these children in the same way. Now, then, is that a case in which the trust-deed is made part and parcel of the marriage-contract in the sense in which the trust-deed in *Herries, Farquhar & Co.* was held to be? I have come to the conclusion, after careful perusal of the case of *Herries, Farquhar & Co.*, that it is not,—that what has been done here does not bring this case within the provisions of the rules laid down in *Herries, Farquhar & Co.* I think the mere reference to the deed as an existing deed, or referring to the fact that that particular estate had been settled in a particular way, is not such a reference as wefind in the marriage-contract to the trust-deed in the case of *Herries, Farquhar, & Co.* I do not see that this estate was settled in consideration for anything done under the marriage-contract. Nor do I see it stated in the marriage-contract that anything was done in that marriage-contract in consideration of the existence of that trust-deed. Now, in the case of *Herries, Farquhar & Co.*, it was quite the contrary. There the trustee under the first trust-deed became a party to the marriage-contract expressly, and undertook to reconvey the estate held by him in trust for the purpose of paying off the debts to Clanranald and the other heirs of entail. And the ground on which the Court came to the conclusion with regard to this undertaking on the part of the trustee, and the consideration in respect of which that undertaking took place, was in respect of the peculiarly onerous terms of the marriage-contract itself. As I read the opinions of the Judges, the mere fact of the marriage having been entered into was not held to make the transaction of itself so onerous as some of the authorities might imply. But in the opinion of Lord Mackenzie on that second branch of the case, viz., whether the entail stood good, his Lordship distinctly alludes to the fact of its having proceeded on most onerous considerations. He says, "Macdonald subsequently entered into the marriage-contract, 1812, and the trustee, Brown, was made a party to it, in the express character of trustee infeft in the lands. On most onerous considerations various stipulations were undertaken by Macdonald, the truster, and him, the trustee; and in particular a sum of £10,000 was paid by the father of Lady Caroline to the trustee for the purposes of the trust. In consideration of this, Macdonald, with consent of the trustee, Brown, bound himself to execute a strict entail of the lands which should remain after satisfying the trust, 1811, in favour of himself and the heir-male of the marriage, now defender, and the other heirs there mentioned. It was expressly declared that the fetters of this entail should be laid on Macdonald himself as well as on the heirs of entail, and that it should be an irrevocable deed. The trustee, Brown, went along with this whole obligation as an express consenter, &c. This was an obligation which was clearly binding on the trustee, and which was undertaken for a full onerous consideration"—the full onerous consideration being the £10,000 that the marriage-contract bore was advanced by the lady's father.

Now, here we have no stipulation in this marriage-contract that this estate of Tarbrax shall go to the eldest son,—no provision that it is to be held by him. On the contrary, in the original trust-deed, as I read it, it is simply referred to with reference to the fact that an estate had been settled under which there was a power reserved to burden it with an annuity in favour of the widow of the truster, who was then entering into the marriage; but I can find nothing in the terms of that deed which entitles me to say that that was any such onerous consideration as that which occurred in the case of *Herries, Farquhar & Co.*, and in respect of which onerous consideration alone it was that the Court, as I read the judgment, came to the conclusion that the estate was protected against the creditors. On that ground I concur with your Lordship and the Lord Ordinary in holding that the marriage-contract, and what was done at the time of the marriage-contract, does not place this estate in the position of being protected against the creditors.

The Court adhered.

Counsel for David J. Robertson—Balfour—Robertson. Agents—Bruce and Kerr, W.S.

Counsel for Pursuer—Dean of Faculty (Watson)—R. V. Campbell. Agent—Alexander Wylie, W.S.

Counsel for Souter Robertson's Trustees—Adam — Kinnear. Agents — Tods, Murray, & Jamieson, W.S.

Friday, November 17.

FIRST DIVISION.

[Lord Young, Ordinary.

CALEDONIAN RAILWAY COMPANY *v.* HENDERSON AND OTHERS.

Railway—Sale—Preservation of Minerals—Acts 7 *and* 8 *Vict. cap.* 87 *and* 8 *and* 9 *Vict. cap.* 33 (*Railways Clauses Act*).

