less, because, however good the title, no liability could be established against the Duke as the heir of the Marquis. If that were to be held to be law, I should not be prepared to say that the pursuer would be entitled to uplift the consigned money; because, as I construe the agreement of 1853, the relief to be effectuated as a condition of uplifting the consigned money was not relief which might be terminated at any time by the heirs of the granter of the obligation denuding of the worthless superiority, but relief to be permanently afforded by these heirs themselves of a burden which, in its nature, is permanent.

In any view, I am of opinion that the pursuer, on whom the *onus* rests, has not established that he is now entitled at once to uplift the consigned money; and that is the only question which can be decided under this summons. By allowing the money to remain consigned as a security against the contingency of a singular successor in the superiority being unable to afford relief, the pursuer is in no worse position than the owner of warrandice lands—the annual proceeds being enjoyed by him in the meantime so long as that contingency has not occurred. Whereas, if the money were uplifted and the contingency meant to be provided against should then occur, the defender would be in the position of having paid £1500 for relief from a permanent burden of which he was no longer to be relieved at all.

My opinion, upon the whole, is that, in the most favourable view for the pursuer, his action is premature; and that, as he does not ask to have it sisted with a view to further proceedings against the Duke, it ought to be dismissed.

Lord Barcaple and Lord Kinloch returned opinions concurring in effect with the opinions of the consulted judges.

At advising—

Lord Justice-Clerk, Lord Cowan, and Lord Benholme concurred with the majority.

Lord Neaves concurred with Lord Deas and Lord Ormidale, holding (1) that upon a fair construction of the obligation of relief, it held good against the heirs as well as the successors of the granter; (2) that that being so, the defender was entitled under his bargain to hold the consigned fund as a security unless it appeared that he was in a position to get relief as well from the heirs as from the singular successors of the granter; and (3) that the debt was not and could not be put in that position now, because an obligation of this sort did not pass *ipso jure* with the *dominium utile*, but required a special assignation from the original grantee or his heirs, which was not tendered, and which indeed could not be got in the present case.

The Lord Ordinary's interlocutor was recalled in conformity with the opinions of the majority of the Court, and decree was granted for the amount —the consigned fund, together with the differences of interest between bank-rates and five per cent., from the date when the defender was called upon to refund and concur in getting up the money.

Agents for Pursuer—Dundas & Wilson, C.S.
Agent for Defender—John Gillespie, W.S.

Saturday, February 15.

FIRST DIVISION.

ADAMSON'S TRUSTEES *v.* SCOTTISH PROVINCIAL ASSURANCE COMPANY.

Insurance—Life Policy—False Declaration—Material Concealment — Suicide — Issue. In an action for recovery of sums contained in policies on life of deceased, counter issues adjusted by the Court to try questions of false statement in the declarations by the deceased, and wrongful failure on his part to disclose facts material to the risk undertaken by the defenders.

Adamson's trustees sued the defenders for payment of certain sums contained in two policies of insurance effected with the defenders on the life of the late Mr Adamson. The defenders pleaded in defence (1) that the policies libelled on were void, and insufficient to constitute any legal claim against the defenders, in respect that the matters set forth in the relative declarations by the deceased Mr Adamson were not truly and fairly stated; *et separatim*, in respect that information materially affecting the assurances thereby effected was unduly withheld from the defenders by the deceased: And (2) that pursuers were not entitled to recover under the policies in question, in respect that the assured died by suicide, in the sense of the policies libelled.

The averments upon which these pleas in defence were founded were to the following effect:—It was alleged that Mr Adamson, with a view to obtaining the said policies, subscribed and delivered to the defenders declarations containing, or professing to contain, particular information in regard to his age, health, habits, and other matters. In these declarations Mr Adamson set forth that he had not withheld or concealed any circumstance tending to render an assurance on his life more than usually hazardous, and he agreed that said declarations should be the basis of contract between him and the defenders, "and that, if any untrue averment is contained in this declaration, all sums which shall have been paid to the said company upon account of the assurance made in consequence thereof shall be forfeited, and the assurance shall be absolutely null and void." In like manner, by the terms of the policies it was expressly declared that what was set forth in the said declarations or otherwise in regard to the assurance should be the basis of the contract; and that "if it shall hereafter appear that any material information has been withheld, or that any of the matter set forth have not been truly and fairly stated, then all the monies which shall have been paid on account of this assurance shall be forfeited, and the assurance shall be void." It was also by the said policies provided that the assurances thereby effected should at all times and under all circumstances, be expressly subject to the several conditions printed on the back thereof. By the third of these conditions it was, *inter alia*, provided that "policies granted to persons on their own lives become void if they die by suicide, duelling, or by the hands of justice; this, however, does not extend to policies which have been *bona fide* assigned to third parties for onerous causes, and of which assignment notice shall have been given to the office previous to the death, nor does it extend to assurances effected by one person on the life of another." The deceased, also, in said declarations, stated and represented that his ordinary medical

attendant was Dr Dyce, of Aberdeen, and that Dr Dyce had, as such ordinary medical attendant, actually attended him five or six years before.

