bleaching works of no value whatsoever."

The defender pleaded, *inter alia*—"1. The averments of the pursuers being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. 3. The lands specified in the summons being no longer required for the purposes of the undertaking for which they were acquired, they are superfluous lands within the meaning of the Lands Clauses (Scotland) Act 1845, and are accordingly in terms of the said Act as modified by section 22 of the 1904 Act subject to a right of pre-emption in favour of the defender if sold or disposed of prior to 22nd July 1916, and to forfeiture to the defender if not so sold or disposed of."

The *facts* of the case appear from the opinion of the Lord Ordinary (CULLEN), who on 18th December granted decree in terms of the conclusions of the summons.

Opinion.—"In this action the pursuers ask declarator that the defender has no right or title to object to a transaction whereby the pursuers the North British Railway Company have agreed to let 17 acres or thereby of ground belonging to them at Seafield, Kirkcaldy, to the other pursuers the Fife Coal Company, Limited, with power to sink a coal pit therein. The ground was acquired by the North British Railway Company

under the North British Railway Act 1895, whereby there was transferred to them and amalgamated with their undertaking the undertaking of a company called the Kirkcaldy and District Railway Company, which was, shortly stated, for making, *inter alia*, a dock at Seafield and also a railway therefrom to Auchtertool, under powers contained in the Seafield Dock and Railway Act 1883. The power to make the dock at Seafield was not exercised and expired many years ago. The power to make the railway to Auchtertool was, with deviations, exercised. The ground here in question is part of the ground intended for the said dock. The Railway Company's right to it embraces the surface only. They do not own the minerals. Power to continue to hold it beyond the normal period was conferred on them by more than one Act subsequent to 1895 altering the operation of the provisions of the Lands Clauses (Scotland) Act 1845 regarding superfluous lands. Ultimately there was passed the North British Railway Act 1913, which by section 41 enacted as follows—[*His Lordship quoted the section.*] At the hearing it was ultimately conceded by the defender's counsel that the ground in question in point of situation and otherwise falls within the category to which this provision of the Act of 1913 is applicable. The defender is proprietor of land adjoining on the west and north the ground in question, being a singular successor therein of the Earl of Rosslyn, from whom part of the said ground was acquired by the Kirkcaldy and District Railway Company. He objects to the North British Railway Company granting the said lease with power to sink a pit, contending that it is *ultra vires* of them to do so. The pursuers seek declarator that he has no right or title so to object.

"The defender founds his title to object on two grounds, the first of which is an alleged right of pre-emption competent to him in the event of the Railway Company proceeding at any time in the future to sell or alienate the ground in question. To conserve his interests under such right of pre-emption it is necessary, he says, that the company should keep the ground intact instead of proceeding to destroy permanently a part of it, to wit, the area of the pit shaft proposed to be sunk.

"The right of pre-emption which the defender thus pleads is, he says, constituted under sections 120-123 of the Lands Clauses Act of 1845 applicable to 'superfluous' lands. Section 120 enacts that 'within the prescribed period, or if no period be prescribed within ten years after the expiry of the time limited by the Special Act for the completion of the works, the promoter of the undertaking' shall sell and dispose of superfluous lands, and that in default thereof such lands shall at the end of the period vest in the adjoining owners. Section 121 enacts that if the promoters sell within said period they must first offer the lands (with certain exceptions) to the person then entitled to the lands, if any, from which the same were originally severed, or if such person refuse to purchase or cannot be found, must offer the same to the adjoining owners. Sections 122 and 123 proceed to condition the right of pre-emption.

"Now in relation to the ground here in question the scheme of these sections for the disposal of superfluous lands has been displaced by the provisions of the North British Railway Act 1913. There is no longer any period within which the pursuers the North British Railway Company are bidden to sell, subject to the right of pre-emption if they do sell, created by section 121, and at the expiry of which without such sale the lands are to vest in the adjoining owners. The company are released from all obligation to sell, and are empowered to keep the ground indefinitely. It is never to become 'superfluous' in the sense of being subjected as such to the provisions of sections 120 *et seq.* of the Act of 1845. And as the right of pre-emption under these sections is only an incident in the scheme of their provisions, it seems to me that it cannot now apply to the ground here in question, which has been definitely liberated from that scheme by the Act of 1913.

"The defender, in the second place, contends that he has *ex contractu* a title to object to the proposed transaction. The contract he appeals to is that under which the ground here in question was originally taken from its owner under compulsory powers. It entitled that owner, the defender says, to see to it that the ground so taken from him for certain defined statutory purposes should be applied only to these purposes, at least so far as he could qualify an interest to object to its being applied to any other purpose *ultra vires* of the undertakers. And the effect of the 1913 Act in this connection is only, he says, to modify the contract by widening the area of authorised uses, within which, in his view, the proposed transaction does not fall, so far as the sinking of the pit is concerned.

"The defender, however, was not a party to the said original contract for the taking of the ground. He is a singular successor in land not taken from the original owner. He contends that he has been specially assigned into the contract by the terms of the disposition in his favour. After the description of the lands and minerals disponed in that deed there follow the words —'together also (so far as applicable to the lands hereby disponed) with the whole rights of access, accommodation, or other such rights reserved or stipulated for under the dispositions granted by the said Earl or his predecessors to the said respective railway companies or otherwise competent to us the granters hereof, but subject to any obligations contained in the said conveyance to the said railway companies respectively.' I do not think that the right here contended for by the defender can, according to the ordinary principles of construction, be held to fall within the words 'other such rights,' attached as these general words are to the specially instanced rights of access and accommodation.

"The defender, however, further contends that the right to invoke the said contract runs with the lands and requires no special assignment. I am unable to sustain this

contention. The right he contends for does not fall within the class of known servitudes. The defender's authority in support of his contention is the case of *Bostock*, 1856, 3 S. & G. 286. The right of the plaintiff there, however, was not, as I read the report, based on mere ownership of the retained property, but on the facts that she was the legal representative of the original owner and that she was also the occupier of it so as to have an interest as well as a title to object. In any event the case can hardly be regarded as an authority on the transmission of land rights in Scotland.

"I am accordingly prepared to affirm the proposition involved in the pursuers' conclusions for declarator, to wit, that the defender has no title to object to the proposed transaction. From that point of view it is unnecessary to consider whether the power intended to be given under it to the Fife Coal Company, Limited, to sink a pit in the ground in question is *ultra vires* of the North British Railway Company under their Act of 1913 or not."