Subsequently to the passing of a private Act (7 and 8 Vict. cap. 87), which contained mineral clauses similar to those of the Railways Clauses Act (to the effect that the company shall not be entitled to the mines or minerals under lands purchased by them unless the same shall have been expressly purchased), a railway company purchased from a proprietor "the perpetual servitude and right to use and occupy so much of the ground above described as is at present used and occupied by the piers or pillars of their viaducts."—*Held*, in a question with the railway company, that the proprietor was in the same position with regard to his right to work minerals as if the company had actually purchased the land.

This was an action at the instance of the Caledonian Railway Company, pursuers, against Robert Henderson, heritable proprietor of the lands of Dundyvan, and the Drumpellier Coal Company, and the said Robert Henderson and Richard Dimmack, its individual partners, lessees of the coal and other minerals in the said lands of Dundyvan. The summons concluded for declarator "that by disposition, dated the 7th, and recorded in the New and General Register of Sasines, &c., at Edinburgh, the 8th days of November 1845 years, granted by the late John Wilson, then heritable proprietor of the said lands of Dundy-

van, to and in favour of the Glasgow, Garnkirk, and Coatbridge Railway Company, the said John Wilson validly imposed upon himself and his successors in the said lands of Dundyvan, and upon the said lands, the perpetual burden and servitude, *inter alia* of giving support to the viaduct over the river Luggie and ground adjacent thereto, forming part of the pursuers' line of railway, and to the piers or pillars of the said viaduct; and that the defenders, or any of them, are not entitled to work or excavate the minerals or other strata in the said lands of Dundyvan subjacent or adjacent to the said viaduct and piers or pillars thereof in such manner as to withdraw the support necessary for the proper maintenance of the said viaduct and piers or pillars thereof, or in any way to endanger the stability of the same."

By disposition, dated the 7th and recorded the 8th November 1845, the late John Wilson, then of Dundyvan, sold to the Glasgow, Garnkirk, and Coatbridge Railway Company (in right of whom the pursuers now were), to be held or conveyed by them in terms of their Act of Incorporation, 7 & 8 Vict. cap. 87 (dated 19th July 1844):—"In the first place, All and whole that strip or piece of ground, being part of the lands after mentioned, extending to one acre two roods and five poles imperial measure, and bounded . . . on the east by the piece of ground belonging to me, the minerals whereof are in the second place disponed; . . . . but reserving always to me and my foresaids the whole mines and minerals under the piece of ground in the first place above disponed, with full power and liberty to work, win, and carry away the same subject to the conditions and restrictions contained in the said Railway Company's Act of Incorporation: And, in the second place, I do hereby sell, alienate, and dispone, from me and my foresaids, to and in favour of the said Glasgow, Garnkirk, and Coatbridge Railway Company, and their foresaids, all and whole the ironstone situated under the piece of ground following, viz., All and whole that piece of ground extending to one acre imperial standard measure, and bounded on the north and south by the Dundyvan Ironworks; on the east by the centre of the Luggie burn; and on the west by the piece of ground in the first place above disponed. . . . . And, in the third place, I do hereby give and grant, dispone and convey unto the said Glasgow, Garnkirk, and Coatbridge Railway Company and their foresaids, the perpetual servitude and right to use and occupy so much of the ground in the second place above described as is at present used and occupied by the piers or pillars of their viaduct, and which viaduct is delineated on the foresaid plan, and marked number 2, and the ground whereon the said viaduct rests measures 1 rood 7 poles imperial standard measure, together with free ish and entry to the ground in the second place above described at all times when necessary for inspecting or repairing the said viaduct or works connected therewith, which perpetual right so granted shall be, as it is hereby declared to be and remain in all time coming, a burden and servitude in favour of the said Railway Company and their foresaids affecting the piece of ground in the second place above described, and my remaining lands of Muirend and Dundyvan after described. . . . Which several subjects and perpetual right aforesaid I do hereby bind and oblige me and my heirs, executors, and successors to warrant to the said company and their foresaids from all fe u duty or other burden whatsoever, at all hands and against all mortals; to hold the premises to the said Glasgow, Garnkirk, and Coatbridge Railway Company, their successors and assignees for ever, according to the true intent and meaning of their said Act of Incorporation." The consideration for the conveyance was certain sums of money awarded by arbiters in terms of a deed of submission between the parties.

