LORD M'LAREN—The case I heard was that of *Finnie & Son* v. *Fulton*. I have had an opportunity of reading the Lord President's opinion in the two cases and I concur both in your Lordship's general views and in the application of them to the case I heard.

LORD PEARSON—I also concur in your Lordship's decision as to *Finnie & Son* v. *Fulton*, and in your Lordship's opinion so far as applicable to that case.

LORD M'LAREN and LORD PEARSON were absent at the hearing of the *Lochgelly Iron and Coal Company, Limited* v. *Sinclair*.

The Court, in the case of *Lochgelly Iron and Coal Company, Limited* v. *Sinclair*, pronounced this interlocutor—"... Adhere to the said interlocutor in so far as it repels the reasons of suspension for the period subsequent to May 18th, 1906; *quoad ultra* recal the said interlocutor and remit to the Lord Ordinary to allow the complainers a proof of their averments, and to the respondents conjunct probation, and thereafter to proceed as accords; finds no expenses due to or by either party in respect of the reclaiming note"—and in the case of *Finnie & Son* v. *Fulton* adhered.

Counsel for the Reclaimers (Complainers) (The Lochgelly Iron and Coal Company, Limited)—Horne—Strain. Agents—W. & J. Burness, W.S.

Counsel for the Respondent (Sinclair)—Crabb Watt, K.C.—A. M. Anderson. Agent—C. Strang Watson, Solicitor.

Counsel for the Reclaimers (Complainers) (Finnie & Son)—Constable, K.C.—Horne. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent (Fulton)—Munro—Mair. Agents—Macpherson & Mackay, S.S.C.

Friday, March 19.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

HIGHLAND RAILWAY COMPANY *v.* INVERNESS MAGISTRATES.

Superior and Vassal — Railway — Lands Clauses Consolidation (Scotland) Act 1845 (8 *Vict. c.* 19), *sec.* 126—*Statutory Title—Part only of Estate Taken—Superiority of that Part—Compensation—Mora.*

The Lands Clauses Consolidation (Scotland) Act 1845, enacts—Section 126—"The rights and titles to be granted in manner herein mentioned in and to any lands taken and used for the purposes of this Act shall, unless otherwise specially provided for, in no wise affect or diminish the right of superiority in the same, which shall remain entire in the person granting such rights and titles; but in the event of the lands used or taken being a part or portion of other lands held by the same owner under the same titles, the said company shall not be liable for any feu-duties or casualties to the superiors thereof, nor shall the said company be bound to enter with the said superiors; provided always, that before entering into possession of any lands full compensation shall be made to the said superiors for all loss which they may sustain by being deprived of any casualties, or otherwise by reason of any procedure under this Act."

The corporation of a burgh, which claimed to be the superiors of certain lands to part of which a railway company had acquired a statutory title in 1874, brought an action against the railway company for declarator that the railway company should either pay compensation for loss in respect of the superiority of the land so taken or redeem the feu-duties and casualties applicable thereto.

Held—following Magistrates of Elgin v. *Highland Railway Company*, June 20, 1884, 11 R. 950, 21 S.L.R. 640—that, although no relation of superior and vassal was created between them and the defenders by the statutory title of the latter, and although the company had obtained possession, yet the pursuers, provided they could produce a title, had a right to compensation, which right they had not lost by mere lapse of time; inquiry *allowed*.

The Magistrates of Inverness brought an action of declarator against the Highland Railway Company that the company were bound to pay compensation in respect of the superiority of, or otherwise to redeem the feu-duties and casualties appertaining to, certain portions of land (Needlefield, Gairbreeds, &c.) acquired by the defenders from Baillie of Leys under the Highland Railway Act 1865, of which land the pursuers claimed to have been superiors.

The defenders pleaded, *inter alia*—"(1) No title to sue. (2) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons. (3) On a sound construction of the statute founded on by the pursuers, the defenders are not liable in either compensation or redemption to the pursuers, and should be assoilzied accordingly. (4) The pursuers' claim is excluded by reason of *mora* and taciturnity. (7) In any event, no apportionment of said feu-duties and casualties having been made, the present action is premature and should be dismissed."

