proceeding is a process of augmentation and modification, and the Court of Teinds, by an interlocutor of the 1st of July 1863, augmented and modified the stipend, but they at the same time declared, "that this modification and the settlement of any locality thereof shall depend upon its being shewn to the Lord Ordinary, that there exists a fund for the purpose." Now it is quite clear, that the minister could not have the benefit of the augmentation unless he proved affirmatively, that there was a fund out of which it could be obtained. In the 10th and 11th condescendence of his revised objections (I will leave the 14th out of the question) he states, that there were certain lands (naming them) which were unvalued. This is denied by the heritors; and they at the same time contend, that he is estopped from averring that there were any unvalued lands in consequence of the decree of valuation of 1682.

The Court of Teinds, by the interlocutors of 1865, "Find, that the teinds of the lands of Barclayhill, Causeyend, and Meddens mentioned in the decree are not valued by the decree: Find, that the terms of the said decree are not such as to exclude a proof on inquiry before answer, that the teinds of the parcels of lands mentioned in the 11th article of the condescendence or any of them are unvalued." And they remit to the Lord Ordinary to direct such inquiry as may be rendered necessary by this interlocutor.

Now this interlocutor of the Court of Teinds was affirmed by this House, and when the case was remitted to the Lord Ordinary to direct such inquiry as might be rendered necessary by it, the question was, What was the proof and inquiry which was to be made? It was whether or not it was the fact, that the teinds of the parcels of land mentioned in the 11th condescendence are unvalued. Upon whom lay the affirmative of that? Upon the person who avers it. It was not for the heritors to prove, that these lands had been valued, but it was for the minister to prove distinctly under this interlocutor that the lands were unvalued. And that appears to have been the construction put upon this interlocutor, both by the Lord Ordinary and by the Court of Teinds afterwards upon the interlocutor which is appealed from, because they find distinctly, "that the objector has failed to prove that any part of the lands of Cookstown or of the barony of Portlethen, other than the lands of Meddens, Barclayhill, and Calsayend remain unvalued. Both the Lord Ordinary and the Court of Teinds have put the same construction upon the interlocutor which I have put, namely, that the proof lay upon the minister, and that he has failed to give such proof. I entirely agree with my noble and learned friend, that the proof has failed, and that being so, I think it unnecessary to travel again over the same ground. I agree with him entirely in thinking that this interlocutor ought to be affirmed.

LORD COLONSAY concurred.

Interlocutor affirmed, and appeal dismissed with costs.

Appellant's Agents, G. M. Paul, W.S.; Martin and Leslie, Westminster.—*Respondents' Agents*, Hill, Reid, and Drummond, W.S.; William Robertson, Westminster.

JUNE 22, 1871.

THE CITY OF GLASGOW UNION RAILWAY CO., *Appellants*, *v.* THE CALEDONIAN RAILWAY CO., *Respondents*.

Railway—Superfluous Lands—Forfeiture if not sold within time limited—8 and 9 Vict. c. 19, § 120—*In* 1851 *the T. Railway Co. bought by private contract certain lands for making mineral depots, the lands not being within the limits of deviation of their special Act. Afterwards the company sold them by private contract in* 1865 *to another company, having, in the mean time, never used them for purposes connected with the railway.*

HELD (affirming judgment), *That the lands having been purchased for extraordinary purposes under the Railway Clauses Act*, § 38, *were not superfluous lands within the Lands Clauses Act*, 8 *and* 9 *Vict. c.* 19, § 120, *which had become forfeited to the adjoining owner, by reason of not having been sold within ten years.*[1]

This was an appeal from a decision of the Second Division. The action was raised by the Caledonian Railway Co., for the price of certain lands bought by the City of Glasgow Union Railway Co., and the objection raised by the defenders was, that the title was invalid, inasmuch

[1] See previous report 7 Macph. 1072: 41 Sc. Jur. 541. S. C. L. R. 2 Sc. Ap. 160; 9 Macph. H. L. 115; 43 Sc. Jur. 429.

as the lands were superfluous lands within the meaning of the Lands Clauses Consolidation Act, 8 and 9 Vict. c. 19, § 120, and not having been sold within the time allowed by the Statute they had previously to the sale vested in the adjoining owner. The pursuers replied, that the lands had been originally acquired by them by voluntary agreement, and not under their compulsory powers, and so that the enactment did not apply. The Second Division decided in favour of the pursuers, whereupon the defenders now appealed.