The defender reclaimed, and cited the following authorities—Lands Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 19), secs. 120 to 123, and preamble to those sections; Seafield Dock and Railway Act 1883 (46 and 47 Vict. cap. cii), secs. 2 and 4; the North British Railway Company Act 1895 (58 and 59 Vict. cap. cli), sec. 38; the North British Railway (General Powers) Act 1902 (2 Edw. VII, cap. cxl), sec. 12; the North British Railway (General Powers) Order Confirmation Act 1904 (4 Edw. VII, cap. cxxxiv), sec. 22; North British Railway Act 1913 (3 and 4 Geo. V, cap. lxxxix), sec. 41; Rankine, Land Ownership, page 113; *Stewart* v. *Highland Railway Company*, 1889, 16 R. 580, 26 S.L.R. 438; *Macfie* v. *Callander and Oban Railway Company*, 1897, 24 R. 1156, 34 S.L.R. 828, 1898, 25 R. (H.L.) 19, 35 S.L.R. 413; *London and South-Western Railway Company* v. *Blackmore*, 1870, L.R. 4 H.L.Ca. 610; *Lord Carrington* v. *Wycombe Railway Company*, 1868, L.R., 3 Ch. 377; *Lord Beauchamp* v. *Great Western Railway Company*, 1868, L.R., 3 Ch. 745; *Rangely* v. *Midland Railway Company*, 1868, L.R., 3 Ch. 306; *Great Western Railway Company* v. *May*, 1874, L.R., 7 H.L.Ca. 283; *Foster* v. *London, Chatham, and Dover Railway Company*, [1895] 1 Q.B. 711; *Cooper & Wood* v. *North British Railway Company*, 1863, 1 Macph. 499; *Llanelly Railway and Dock Company* v. *London and North-Western Railway Company*, 1875, L.R., 7 H.L.Ca. 550; *Maule* v. *Moncrieff*, 1846, 5 Bell's App. 333; *Bostock* v. *North Staffordshire Railway Company*, 1852, 5 De G. and Sm. 584; *Countess of Rothes* v. *Kirkcaldy Water-Works Commissioners*, 1882, 9 R. (H.L.) 108, 19 S.L.R. 907; *Betts* v. *Great Eastern Railway Company*, 1878, 3 Ex. D. 182; *Hooper* v. *Bourne*, 1880, 5 A.C. 1.

The pursuers in reply cited the following additional authorities—The Railway Clauses Act 1863 (26 and 27 Vict. cap. 92), secs. 38 and 39; *Hobbs* v. *Midland Railway Company*, 1882, 20 Ch. D. 418; *Attorney-General* v. *Pontypridd Urban District Council*, [1905] 2 Ch. 441; *Attorney-General* v. *North-Eastern Railway Company*, [1906] 2 Ch. 675; *Smith* v. *Smith*, 1868, L.R., 3 Ex. 282; *in re Duffy*, [1897] 1 I.R. 307; *Tennent* v. *Magistrates of Partick*, 1894, 21 R. 735, 31 S.L.R. 619.

At advising—

LORD SKERRINGTON—The pursuers' written pleadings are confused and obscure, but not I think to such a degree as to necessitate the dismissal of the action as wholly irrelevant. It will, however, conduce to clearness if I state in my own words, and in their logical order, the propositions in fact and in law which, if I rightly understood the speeches of the pursuers' counsel, they wish us to affirm, and the affirmance of each and all of which is in my judgment a condition of the pursuers' success in the action. These propositions are three in number, viz.—(*first*) that certain lands acquired by the pursuers the North British Railway Company, and not immediately required for the purposes of their undertaking, are adjoining or near to railways or stations belonging to that company, and are therefore lands to which section 41 of the North British Railway Act 1913 applies; (*second*) that this section takes away from the defender any right of pre-emption with respect to these lands which may previously have been vested in him by virtue of section 121 of the Lands Clauses Consolidation (Scotland) Act 1845; and (*third*) that the defender has no right or title to prevent the pursuers the North British Railway Company from alienating these lands as and how they think fit, either temporarily by a lease, or permanently by an absolute sale and conveyance. The defender does not claim to be a shareholder of the Railway Company, and accordingly it is not necessary to consider whether the lease which the latter has agreed to grant in favour of the pursuers the Fife Coal Company is one to which a shareholder could object as being *ultra vires* of the Railway Company. It appears from the Lord Ordinary's note that one of the grounds on which the defence was rested in the Outer House was a supposed contract entitling the defender to object to the proposed transaction, but in his speech to us the defender's senior counsel stated that he abandoned this contention, and that, founding on section 121 of the Act of 1845, he rested his defence exclusively upon his client's possession of a right of pre-emption which would or might be prejudiced by the proposed lease. It has been decided in England, in cases governed by the corresponding section of the Lands Clauses Act, that if a Railway Company purports to convey away lands acquired for the purposes of its undertaking, any person who has a statutory right of pre-emption may have the conveyance set aside, and may restrain the Railway Company from selling them until it has first offered them, as enjoined by the statute, to the persons vested with the right of pre-emption—*London and South-Western Railway Company* v. *Blackmore*, 1870, L.R., 4 H.L. Cases, 610; *Hobbs* v. *Midland Railway Company*, 1882, 20 Ch.D.

418. The pursuers' counsel, on the other hand, while primarily maintaining that the defender has no right of pre-emption, did not admit that their clients could succeed only by negativing any such right. They argued that by section 41 of the North British Railway Act 1913 the Railway Company had express power conferred upon it to lease the lands referred to in the summons (which was all that it proposed to do), and that as one of the purposes of the proposed lease was to lay down lines and sidings connecting the public railway with a pit to be sunk on the ground in question, it sufficiently appeared that the lease would further the purposes of the Railway Company's undertaking. I do not think it possible to express any opinion upon this contention without having much fuller information than is to be found in the pleadings in regard to the character and particularly the duration of the contemplated lease. A lease for a long or an indefinite period may amount to an alienation. The pursuers have brought the defender into Court with a negative declarator intended to shut his mouth in all time coming, and it therefore behoves them to make it perfectly clear that in no possible circumstances can the defender have any right of objection. Having regard to the manner in which the pursuers have chosen to present their case, I do not think that they can obtain any measure of success in this action except by establishing an absolute right on the part of the Railway Company in a question with the defender to alienate the subjects as and how it pleases, either temporarily or permanently, and this they can do only by negativing any right of pre-emption on his part. With some hesitation I have come to think that the present action may be utilised for the purpose of deciding this question. The point is one of some general interest and importance, because clauses similar to section 41 have of recent years begun to appear in private Railway Acts. Another question which was alluded to at the debate, although not argued, was whether the "undertaking," the requirements of which must be kept in view in considering whether the lands are superfluous, is that of the North British Railway Company as it now stands, or that of a smaller Railway Company (now amalgamated with it) which originally acquired the subjects by compulsory purchase, or that of a still earlier Dock and Railway Company. The defender has no pleas bearing on this question, and the case was argued by both sides on the footing that the only "undertaking" to be considered is that of the present North British Railway Company.

As I have already indicated, the first question which has to be disposed of is one of fact, viz—Whether (there being no station in the vicinity) the land referred to in the summons adjoins or is near to the North British Railway. The pursuers have a bare averment to that effect at the end of condescendence 3, and the defender's denial is equally general. It was explained that the Lord Ordinary was mistaken in his statement to the effect that this point had been conceded by the defender's counsel, and the latter insisted upon it in their argument before us. While I doubt whether there is any substance in the objection, it was the duty of the pursuers in framing their record to give an intelligible description under reference to the titles and plans of the precise position of the ground in relation to the North British Railway. As they have not taken the trouble to do this they cannot expect a judgment to be given in their favour *de plano*, but they are entitled to a proof in the absence of any demand by the defender for further specification. On the other hand, without awaiting the result of a proof on this point, the defender maintains that even if he is wrong on the facts he is right in his law, because section 41 of the 1913 Act does not have the effect attributed to it by the pursuers, and does not prejudice his right of pre-emption. I am of opinion that this contention is well founded, and that the action ought to be dismissed as irrelevant.

