pursuer, Sir George Clerk, holds the lands of Lasswade, it is declared "that it shall not be lawful to, nor in the power of my said heirs of tailzie, or any of them, to set tacks, for any period whatever, of the whole or any part of the coal lying under and beneath the whole lands and barony of Lasswade, for any term whatever, nor to communicate the level of the said coal of Lasswade to any neighbouring colliery." The prohibition to let leases of coal is removed by the Statute 6 and 7 William IV. c. 42; which gives power to let leases of minerals for thirty-one years, notwithstanding the prohibitions of any entail. The question now raised is, How the remaining prohibition "to communicate the level of the said coal of Lasswade to any neighbouring colliery," is to be dealt with?

I am of opinion that this prohibition is ineffectual, in respect that it is not a prohibition which can competently be fenced by irritant and resolutive clauses. It is not every clause which may be put into an entail which can be so fenced. Some are sanctioned by long usage, and their close connection with the object of perpetuating families, such as the obligation to bear a particular name and arms. But, generally speaking, it may be said that it is not within the competency of an entailer to dictate the whole future administration of his estate, and enforce his dictates by irritant and resolutive clauses. Entails are not intended to regulate administration, but to prevent alienation; and it is well known that it is mainly as forming acts of alienation that extraordinary acts of administration, such as granting long leases, have been disallowed. This clause about the non-communication of levels I consider simply as a direction in regard to administration. I do not see that it can be considered, in any rational view, a matter touching on alienation. There is no alienation implied in communicating a level. It may be a good thing or a bad thing in itself, in regard to the wellbeing of the entailed estate. Properly speaking, it is good or bad according to circumstances. In the present case there is the strongest evidence from men of skill that the communication of the level will be to the great benefit of the entailed estate. But however this may be, it is simply a matter of administration, and not capable of being enforced by irritant and resolutive clauses. If the entailer had declared that his entailed estate should never (any part of it) be put under crop, or that some particular kind of crop should never be grown on it, I suppose no one would contend that the prohibition could be enforced by irritant and resolutive clauses. If he had declared that there should never be any communication on the surface between the entailed property and the next adjoining estate,—that there should never be a road from the one into the other, but always a wall of 20 feet high kept up between the properties,—I think he would have engrossed an ineffectual prohibition. But so equally in the present case.

It was suggested that, even without any express prohibition, an heir of entail was bound to avoid communicating a level, as an act equivalent to throwing away the protection of the property against over-drainage; like knocking down an embankment on the bank of a turbulent stream. To test this argument, all reference to the subject must be supposed left out of the entail; and how, then, would matters stand? I cannot for a moment suppose it competent to a succeeding heir of entail, on mere general grounds, and without any express prohibition, to have the heir in possession interdicted in all circumstances (for such is the demand) from communicating a level. The reason is that there is nothing in the nature of the case making the act always one of injury to the entailed estate. It does not necessarily follow that the lower workings will be drowned. The reports of the scientific men prove that arrangements may be made so as not merely to avoid all injury, but to produce large benefit to the entailed estate. Two adjoining heirs of entail may so contrive as to benefit both estates equally. It is, no doubt, conceivable that the act may be threatened to be performed in such a way as to create injury; so may every possibly beneficial act. In such a case there may be special means of prevention applicable to the special circumstances. But what the defender here asks us to do is to pronounce that, in no circumstances whatever, can there be a communication of level. I cannot so find. With regard to the special circumstances, the reports are all in favour of the measure. I am of opinion that, both on the general point, and with reference to the special circumstances, the pursuer is entitled to decree of declarator.

I would only add that I do not proceed on the terms of the Statute 6 and 7 William IV. c. 42. That statute permits leases of minerals. But the communication of levels is not a necessary incident of a lease. There may be a lease, and a beneficial lease, without such communications. I cannot infer from a permission to lease a permission to communicate levels. To do so is to beg the question. But the more general ground on which I have proceeded is sufficient for the determination of the present case.

The Court accordingly pronounced judgment to the following effect:—Find and declare that the pursuer has right, notwithstanding the clause of restriction in the deed of entail of 1782, to communicate the level of the coal workings at Loanhead to the neighbouring colliery of Dryden, in so far as such communication may be necessary and beneficial to the working out of the minerals at Loanhead, and not prejudicial to the mines of Lasswade, but under the condition that, so soon as the purpose for which this communication is made is fulfilled, the pursuer and his lessees shall be bound and obliged to build up the communication made between the two fields.

Agent for Pursuer—Stuart Neilson, W.S.
Agent for Colonel Henry Clerk, R.A.—John W. Tawse, W.S.

Wednesday, March 20.

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

Railway—Obligation—Clause—Construction.

The Caledonian Railway Company had in 1849 leased the Barrhead Railway for 999 years at a rent of £16,500. In 1851, under the Caledonian Railway Arrangements Act, it was agreed that this rent should be reduced to £11,250 per annum, and that the Caledonian Company should issue to the shareholders of the Barrhead Company £82,500 of the ordinary stock of their Company, which was then selling in the market at from 27 to 30 per cent,

as the price of the redemption of the £5250 of yearly rent. In 1869 an Act was passed admitting the Glasgow and South-Western Company to share equally with the Caledonian Company in the benefits of the Barrhead lease, upon the condition that the South-Western Company should pay one-half the year's rent, and should repay to the Caledonian Company "a sum equal to one equal moiety of all sums expended by the Caledonian Company on capital account, prior to the vesting period (1st August 1869) in connection with the Barrhead Railway."

Held that the £82,500 stock issued by the Caledonian to the Barrhead Company in redemption of rent was to be considered a payment on capital account, in terms of this section, and that the Glasgow and South-Western were bound to relieve the Caledonian of one-half, taken at its nominal value.

This was an action of declarator and payment at the instance of the Caledonian Railway Company against the Glasgow and South-Western Railway Company, in which the former Company sought to have it declared that the sum of £82,500 of the stock or ordinary share capital of the pursuers, set apart and appropriated by them for the Glasgow, Barrhead, and Neilston Direct Railway Company, under and in terms of "The Caledonian Railway Arrangements Act, 1851," was and is a sum expended by the pursuers on capital account prior to the 1st day of August 1869, in connection with the Glasgow, Barrhead, and Neilston Direct Railway, within the meaning of the 4th section of "The Caledonian and Glasgow and South-Western Railways (Kilmarnock Joint Line) Act, 1869;" and that the defenders, under and in terms of the said last-mentioned Act, are bound to repay to the pursuers, *inter alia*, a sum equal to one equal moiety of said sum of £82,500; and farther, that the sum of £4000 paid by the pursuers to the said Glasgow, Barrhead, and Neilston Direct Railway Company, under and in terms of the said Caledonian Railway Arrangements Act, 1851, in full of all arrears of guaranteed dividend due at the date of the passing of the last-mentioned Act to the said Glasgow, Barrhead, and Neilston Direct Railway Company, also was and is a sum expended by the pursuers on capital account prior to the said 1st day of August 1869, in connection with the said Glasgow, Barrhead, and Neilston Direct Railway, within the meaning of the said 4th section of "The Caledonian and Glasgow and South-Western Railways (Kilmarnock Joint Line) Act, 1869;" and that the defenders, under and in terms of the last-mentioned Act, are bound to repay to the pursuers, *inter alia*, a sum equal to one equal moiety of the said sum of £4000. The pursuers finally concluded for payment to them of the one-half of each of the above sums by the Glasgow and South-Western Company, with interest since 1st August 1869.