Sir R. Palmer Q.C., and *H. Lloyd* Q.C., for the appellants.—The interlocutor of the Court below was wrong. The lands had been originally acquired by the Company for the purposes of their special Acts, but had never been used for such purposes or for any railway purpose. The 120th section of the Lands Clauses Act applied to all lands acquired under the compulsory powers, if they be superfluous lands. That these were superfluous is clear from their never having been put to any purpose connected with the railway for the fifteen years since they were purchased from Sir John Maxwell. It is not enough to say, that the lands might at some future time be required. The test is, whether they have been required within the ten years. It is immaterial whether they were originally acquired by compulsion or private contract, if they were within the limits of deviation, and might have been compulsorily acquired, which was the present case. They cannot be treated as having been acquired for extraordinary purposes, under § 38 of the Railway Clauses Act, for that power only applies to lands which are beyond the limits of deviation. It is not alleged on the record, that these lands were acquired for extraordinary purposes.

The *Lord Advocate* (Young), and *Cotton* Q.C., for the respondents.—The interlocutor was right. These lands were acquired originally for extraordinary purposes by the respondents' predecessors, the General Terminus and Glasgow Harbour Railway Co., in 1851. This is alleged on the record. The lands were acquired by voluntary purchase for mineral depots, and the Terminus Co. could not have taken these lands by compulsion, being beyond the limits of deviation. If so, then the 120th section, as to superfluous lands, is inapplicable. That section only applies to lands acquired, or which might have been acquired, by compulsion. It would defeat the object of the Acts, if the land required for extraordinary purposes could not be kept in hand by railway companies for the extension of stations and other useful purposes. In point of fact these lands were not superfluous, and would have been adopted but for temporary want of funds.

Cur. adv. vult.

LORD CHANCELLOR HATHERLEY.—My Lords, the question which arises in this case is with reference to the sale of a certain portion of land by the respondents, the Caledonian Railway Company, to the City of Glasgow Union Railway Company, which sale was under compulsory powers possessed by the City of Glasgow Union Railway Company, who gave notice to the Caledonian Railway Company of their intention to purchase the land. That notice having been given, an arbitration was held with reference to the price to be paid for the land. Several portions of land were taken, and the portion of land in respect of which the present controversy arises is a portion consisting of 12,000 and odd square yards, for which a very large price was given, namely, £12,000.

There is no question in dispute about the precise title to the land other than this: The Caledonian Railway Company, beyond all dispute, acquired the land, and are able to make a good title to sell it, unless the land, by reason of its not having been used for railway purposes, and now being sold as not being used any longer by the Caledonian Company for railway purposes, is to be treated as superfluous land, and the question is, whether or not it is land in respect of which the property should be dealt with in the mode prescribed by the 120th section of the Lands Clauses (Scotland) Act, which is precisely similar to the English one, except in regard to the numbering of the clauses.

The 120th section of the Lands Clauses Consolidation (Scotland) Act requires, that "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 completion 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." The controversy raised by the appellants is this: They say, We are not unwilling to pay the price for the land provided we can acquire a good title thereto, but the operation of this clause upon the land in question will have the effect of passing the title to the land to the owner of the lands adjoining thereto, under the 120th section.

Now this section has received its construction on several occasions in our Courts, and one of the last cases was a case which came before the Court of Exchequer Chamber, and which was cited before us and relied upon a good deal; but I do not think your Lordships will find that to have any special application to the case now before you. In that case the point that was