The viaduct and its piers and pillars as mentioned in the disposition were those standing at the date of the action. Before the deed was granted a great portion of the coal near the viaduct had been excavated, and the wastes left with stoops supporting the roof. The pursuers averred that the proprietor did not intend to work any more of the coal; that he only intended to work the ironstone, which the Railway Company had accordingly agreed to purchase; and that no more minerals of any kind were in respect of that understanding worked until the Drumpellier Coal Company became lessees of "the seams of coal, ironstone, shale, and fireclay" in the property of Dundyvan. That took place under a lease from Mr Wilson's trustees, dated 2d and 27th December 1873. The lease was for nineteen years, and there were excepted "such portions of said minerals as have been purchased and paid for by the Caledonian Railway Company." In 1874 Dundyvan was sold by Mr Wilson's trustees to the defender Robert Henderson.

In August or September 1875 the defenders the Drumpellier Coal Company began to sink pits within 30 yards of the viaduct, and they afterwards asserted a right to excavate all the remaining coal in the lands of Dundyvan under and adjacent to the viaduct, and so to deprive it of its support. This was notwithstanding the perpetual right and servitude of support which the pursuers maintained they possessed. They raised this action to have their right declared, and the Railway Company prevented from interfering with it.

The defenders maintained their right to work these minerals, including the coal, subject to the provisions in the above-mentioned Act of Parliament of the Glasgow, Garnkirk, and Coatbridge Railway, sec. 56 of which provided, "and with respect to any mines of coal, ironstone, lime, slate, or other minerals under any land purchased by the Company, be it enacted that the Company shall not be entitled to any such mines or minerals, except only such parts thereof as shall be necessary to be dug or carried away, or used in the construction of the railway and works by this Act authorised, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly thereby conveyed, but providing that the owners thereof shall not have power to make openings in the surface of the lands so to be acquired by the company." Secs. 84 and 85 further provided that in the event of a party in right of minerals lying under a railway or its works, or within forty yards of them, being desirous of working the minerals, he should give the railway company notice, and the company might make him compensation, or, in the event of their not agreeing to do so within a stated time, that he should be at liberty to work

the minerals, being at the same time liable for damage caused to the railway company by improper working.

The defenders averred that the disposition by Wilson was granted, and the railway and viaduct were formed, subject to the provisions of the Act of Parliament, and in particular subject to those above narrated. They further stated that they had acted upon that footing, and had sent the pursuers notice when their workings were about to approach within the statutory distance of the railway.

The pursuers pleaded—"(1) Under and in virtue of the disposition libelled, the pursuers are entitled to decree of declarator against the defenders in terms of the conclusions of the summons. (2) The workings so far as they have already gone, and the further threatened workings of the said defenders under and adjacent to the said viaduct, being such as will seriously endanger the stability and safety of the said viaduct and the piers and pillars thereof, the pursuers, as now in right of the perpetual burden and servitude foresaid, are entitled to decree in terms of the conclusions of the summons, with expenses."

The defenders pleaded, *inter alia*—"(2) The said railway and viaduct having been constructed under the Acts quoted, the rights of the defenders in regard to the minerals under and adjacent to the viaduct fall to be regulated by the said Act. (3) The defenders not being bound to leave support for the said viaduct, except under the conditions and as provided for in the said Act, they are entitled to be assoilzied from the conclusions of the summons."

Two other actions between the same parties were conjoined with this one. The first was a suspension and interdict against the working of the minerals, and the second was an action at the instance of Henderson & Dimmack for payment of £733, 19s. 9d., the sum fixed by verdict of a jury prior to the raising of these actions as the value of the coal in question.

The Lord Ordinary pronounced the following interlocutor:—

"14*th June* 1876.—The Lord Ordinary conjoins with this action (1) suspension and interdict at the instance of the Caledonian Railway Company against Henderson and the Drumpellier Coal Company, and (2) the action at the instance of Henderson & Dimmack against the Railway Company, and having heard counsel for the parties in the conjoined actions, and considered the records and productions in the declarator, assoilzies the defenders from the conclusions of the summons, and decerns: Finds the pursuers liable in expenses: In the suspension and interdict repels the reasons of suspension, refuses the interdict, recals the interdict formerly granted, and decerns: Finds the complainers liable in expenses; and in the ordinary action at the instance of Henderson & Dimmack against the Caledonian Railway Company decerns against the defenders in terms of the conclusions of the summons: Finds the defenders, the Railway Company, liable in expenses, and remits the several accounts of expenses when lodged to the Auditor to tax and report.