The foresaid declarations, subscribed by the deceased William Adamson, contained various statements and representations which were untrue. In particular, the statements and representations therein made by the said deceased to the effect that the said Dr Dyce was his ordinary medical attendant, and as such had, in fact, attended him during an illness which he had five or six years previously, were altogether untrue. The statements and representations therein made by the said deceased with regard to his health were also inconsistent with fact, and did not truly and fairly disclose the whole facts and circumstances relating to the said matter. The said deceased also unduly withheld from the defenders material information, and particularly touching his health and habits, which was calculated to render an assurance more than usually hazardous, and which ought to have been communicated to the defenders.

During the years 1858 and 1859, the said deceased laboured for a considerable period under illness of a serious nature. His nervous system was very much depressed, His mind was also to some extent affected, and he had occasional attacks of suicidal mania. Dr Dyce was not his medical attendant during his illness, and was not aware, at the time when the policies sued on were issued, that the deceased had been so affected. The deceased, however, was well aware of these circumstances at the time when he subscribed the aforesaid declarations; and he also knew that an uncle of his had committed suicide, having died by his own hand, but he concealed all of these facts and circumstances from the defenders. Said circumstances materially affected the risk of insuring his life; but the deceased, notwithstanding, withheld all information regarding them from the defenders, and failed to communicate to them the name of the medical men, Dr Sutherland and Dr Kilgour, whom he consulted during said illness.

The said Mr Adamson died by suicide on or about the 24th August 1866, he having, of that date, voluntarily inflicted severe wounds upon his own person, which caused death by hæmorrhage within an hour or two.

The pursuers proposed an issue in the usual terms, and the defender proposed the following counter issues.

"(1) Whether the declaration, No. 20 of process, referred to in the said policy, No. 6 of process, contains any untrue averment?

"(2) Whether, by concealment or non-communication of fact or facts, material to the risks undertaken in the said policy, No. 6 of process, the defenders were induced to grant the said policy?

The third and fourth issues were in similar terms, and were applicable to the other policy.

(5) Whether the said William Anderson died by suicide?

The Lord Ordinary (Mure) reported the case with this note:—

"The parties in this case differ as to the terms of the 1st, 2d, 3d, and 4th counter issues proposed for the defenders. With reference to the 1st and 3d of those issues, the pursuers maintain that they are too general, and also that the materiality as well as the truth of the averments should be put in issue; while the form of the issues is, on the other hand, supported by the defender on the authority of the case of *Anderson*, Clark's House of Lords Reports, 4844.

"As regards the 2d and 4th counter issues, the pursuers object to them also, as being too general in their terms, and as not putting specially in issue the nature of the fact or facts to which the attention of the jury is to be directed; and to the extent of having the words 'as to the health and habits,' of the said William Adamson inserted in the issue, their objection seems to be supported by the style of the issue frequently adopted in such cases."

Gifford for Pursuers.

Watson for Defenders.

The Court adjusted the following issues:—

"It being admitted that the defenders issued the policies of insurance, No. 6 and 7 of process, in favour of the said William Adamson on his own life, and that the premiums of insurance falling due thereon were all regularly paid:—

Issue for Pursuer.

"Whether the said William Adamson died on or about 24th August 1866; and whether, under the said policies, the defenders are indebted and resting-owing to the pursuers, as executors of the said William Adamson, the sums of £1000 and £5000, contained in the said policies respectively, or any part thereof, with interest at five per cent. from 30th November 1866?

Counter Issues for Defenders.

Or,

"(1) Whether, in the declaration, No. 20 of process, referred to in the policy, No. 6 of process, the said William Adamson falsely stated that Dr Dyce, therein mentioned, was his ordinary medical attendant; that as such he had attended him during an illness he had six years before, and that the said William Adamson never suffered from any disease or disorder tending to shorten life?

"(2) Whether in entering into the contract of insurance contained in the said policy, No. 6 of process, the said William Adamson wrongfully failed to disclose to the defenders facts material to the risk undertaken by them in the said policy?"

The third and forth issues were in similar terms, and related to the second policy.

"(5) Whether the said William Adamson died by suicide?"

Agents for Pursuers—M'Ewen & Carment, S.S.C.
Agents for Defenders—Cheyne & Stuart, W.S.

Saturday, February 15.

BOYD *v.* NORTH BRITISH RAILWAY CO.

Agreement—Arbiter—Access to sea-shore. Circumstances in which a railway company *held* bound to enter into a reference for determining as to construction of access to sea-shore, or compensation therefor to be paid to a proprietor.

In 1843 the pursuer, Mrs Waddell Boyd, purchased the property of Nellfield, lying along the sea-shore, in the vicinity of Burntisland. In the following year the Edinburgh and Northern Railway Company (now amalgamated with the defenders) applied for their Act of Incorporation. The railway was to pass along the shore, between the pursuer's house and the sea, and the company having