The circumstances under which the action arose were as follows:—The pursuers were, prior to 1869, lessees, for a period of 999 years, from 1849, of the Glasgow, Barrhead, and Neilston Direct Railway, by virtue of the Caledonian Railway (Glasgow, Barrhead, and Neilston Direct Railway Lease) Act, 1849. By this Act the pursuers were taken bound to pay a guaranteed dividend of 6 per cent. upon £150,000, being the original capital stock, and 5 per cent. upon another £150,000, being the amount of new shares, and said two sums being the whole share capital of said railway. The said dividends, which the pursuers were thus bound to pay, amounted in all to £16,500 per annum, and the pursuers were also taken bound to pay to the holders of the original shares of said Company one-half of the surplus profits, if any, after paying said dividends, accruing from traffic on the said line of railway. Besides the above dividends and half profits, the pursuers also took over debts of the said Glasgow, Barrhead, and Neilston Direct Railway Company, amounting to £50,000. Soon after the passing of this Act, the Caledonian Railway Company got into embarrassed circumstances, which necessitated an arrangement with their creditors, which was effected by "the Caledonian Railway Arrangements Act, 1851." This Act altered the relations between the Caledonian Company and the Glasgow, Barrhead, and Neilston Direct Railway Company, and, amongst other things, provided for certain arrears of the guaranteed dividend.

By section 26 of the said Caledonian Railway Arrangements Act, 1851, it is enacted as follows:—"In lieu of the fixed dividends, and contingent increase thereof, by 'the Caledonian Railway (Glasgow, Barrhead, and Neilston Direct Railway Lease) Act, 1849,' made payable to the Glasgow, Barrhead, and Neilston Direct Railway Company, for behoof of the proprietors of shares in that Company, the Company (pursuers) shall pay to the Glasgow, Barrhead, and Neilston Direct Railway Company, for behoof of the said proprietors, for a period of three years, reckoned from the 1st day of August 1851, a fixed annuity of £10,425, and from and after the expiration of that period, and in perpetuity thereafter, 'a fixed annuity of £11,250.'" This annuity was subsequently increased by "the Caledonian Railway (Crofthead Extension and Amendment) Act, 1853," to £11,437, 10s. By section 39 of said Caledonian Railway Arrangements Act, 1851, it is enacted "that the Company shall, within one month after the first ordinary or extraordinary meeting of the Company held after the passing of this Act, and in manner after mentioned, pay in full of all arrears of guaranteed dividends due to" the parties therein mentioned, up to the first day of August 1851, the sum of £54,000 (that is to say), *inter alios*, to the Glasgow, Barrhead, and Neilston Railway Company, for behoof of the shareholders therein, rateably as aforesaid, the sum of £4000." This sum of £4000 was duly paid by the Caledonian Company to the Barrhead Company in extinction of all arrears up to 1st August 1851.

By section 59 of the said arrangements Act of 1851 it was enacted that, in respect of the abatement from certain guaranteed and preferential dividends payable by the Company, effected by the previous clauses of the Act, and, *inter alia*, of the abatement from the Barrhead Company's guaranteed dividend, there should be added to the consolidated stock of the Company the sum of £667,054. And the following section (§ 60) provided that "out of the said new stock the directors of the Company shall, immediately after the passing of this Act, set apart and appropriate," *inter alia*, "the sum of £82,500 for the said Glasgow, Barrhead, and Neilston Direct Railway Company; and the amounts of stock so set apart for the several Companies hereinbefore mentioned shall be forthwith assigned to, or registered in the names of such persons as shall at the time of the passing of this Act be entitled as ordinary shareholders to participate in the benefit of the fixed annuities hereby made payable to the said Companies respectively, rateably,

and in the proportion of their respective interests therein." The said stock, amounting to £82,500, was thereafter accordingly set apart, and appropriated, and delivered to the said Glasgow, Barrhead, and Neilston Direct Railway Company, in terms of said Act.

The pursuers continued to hold the said Glasgow, Barrhead, and Neilston Direct Railway, as lessees foresaid, and to pay the diminished dividends, and also the dividends upon the foresaid £82,500 of new stock, until the year 1869, when, by virtue of the Act of Parliament after mentioned, the said railway became part of a new line of railway from Glasgow to Kilmarnock, belonging jointly to the pursuers and the defenders. By their Kilmarnock Direct Act of 1865, and Crofthead and Kilmarnock Extension Railway (Deviations) Act 1866, the Glasgow and South-Western Railway were authorised to make a direct line of railway between Glasgow and Kilmarnock. In the same years the Caledonian Railway Company were, through the Crofthead and Kilmarnock Extension Act 1865, and the Crofthead and Kilmarnock Extension Deviations Act of 1866, in conjunction with their existing lease of the Glasgow, Barrhead, and Neilston Railway, secured in a direct route to Kilmarnock, to compete with the Kilmarnock Direct line of the South-Western Company. With a view of obviating the useless expense to both companies involved in the construction of these two competing lines, negotiations were entered into in 1867 and 1868 between the directors and officials of the two companies, which resulted in a memorandum of arrangements, dated 21st November 1867, being entered into between the two Companies and signed by their chairmen, whereby it was, *inter alia*, agreed that the line from the Caledonian South Side Station at Glasgow to Kilmarnock should be joint property, and that the whole expenditure on the Barrhead line, and its extension to Crofthead, in addition to the annual dividends payable to the Barrhead guaranteed Company, should be shared in equal proportions between the two Companies. A formal deed of agreement carrying out the terms of the above memorandum of arrangement was thereafter entered into on 17th December 1868.