determined was this: that when once this forfeiture (for it is a forfeiture) had accrued upon the disposition of the lands, by the non-user by the railway company of their powers, at the termination of the period fixed for that purpose, such forfeiture should vest them in the owners of the adjoining lands, whoever they might be. The title of the company is displaced, and the revival of the powers of the company, or the giving to them of fresh powers by a new Act of Parliament, would not have the effect of displacing the title which had been so acquired by the owners of the adjoining lands, and the company must take therefore any revival of their powers by a new Act of Parliament subject to the condition of their losing all title to the land which they had formerly acquired, that land remaining vested in the persons who were the owners of the adjoining property from whom it had been taken, and from whom after the forfeiture it could not be displaced but by a renewing Act. But nothing, I think, turns in reality upon this point, although it was very much discussed before your Lordships, because in reality the case turns upon the point which was discussed fully in argument before the learned Judges in the Court below; and in their view of that point I entirely concur, namely, that if the land be taken for the general purposes of the railway, not for the purposes of making the railway itself, but for the purpose of giving accommodation, with respect to which there was particular provision made either in the special Act or in the general Act of Parliament, that land is not within the category of lands to be dealt with under the 120th section. That is the short point upon which I think this case really turns: we shall see presently whether the facts of this case apply to it. Now in the case before us, extracts are given from various Acts of Parliament, and they are correctly extracted as I have had occasion to ascertain, and by the Lands Clauses Consolidation (Scotland) Act, which was passed in 1845, it is enacted by § 12, that "In case the promoters of the undertaking shall be empowered by the special Act to purchase lands for extraordinary purposes, it shall be lawful for all parties who, under the provisions herein before contained, would be enabled to sell, feu, and convey lands, to sell, feu, and convey the lands so authorized to be purchased for extraordinary purposes." Then the 13th section is, "It shall be lawful for the promoters of the undertaking to sell the lands which they shall have so acquired for extraordinary purposes, or any part thereof, in such manner and for such considerations and to such persons as the promoters of the undertaking may think fit, and again to purchase other lands for the like purpose, and afterwards sell the same, and so from time to time, but the total quantity of land to be held at any one time by the promoters of the undertaking for the purposes aforesaid shall not exceed the prescribed quantity."

Now these being the sections with respect to lands so purchased, we find, that there is nothing said there as to any necessity for selling the land within a given time; on the contrary, these lands may be sold and disposed of from time to time, and other lands may be bought. There is nothing said there about their vesting in the adjoining proprietors, nor is there anything said about that which appears in another clause, namely, that there shall be a right of preemption given to the owners of the adjoining lands in respect of the property which was about to be disposed of. None of those requisites appear to apply to lands purchased for extraordinary purposes. But they may be sold from time to time, and if so sold the company are enabled to purchase other lands for like uses. Your Lordships will see at once that there may be very reasonable grounds for drawing that distinction. With respect to lands taken compulsorily from the proprietor, nothing can be more just and reasonable than this, that if the works be abandoned, or if, *quoad* those lands, they be abandoned, nothing can be more right or just than that those lands so compulsorily taken should revert to the persons from whom they had been so taken. The payment for them might be a question for an arbitrator: that I do not go into, but that in some shape the persons who have had their lands taken away from them compulsorily for a particular purpose should, if that purpose fails, be entitled to have those lands again vested in them, is right and reasonable. But these lands which are required for extraordinary purposes are lands which are only taken with the goodwill of the proprietor; and the only power which is given by the Act with respect to them is, not a special power given to the railway company to purchase compulsorily, but a power given to all persons holding a limited interest to part with their interest in that property, when it is wanted for the extraordinary purposes of the railway. But still it is done by a voluntary agreement, and nothing can be forcibly taken from the proprietors for that purpose. On the other hand, with reference to the character of the works of the railway itself, it seems to me to be very reasonable, that there should be a definite time within which it should be ascertained whether or not the railway can be properly carried into effect. It is not to be suspended for an indefinite time over the heads of the proprietors. And accordingly there is a term given, I think of three or four years, for the purchase of the land, and of five or six years for the completion of the works, and within that time the proprietors of the land are to be informed whether their lands are to be taken from them or not. And within that time the railway company should know to what extent they can reasonably expect to be able to carry on their works. It is without any question that they should know their own minds by that time. But with regard to the additional extraordinary purposes the case is different. Those purposes are defined in one of the clauses of the Railway Clauses Consolidation (Scotland) Act, 1845, which says, that these extraordinary purposes shall be "for the purpose of making and providing

additional stations, yards, wharfs, and places for the accommodation of passengers, and for receiving, depositing, and loading or unloading goods," and so on. Of course we all know that a variety of circumstances may from time to time arise in the course of the next hundred years to come, which may render it necessary that further accommodation should be provided; and therefore it would be contrary to all good sense to hold, that this clause was a clause which was to limit it within any definite period, and not a clause which could be exercised voluntarily with regard to those things which they might wish to secure as occasion required.