"*Opinion.*—The respondents are the lessees and occupiers, and one of them is the owner, of the minerals in question—that is not disputed. Had the Railway Company purchased the land under which they lie, it is, I think, clear that the Company must have paid for these minerals which they desired the owner (I confine myself to one title for convenience) not to work. The complainers dispute this, on the authority of the case of *Sprott* v. *Caledonian Railway Company*, 2 Macq. 449. But this case is in my opinion inapplicable as an authority. The question here turns on the applicability and construction (if applicable) of the statute referred to in the defenders' statement. In *Sprott's* case the rights of the proprietor and of the Railway Company were governed by a conveyance before the Act, and it was held by the House of Lords that if the Act applied at all (which was not decided) it was applicable only with reference to the rights of parties as standing on the prior title by which, although the Company did not choose to exercise their option of prohibition with compensation, the proprietor was still restrained from any working whereby the necessary support of the surface, whether vertical or lateral, would be withdrawn. There is here no case of prior title, and I cannot countenance the notion that the Company, giving notice to the mineral owner under their Act, may resist payment of the compensation awarded in pursuance of the Act, and substitute an interdict for the protection of their works which the statute gives, subject to the obligation of paying that compensation. I must therefore hold that had the Company purchased the land they must have paid the compensation awarded to the mineral owner for the minerals which they required him to leave unworked.

"But as the Company did not purchase the land, but 'the perpetual servitude and right to use and occupy so much of the ground specified as is at present occupied by the piers and pillars of their viaduct,' the conclusion regarding what would have been their obligation had they purchased the land itself is not conclusive, but available only as an argument. On the one hand, the Company say—here is a servitude of support for the viaduct, which necessarily restrains the proprietor of the servient tenement from doing anything inconsistent with it. On the other hand, the defenders contend that there is no servitude of support, but only such a right to use and occupy the ground as would have been implied and included in a right of property in the ground by purchase, and that to exempt the Company from paying compensation for the minerals which they required to be left unworked would involve the absurdity of construing the lesser right as really greater and more valuable than the larger, which would have implied and included it. Both parties refer to the sale of the ironstone, and each maintains that it supports his view. My opinion is with the defenders. I think the Company have no better or secured right to use and occupy the ground with their viaduct than they would have had as purchasers of the ground, and that having required the mineral owners to leave the minerals unworked they must pay the compensation that has been awarded under the statutory proceedings. As regards their purchase of the ironstone, I think the effect of that is only that with respect to it they are themselves the mineral owners, and so under no necessity to give notice or make compensation."

The pursuers reclaimed.

They at first contended (in respect of the proceedings that had previously taken place under a submission and arbitration upon which the deed of conveyance was executed) that the land in question was acquired by them previously to 1844, and could not be affected by the Act of that year—but that argument was afterwards departed from. They further argued—The disposition by Mr Wilson was extra-statutory. What was conveyed was the area securing support to the line, and a right of servitude extending over the lands outside the area. The transaction was one not contemplated by the statute. Otherwise there was no need to reserve the minerals. In *Ackroyd's* case there was no express reservation of minerals, and no burdening of the circumjacent soil.

Argued for the defenders—The provisions of the statute with regard to minerals applied, except (1) to obligations undertaken prior to its date, and (2) to cases where parties had contracted themselves out of them. There was nothing in the terms of the disposition to take it out of the Act of 1844, whose provisions were similar to those of the General Act of 1845. The right of servitude was only a right to occupy the surface, and did not imply an obligation of support The case of *Ackroyd* v. *The L. and N.-W. Railway Company* was in point.

Authorities quoted—*Caledonian Railway Company* v. *Sprott*, June 16, 1856, 19 D. (H. of L.) 3, 2 Macq. 449; *Caledonian Railway Company* v. *Belhaven*, June 5, 1857, 19 D. (H. of L.) 5, 3 Macq. 56; *London and North-Western Railway Company* v. *Ackroyd*, Feb. 26, 1862, 31 L.J., Chanc. 588.