In terms of the foresaid agreement, a bill was promoted in Parliament in the session of 1868-1869, and that bill was passed into an Act entituled "The Caledonian, and Glasgow, and South-Western Railways (Kilmarnock Joint Line) Act, 1869." By section 4 of the said Caledonian and Glasgow and South-Western Railways (Kilmarnock Joint Line) Act, 1869, it is enacted as follows:—"The South-Western Company shall repay to the Caledonian Company a sum equal to one equal moiety of all sums expended by the Caledonian Company on capital account, prior to the vesting period, in connection with the Barrhead Railway, after deducting therefrom all sums, if any, received by the Caledonian Company in respect of the sale of lands acquired for the purposes of the Barrhead Railway, and on such repayment being made, all the estate, property, rights, privileges, powers, and authorities which are possessed, held, or enjoyed, or are exerciseable by the Caledonian Company, of or in respect of, or in connection with the Barrhead Railway, and the stations, sidings, works, and conveniences of whatever description, and generally all other subjects of every description falling under the said lease of the Barrhead Railway, or the Acts relating thereto (excepting the lands, if any, sold as aforesaid, or paid for by the South-Western Company to the Caledonian Company, under the provisions of this section), are, together with the said lease itself, as from the vesting period, vested in the two companies jointly, for their joint and separate use and benefit, on equal terms in every respect, but under burden of the said rent or annuity of £11,437, 10s., and subject to the provisions hereinafter contained, and shall and may be possessed, held, used, exercised, and enjoyed by them and each of them, for and during the residue of the term of 999 years for which the Barrhead Railway is leased to the Caledonian Company, as fully and freely in every respect as if the name of the South-Western Company had been originally inserted in the before mentioned lease, and the Barrhead Lease Act, 1849, as joint lessee with the Caledonian Company."

Certain other payments by the one Company to the other were provided for by subsequent sections of the Act, and section 55 thereafter enacted that "The payments by sections 4, 7, 11, and 21 respectively of this Act, required to be made by the South-Western Company to the Caledonian Company, and *vice versa*, shall respectively be made within six months after the vesting period, and shall respectively bear interest at the rate of five per cent. per annum from the vesting period until payment; and such respective payments may be made by the striking of a balance between the two Companies, in respect of the sums payable by each to the other of them, and by the payment of such balance to the Company to whom it shall be found due by the Company from whom it shall be found due."

Preliminary to the agreement of 1868, which preceded the joint Act (as averred by the South-Western Company) a Memorandum, in the following terms, of the total expenditure on the Barrhead Railway, initialed by the accountant of the Caledonian Company, was handed by the Secretary of the Caledonian Company to the Secretary of the South-Western Company:—

"*Caledonian Railway.*
302 *Buchanan Street, Glasgow,*
15th November 1867.
Memorandum from Accountant's Office to Secry.
BARRHEAD RAILWAY.

Total expenditure to 31st July 1867, ...	£369,388	17	0
Deduct amount of Barrhead Company's capital shares, £275,000, and loans £25,000, . . .	300,000	0	0
Thus expended by Caledonian Co.,	£69,388	17	0
Add Crofthead Extension, . .	21,585	5	9
	£90,974	2	9

The annual amount of annuity payable to the Barrhead Company by the Caledonian is—

On old shares, £150,000, @ 4½ per cent., ...	£6,750	0	0
On new shares, £125,000, @ 3¾ per cent., ...	4,687	10	0
	£11,437	10	0

Init. G. G."

The above sum of £369,388, 17s. is the sum shown in the published accounts of the Caledonian Company as the sum expended on the Barrhead Railway at 31st July 1867. The South-Western Company farther averred that the whole subsequent negotiations proceeded on the understanding by

both Companies, and in reliance by the Glasgow and South-Western Company, that the above Memorandum showed the whole expenditure of the Caledonian Company on the Barrhead Railway. After the passing of the Act, an account of the expenditure of the Caledonian Company, under section 4 of the said Act, was, on 31st August 1869, forwarded by the accountant of the Caledonian to the accountant of the South-Western Company. This account bore no reference to the sums, the moiety of which was claimed in this action. On 8th January 1870 the secretary of the South-Western Company addressed a letter to the Caledonian Company, requesting a more detailed account of the said expenditure. Such account was rendered, and still contained no notice of either of the items now claimed. It was not till a still later date that an account, bearing to be "details of capital expenditure by the Caledonian Company for the Barrhead Railway, exclusive of the share capital on which guaranteed dividends are payable, and which contained the two sums of £82,500 and £4000 now claimed, was rendered to the South-Western Company. The pursuers thereafter claimed payment of the one-half of the said sums, as expended on capital account in terms of section 4 of the said Joint Line Act of 1869, which payment the defenders refused to make.

The defenders stated that no mention had been made of any such sums in any of the negotiations which preceded the passing of the said Joint Line Act of 1869, nor did either of the said sums appear as expended on capital account in connection with the Barrhead Railway in any of the statements or accounts then interchanged between the Companies, and in reliance on which the agreements for the Act were entered into, and the Act obtained. Further, no such sums were entered in any of the annual published accounts of the Caledonian Company as part of their expenditure upon, or in connection with the Barrhead Railway. The arrangement between the Companies was entered into for the express purpose of saving the expenditure of capital, and if either of the sums now claimed had been disclosed while the negotiations were pending, as forming a part of the expenditure on the Barrhead line, they would have formed a most material element in the said negotiations and arrangements, and the Glasgow and South-Western Company would not have agreed to the terms to which they did agree. The said arrangements were, however, concluded without the said claims being in the view or contemplation of either of the said Companies. No part of the said sum of £82,500 was ever paid by the Caledonian Company to the Barrhead Company, or expended by the Caledonian Company on capital account in connection with the Barrhead Company—shares only to that nominal amount having been authorised to be delivered by the former to the latter Company. At the date when the Caledonian Company Arrangements Act of 1851 was passed, the market value of the shares of that Company was 21¾ per cent., and at 31st January 1852, when the first entry appears in the accounts of the Caledonian Company issued to their shareholders, that the stock under the Arrangements Act had been delivered, the market value of the shares was 30 per cent. Accordingly, at the said date, Caledonian shares to the said nominal amount could have been purchased in the open market at £24,750. Even if the arrangement had been that the Glasgow and South-Western Company were to be liable to the Caledonian Company for a moiety of the said £82,500 stock, their obligation would have been sufficiently implemented by their purchasing and delivering to the Caledonian Company, to be cancelled, stock of that Company of the nominal value of £41,250. The sum of £4000 sued for, being arrears of dividend, forms a charge upon revenue, and is not an expenditure on capital account. The dividends payable to the Barrhead Company were exclusively payable out of the revenues of the Caledonian Company.

The pursuers pleaded, *inter alia*—"(2) The amount of stock set apart and appropriated by the pursuers for the Glasgow, Barrhead, and Neilston Direct Railway Company, under section 60 of the Caledonian Railway Arrangements Act 1851, constitutes a sum expended by the pursuers on capital account in connection with the Barrhead Railway within the meaning of section 4 of the Caledonian and Glasgow and South-Western Railways (Kilmarnock Joint Line) Act 1869, and the defenders are therefore bound, in terms of said Act, to repay to the pursuers a sum equal to one equal moiety of said amount. (3) The said sum of £4000, paid by the pursuers to the said Glasgow, Barrhead, and Neilston Direct Railway Company under section 39 of the Caledonian Railway Arrangements Act, 1851, was also one of the sums expended by the pursuers on capital account in connection with the Barrhead Railway; and under and in terms of said section 4 of the Joint Line Act of 1869, the defenders are bound to repay to the pursuers a sum equal to one equal moiety thereof."