The *facts* of the case and the *averments* of parties appear in the opinion (*infra*) of the Lord Ordinary (MACKENZIE), who on 3rd February 1909 allowed the pursuers a proof and repelled the second and seventh pleas-in-law for the defenders.

Opinion.—"This action by the Magistrates of Inverness against the Highland Railway Company is for compensation for loss of feu-duties and casualties in respect of land to which the company obtained a statutory title under the Lands Clauses Act 1845, and of which the pursuers say they were superiors.

"The lands so acquired by the company were a portion of the estate of Mr Baillie of Leys. The conveyance was dated and recorded in the Register of Sasines in 1874, in terms of the Lands Clauses Act.

"The pursuers aver that prior to the date of the acquisition of the lands by the defenders they were held by Mr Baillie off the pursuers as superiors. They state that the last investiture was a charter of confirmation in his favour in 1857. The defenders do not admit that the pursuers were superiors of the subjects. They maintain the defenders have not set out a relevant defence to the case they aver on record as to their right to the superiority of the lands in question, and found on the authority of *Earl of Breadalbane* v. *Macdougall*, 8 R. 42, *affd.* 8 R. (H.L.) 92. The pursuers must, however, to succeed in this action, adduce a good title under section 110. There is now no relationship of superior and vassal between the pursuers and defenders. There must be proof on this point.

"Unless the pursuers can instruct that they were superiors of the lands, the further questions argued do not arise. The parties, however, urged that it would be convenient if an opinion were expressed upon the point whether, assuming the pursuers to be right, and that they were the superiors, they have any claim for compensation against the defenders.

"This depends upon the sections of the Lands Clauses Act 1845, which were the subject of detailed criticism in the cases brought against the present defenders by the *Magistrates of Elgin*, 11 R. 950, and by the *Magistrates of Inverness*, 20 R. 551.

"The summons in the present case concludes that the defenders are bound to pay the pursuers compensation in respect of the superiority of the lands, or otherwise to redeem from the pursuers the feu-duties and casualties and pay the price as the same may be fixed by arbitration, or otherwise determined in one or other of the modes prescribed by the Lands Clauses Act 1845. The first conclusion was said to give effect to the view of the Lord President in the *Elgin* case, and to be based on sections 109 and 126 of the Act. The alternative conclusion is supported by the opinion of Lord Kinnear in the *Inverness* case, and is rested on a construction of section 107. It would serve no good purpose to discuss now which alternative should be adopted if each leads to the same conclusion, viz.—that the defenders must pay the pursuers a sum of money which, whether it be called compensation or redemption money, is to be calculated, in either case, upon the same principles.

"The title which the Railway Company obtained here was, as in the *Elgin* case, under section 80 of the Act. The effect was that the company got an independent right without any relation to the superior at all as regards title. The only relation the company could have to the superior would be one arising out of a liability for money. The Lord President dealt in the *Elgin* case with the case where a portion of land only was taken out of an estate held by the seller under the same titles (that is the case here), and observed—'It is quite just and consistent that, as the superior is to lose his security for feu-duties and casualties in so far as regards the subjects conveyed to the railway company, he should be compensated therefor. That is a principle which runs through the whole of these statutes.' This proceeded on the view that section 126, taken along with section 109, provides for compensation in a case where a portion only of the lands are taken, and that section 107 applies where the whole of the lands are taken.

"In the *Inverness* case, Lord Kinnear (at p. 571), dealing both with the case where the whole and only a portion of the lands are taken, said—'The defenders cannot continue to hold the lands without paying or redeeming feu-duties and casualties.' This proceeded on the view that section 107 applies both where the whole and a portion have been taken.

"It is clear from the opinion of the Lord President that section 108 provides that the compensation is to be ascertained according to the usual way, not only in the case provided for by section 107 (what the pursuers here call redemption), but also in the case where only a portion of the lands has been taken, under section 109. Lord Kinnear's view was that sections 107 and 108 are applicable generally to all cases in which any lands are charged with feu-duties and casualties whether the whole or only a portion is taken; that section 108 regulates the settlement of compensation in any case of the kind described where differences arise; and that section 109 deals with a specific case falling within the general rule, not by exempting it from the operation of the regulations already laid down, but by providing the necessary data for enabling them to be carried into effect. Therefore in dealing with a case for compensation in the circumstances which have arisen here, it appears to me, in accordance with the opinions both of the Lord President and Lord Kinnear, that here section 108 applies. If and when the stage of arbitration is reached the question for the arbiter would, in my opinion, be to determine the consideration to be paid by the Railway Company for the discharge of the lands taken by them from the portion of the charges thereon to which the pursuers may be entitled in terms of section 108.