The only argument against that construction which appeared to me to have any apparent force in it was a clause in the Act which was mentioned in the argument, and which is a very well known clause, namely, that when the time has expired for the completion of the works, the powers of the Act shall cease as to all works which are not completed. Then in the definition of works, it is said, that works shall include railway stations, and so on. But I think that clause must be read with a reasonable construction. In all these clauses the meaning of the words is carefully defined, and I apprehend it would be supplied if it were not so. The clause is to be taken with reference to the sense and context of the Act. Now it would be utterly beyond all common sense and reason to say, that, when fresh powers are given for acquiring land for these extra works, which comprise selling certain portions of land, and buying other lands for the same purposes, all those are to be said to cease, not only with regard to portions of railway which have never been constructed, and for which, of course, no accommodation would be wanted, but also as regarded a railway which is already constructed, and which would require further accommodation. I think that would not be the true and reasonable construction of the Act.

And then, when you turn to the special Act, which is before us in this case, there were special Acts, by which the Terminus Railway Company at Glasgow was authorized to buy land, first to the extent of 30 acres, and afterwards 20 acres more, making altogether 50 acres, which Parliament considered might properly be wanted for the purposes of this railway. The circumstances which occurred were these: The Terminus Company bought the land in question. The Terminus Railway was bought by the Caledonian Company, and the Caledonian Company became so possessed of this land; and being so possessed of this land, the appellants, the City of Glasgow Union Railway Company, were authorized to buy the land, including this portion which had been bought by the Caledonian Railway Company. There was a sort of bargain made (which has nothing at all to do with the merits of the case) by which the appellant company did not take all that it was authorized to take under the powers of its Act, because it was inconvenient to both companies that it should do so, but an arrangement was entered into, by which the respondent company agreed to hand over part of this land to the appellant company. But that being so, one question which had been raised is this: They say, You never wanted this land for the purposes of the railway company at all. Upon that ground the Lord Ordinary proceeded, and gave his decision, which upon a reclaiming note was varied by the Court of Session. The opinion of the Lord Ordinary was, that the City of Glasgow Terminus Company had never wanted this land. He said, You have acquired it a long time since, and up to this time you have not used it. You do not say whether you are going to use it or not, and indeed you have let a portion of it for a brickfield. Now I apprehend, if there be one thing clearer than another, it is the decision of your Lordships in the case of *Brown* v. *The Stockton and Darlington Railway Company*, 9 H. L. C. 246; that the engineers of a railway line, acting *bonâ fide*, are to be taken as conclusive judges of what is or what is not necessary for the purposes of the company. And in this case the accommodation being wanted for a large city like Glasgow, and it not being possible to foresee at the moment the whole extent of the accommodation which might be wanted, but it being easy to see that greater accommodation might be wanted, I apprehend it is not an incorrect or improper interpretation of the Act to say, that they may make a reasonable and proper estimate of the amount of their prospective traffic, and that they are not positively obliged to have recourse to this very inconvenient mode of procedure, in a place like Glasgow, namely, to purchase a bit of land, and when they have improved the property all round that land, by bringing traffic to that piece of property, to purchase the next bit at an enhanced price, and so to go on purchasing bit by bit at an enormous price instead of purchasing the whole at one time, and then using it for providing the required accommodation from time to time as it is wanted. I apprehend, that the legislation upon this subject has been wise, in that it has provided, that they may acquire from time to time not more than fifty acres at once, and that they may from time to time sell that which they do not want in one place, in order that they may purchase that which they do want in another.

Now, I apprehend, that the question which has been raised upon the term "superfluous land" really does not arise in this case, because I hold this land ought to be exempt from that 120th clause altogether. If it were necessary to determine the question whether these lands were superfluous lands or not, I should say, that the fact of their being used for a brickfield, until the time when they would be required for railway purposes, would not render them superfluous in any sense applicable to this subject matter.