The defenders pleaded—"(2) The defenders are entitled to absolvitor, in respect that neither the stock of the nominal value of £82,500, alleged to have been set apart, nor the £4000 alleged to have been paid by the pursuers, were sums expended by them on capital account in connection with the Barrhead Railway, within the meaning of section 4 of 'The Caledonian and Glasgow and South-Western Railways (Kilmarnock Joint Line) Act 1869.' (4) The whole negotiations and agreement of the pursuers and defenders having proceeded upon the understanding by both Companies, and in reliance on the part of the defenders, induced by the representations of the pursuers, that the whole sums expended by the pursuers on capital account in connection with the Barrhead Railway, were correctly stated by the pursuers in the memorandum of 15th November 1867 aforesaid, the defenders are entitled to absolvitor. (5) Even assuming the pursuers to be entitled to have the said stock of the nominal value of £82,500 dealt with as expenditure on capital account in connection with the Barrhead Railway, the said stock cannot, in the account between the pursuers and defenders, be stated at a higher value than its selling price when delivered to the Barrhead Company, or, at all events, than the selling price at the time when the pursuers were *ex hypothesi* entitled to have a moiety stated against the defenders in account; and in the stating of any account the pursuers must deduct the amount of the dividends of which they were relieved under the said Arrangement Act of 1851. (6) In no view can the pursuers obtain decree of declarator or payment as concluded for with respect to the foresaid sum of £4000, in respect that the same formed a charge, not upon capital, but upon revenue account."

The Lord Ordinary (GIFFORD) pronounced the following interlocutor:—

"*Edinburgh, 5th December* 1871.—The Lord Ordinary having heard parties' procurators, and

having considered the closed record, statutes founded on, and whole process—finds, decerns, and declares in favour of the pursuers, in terms of the first declaratory conclusion of the summons, in reference to the sum of £82,500 of the stock or ordinary share capital of the pursuers, but assoilzies the defenders from the second declaratory conclusion of the summons in reference to the sum of £4000 therein mentioned: Decerns and ordains the defenders to make payment to the pursuers of the sum of £41,250 in manner provided by the 'Caledonian and Glasgow and South-Western Railways (Kilmarnock Joint Line) Act, 1869,' with interest thereon, at the rate of five per cent. per annum, from 1st August 1869, and until paid: *Quoad ultra* assoilzies the defenders from the other conclusions of the action excepting the conclusion for expenses, and decerns: Finds the pursuers entitled to expenses, and remits the account thereof, when lodged, to the auditor of court to tax the same and to report.

"*Note.*—The question in the present case turns upon the true meaning and construction of section 4 of the 'Caledonian and Glasgow and South-Western Railways (Kilmarnock Joint Line) Act, 1869,' which provides, 'The South-Western Company shall repay to the Caledonian Company a sum equal to one equal moiety of all sums expended by the Caledonian Company on capital account prior to the vesting period in connection with the Barrhead Railway.'

"There is no dispute as to a variety of sums which admittedly fall under this clause, consisting of sums of money actually paid away by the pursuers in connection with the 'Barrhead Railway,' or of costs actually spent by the pursuers thereon. All these, it is admitted, must be divided, and one-half thereof repaid by the defenders to the pursuers.

"But besides *cash actually paid*, the Caledonian Railway Company have given off no less than £82,500 of their ordinary capital stock to the shareholders of the Barrhead Railway, and this as a consideration for reducing the rent payable to said shareholders for 999 years from the sum of £16,500 per annum to £11,437, 10s. per annum. The £82,500 of stock was really a redemption of a portion of the tack-duty or annuity which the Caledonian Company had become bound to pay under the Barrhead Lease Act of 1849. The stock so given off or appropriated was part of a larger quantity of stock which was created by the Arrangements Act of 1851, and this stock was created to the extent of £82,500 for the express purpose of being given off to the Barrhead shareholders, 'in respect of the abatement from the aforesaid guaranteed and preferential dividends,' that is, in respect, *inter alia*, of the diminution of the foresaid fixed tack-duty or annuity from £16,500 to £11,437, 10s.

"This £82,500 of stock was actually given off to the Barrhead shareholders, as appears from the certificates in process, and the Caledonian Company has ever since paid dividends thereon.

"Now, although in strictness this £82,500 of stock has not been *spent* or *disbursed in cash*, the Lord Ordinary thinks that it fairly falls under the expression '*expended on capital account.*' It has been added to the Caledonian Company's capital. They are indebted in the amount to the Barrhead shareholders or their successors, and they must pay dividends thereon in all time coming. Though this is not cash disbursed, it is fairly 'capital expended,' and comes within the meaning and intendment of the clause.

"The construction which the Lord Ordinary has adopted is the only construction in accordance with the true meaning of the statutory contract into which the pursuers and defenders entered. The Act of Parliament is just a statutory contract, and is subject to the same equitable rules of interpretation.

"By the Act of 1869 the two companies were in time coming to be *joint proprietors* of this Barrhead line, and the condition of the bargain was, that as the pursuers had in substance bought it, the defenders should repay them *half the price* and half the *considerations* of every kind which the Caledonian had given for it. Now the capital allocated to the Barrhead shareholders was really just as much part of the price or cost as money expended upon the line, and it would be very unfair if the defenders should get half of a line paid for by *capital*, without repaying half that capital. It will be observed that the defenders get the full benefit of the redemption of part of the tack-duty or annuity, for in all time coming they are to pay one-half, not of the original tack-duty of £16,500, but only of the reduced tack-duty of £11,437, 10s. It follows that if they get the benefit of half the redemption, they must pay half the redemption money.

"An attempt was made by the defenders to show that they had been deceived or entrapped into the bargain by the £82,500 capital stock being kept out of view in the communings which preceded the statute.

"The Lord Ordinary is of opinion that he cannot look at these communings to cut down the statute, or even to control or interpret its provisions. It is quite fixed that discussions in Parliament, or its committees, and still less preliminary communings between the parties, cannot be referred to as controlling or over-riding the words of a statute. If there has been fraud or essential error, the only remedy is a new application to Parliament.

"In the present case, however, there is really no room for any allegation of error. The whole prior statutes were before the parties, and are narrated in the joint Act of 1869. These Acts plainly *disclose the* £82,500, and its appropriation; and, although the sum is omitted in the jottings which seem to have passed between the parties, this has arisen from an imperfect examination of accounts which were really before both the contracting parties.

"The £4000 is in a different position; that sum is not expenditure of capital. It is not capital given off or appropriated at all. It is a payment on account of past due dividends, and therefore a payment from revenue, and not from capital.