The argument of the pursuers' counsel as to the construction of section 41 of the 1913 Act is very simple and intelligible. The section enacts that the North British Railway Company "shall not be required to sell or dispose of any lands acquired by the company adjoining or near to its railways or stations and which are not immediately required" for the purposes of its undertaking, "but may retain hold or use or may lease or otherwise dispose of the same in consideration of such rent or on other such terms as the company . . . may think fit." Counsel pointed to the power to lease, which is quite general and is not limited to leases of ordinary duration. They further pointed to the power to "dispose of" the subjects, which is not merely perfectly general, but which, according to the argument, is framed so as to exclude any right of pre-emption, because the "terms" are to be such as the company may think fit, and not such as an arbiter, acting in pursuance of section 123 of the Act of 1845, may determine. In construing the section, however, it is necessary to keep in view the whole of it, including the part which defines its application. The first point to notice is that the section applies only to ground in the vicinity of railways or stations—a kind of property which is unlikely to become superfluous in the legal sense even if the ground has for many years stood vacant or has been temporarily used for non-railway purposes. Accordingly one would expect that a section conferring "further powers" with respect to ground so situated would be framed so as to include all such ground not actually used for railway purposes irrespective of whether any particular parcel ought to be described on the one hand as "superfluous" or as "not required for the purposes of the undertaking," according to the phraseology of the Lands Clauses Act, or on the other hand as land which "would in all probability become necessary within a reasonable time," to quote the words of Lord Watson in *Macfie* v. *Callander and Oban Railway Company*, (1898) 25 R. (H.L.) 19, at p. 20, 35 S.L.R. 413.

This anticipation is fulfilled by the language of the section, which departs from that of the Lands Clauses Acts by the introduction of a new phrase, "lands not immediately required for the purposes of the undertaking." In short, the object of the section is to relieve the Railway Company from the delicate and anxious duty of having periodically to decide (under the penalty of forfeiture in case of error) whether any, and if so which, of the company's lands in the vicinity of its railways or stations must be regarded and treated as superfluous. To limit its application to lands which can be proved to be superfluous to the satisfaction of the solicitor of an intending lessee would deprive the section of most of its utility. These substantial considerations outweigh any inference from the peculiar structure of the operative part of the section which might suggest that as the release from the obligation to sell can apply only to lands which are in fact superfluous, the grant of further powers which follows thereon must be limited in the same way. The construction which I adopt as the right one also commends itself to the pursuers, as they aver (cond. 3) that the ground proposed to be leased is "likely to be required for the purposes of the undertaking of the North British Railway Company."

If I am right in supposing that section 41 of the Act of 1913 applies to all lands not immediately required for the purposes of the railway, including land which will certainly be so required in a few years, it is difficult to come to the conclusion that the section authorises the company to sell such land out and out if it should happen at any time to be in need of ready money. Hitherto it has been a fundamental rule of railway law that land which is certainly or probably required for the purposes of the undertaking cannot be alienated. As the Lord President (Robertson) said in the case of *Macfie*, 1897, 24 R. 1156, at p. 1169, 34 S.L.R. 828, already referred to, "directors can only sell land not required for the company's purposes." I cannot believe that this salutary rule has been incidentally repealed as regards the North British Railway Company by a section the primary purpose of which was to encourage the company to retain and not to alienate such of its property as might possibly be useful with a view to future developments. For this purpose it was necessary to abolish a forfeiture which Parliament probably regarded as somewhat unfair and out of place in the case of ground adjoining or near to a railway or station. It was at the same time very natural to enact that the Railway Company should in future have a much freer hand in regard to the management of such of its lands as were not immediately required for railway purposes than was possible at a time when its hands were tied by the fear of a challenge founded upon section 120 of the Act of 1845. It is true that the power of disposal conferred in the concluding words of the section is expressed in very general language, but it might equally well be argued that the generality of the word "use" authorises the company to utilise the land for purposes inconsistent with its statutory constitution. The language of the section seems to me to savour more of management than of a drastic re-writing of the law of *ultra vires*. Counsel for the pursuers suggested that unless the power of disposal is construed in an absolutely unlimited sense the words conferring the power are rendered meaningless, because in that view they add nothing to the previously conferred power to use and lease. That is not so. Without itself making use of the land, and without giving a lease (which implies an exclusive right of possession), a railway company might find it convenient to authorise a trader to make use of the ground for a certain time, and that upon "terms" which might or might not include the payment of a "rent."

I have somewhat laboured the case of land which though not immediately required for the purposes of the railway will certainly come to be so required in the future, in order to demonstrate that the operative words of section 41 do not necessarily bear the absolutely unrestricted meaning attributed to them by the pursuers. The next question is, Whether the same words must necessarily be construed as authorising the Railway Company to alienate its superfluous lands without regard to the rights of pre-emption created by section 121 of the Act of 1845? I cannot think so. The "further powers" are conferred with reference to lands which are not immediately required for the purposes of the railway. These powers seem to me to have no application to land which is being alienated absolutely and permanently for no other reason except that it is not and never will be required for any such purpose. Even if the clause were ambiguous as regards the lands to which it applies, it ought not, unless any other construction is inadmissible, to be interpreted so as to take away a valuable patrimonial right of pre-emption from persons who received no notice that any such legislation was in prospect. It is, no doubt, true that persons in this position lost the benefit arising from a possible forfeiture in consequence of what is in substance a repeal of section 120 of the Act of 1845, but although section 41 of the 1913 Act does not expressly refer to the forfeiture of superfluous lands it necessarily and unambiguously excludes it by repealing the duty for the breach of which forfeiture had previously been the penalty. On the other hand, as I have tried to prove, the operative words of section 41 are satisfied and fulfil a useful function if we construe them as enlarging the company's powers of management with reference to lands the ultimate destination of which is uncertain, in respect that the company is neither applying them to the purposes of its undertaking nor selling them as superfluous.

The view of the Lord Ordinary is that a repeal of section 120 of the Act of 1845 necessarily, or at least *prima facie* and naturally, implies a repeal of section 121. This is a very simple ground of judgment, though if I remember right little or nothing was said in support of it at the debate. If the words "any such superfluous lands"

near the beginning of section 121 ought to be limited to such lands only as possess every one of the qualities mentioned in section 120, including liability to forfeiture if "remaining unsold" at a certain date, then the Lord Ordinary is clearly right. On the other hand it seems to me more natural to construe these words in the same way as they fall to be construed when occurring in section 120, viz., as referring back to the preamble, which mentions lands acquired by the promoters of the undertaking under the provisions of any Act, but not "required for the purposes thereof." The distinction between lands required for the purposes of the undertaking (which lands the Railway Company cannot alienate) and superfluous lands (which it can alienate if it elects to do so and takes the legal method) is in my opinion fundamental and perpetual.