"Neither side founded upon the terms of sections 117 and 118, or maintained that there had been a failure through mistake or inadvertency to pay compensation.

"It would of course be necessary, as only a portion of the lands have been taken, that the machinery of section 109 should be invoked before recourse can be had to section 108. The Sheriff must, failing agreement, apportion the charges between the lands taken and the remainder of the estate. It was argued that until this was done it was the owner of the rest of the estate that remained liable for the whole feudal obligations to the superior as if no part of the land had been taken from him, and *Macfarlane* v. *Monklands Railway*

Company, 2 Macph. 519, L.J-C. Inglis, p. 531, was founded on. The opinion there expressed was, however, on the terms of the Special Act, which was different to the Lands Clauses Act. The argument of the defenders on this point is quite inconsistent with the opinions in the *Elgin* and *Inverness* cases.

"The defenders' seventh plea is that no apportionment of feu-duties and casualties having been made the action is premature. The summons, however, is only to have a right declared; there is no conclusion that the defenders are bound to arbitrate. Until the right is declared no good purpose would be served in applying to the Sheriff. Further, there is an averment on record that the *cumulo* feu-duty was apportioned by agreement when the lands were taken—the portion allocated on the lands taken by the defenders, and since paid by them, being 14s. 11d. This is denied by the defenders. There will have to be proof on this point also.

"The defenders' fourth plea of *mora* is one which will be dealt with after the proof. It cannot be sustained upon the statements on record.

"The argument that there is no relevant averment of any loss depends upon the argument that the original vassal is still bound for the whole feudal obligations relating to the land the Railway Company has taken. This, as already indicated, is, in my opinion, not sound. If it is unsound, then the pursuers, if they prove they are the superiors, have had a right taken from them by the statute, and for this the statute says they are entitled to be paid.

"The defenders' second and seventh pleas will be repelled, and a proof allowed."

The defenders reclaimed, and argued—Here only a part of the estate was taken, and until apportionment of the charges between the lands taken and the remainder of the estate was made by the Sheriff the owner of the remainder of the estate was liable for the whole feudal obligations to the superior—*Macfarlane* v. *Monklands Railway Company*, January 20, 1864, 2 Macph. 519. The defenders' fourth plea-in-law of *mora* should be sustained.

The pursuers argued—*The Magistrates of Elgin* v. *Highland Railway Company*, June 20, 1884, 11 R. 950, 21 S.L.R. 640, decided that the pursuers were entitled to compensation, which was preserved by the proviso in section 126 of the Lands Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 19), and only when compensation was paid did the superior lose his rights. Section 107 applied equally where the whole or part only of the estate was taken by the defenders, and they could not continue to hold unless they either paid or redeemed the existing feu-duties and casualties—*Magistrates of Inverness* v. *Highland Railway Company*, May 16, 1893, 20 R. 551, 30 S.L.R. 502.

At advising—

LORD KINNEAR—This is an action by the Magistrates of Inverness against the Highland Railway Company for compensation for the loss of feu-duties and casualties in respect of certain lands to which the Company had acquired a compulsory title under the Lands Clauses Act 1845. The condition of fact is that the lands taken by the Railway Company formed part of an estate all of which was held by the same owner and under the same titles. The pursuers say that they were at the time of the acquisition the superiors of the lands from which this portion was taken, and that they would be superiors still of the portion taken by the Railway Company were it not that the statutory title made up by the company gives them a valid and effectual title, not in room and place of the vassals whom they have dispossessed, but independently of any relation of title to the superior at all. The effect of the statutory title is quite settled. The Railway Company has a complete and valid title to the lands, and it holds by force of the statute and not by tenure under a superior. The pursuers accordingly allege that by carrying away this part of their estate of superiority the company has deprived them of security for their casualties and feu-duties, and that they are entitled to compensation. The Lord Ordinary has allowed a proof, and, as I understand his Lordship's opinion, he does so on the footing that the claim is good in law provided the pursuers can prove that they were in fact superiors of the lands in question, and also provided that it cannot be proved against them that they have by their conduct abandoned their right to obtain compensation for the loss which they allege they have suffered.