"An ingenious argument was submitted, founded on the fact that the Caledonian stock was greatly below par in the market when the £82,500 was given off. It is then said to have been selling at 27/30 per cent. The Lord Ordinary cannot give any weight to this circumstance; the full amount of £82,500 was given off; and though the real value at that date might be under par, as it is now greatly above par, it is the nominal value,—the amount of indebtedness, which can alone be looked to, and not the accidental value in the market. The full sum of £82,500 has been 'expended on'—that is debited to—capital account.

"The question as to the £4000 has not caused any extra expense, and the Lord Ordinary has not thought it right to modify expenses."

Against this interlocutor the defenders reclaimed.

Solicitor-General (A. R. CLARK), BALFOUR, and ASHER for them.

WATSON and JOHNSTONE for the pursuers and respondents.

At advising—

LORD PRESIDENT—The decision of this case involves the consideration of several Acts of Parliament, and of the history of a line of railway which now connects Glasgow and Kilmarnock by a more direct route than that originally constructed. Both the Caledonian Railway Company and the Glasgow and South-Western had been for some time considering the desirability of making such a line. The Caledonian had acquired a short line of railway which almost completed a direct route; and the Glasgow and South-Western had resolved to apply to Parliament for a bill authorising them to make a new line. In these circumstances the directors of both Companies determined that the simplest way of attaining their object would be to unite in the undertaking. The result of this determination was embodied in the statute of 1869. The general scheme of such an arrangement is easily understood, and was in the circumstance quite reasonable. The Glasgow and South-Western Company were to desert their proposed new line, and the Caledonian Company were to complete their direct line. In order to make the connection complete it was necessary that four different sections of railway property should be thrown into one. These were as follows, viz.—

1. The Barrhead Railway, which line had been leased by the Caledonian Company for 999 years from 1849.

2. The Barrhead Extension Line, which was the property of the Caledonian Company.

3. The Crofthead Railway, which was to be acquired from the Crofthead Railway Company, and the means of acquiring which were very much in the hands of the Caledonian Company, as they were very large shareholders in it.

4. A portion of the South Side Station, in Glasgow, belonging to the Caledonian Company.

In addition to these four there was also required a short portion of the Kilmarnock Direct Line, which the Glasgow and South-Western Company had been applying for powers to construct. All these separate properties were required before the contemplated line could be completed. The plan upon which the sort of partnership proposed between the Companies was to be carried out, was that the two Companies should have equal interests for the future; and, as regarded the past, an equal division of all expense and all liability. The clauses of their Act of 1869 show that this was the whole scope and intention of the proposed arrangement. In the case of the Barrhead Railway, as already stated, the Caledonian Company were lessees of it for a period of 999 years from 1849: and section 5 of the Act provides that the Glasgow and South-Western Company are to relieve the Caledonian of one-half of the rent which they were to pay to the Barrhead Company while their lease lasted. With regard to the Barrhead Extension Line, the Glasgow and South-Western were to pay to the Caledonian one equal moiety of the expense of constructing that line. The Glasgow and South-Western were also to pay one-half of the deposits and calls previously paid up by the Caledonian as shareholders in the Crofthead Railway Company; and, as regarded the future, each Company was to pay an equal moiety. By section 11 it was provided that the portion of the Caledonian's South Side Station at Glasgow was to belong to the two Companies in consideration of the Glasgow and South-Western paying one-half of the expense of constructing the station. Thus, with respect to the four separate properties to be acquired by the two Companies, there was an undertaking on the part of the Glasgow and South-Western to pay half of the expenses and value. On the other hand, in the 21st section the Caledonian are bound to pay to the Glasgow and South-Western one-half of the expenses which they had incurred in prosecuting their plan for constructing a direct line between Glasgow and Kilmarnock, and more particularly for that portion of the line which was still to be retained as a part of the new scheme. All this goes to show that the principle of the arrangement was an equal division of the whole cost of the various properties required to make up the direct line to Kilmarnock. One of the undertakings of the Glasgow and South-Western Company was an undertaking to pay one-half of the rent which the Caledonian had to pay to the Barrhead Railway Company for the 999 years of their lease of the line, and the amount of which rent had been originally fixed in the lease, and the Act confirming it, at £16,500 per annum; but it had been shortly afterwards reduced to £11,437, 10s., the sum of £5062. 10s. per annum having been redeemed by the Caledonian. Now, the question is, whether that redemption is chargeable to the extent of one-half against the Glasgow and South-Western Company? The lease between the Barrhead Railway Company and the Caledonian in 1849 was arranged upon the footing that the Caledonian was to pay 6 per cent of a dividend to the Barrhead shareholders upon their original capital of £150,000, and 5 per cent upon another £150,000, being the amount of new shares; and over and above they were to pay one-half of the profit when the dividend of the Caledonian Company exceeded 6 per cent.

Now, the interest upon these two sums of Barrhead capital amounted to £16,500, which was the amount fixed by the Act of 1849 as the annuity, or rent to be paid by the Caledonian to the Barrhead Railway Company. This sum was paid until 1851, which was the date of an Act called the "Caledonian Railway Arrangements Act." The history of that Act is notorious. The Caledonian Company had got very much involved, and principally through the enormous amount of their preference stocks, the interest upon which they were paying out of capital.

At that time an arrangement was made, which was given effect to by two clauses of the Act, to which it is therefore necessary particularly to refer. The 26th section provides that, "In lieu of the fixed dividends"—(*reads the section, quoted supra*). For the purposes of this case the larger sum may be regarded as the rent specified in the section which I have just quoted. The 59th section provides that, "For providing the amount of stock"—(*reads the section, quoted supra*). Then this new stock, so to be created, is disposed of by the immediately following section. Among other persons who are to receive shares of the new stock are the shareholders of the Barrhead Railway Company. The words of the 60th section are as follows—(*reads the section, quoted supra*).

Now, taking these sections in connection with section 26, the result is this, that the price paid

by the Caledonian Railway Company for the redemption of £5062, 10s. of the annuity payable to the Barrhead Railway shareholders is £82,500 stock of the Caledonian Railway Company. That stock becomes the property of the Barrhead Railway shareholders, to whom the annuity redeemed had been previously payable. They become to the extent of £82,500, and each in proportion to what he was entitled of the annuity redeemed, shareholders of the Caledonian Railway Company to the same effect as if they had paid up the full nominal amount of such stock so apportioned. In short, they are just placed in the same position as if they had been original shareholders of the Caledonian Railway Company to the extent of the amount of stock set aside.

Now, such being the nature of the arrangement made between the Caledonian Company and these Barrhead shareholders, the question arises, Whether this portion of the cost of the Barrhead lease to the Caledonian Company is chargeable against the South-Western Company under the 4th section of the Act of 1869; or, in other words, Whether the cost of redeeming a portion of the rent of the Barrhead lease is to be chargable to the extent of one equal moiety against the South-Western Company. This brings us back again to the construction of the 4th section of the Act of 1869, which thus requires a more minute examination. That section is as follows—(*reads section, quoted supra*). The 5th section then provides for the division of the rent between the two Companies in conformity with the 4th section.