I have already explained my reasons for thinking that the present action must be dealt with on the footing that it fails unless the pursuers can succeed in negativing any right of pre-emption on the part of the defender, however remote may be the date at which that right might become operative. I have also stated the judgment which I advise your Lordships to pronounce.

LORD JOHNSTON—This summons as laid is, I think, incompetent, but if not the statement on which it is based is of more than doubtful sufficiency, and therefore of more than doubtful relevancy. It is just one of those cases in which it is very difficult to separate competency and relevancy, and in which, in judging of the competency, one cannot altogether confine attention to the summons but must take the summons in relation to its condescendence. The result, however, in my opinion leaves the question one of competency.

The form of the summons is a negative declarator, and the draughtsman appears to have had in mind to adapt the form of action for putting to silence in a novel and I think unprecedented manner for which no authority was cited. So far as I am aware the action of putting to silence has never in practice been allowed except in relation to questions of status—thus A may bring an action during his lifetime to have it declared that B is not his lawful wife or C his lawful child where they respectively are laying claim to that relationship. It has not been extended further. But to allow such a form of action in these cases is a manifest necessity. Upon the relationship immediate duties and rights and prospective claims depend, and some of these are such that in the interest of society and even of morality they call for immediate determination, while some of them are such that they emerge only on death and affect succession, when to postpone the determination of the question of status on which they depend might be to inflict injury on the predeceasing party and lead to possible injustice by loss of evidence, &c. The adoption of the form of declarator of putting to silence is not only a well-recognised practice in these cases but is a convenient and effective method for disposing of a particular class of questions which call for immediate solution.

I do not think that it is any exception to the above general rule that a negative declaratory conclusion is occasionally adopted as an introduction to a conclusion for interdict where the interdict is not a summary Bill Chamber process but sought in the ordinary court in the form of declarator and interdict. Declarator is there used to clear the way to interdict where the question of right is too uncertain to justify the complainer taking the risk of damages for wrongous interdict if he proceeds summarily in the Bill Chamber. The declarator is then not a separate action or bare declarator but an ancillary conclusion in an action of interdict. We are dealing here with a bare negative declarator unaccompanied by any operative conclusion.

Here the pursuers seek to borrow the form of declarator of putting to silence and to apply it in order to expiscate their own right and title to utilise a piece of land in a particular way by having it declared merely that the defender has no right to prevent them. They do not seek to have it declared what their right in relation to the land is in positive terms apposite to their claim to deal with it, but simply to have it declared negatively that the defender has no right or title to object or prevent them dealing with it, the particulars of their proposed mode of dealing with it being set out in a very general way indeed. A more inconvenient mode of raising a question could not well be devised and I do not wonder that it is unprecedented.

The pursuers are the North British Railway Company and the Fife Coal Company. The former are said to be the owners of a certain block of land, and this the latter are said to intend to lease, but they have at present no contractual relations with the former and no right in the land whatever. The conclusion in more detail is that declarator should go forth that the defender has no right to object to or prevent the pursuers the North British Railway Company letting to the pursuers the Fife Coal Company the land in question for the purpose of the latter sinking and working a new coal pit or mine thereon and laying down lines and sidings and constructing other works in relation to said coal pit or mine. The justification of the action is stated to be that the pursuers the Fife Coal Company are not disposed to make the great necessary expenditure involved in sinking a pit and laying down other plant with the risk of possible challenge by the defender, a neighbouring proprietor, from whose lands the subject in question was severed under compulsory powers. The criticism which at once occurs to the reader is that the right thus sought to be negatived *a priori* must depend not on the wishes, objects direct or indirect, or purposes of the pursuers the Fife Coal Company, who have no title whatever to sue in their own name, and whose concurrence cannot in any way aid or support the other pursuers the North British Railway Company, but on the measure of

the right of the pursuers the North British Railway Company in the land. Until these latter pursuers have established their right to sue the action the defender is not called on to meet them. In order that they should establish their right to sue they must set out their right and title in sufficient and relevant terms. Their adoption of this mode of bare negative declarator leads one to suspect that they are seeking to avoid the necessity of stating their right and title in positive terms because they see the difficulty of doing so either sufficiently or relevantly. But that is no reason why they should be allowed to escape the duty rightly imposed on other litigants.

What these pursuers, just as others, have got to do is to establish their right positively and to define its quality and either its absolute character or the limits of its limitations. This they can only be allowed to do in direct terms and not obliquely and so as not to indicate with either definiteness or completeness what the nature of their right is. Whether they can do so, and that in a question with the present defender, depends on matter which, with all deference, I think is not at present competently or sufficiently before the Court. It is enough for my judgment that I say that the pursuers' present attempt will not pass.

Were it necessary a consideration of the terms of the condescendence which is meant to support the summons is quite enough to show how ill adapted the form of the process is to bring before the Court the question which not the summons but the condescendence adumbrates. After setting forth, not originally, but when these are dragged out of them by the defences lodged, a large number of railway statutes, general and special, on which the rights of the pursuers the North British Railway Company admittedly depend—and this dependence shows that they are not ordinary fee-simple proprietors of the land in question—condescendence 3 proceeds to say that the pursuers the North British Railway Company in the exercise of the powers conferred upon them by these Acts have agreed (subject to the adjustment of details and execution of a formal agreement) to let to the pursuers the Fife Coal Company the land in question. But what the powers conferred upon the first-named pursuers are is nowhere attempted to be defined any more than the terms of the proposed lease. And there is added in general terms that the second-named pursuers intend to sink a coalpit and construct relative works on the land so proposed to be let to them. If it turn out that the pursuers the North British Railway Company are not unlimited or unfettered proprietors of the land it is obvious that their power to let it to the other pursuers depends on the limits of their powers, and therefore on the specific terms of the agreement of lease, and not on the mere general intention of their proposing tenants. These are so sketchily painted that we are not even told the duration of the proposed lease, much less in detail how the land is to be occupied or what state it is to be left in at the termination of the lease. The inadequacy of the condescendence is only increased when it is known, as we learned from counsel in course of the debate, that the object of the pursuers the Fife Coal Company is to use the ground in question as a means of bringing to the surface the coal in extensive measures under the sea in its neighbourhood. When therefore the condescendence is considered its inadequacy only illustrates the incompetency of the summons. This enables me I think to say that when the summons is read with the illumination of the condescendence, it is seen that what the pursuers the North British Railway Company are trying to get is a judicial interpretation of some six or seven of their private Acts taken in conjunction, and the opinion and advice of the Court on their right thereunder, without committing themselves to their own construction, and reducing it to a definite declaratory conclusion which a contradictor can be called to meet and the Court to dispose of.

The defender is admittedly the proprietor of property adjoining the land in question, and in the correspondence produced and founded on by the pursuers, which is almost entirely with the Fife Coal Company, who have no title to sue in any view, and not with the Railway Company, who are the true and only pursuers, he challenges the right of the Railway Company to dispose of their land in the way in which he is led to understand that they intend. There is no question that he has a title and interest to be heard as to the pursuers the North British Railway Company's proposals to deal with the lands in question. But in my opinion he is not bound to submit to have the right of that company, on which his own rights depend, determined in an action so laid as the present.