I think the Lord Ordinary's view is right, and that his judgment should be adhered to. In my opinion the case is governed by the decision of this Court in the case of the *Magistrates of Elgin* v. *The Highland Railway Co.* (11 R. 950). It is true that in that case there was no direct claim for compensation, but the validity of the claim was necessarily involved in the reasoning upon which the judgment proceeded. The question directly raised in that action was whether the Railway Company were or were not still liable for feu-duties and casualties; and that question was raised in a very distinct form by their statement of a single plea. The fourth plea-in-law for the defenders was to this effect—that the action was excluded under the 126th section of the Lands Clauses Consolidation (Scotland) Act 1845; and that plea was sustained. Now in explaining the ground of judgment the Lord President (at p. 958) says this—"I cannot think that the words in the second part of the section (126th) admit of any construction but one. 'In the event of the land so used or taken being a part or portion of other lands held by the same owner under the same titles, the said company shall not be liable for any feu-duties or casualties to the superiors thereof.' Now, about the meaning of these words I cannot see that there can be any dispute. In the event of a portion of the land taken by the company being part of an estate held by the same owner under the same titles, the Railway Company are

not to come into the position of vassal, and are not to be liable for any feu-duties or casualties to the superiors thereof, 'nor shall the said company be bound to enter with the said superiors; provided always that before entering into possession of any lands, full compensation shall be made to the said superiors for all loss which they may sustain by being deprived of any casualties, or otherwise by reason of any procedure under this Act.'" And then his Lordship goes on to observe —"It is quite just and consistent that as the superior is to lose his security for feu-duties and casualties in so far as regards the subjects conveyed to the Railway Company, he should be compensated therefor. That is a principle that runs through the whole of these statutes." I am of opinion that this is a direct decision, not only that the superior is deprived of his claim for feu-duties or casualties in respect of the lands in question, but also that he is entitled to compensation for the loss.

The Lord Ordinary observes that different opinions have been expressed in the later case of the *Magistrates of Inverness* v. *The Highland Railway Company*, 20 R. 551, as to the precise effect and meaning of this 126th section. I must say, for myself I still consider it to be a section that is exceedingly difficult to construe, and the Lord President's opinion in the *Elgin* case sets out by pointing out that, taken as a whole it is incoherent, and that it is inconsistent with the Scotch legal conception of the rights with which it professes to deal. But then his Lordship thought that the particular part of the clause which was then, and is now, in question, is perfectly clear and unambiguous. And we are not to deny effect to clear language because it is associated with an obscure context. Whatever difference of opinion there may be as to the clause as a whole, the great weight of authority is undoubtedly with the Lord President in so far as regards the meaning and effect of that part of the clause with which we are now concerned; and if that were doubtful, which I do not think it is, the decision in the case of the *Burgh of Elgin*, 11 R. 950, is a decision binding on the Court, and I think we ought to follow it; whereas the views expressed in the later case were not necessary for the judgment, and cannot in any way detract from the authority of the earlier. I have no doubt, therefore, that we must follow the case of the *Burgh of Elgin*.

I will only add that I do not think that the plea of *mora* goes to exclude the action, or to exclude inquiry. The condition of the statute is that compensation shall be payable before entry upon possession, but it does not follow that a superior who has been prejudiced by the taking away of part of his estate is to lose his compensation merely because he has allowed possession to be taken without interference; nor does he lose his right, in my opinion, by mere lapse of time. If the question is whether he has acted in such a way as to show that he has abandoned or waived his right, or has created a personal bar against his maintaining it, that must depend upon matters of fact which will form the subject of the inquiry allowed by the Lord Ordinary.

I therefore think that we ought to adhere to his Lordship's interlocutor.

LORD M'LAREN—I concur.

LORD PEARSON—I concur.

LORD PRESIDENT—I also concur.

The Court adhered.

Counsel for Defenders and Reclaimers—Cooper, K.C.—Macphail. Agents—J. K. & W. P. Lindsay, W.S.

Counsel for Pursuers and Respondents—M'Lennan, K.C.—Chree. Agents—Skene, Edwards, & Garson, W.S.