Now, it must be kept in view that, in addition to the stock which the Act of 1851 authorised for the redemption of the annuity, the Barrhead line had cost the Caledonian Company very large sums of money directly expended; and it would appear from the capital account of the Company that these amount to £360,000, so that the terms used in this 4th section must, of course, have been used with a special view to that large direct expenditure of money. But the question is, Whether the terms used are not also sufficient to embrace the expenditure which resulted in the issue of that £82,500 of stock. They are certainly more directly and literally applicable to the one kind of expenditure than to the other. The South-Western Railway Company contend that the words "all sums expended on capital account" cannot be held to embrace that £82,500 of stock. The construction which they contend for is, however, open to the objection that the result would be very unequal and inequitable, though that objection may not be conclusive. The contract between the two companies proceeds, as I said before, upon the principle of a perfect equality, on the one hand, in the interest which the two companies are for the future to have in the line, and, on the other hand, in the equal distribution of past expenditure and existing liabilities. Now, it is in vain to say that the issue of that £82,5000, stock of the Caledonian Company cost that Company nothing, for it certainly involved them in very large future liability. They are bound to treat the Barrhead Railway shareholders as if they had paid up the full nominal value of their shares; and these shareholders are, consequently, entitled, in all time coming, to payment of an equal dividend with all the other shareholders of the Caledonian Railway Company. It has thus cost that Company a good deal to redeem the portion of the annuity previously payable to the Barrhead Company. If that annuity had not been so redeemed, then the rent payable under the Barrhead lease would have continued to be £16,500; and if the bargain between the two companies in 1869 had been concluded before that annuity had been redeemed, then the South-Western Railway Company would have been obliged to pay one moiety of the rent of £16,500. It therefore appears to me that, in equity and fairness, the sum paid to redeem the annuity is comprehended under the 4th section of the Act of Parliament. Moreover, I think that any difficulty arising from the use of the words "sums expended" is very slight, and that it disappears entirely when these words are read along with the words which follow, especially those relating to the capital account. Everything may be called a sum expended on capital account which is entitled to appear on the credit side of that account. Now, on the debit side of the capital account of an incorporated company there must appear the full nominal value of their shares and any money which they may borrow, and in order to balance the account it is absolutely indispensable that every one of the shares on the debit side be accounted for on the credit side. The £82,500 of new shares, issued under the authority of the Act of 1851, being necessarily embraced on the debit side of the capital account, required to be written off, that is to say, to appear as an article of credit or discharge on the other side of the account. An examination of the accounts of the Company shows that this is just what was done.

I think, therefore, that the true construction of the 4th section of the Act of 1869 is that the South-Western Railway Company shall pay to the Caledonian Railway Company one-half of the sum so expended on capital account in connection with the Barrhead line.

But then another question has been raised by the defenders, whether, in estimating the liability of the South-Western Railway Company under this 4th section of the statute, the shares issued in 1851 to the Barrhead shareholders are to be taken at their full nominal amount, or whether they are to be valued at the market price of the ordinary shares of the Caledonian Company in 1851, or alternatively in 1869, when this contract was made between the two companies. The defenders contend that it would be unfair to estimate the shares at the nominal value of £82,500, seeing that in 1851 their market price was only about £27 or £28 each. At first sight there appeared to be a good deal of plausibility in that contention, but a very slight examination is, I think, sufficient to show that it is quite untenable. The Caledonian Railway Company incurred, by issuing these shares, a certain liability which can never be discharged. That liability is to pay the new shareholders the same dividend as is paid to the ordinary shareholders of the Company, whatever that dividend may be. I do not think that the liability of the Company can possibly be estimated by the market price of the shares, seeing that their value in the market is notoriously subject to great fluctuations of a temporary character. We might just as well take the value of these shares now, when they happen to be above par, as in 1851, when they were under par. In short, you can only take this sum of £82,500, if you are to take it at all, as an article of expenditure on capital account, as measuring the indebtedness of the Caledonian Railway Company by that issue of shares in 1851. That indebtedness can be ascertained only by what is called the nominal value of the shares. But, as far as the present

case is concerned, that value was nominal only in this sense, that the money was not actually paid by the Caledonian Railway Company; but still value to the extent of £82,500 was given for the partial surrender of the annuity.

I am therefore of opinion that the Lord Ordinary's interlocutor is well founded, and that the Caledonian Railway Company are entitled to decree for one moiety of this sum of £82,500.

LORD DEAS concurred.

LORD ARDMILLAN—I concur so entirely in the opinion expressed by your Lordship in the Chair, that I really feel it unnecessary to make any additional remarks. The two leading questions raised are—(1) What is the effect of the transfer of the Caledonian shares to the Barrhead Company? and (2) What is to be held as the value of that transfer of shares? That by the transfer of £82,500 of the capital stock of the Company the pursuers effected in 1851 an arrangement with the Barrhead Railway Company, by which they, being lessees of the Barrhead Railway for a term of 999 years, reduced the rent from £16,500 to £11,437, 10s., is beyond all doubt. That the defenders, the South-Western Company, when in 1869 they made this statutory agreement with the Caledonian Company, were aware of the transaction and of the reduction of rent, or redemption of fixed dividend to the Barrrhead Company, which had been thus effected, is equally clear. If the defenders had entered into the agreement with the pursuers before the date of the Caledonian Arrangement Act of 1851, and without getting the benefit of the transfer of the £82,500 of stock, they must have arranged for payment to the Barrhead Company of a rent or fixed dividend of £16,500 a-year. There is no doubt that, by the arrangement made by the pursuers, and the transfer of their stock, the position of the defenders was materially improved,—improved to the extent of their share in the redemption effected. In 1869 the two Companies, the Caledonian and the South-Western, became by statutory contract, following on an express agreement, the joint lessees—substantially the joint proprietors—of the Barrhead Railway, from the date, and on the conditions expressed in the statute. There was nothing unfair or unreasonable in this transaction of redemption and transfer of shares. The sum was what might be expected as sufficient to purchase up an annual payment of about £5063. If, therefore, the transfer of this stock was a "sum expended on capital account,"—that is, on capital account of the Caledonian Railway,—then I think that the defenders are bound to repay to the Caledonian Company "one equal moiety" of that sum. Now, reserving for a moment the question of amount or value in money of the shares transferred, I am of opinion that the transfer of shares made under the powers of the Caledonian Railway Arrangement Act of 1851, and made for the purpose of acquiring fully the right, and the profitable possession and use, of the Barrhead Railway for a period which was substantially in perpetuity, was truly a "sum expended on capital account." It was beneficially expended,—it was expended not on revenue account, but on capital account,—it was expended under statutory powers, and for a statutory purpose,—and as a transfer of shares it was a handing over of money's worth, and corresponding dividends have since been paid. It was truly an expenditure in purchase *pro tanto* of the Barrhead Railway, by redemption of the dividend or tack-duty to the extent of about £5000 Your Lordship's clear explanation on this point is, to my mind, entirely satisfactory. I think this was a payment "on capital account;" and I also think that it was a "sum expended." The defenders got the benefit of this. They, to the extent of a half, pay £5000 less rent to the Barrhead than they would otherwise have done. Is it the meaning of this Act of 1869 that the defenders, now the joint lessees, shall get this benefit, purchased by the pursuers, and get it at the cost of the pursuers? Shall they be relieved of half the annual rent redeemed by this payment or transfer, and yet not repay to the pursuers half the redemption money?