I am not disposed in any case to stand on form for mere form's sake. But this is a matter not of form merely but of substance. If the pursuers desire to make any motion to amend their pleadings under recent statutes, and a suitable amendment were possible, I should of course be ready to give all reasonable facility. But, in my opinion, they would be better to begin again *de novo* if they really desire the situation to be judicially cleared up. The result of my judgment is that this action should be dismissed as irrelevant and incompetent.

Your Lordships, however, I believe, think that notwithstanding the defective condition of the record the Court may find itself able to determine a matter in which the parties are interested and which has been presented by counsel for their decision, and your Lordships being on that matter divided I am, I am afraid, called on to express such opinion as I am in the circumstances able to form. I do so under protest, for I think that it is a dangerous course to allow counsel, discarding their record, to present a case in argument to which they are not tied by their pleadings, and which, if it be decided one way, will not lead to the disposal of the case as laid, and if it be decided in the other will only lead to its dismissal. It is in fact undertaking to give an opinion and judgment, on a case *not* stated, on the following

question, viz., Whether the 41st section of the North British Railway Act 1913 repeals, for the North British Railway Company, and that entirely, sections 120 and 121 of the Lands Clauses Act of 1845? I may misunderstand the position in which the learned counsel left us, but if so, however much I regret it, I must disclaim responsibility.

In order to approach that question it is necessary to go back on the legislation affecting the North British Railway Company, for the Lands Clauses Act 1845 is incorporated in all its Acts. Sections 120 and 121 are part of the fasciculus of clauses headed "Sale of Superfluous Lands." They have this important preamble—"And with respect to lands acquired by the promoters of the undertaking, under the provisions of this or the Special Act, or any Act incorporated therewith, but which shall not be required for the purposes thereof, be it enacted as follows." It is, I conceive, necessary to mark the expressions "undertaking," "Special Act," and "purposes thereof." For they would at first sight appear to point to a restricted application of what follows to the purposes of an undertaking authorised by a Special Act, and to lands acquired but not required for the purposes of that particular undertaking. Yet so was the case presented to us that neither counsel took any notice of these expressions, but assumed that, though the Special Act created a separate small company in 1883, for a separate and limited undertaking, very partially carried out and *quoad ultra* abandoned, because in 1895 this company was dissolved and merged in the North British Railway, the only undertaking which need be considered was that of the North British Railway Company as it now stands, or as it may in future years be extended. I shall not presume to offer an opinion upon this matter, or to attempt to determine how far it affects that on which I am called on to give judgment. I only say that it is one which I think deserves consideration, and that its avoidance only accentuates my objection to give any answer in these proceedings to the question which I am now considering.

Section 120 of the Lands Clauses Act 1845, paraphrasing it, provides that within ten years after the expiration of the time limit for the completion of the works, the promotors of the undertaking shall absolutely sell and dispose of all such superfluous lands (the "such" referring to the heading of the fasiculus of clauses, and being defined by the preamble as lands "which shall not be required for the purposes of the undertaking") and apply the purchase money to the purposes of the Special Act, and that in default thereof all such superfluous lands, remaining unsold at the expiration of the ten years shall thereupon vest in and become the property of the owners of the lands adjoining thereto.

Section 121, on the other hand, restricts the promotors' powers of sale during the ten years thus—Before the promotors of the undertaking dispose of any such superfluous lands they shall first offer to sell the same to the person then entitled to the lands (if any) from which the same were originally severed. If such person refuse to purchase, then the like offer shall be made to those interested in adjoining lands in manner more particularly specified.

The Seafield Dock and Railway Company was formed in 1883. In its Act the Lands Clauses Act 1845 was incorporated. The undertaking consisted of a mineral railway and a loading dock, the latter being near Kirkcaldy and in the parish of Kinghorn. The land in question in this case was acquired under powers from the defender's author mostly for dock purposes, though as the railway was to end at the dock as its terminus, no doubt part of the land would be used for the railway and for dock sidings. There is (in section 47) an exceptional, though in the circumstances intelligible, provision authorising the company to lease any of their land not required for the purposes of the works to any person or corporation who should covenant to construct graving docks, warehouses, sheds, or other buildings calculated to promote the business of the dock. And (in section 49) it was provided that notwithstanding anything in the Lands Clauses Acts to the contrary the company should not be bound to sell or dispose of any lands so leased.

The time allowed for completion of the works (section 53) was for the railway, five years, *i.e.*, till 1888, and for the dock, eight years, *i.e.*, till 1891.

By an Act of 1888 the name of the company was changed to the Kirkcaldy and District Railway Company, and the period allowed for the completion of the railway was extended by three years or to 1891.

By the Act of 1891 the time for completing the railway was extended by five years or to 1896, but there was no extension of time for constructing the dock. The railway was constructed in part before 1895. But the dock can hardly be said to have been commenced, and from at any rate 1891 the dock portion of the undertaking was abandoned, no further extension of time having, so far as it was concerned, been sought.

By the North British Railway Company's Act 1895, section 17, the deposit funds in respect of the railways of the Seafield Dock and Railway Company, and its successor, the Kirkcaldy and District Railway Company, were released; the latter company was (section 38) dissolved, and its undertaking amalgamated with the North British Railway Company, its shareholders being paid out on terms. At the same time the North British Railway Company were authorised to construct certain lines described as "the Kirkcaldy New Railways," requisite to make, by means of extensions and junction lines, that part of the Kirkcaldy and District Company's railway undertaking which had been constructed of practical use to the North British Company. At the date of the amalgamation then the undertaking of the subordinate company, the Kirkcaldy and District Railway Company, so far as it consisted of a proposed dock, had long since been abandoned, and so far as it consisted of railway had in part

only been constructed. What passed to the North British Railway Company was nothing but that part of the railways which had been built, and I suppose, as the Kirkcaldy and District Railway Company had obtained an extension of time for completion of the railway part of their undertaking of 1896, the right for another year to complete it. No further extension of time for construction of the railway part of the Kirkcaldy and District Railway Company's undertaking was sought by the North British Railway after 1896. The "Kirkcaldy New Lines" were an undertaking of the North British Company's own, authorised in 1895, and had no relation whatever to the proposed dock or to any works for which the lands in question here had been acquired. Along with the undertaking of the Kirkcaldy and District Railway Company, so far as it was capable of being acquired and was acquired by the North British Company in 1895, that company, I assume, acquired any lands taken as were those in question but not applied for the purposes of the Kirkcaldy Company's undertaking.

I have stated with perhaps too great elaboration the position in which the amalgamation of 1895 placed the North British Company, because it makes clear what I have already pointed out, that a substantial question underlies the case as presented, but cannot be decided in this action, viz., whether the North British Railway Company now hold the lands in question for the purposes of their general undertaking present and future, and are not in any way limited by the scope of the undertaking for which the lands were acquired.