At advising—

Lord President—At the commencement of the argument in this case a considerable difficulty was raised in consequence of the contention of the Railway Company that the land which they acquired from Mr Wilson of Dundyvan for the purpose of constructing the Coatbridge branch of their railway was acquired by them previous to the Act of 1844, and that the transaction between the parties was therefore not to be regulated, or indeed in any way affected, by the provisions of that Act in respect to minerals. If that had been so, we should have had a very different question to dispose of from that which really arises upon this record, and a question which might have been attended with very considerable difficulty. But it was conceded on the conclusion of the argument, and is indeed quite apparent from an attentive examination of the deed of conveyance by Mr Wilson to the Railway Company, dated in November 1845, that the transaction between these parties was in reality a transaction under the Act of 1844—in short, it was a purchase by the Company, no doubt in the exercise of compulsory powers, but by voluntary agreement under the provisions of that statute. It is therefore, I think, quite obvious that the clauses of that Act regulating the matter of minerals as between the landowner and the Company apply to this case. Now, by the 56th section of the statute it is provided—[*reads*]. The effect of this clause of the Act is to insert by statutory implication in every conveyance of land a reservation to the disponer of the minerals under the land. But then it is further provided as a necessary arrangement for the safety of the railway, by section 84—that if an owner of minerals lying near a railway desire to work them, he must give notice to the railway, who may purchase them. And further, it is provided by section 85 that if the Company will not purchase them the owner is entitled to go on and work, subject to certain conditions. Now these clauses, which are substantially repeated in the General Railways Clauses Act of 1845, were introduced upon considerations which are very obvious and of great importance. The minerals lying under land purchased by the Railway Company may be of various descriptions, and they may be likely to be wrought within a very short time, or they may be very unlikely to be wrought for a considerable time after the purchase. There are minerals, too, underground, purchased for railway purposes, which are very imperfectly explored, the value of which is very little known, and can hardly be ascertained until they are actually wrought, and therefore to settle at the time of the purchase of the land for railway purposes what shall be paid as compensation for the mineral estate to be conveyed along with the surface, would obviously be a most inexpedient proceeding, and very great injustice might result either to the Company on the one hand or to the landowners on the other, by that kind of speculation and conjectural valuation which would alone be possible at that time; and therefore the Legislature fell on the device—a very expedient one obviously—of postponing the valuation of the minerals until they should come to be wrought; and if, when they came to be wrought, the Railway Company found it necessary to acquire the minerals under the railway or within 40 yards of it, they should have an opportunity of then acquiring them at the value which could then be ascertained and fixed.

Now, keeping in view that this is the object of the clauses of the statute with which we are dealing, let us see what it is that the parties have done in this transaction for the purchase of the land by the Railway Company from Mr Wilson. Mr Wilson, in consideration of the various sums of compensation which have been awarded to him by arbiters chosen between the parties, conveys, in the first place, but under the reservation after mentioned, to and in favour of the said Glasgow, Garnkirk, & Coatbridge Railway Company, to be held or conveyed both in terms of their Act of Incorporation—"All and whole that strip or piece of ground being part of the lands aftermentioned, extending to 1 acre 2 roods and 5 poles imperial standard measure, and bounded," &c. The boundaries are unimportant, except in so far as to show that this piece of ground is bounded on the east by another piece of ground afterwards conveyed, so that the two pieces of ground are adjacent to one another. Then there follows this reservation—"But reserving always to me and my foresaids the whole mines and minerals under the piece of ground in the first place above disponed, with full power and liberty to work, win, and carry away the same subject to the conditions and restrictions contained in the said Railway Company's Act of Incorporation." Now, it is needless to say that this reservation was an unnecessary reservation, because the statute had already made that reservation for the disponer. At the same time it did no harm; it was merely repeating and referring to the Act of Parliament itself. Then he proceeds, in the second place, to