I agree with the Lord Ordinary in holding that, for this plea of the defenders there is no foundation in the statutes, and that, apart from the statutes, there is no authority and no equity to support it; and I have nothing to add to what your Lordship has explained, except to say that I agree in the view which Lord Deas has taken of the effect of the Act of 1869 in planting the defenders in the lease of the Barrhead line as at the date of that lease in 1849. At that time the rent was £16,500, and the reduction has been effected by this transfer.

On the second question, relating to the value at which the transferred shares should be estimated, I have had some difficulty; and I was greatly impressed by the able argument of the Solicitor-General. But I have now come to the conclusion that the Lord Ordinary is right.

The shares were of fluctuating value in the market, but of abiding indebtedness as regards the Company. In 1851 the shares were below par. I believe they are now above par. It appears to me that it is really impossible to follow the fluctuation of the shares. The Caledonian Company must, as regards their obligation, recognise their nominal value,—their value at par—and must pay dividend proportioned to that value, which remains amid all market fluctuations the standard of their proper indebtedness. The transfer of shares being equivalent to a "sum expended," the value of the transfer is the amount of indebtedness. No one suggests that a market value above the nominal value can be taken into consideration, and why should a lower market value be taken when a higher is not? I think that, for this question, the only fixed and unchanging value,—the basis for dividends, and the standard of the Company's indebtedness—is the value at par.

LORD KINLOCH—I have found great difficulties in the way of adhering to the Lord Ordinary's interlocutor; and these difficulties have not yet been overcome.

The question arises out of a transaction engaged in by the two Companies who are parties to the present process in the year 1869, and which is embodied in the Act of Parliament passed that year. A part of this arrangement consisted in the Companies becoming joint lessees in a lease of the Barrhead Railway, held for 999 years by the Caledonian Company. The rent exigible for this lease at the date of the arrangement of 1869 was £11,437, 10s. per annum. Accordingly, in declaring the lease vested jointly in the two Companies, the 4th section of the statute sets it forth as so vested "under burden of the said rent or annuity of £11,437, 10s." And the 5th section enacts that "as from the vesting period, the South-Western Company shall pay to the Barrhead Company, and

shall free and release the Caledonian Company of the payment of an equal moiety of the rent or annuity of £11,437, 10s., now payable by the Caledonian Company to the Barrhead Company: and such payment shall be made at the times, and in the proportions, at and in which the said rent or annuity is now payable by the Caledonian Company to the Barrhead Company."

As to the price or consideration for which the South-Western Company was to acquire their joint interest in this line, the 4th section enacts, "The South-Western Company shall repay to the Caledonian Company a sum equal to one equal moiety of all sums expended by the Caledonian Company on capital account prior to the vesting period in connection with the Barrhead Railway Company, after deducting therefrom all sums, if any, received by the Caledonian Company in respect of the sale of lands acquired for the purposes of the Barrhead Railway." The joint vesting is declared to take place on such payment being made.

The question now raised is, What is to be held included in the "sums expended by the Caledonian Company on capital account prior to the vesting period in connection with the Barrhead Company." Up to a certain point there is no dispute between the parties. The Caledonian Company had advanced a large sum of money in the construction or improvement of the Barrhead line. The amount was stated in the negotiations of 1869 as being, anterior to 31st July 1867, the sum of £369,388, 17s.; deducting from which the Barrhead Company's capital, which was, of course, to be primarily employed in making the line, there was left a sum of £69,388, 17s. at the credit of the Caledonian Company. There is no controversy as to the South-Western Company being liable in one-half of this amount. So far the words of the statute are fairly and reasonably satisfied.

But a further demand is made, and is sought to be enforced by the present action, on the part of the Caledonian Company. The original rent payable by that Company for the lease of the Barrhead line was £16,500 per annum. In 1851, eighteen years before the transactions of 1869, the Caledonian Company had fallen into embarrassment, and was unable to meet its obligations. An Arrangement Act was passed in that year 1851, one of the enactments of which was that the rent payable to the Barrhead Company should be reduced by about £5000 per annum; and that, as compensation, *pro tanto*, for this reduction, the Barrhead shareholders should have allocated amongst them £82,500 of a new Caledonian Company's stock, created by authority of the Act. This arrangement was carried out. At this time, it is said, the Caledonian Company's stock was worth no more in the market than about £25 for the £100 share; so that not much was got by the transaction at the time, though the stock has since largely risen. The Caledonian Company now claim that the South-Western Company should pay them a sum of £41,250, as one-half of this amount of stock. For this sum the Lord Ordinary has granted decree in favour of the Caledonian Company.

I have great difficulty in finding that there is here, in terms of the Act, "a sum expended by the Caledonian Company on capital account in connection with the Barrhead Railway:" and this, whether I have regard to the words of the Act, or to its spirit and presumable intention. Certainly this allocation of Caledonian Company's stock is not directly or literally a "sum expended." No money whatever was expended by the Caledonian Company. There was merely a formal issue of what, at this time, was almost absolutely worthless stock. No doubt this issue involved an obligation to pay to the holders of the stock what dividend the Caledonian Company might be able to pay on the stock so allocated. If the present claim had been for repayment of the half of the sum payable annually in name of dividend on this stock, it would have had more feasibility. But no such claim is made, or is supposed to lie. The annual liability of the South-Western Company is admittedly restricted to one-half of the existing rent of £11,437, 10s. But, not being liable in repayment of any part of the yearly dividend, I am at a loss to see how they should be liable in any part of the nominal capital of the stock; which, much less than the dividend, holds the character of a "sum expended."