After the amalgamation of the Kirkcaldy and District Company with the North British, the latter company appear to have initiated legislation with the ostensible purpose of protecting themselves from the statutory consequences which might overtake their superfluous lands. I cannot, of course, say that they had taken no previous step in that direction. I speak merely on the information afforded by those railway Acts which are produced and founded on.

They first got in an Omnibus Act of 1897 (section 17) power, notwithstanding anything in the Lands Clauses Acts, to hold and retain for the period of five years any lands belonging to them in scheduled parishes (among which Kinghorn is included) which had not yet been applied or were not required for the purposes of the company, but were situated near or adjoining any railway or station of the company, or might in the opinion of the company be required by them for the purposes of stations, sidings, or other conveniences. But it was added that at any time during the five years the company might, and at their expiry must, sell and dispose of as superfluous lands all such part of these lands as should not then have been applied or were not then required for the purposes of their undertaking. This precludes any lands acquired but not applied being deemed superfluous during the prescribed period of five years. But it would, I think, have impliedly rendered all such lands not applied within such period, or not actually required at its expiry, *vi statuti*, superfluous at the latter date. It is far from wiping out the superfluous lands provisions of the Act of 1845. It only suspended their operation. But the Act expired in 1902.

Accordingly in a General Powers Act of 1902 a clause was inserted (section 12) further "extending time for sale of superfluous lands," which provided that the North British Railway Company, notwithstanding anything in the Lands Clauses Act of 1845, might "retain and hold any lands acquired by them on which the adjoining owner has not entered, and which have not yet been applied to the purposes" of their undertaking, "or sold or disposed of by them," for the period of ten years. But it was added that the company during such period of ten years might, and at its expiry must, sell or otherwise dispose of all such parts of those lands as should not then have been applied to or were not then required for the purposes of their undertaking. This carried the company to 1912. It was a bolder stroke. It covered all unapplied lands then remaining with the company without discrimination. But at the conclusion of the ten years period it provided a sanction, also without discrimination. Neither did this wipe out the superfluous lands clauses of the General Act, but only suspended their operation.

For some reason not explained, in 1904, by Provisional Order of the general powers character (section 22), the power to hold and retain superfluous lands for a period of ten years from its date, that is from 1904, is repeated in the same terms as those used in the Act of 1902. There was, however, this difference, that instead of being bound in general terms to sell at the expiry of ten years all superfluous lands, defined as all such lands as should not then have been applied or were not then required for the purposes of their undertaking, the company were limited in effecting the sale to a period of two years after the expiration of the ten years. This again, while it fixes down what are at the expiry of the moratorium to be deemed superfluous, only suspends and does not repeal, so far as the North British Railway Company is concerned, the general provisions regarding superfluous lands of the Act of 1845. What it does is to postpone their operation for ten years, that is to 1914, to substitute two years from the expiry of such ten years for the ten years from the date fixed for the completion of the works, of the Act of 1845, and therefore to postpone the vesting in the adjoining owner not only for ten years but for two years more, that is till 1916.

When this action was raised on 24th June 1915, though the ten years moratorium provided by the Act of 1904 had expired in the previous year, the two years during which sale was still permissible but compulsory were current. Before the case came before this Court on reclaiming note (February 1917) these two years had expired, and the vesting provision would have taken effect but for the passage of

a further Act in 1916, to be immediately noticed.

It is important, however, first to resume the terms of the Act 1904, section 22, to see exactly what lands were affected. These were such "lands as shall not then have been applied to or are not then required for the purposes of their" undertaking. That eliminates much of the difficulty in determining what are at any point of time superfluous lands. It covered what might under the Act of 1845 be disputed to be yet superfluous. But that was the consideration given by the company for the exceptional moratorium accorded to them.

I pass over for a moment the Act of 1913, which we are asked to interpret, to notice that in 1916 the North British Railway Company thought fit to embody in another Omnibus Act a clause (section 20) in these terms:—"Section 22 (extending time for sale of superfluous lands) of the North British Railway (General Powers) Order 1904 shall be read and have effect as if the period of five years had been mentioned therein in lieu of the period of two years, and from the 22nd day of July 1916 until the passing of this Act the operation of section 120 of the Lands Clauses Consolidation (Scotland) Act 1845 with regard to any lands referred to in section 22 of the said Order shall be, and shall be deemed to have been, suspended."

I have quoted this clause in full, for it has an important bearing on the point at issue. It first extends the period during which the company might still sell superfluous lands, and till expiry of which vesting in the adjoining owner was not to take place, from 1916 to 1919, and second, for fear that the moratorium of the Act of 1904 should run out before the Bill of 1916 should become an Act, it provided for temporary suspension of the vesting clause (section 120) of the Lands Clauses Act 1845, from 22nd July 1916, fixed by the date of the passing of the Act of 1904, until the passing of the Act of 1916. It does not matter that the Bill did pass and become an Act, with three days to spare, on 19th July 1916. What is important is that so little was the 120th section of the Lands Clauses Act of 1845 considered a dead letter so far as the North British Railway Company were concerned that this anxious step was taken to avoid its automatic operation the moment the "close time" expired, and with the 120th section the 121st came in its train.

It is therefore difficult to understand how these sections of the Lands Clauses Act 1845 are to be deemed to have been repealed in 1913 so far as the North British Railway Company was concerned, as we are now asked to find.

Going now to section 41 of the North British General Powers Act 1913 it says—"And whereas lands have from time to time been purchased or acquired by the company adjoining or near to railways or stations belonging to the company, but such lands are not immediately required for the purposes of the undertaking of the company, and it is expedient that further powers should be conferred upon the company with respect to such lands, therefore notwithstanding anything contained in the Lands Clauses Consolidation (Scotland) Act 1845, or in any Act or Order relating to the company with which that Act is incorporated, the company shall not be required to sell or dispose of any such lands which may not be immediately required for such purposes, but may retain, hold, or use or may lease or otherwise dispose of the same in consideration of such rent or on such other terms as the company may think fit."

When one comes to compare the provisions of the North British Acts of 1904 and 1916 with those of their Act of 1913 and the exceptional powers obtained by the company thereunder respectively—I say exceptional, for the Lands Clauses Act still rules in the common case, and expresses the general policy of Parliament considerately adopted, and not the laxer view of a casual committee—it is apparent either that a different hand was guiding the Private Bill draughtsmanship of the North British Company, or that the Act of 1913 had a totally different object, and presumably a totally different result, from those of 1904 and 1916. That result, whatever the object, the company now represent to be the wiping off the statute book, as regards the North British Company, of two sections of the Act of 1845 which yet the Act of 1904 impliedly, and the Act of 1916 expressly, treat as still *in viridi observantia*. I cannot think that this was the case, and consider that the company is seizing this opportunity of putting on the expressions of the Act of 1913 a construction which they were never meant to have, and which is a mere afterthought. They will, I am satisfied, be found to have a much more reasonable meaning and effect.