dispone "All and whole the ironstone situated under the piece of ground following." And then follows a description of a piece of ground which lies immediately to the east of the ground conveyed in the first place. That is the second subject conveyed—the ironstone under that secondly described piece of ground. And, in the third place, he conveys "The perpetual servitude and right to use and occupy so much of the ground in the second place above described as is at present used or occupied by the piers or pillars of their viaduct, and which viaduct is delineated on the foresaid plan, and marked No. 2, and the ground whereon the said viaduct rests measures 1 rood 7 poles imperial standard measure, together with free ish and entry to the ground in the second place above described at all times when necessary for inspecting or repairing the said viaduct or works connected therewith, which perpetual right so granted shall be, as it is hereby declared to be, and remain in all time coming, a burden and servitude in favour of the said Railway Company and their foresaids affecting the piece of ground in the second place above described, and my remaining lands of Muirend and Dundyvan after described." Now, there is here a very obvious distinction, technically speaking, between the conveyance of the piece of ground upon which the viaduct rests and the conveyance of the piece of ground to the west of it, which I understand is covered by an embankment of the railway. In the case of the ground covered by the embankment, the property of the ground is conveyed in the usual form ; but in regard to that portion of the ground over which the viaduct extends, what is conveyed is not the property of the ground but the perpetual servitude and right to use and occupy so much of the ground as is occupied by the piers of the viaduct. Undoubtedly, in the ordinary case where a viaduct is constructed, the Company take the ground which is covered by the viaduct in the ordinary form, either by voluntary conveyance or by notice under the 17th section of the Lands Clauses Act, and in that case they have acquired the property of the surface under the viaduct during its whole length. When such land is taken the viaduct has not been constructed, and it becomes necessary to take the whole strip of ground to a certain limit of deviation on either side, because until the viaduct comes to be actually built nobody can foresee what are the precise spots of ground that are to be occupied by the piers of that viaduct. But it appears upon the face of this conveyance that the piers of the viaduct were already built when the transaction took place, and that being so, it was quite easy to limit the right of the Railway Company to the ground actually occupied by the foundations of their piers, and so, instead of taking the whole strip of ground, they take the servitude or right to use and occupy the ground on which the piers of the viaduct actually stand. That, I take it, is the explanation of the peculiarity of this deed.

Now, it is maintained that the effect of this in law is to take the case out of the operation of the mineral clauses of the Act of 1844 altogether, because it is said the 56th section applies only to mines under land purchased by the Company, and so in like manner the other clauses are constructed with reference to the 56th, regulating the working of mines under the land which has been acquired by the Railway Company for the purposes of their works. But here the Company contend, the land over which this viaduct extends has never been purchased—but only a servitude, and that servitude is a servitude of support, and the ground being granted expressly for the purposes of a servitude of support, and not being a statutory conveyance at all, the servitude of support necessarily requires that the mineral under the thing to be supported shall not be wrought; and therefore they say, at common law—for this is a common law transaction, and not a statutory conveyance—you, who have given me this servitude of support, cannot derogate from your own grant and insist upon working out the mines below, so as to destroy the support altogether. That is a very ingenious argument, but I confess it has not made very much impression upon my mind.

I am humbly of opinion that what has been done here is really, and in all practical effect, a taking of land under the statute for the purposes of the railway and its works, and indeed it differs very little, if at all, from the effect of taking land in the ordinary form. What is it that a company does under the 17th section of the statute when it serves a notice upon a landowner? It gives him notice that a certain piece of land is required for the purposes of the railway, and will be taken and used. That is the general style of the notice ; and it is quite in conformity with the 17th section of the statute. The form of a conveyance no doubt is an ordinary disposition of the piece of land, but that is a statutory conveyance, and we must consider what is the effect of the conveyance and not look at the mere words of it. The effect of the conveyance is to enable the Railway Company to use the land for the purpose of constructing their railway or works thereon, and for no other purposes whatsoever. The Railway Company having acquired the land, cannot use it for any purpose except that, and if they do not require it for that purpose they are bound to sell it back to the owner. So that the land is acquired in the ordinary case for a limited use only, and if it be land acquired for the purpose of being occupied by a portion of the line of railway, but not for any special purposes of station-room or the like, but merely for the purpose of sustaining the rails in one part of the line, then all that the Company do acquire in practical effect is the right to lay down and maintain their rails upon the surface of that ground, or to make a cutting through the ground for the purpose of laying down their rails and maintaining them there, or to lay down an embankment upon the ground for the purpose of sustaining their rails, or to build a viaduct for that purpose. That is the only right the Company ever can acquire under their statutory powers of taking land, whether they get it by voluntary agreement or by the exercise of compulsory powers. Now, what have they got here under the conveyance of a perpetual servitude and right to use the land? They have got the exclusive possession of the particular pieces of ground occupied by the piers, just as exclusive possession as they would have got under a conveyance in the ordinary form, because these piers standing upon the ground, the ground can never be occupied for any other purpose. But, on the other hand, they have got it for the one special and limited pur-