There are strong grounds, as I think, for maintaining that the transaction of 1869 was engaged in without any reference to the arrangements of the Caledonian Company in 1851. These arrangements were, substantially, just a composition with their creditors. They got their debt to the Barrhead Company reduced from £16.500 to £11,437, 10s. per annum. The composition they paid was the allocation of £82,500 of worthless Caledonian stock to the Barrhead shareholders. In other words, whilst giving up £5000 a-year of rent, these shareholders were, by way of compensation, made Caledonian shareholders to the extent of £82,500 of stock. But what had the South-Western Company to do with this composition arrangement in 1869? They found the Caledonian Company lessees of the Barrhead line at an existing rent of £11,437, 10s. They are to be fairly held, I think, to have transacted on the footing of this being the rent under the lease; in other words, to have dealt with the Caledonian Company for a lease running at this rent, and nothing else. Accordingly, the statute of 1869 expressly limits their yearly liability to one-half of this rent of £11,437, 10s. Admittedly they are not liable for the yearly difference of £5000 between this and the original rent. Yet it seems little else than charging them with this yearly difference when they are asked to pay the capitalised sum by which the difference is represented.

The main argument in support of the claim rests on an assumption that by the transaction of 1869 the South-Western Company became bound to pay to the Caledonian Company all the sums they had laid out in the acquisition of this lease; and that this allocation of Caledonian stock was just part of the cost of acquiring the line, being the sum paid to buy up the abatement of rent from £16,500 to £11,437. But to say that the transaction involved a repayment of all paid by the Caledonian Company towards acquiring the line, is, with all deference, simply to beg the question in issue. There is no evidence of this beyond what is contained in the words of clause 4; and the question still returns, what is comprehended in the words "sums expended on capital account." It is, with deference, illogical, first, to assume that the South-Western Company were to repay all that the Caledonian Company had expended in any way, and then to bring the stock in question under the category of a "sum expended." I see nothing impossible or unreasonable in supposing that the South-Western Company were *not* to pay all that the Caledonian Company had paid, and, in parti-

cular, were to have nothing to do with the composition arrangement of 1851. Whether they had or not is to be determined, not by an assumption one way or other, but by a sound construction of the terms "sums expended on capital account in connection with the Barrhead Railway." The whole question lies here.

The pursuers have not satisfied me that the present claim is comprehended in these words. I think that if it had been intended to comprehend this allocation of stock under the name of a "sum expended," it would have been clearly and unequivocally so stated. This, it very plainly is not. The sum claimed is not a "sum expended," except by a construction which I cannot help considering somewhat forced. I do not think it, in any sound sense, a sum expended "on capital account." These words, I think, do not allude to any capital account kept by the Caledonian Company, nor indeed to any account, considered as a document kept either by one Company or another. An expenditure "on capital account," I consider merely to express the kind of expenditure, and to denote it as that which properly and usually comes out of capital. The sums laid out by the Caledonian Company in the construction and improvement of the Barrhead line clearly come under this category. But I do not think the claim now made can be reasonably brought under the description. Finally, I do not think that what is now sought is "repayment" in any sound sense. Repayment is the counterpart of payment—it is the undoing of what payment effected. What was done by the Caledonian Company was not to pay money, but to allocate Caledonian stock. It is not now proposed to cancel the stock so issued to the extent of one-half, which is the only act which, in the circumstances, would be correctly called repayment. The whole stock of £82,500 is to remain with the Barrhead shareholders, as issued. The Caledonian Company are not to be relieved from the half of this stock, but they are to have £41,250 of actual present cash put into their pockets, to do with and dispose of as they please. I cannot consider this "repayment" in any reasonable, or in the statutory sense.

It cannot but be held somewhat confirmatory of these views, that in two several accounts rendered by the Caledonian Company to the South-Western, posterior to the vesting, and in which the sums actually expended on the line are comprehended, no mention is made of the claim now put forward. This may not be by itself conclusive; but in a matter of doubtful construction it is, to say the least, a strong circumstance against the interpretation of the pursuers.

My conclusion is, that the pursuers have not satisfactorily established their claim in the present process. Whether or to what effect these arrangements of 1851 were taken into view when the transaction of 1869 was concluded, we have, as already said, no evidence to show, except what lies in the words employed in section 4 of the Act 1869. I have a strong impression that these arrangements were wholly thrown out of sight in the transaction of 1869, the rent simply being taken at the current rate of £11,437, 10s., without the South-Western Company being in any way implicated in the allocation of Caledonian shares, by which the reduction was obtained in 1851. Any glimpses we have of the negotiations lead towards this inference. But, at any rate, the pursuers are bound to make it clear that the claim now urged falls by legitimate construction under the words employed in section 4. In my apprehension, they have not succeeded in doing so, and therefore the defenders are entitled to absolvitor.

Agents for Pursuers—Hope & Mackay, W.S.
Agents for Defenders—Gibson Craig, Dalziel, & Brodies, W.S.

Wednesday, March 20.

SECOND DIVISION.

SPECIAL CASE—EWING, ETC.

Liferent and Fee—Superior and Vassal—Casualty—Ground-Annual—Grassum.

Trustees under a trust-disposition and settlement conveyed certain lands in liferent to one person, and in fee to another. Parts of the lands had been feued out for a yearly stipulated sum, and a sum to be paid every twenty-fifth year in lieu of casualties. Other lands had been disponed under contracts of ground-annual, stipulating for a certain yearly payment, and a sum in name of grassum every twenty-fifth year. *Held* that the sums payable every twenty-fifth year, both under the feu-contracts and the contracts of ground-annual, belonged to the liar.

The following Special Case was presented by Mrs Ewing and H. E. C. Ewing, Esq. of Strathleven:—

"The facts are as follows:—(1) The late James Ewing, Esq. of Strathleven, died on or about 29th November 1853, leaving a general trust-disposition and settlement, dated 9th September 1844, whereby he conveyed to trustees, for the purposes therein mentioned, the whole lands, estates, &c. (2) By the third purpose or direction of the said trust-disposition and settlement the testator directed and appointed his trustees to execute and deliver a regular and valid deed or deeds disponing and conveying his lands and estate of Levenside, &c., to the said Mrs Jane Tucker Crawford or Ewing, his spouse, in liferent, during all the days and years of her life, in the event of her surviving him, but so long as she continued his widow allenarly, and to and in favour of the heir-male of the body of the said James Ewing and his heirs and assignees whomsoever; whom failing, the heir-female of the body of the said James Ewing and her heirs and assignees whomsoever; whom failing, to the said Humphrey Ewing Crum Ewing, and the heirs-male of his body, &c., in fee. (3) The said James Ewing left no heirs of his body. (4) After his death the trustees made up a feudal title to the said lands and estate of Levenside, now called Strathleven, and then, by disposition bearing date the 7th December 1854, they disponed and conveyed the same to Mrs Jane Tucker Crawford or Ewing 'in liferent during all the days and years of her life, but so long as she continued the widow of the said James Ewing allenarly.' Mrs Ewing was duly infeft on this disposition in September 1855. (5) Certain portions of the said estate which were held burgage had been disposed of by Mr Ewing and his predecessors for building purposes, the consideration being payment of ground-annuals. The contracts of ground-annual are in usual form. By them the property of the building lots is conveyed to be built upon under the real lien and burden of the payment of a yearly ground rent or ground-annual to be paid or uplifted and taken