It is worth while looking for a moment at the position created by the compulsory powers to take of the Seafield Dock and Railway Company in 1883, and at that which would result from the North British Company's construction and proposed application of the powers conferred by their Act of 1913. I assume for the present that the defender is *in pari casu* with his author Lord Rosslyn, for it seems to be the case that he purchased the property from which the subjects in question were severed under the Seafield Company's compulsory powers after the date of their severance. I assume this because I think it is the case, and because though the subject was touched upon, there was not sufficient argument to the contrary. By the contract made by the parliamentary offer of Lord Rosslyn's land by the statute conferring compulsory powers on the Seafield Company, and by the acceptance involved in the company's notice to take, there is, in my opinion, a *jus quæsitum tertio* impliedly conferred on Lord Rosslyn's transferee, he having chosen to part with the estate from which the severance was made. The North British Railway Company can plead no higher right than their author the Seafield Company. The object of conferring powers on the Seafield Company was that they might build a dock. The landowner was bound to accept the con-

sequences of such an enterprise being carried out. His opposition to or acquiescence in the Seafield Company's application to Parliament was based on that footing. The prospect may have been advantageous to his estate as a whole, or it may have been detrimental. But the dock has been abandoned, and now it is proposed to open in its stead a coalpit on the ground taken, and a coalpit not for working the minerals under the ground taken, though probably that does not make any difference in principle, but for working an extensive seam outside its limits. It goes without saying that no such powers would have been given by Parliament to a dock or railway company with that object. But it is also clear that if such had been the promoters' purpose, the defender's author would have had a very different proposition to consider in determining to oppose or acquiesce, as the interests of his estate would have been very differently affected. His course would have in all reasonable probability been different, and it is certainly not to be assumed that any Parliamentary Committee would have given the powers necessary. It is not therefore to be lightly accepted that in 1913 Parliament by a few general expressions, with no conception of what is now the North British Company's object, have so transfigured the powers conferred in 1883, and that behind the backs of those interested in adjoining property, as is now maintained by the North British Company. It may, I think, be assumed that some more reasonable object and effect can be attributed to the clause of the Act of 1913 founded on.

The explanation of the Act of 1913 and its reconcilement with those of 1904 and 1916 is, I think, this—The North British Company had obtained by the leniency of Parliament, at any rate from 1897 onward, powers of retention of lands acquired but not applied to railway purposes, greatly restricting the operation of the general provisions of the Lands Clauses Act. The lands affected were thus described in their 1904 Act, section 22—"Any lands acquired by them on which the adjoining owner has not entered and which have not yet been applied to the purposes of their undertaking or sold or disposed of by them." It is obvious that this definition covers all unapplied lands, whether technically "superfluous" or not, which had not at the date of the Act actually reverted to the adjoining owner, or been sold by the company under the provisions of the Lands Clauses Act 1845, and that the result of the section in question was to entirely suspend the operation of the Lands Clauses Act 1845, sections 120 and 121, for the lengthy period of ten to twelve years. But the grant of this extensive concession was subject to a condition tightening in an opposite direction the operation of the last-mentioned clauses, viz., that the company within two years after the expiry of the moratorium "shall sell, feu, or otherwise dispose of all such parts of those lands as shall not then have been applied to or are not then required for the purposes of their undertaking." It may, I think, be reasonably surmised that in 1913 the North British Railway Company had become apprehensive that this condition might be so construed as to limit the interpretation of the term "superfluous" of the 1845 Act with consequences, and so as to render *ipso facto* superfluous a good deal which might not under the familiar application of the Act of 1845 have passed as such. The words "as shall not *then* have been applied or are not *then* required" are very precise and limiting. It was, I think, to meet the difficulty which the company anticipated arising at the expiration of the period prescribed by the Act of 1904, though to meet it by rather a side wind, that the North British Company applied for and obtained the 41st section of their omnibus Act of 1913.

What then does that section provide? On the preamble that lands had from time to time been acquired by the company adjoining railways or stations, but that such lands are not *immediately* required for the purposes of the company's undertaking, and that it is expedient that further powers should be conferred upon the company with respect to such lands, it is enacted that notwithstanding anything contained in the Lands Clauses Act 1845, &c., "the company shall not be required to sell or dispose of any such lands which may not be immediately required for such purposes but may retain, hold, or use or may lease or otherwise dispose of the same in consideration of such rent or on such other terms as the company may think fit." It is contended that this provision entirely wipes sections 120 and 121 of the Lands Clauses Act 1845 off the statute book so far as the North British Company is concerned. I am satisfied that the provision in question was neither intended to have, nor has, any such result, and as I have already said that the North British Company are striving to twist a clause obtained for one purpose to effect a totally different one. It will be noticed that section 41 only applies to lands falling under the category of "adjoining or near to railways or stations belonging to the company," and that the "not *then* required" of the Act of 1904 becomes "not *immediately* required," which I think forms the clue to the situation. What the section intended to effect, and all I think which it did effect, was to restore lands not *immediately* required but which were not yet within the category of "superfluous" according to the construction which the Act of 1845 has received, to the position which they would have held under the Act of 1845 but for the Act of 1904, and to obviate the necessity of disposing of them as "not *then* required" under the Act of 1904. Had the company been a little more ingenuous in their application to Parliament this would, I think, have appeared more distinctly. But nevertheless when the series of Acts obtained by the North British Company are read in their sequence the real object and effect of section 41 appears with, I think, sufficient distinctness.

Section 41 may, however, have had a subsidiary object, quite consistent with the above. The period of the moratorium of

1904 had been a long one. There is no express power in the Act of 1845 to let or put to any remunerative use, otherwise than for the purposes of the undertaking, lands which have been acquired but have not yet been applied, and may become superfluous, and it may well be that it was thought expedient formally to authorise the leasing of the lands covered by the section. As to "otherwise dispose of," having regard to the collocation of the words "sell or dispose of," but three lines higher up in the clause, this can only have a meaning *ejusdem generis* with leasing.

But though these two purposes may both be covered by section 41 they are both restricted by the limitation to lands adjoining or near to railways or stations, and by the condition "not *immediately* required" for the purposes of the undertaking, whatever these may be. They do not put even temporarily lands which are already superfluous in the sense of the statutes beyond the operation of the Lands Clauses Act 1845, nor do they preclude lands which are not immediately required, and are not at the moment superfluous, from becoming superfluous by virtue of that statute. Moreover as they only apply to what is not *immediately* required it is an implied condition of the exercise of the powers which they confer that such exercise does not put such lands beyond possibility of being applied the moment they are required for the purposes of the undertaking.

Accordingly in my opinion the defender's interest in the contingency of these lands being now or ultimately becoming surplus lands is not excluded by the 41st section of the North British Company Act of 1913, and that various questions will have ultimately to be decided with him which are not before us in this case, as, for instance, can these lands ever be required for the purposes of the undertaking, and therewith what is the undertaking; are these lands adjoining or near to railways or stations of the company in the sense of the statute; has not the present proposal of the company already stamped on them the quality of superfluous, &c.

For the above reasons it is my opinion that section 41 of the North British Company's Act does not wipe out of the statute book, as regards the North British Company, sections 120 and 121 of the Lands Clauses Act of 1845, and under the circumstances I express that opinion, though I doubt whether it can legitimately be applied in disposing of this action. My own judgment is that the summons before us is incompetent and should be dismissed on that ground.