Further than that: it was said in argument, that the very fact of their selling the lands shews them to be superfluous. But it would be a most extraordinary construction of this Act to say, that,

when the Legislature thinks proper to authorize the Act of the Caledonian Railway Company by which they have compulsory power for taking land, and when the Glasgow City Union Railway Company obtain compulsory powers of taking the Caledonian Company's land, that then the Caledonian Company must be held not to want the land which the other company can compulsorily take from them, and that because they do not want it, it should be held to revert to the proprietors. It seems to me, that that would be a confusion of ideas which could introduce nothing but mischief into the interpretation of this Act, which was intended to give a large and wide scope for providing the accommodation required for the public, and to allow them to purchase what was wanted from time to time, and to sell from time to time. I concede the argument, that the time had expired, by which, if the property had been acquired under the 120th clause, it would have been forfeited to the appellant company; but I cannot agree that this land is subject to the operation of that clause.

There is one other point which I should notice with respect to the limits of deviation. It has been pressed upon us very much, that the 120th clause applies to all lands within the limits of deviation which could have been taken by the railway company compulsorily. I think there is a great fallacy in that argument. If they were taken not compulsorily under the Act for the purpose of construction of the railway, but were taken afterwards for extraordinary purposes, for enlarging the stations and so forth, then they are lands which, having been within the limits, could at one time have been taken, but which could not be taken when once the company had determined to set out their line in a different direction, and they are like all other lands in the market, open to the company to go and make a bargain with the owner. The owner is willing to make a bargain; he knows that his lands are not to be taken compulsorily; he is out of all danger in respect of that, but he enters into a bargain with reference to his lands like any other person. It is a voluntary bargain with the company, who desire to purchase the lands for these extraordinary purposes.

Upon these grounds I hold, and I trust your Lordships will hold, that the Court of Session has come to a right conclusion, and that this appeal should be dismissed with costs.

LORD WESTBURY.—My Lords, I have very few words to add to what has been said by my noble and learned friend on the woolsack. Two sets of powers are given by the Railways Act to a railway company—one, a set of compulsory powers, by which, with regard to lands lying within the limits of deviation they may compel unwilling proprietors, and enable incompetent proprietors to part with their lands; and another set, by which they are left to acquire lands by private treaty and agreement, in the same manner in which any ordinary person may acquire them. It was quite fit and reasonable that a different destination should be given to lands acquired under these separate powers, provided the lands were not required for the railway. Accordingly we naturally expect that lands included within the limits of deviation, and taken by compulsory powers, should, if not wanted for the railway, be restored to the proprietors from whom they were perforce taken. The difference between the two cases is plain from the nature of the thing, as well as from the contrast between the powers of disposal given with respect to lands acquired compulsorily by virtue of the Act, and the powers which are extended to lands acquired by purchase. The company is left to deal with the lands which they have acquired by private treaty, in like manner as any other ordinary proprietor might do. They are limited with respect to these lands in point of quantity, but by the 12th and 13th clauses of the Lands Clauses Consolidation (Scotland) Act they are left at liberty to sell those lands from time to time and to acquire other lands. The whole contest, therefore, that these lands, which were acquired by private treaty, became by disuse and lapse of time superfluous lands within the meaning of the 120th section, is a mere mistake. The lands that come within the meaning of the 120th section are not lands acquired by private agreement. The contrast between the 13th section and the 120th section proves that, I think, beyond the possibility of doubt.

There is only one point on which, for some little time, I felt some difficulty. It was this, whether a small portion of the 12,000 yards in question being within the limits of deviation could be regarded as acquired by private treaty. I think that is effectually removed when you consider the fact, that *de facto* the lands were not bought by the company by private treaty until after the compulsory powers had expired; and I have no difficulty in holding, that the power of buying land by private contract will include lands lying within the limits of deviation after the compulsory powers of taking those lands have come to a termination.

It will be a satisfaction to the appellant company to feel, that by the decision of your Lordships' House they get a good title, and in return for the benefit they so get they must pay the costs of this appeal.

LORD COLONSAY.—My Lords, I am entirely of the same opinion.

Interlocutor affirmed, and appeal dismissed with costs.

Appellants' Agents, M'Grigor, Stevenson, and Fleming, Glasgow; Murray, Beith, and Murray, W.S.; Martin and Leslie, Westminster.—*Respondents' Agents*, Hope and Mackay, W.S; Grahames and Wardlaw, Westminster.