LORD PRESIDENT—I agree with senior counsel for the reclaimers in this case that the vital question is whether the 41st section of the North British Railway Company's Act of 1913 has the effect of displacing the 120th and immediately succeeding sections of the Lands Clauses Act of 1845 *quoad* the seventeen acres of ground mentioned in the summons. My answer to that question coincides with the answer given by the Lord Ordinary. But his Lordship observes that at the hearing it was ultimately conceded by the defender's counsel that the ground in question, in point of situation and otherwise, falls within the category to which this provision of the Act of 1913 is applicable. That concession was not given before us, but the proposition was, I think, established in argument.

The application of section 41 to the ground in question depends upon three statutory pre-requisites being complied with—(*first*) the ground must have been purchased by the Railway Company—it is admitted that this ground was; (*second*) the ground must lie near the railways belonging to the company—it was not disputed that this ground so lies; (*third*) the ground must not be immediately required for the purposes of the undertaking—it was admitted that this ground was not immediately required for the purposes of the undertaking. But it was argued that that was not sufficient to let in the application of section 41—that the ground, although not immediately required for the purposes of the undertaking, must be ground which may be or will be ultimately required for the undertaking. The section, so it was argued, does not apply to ground which never will be required for the purposes of the undertaking. And the defender accordingly avers that the whole of the seventeen acres were acquired under statutory powers for the purposes of the undertaking, and are not now required and cannot now be used for the purposes thereof, and that accordingly they have become superfluous lands within the meaning of the Lands Clauses Act.

Now the section certainly does not say that it is inapplicable to superfluous lands, and so to interpret it would, I think, be to defeat its plain meaning and to deprive it of all real utility. The section expressly provides that the Railway Company shall be armed with "further powers" in relation to the land to which it refers. These further powers are four in number—(*first*) the Railway Company is entitled to hold the lands for an indefinite period, (*second*) it is entitled to use the lands for an indefinite period, (*third*) it is entitled to lease the lands for an indefinite period, and (*fourth*) it is entitled to dispose of the lands on such terms as the company may think fit—that is, I take it, to sell the lands out and out. In short, the Railway Company is clothed with powers in relation to land to which the section applies which are exactly the same as those of any ordinary proprietor who has bought and paid for his lands and has power to deal with them. The Railway Company is authorised to put these lands to what they consider the best possible use.

If my interpretation of this section is correct, and if these are the "further powers" which it confers upon the company, then it is obvious that they must embrace superfluous lands, although their scope may not be confined exclusively to lands which are superfluous. For if the section does not apply to superfluous lands I am at a loss to understand what it means by professing to give the Railway Company "further powers"

in relation to the land. Apart from the provisions of section 41, the only statutory power which the Railway Company possesses in regard to superfluous lands is to sell these lands subject to a right of forfeiture and to a right of pre-emption as prescribed by the statute. But if I am right in my interpretation of the section, then they are now empowered to hold the lands for such length of period as they think proper, to use them as they think proper, to lease them on such terms and for such length of time as they think proper, and to sell them out and out without giving anyone a right of pre-emption. Furthermore, the section expressly says that, notwithstanding anything contained in the Lands Clauses Act of 1845, the Railway Company shall not be required to sell such lands. Now the only lands which the Railway Company is required to sell by the Statute of 1845 are superfluous lands, and accordingly it appears to me that the section in express terms does apply to superfluous lands. The defender says—and this is the ground of his defence—these lands are superfluous. If so, then the 41st section in my opinion applies to them, and the Railway Company are entitled to have the declarator which they here seek.

In accordance with the opinions of the majority of the Court the action will be dismissed.

LORD MACKENZIE was absent.

The Court recalled the interlocutor of the Lord Ordinary and dismissed the action.

Counsel for the Pursuers (Respondents)—Macmillan, K.C.—Watson, K.C.—E. O. Inglis. Agent—James Watson, S.S.C.

Counsel for the Defender (Reclaimer)—Wilson, K.C.—Hamilton. Agents—Guild & Guild, W.S.

Friday, March 16.

FIRST DIVISION.

[Sheriff Court at Glasgow.

MULLIGAN *v.* GLASGOW CORPORATION.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule* (1) (*b*) *and* (16)—*Incapacity—Possibility of Supervening Incapacity—Suspensory Order—Workman Deprived of the Use of One Eye Able to Earn the Same Wages as before Accident.*

A workman was deprived of the use of one eye by accident arising out of and in the course of his employment. The employers paid him compensation for nearly a year; they then ceased to make the weekly payments. The workman brought an arbitration. The arbitrator found that at the cessation of payment the workman was fit for work and had been invited to resume his former work, and that it was not proved that the workman's earning capacity in the open market had been affected. The workman did not move for a suspensory order. *Held* that though in the present state of the labour market the workman might not have lost his earning capacity, in a normal market his wage-earning capacity might be impaired, and the case *remitted* to the arbitrator to consider whether or not a suspensory order should be pronounced.

Dempsey v. *Caldwell & Co.*, 1914 S.C. 28, 51 S.L.R. 16, *followed.*

Owen Mulligan, labourer, Glasgow, *appellant*, being dissatisfied with a decision of the Sheriff-Substitute (MACKENZIE) at Glasgow in an arbitration brought by the appellant against the Corporation of Glasgow, *respondents*, for an award of compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) appealed by Stated Case.

The Case stated—"The following *facts* were established—1. That the applicant is a labourer residing at 277 Gallowgate, Glasgow, and that the respondents are the Corporation of the City of Glasgow. 2. That on 25th June 1915 the appellant was engaged in the respondents' employment as a labourer on the permanent way at Woodlands Road, Glasgow. 3. That on said date, while the appellant was engaged in his said employment, he sustained injuries by accident arising out of and in the course of his employment, viz., injuries to his left eye, which have resulted in blindness in said eye, in consequence of which he was incapacitated for work until 6th May 1916. 4. That the respondents admitted liability for said accident, and paid the appellant compensation under the Workmen's Compensation Act 1906, at the rate of 13s. 4d. per week up to and including the week ending 6th May 1916, since which date they have refused to continue payment of said compensation. 5. That appellant's average wages while in the respondents' employment prior to said accident were 27s. per week. 6. That the appellant is now fit for work and has been invited to resume the work he was formerly engaged in; that he has been so fit since 6th May 1916; that it is not proved that his earning capacity in the open market has been affected by the accident.

"I *found in law* that the respondents were not liable in compensation to the appellant beyond 6th May 1916. I therefore dismissed the application and found the appellant liable to the respondents in expenses."

The *question of law* was—"Was there evidence upon which the arbitrator could competently find that the respondents were not liable in compensation to the appellant beyond 6th May 1916?"

To his award the Sheriff-Substitute appended the following

Note.—"As early as 1st February 1916 the pursuer was reported by Dr Gilchrist as fit to resume his work. The defenders have paid compensation up to 6th May, and looking to the confirmatory certificates granted by Dr Riddell and Dr Gilchrist on 27th July 1916, I think that they are entitled to be relieved of compensation as from 6th