pose of their railway, or that portion of it which consists of the piers of the viaduct standing upon and being supported by this ground. So that really the right which they obtain under this part of the conveyance is in all practical effect exactly the same right which they get under the other portion of the conveyance, which conveys to them in appearance and formally and technically the property of the land itself.

Now, I think it would be a most unreasonable construction of such an Act of Parliament as this to say, that because the conveyancer chooses to put the thing in this particular shape in making out his conveyance of the subject, therefore this shall not be taken to be a purchase of land within the meaning of the 56th and other clauses of the statute. I think it is a purchase of land just as much as the purchase of the other piece of land. It is a purchase of land for a special and limited purpose. So is the other. And the special and limited purpose in the one case is just as special and limited as it is in the other—neither more nor less. It is for the same purpose in both.

I am therefore of opinion that the mineral clauses, as they may be called, of this statute, 7 and 8 Vict. chap. 87, are clearly applicable to this part of the conveyance as well as the other, and therefore I am for adhering to the Lord Ordinary's interlocutor.

Lord Deas—The question in this case is whether the mineral clauses—sections 56, 84, and 85—of the Act of 1844 are applicable. The Caledonian Railway Company maintain that they are not applicable, and originally (as your Lordship has pointed out) they maintained that on two grounds. In the first place, that this transaction and conveyance were not subsequent to the Act of 1844, and that therefore the Act was not at all applicable; and, in the second place, that this was not a purchase of land, but the constitution of a servitude, and that therefore these clauses in the Act did not apply. But latterly the second became the sole ground of the contention for the Railway Company, and, as your Lordship has said, it is very clear that, even apart from the concession, that is so.

The Caledonian Railway Company say that this is not a purchase of land in the sense of the statute, because (and this is the main ground) this was not a sort of deed or conveyance which the Railway Company could have compelled the granters to make. They say it was a mere voluntary transaction, to which the statute has no application.

I am of opinion that that contention is not well founded, and I rest my opinion upon this simple ground. The reason why a conveyance of land is subject to those clauses in the statute is simply this—that the conveyance of the land implies the constitution of the servitude of support. That is the sole ground of it. Now, we have here this servitude of support constituted, not by implication, but by an express deed. My humble opinion, however, is that that makes no difference. As I have said, the servitude of support implied in the disposition of the above brings in these clauses; and when we have that servitude of support expressly given in place of by implication, I think it makes no difference on the result.

Lord Mure—I have come to the same conclusion, and very much on the same grounds as your Lordship and Lord Deas have mentioned. The substance of this transaction is the acquisition of ground under an Act of Parliament for the use of the railway; that is distinct throughout the whole of the conveyance. And secondly, there is the peculiarity in the expression of the conveyance of the servitude, which I was at first struck with, but I am satisfied it arises from the fact that the viaduct was actually built and in existence at the time the land was acquired; and referring to the terms of the disposition and to the clauses in it, by which the provisions of the Act of Parliament are imported into that conveyance, I think it must be regulated by the ordinary rules which are applied in all such cases. After the conveyance of the ground, the deed bears that it is taken by the Railway Company, and shall be held by them and their successors "according to the true intent and meaning" of the Act of Parliament. And that is applicable not merely to the land acquired, but to the whole premises expressly above mentioned.

On these grounds I have come to the same conclusion.

The Court adhered, with additional expenses.

Counsel for Pursuers (Reclaimers)—Lord Advocate (Watson)—Johnstone. Agents — Hope, Mackay, & Mann, W.S.

Counsel for Defenders—Balfour—Mackintosh. Agent—T. J. Gordon, W.S.

Thursday, November 17.

SECOND DIVISION.

GIRDWOOD OR THOMSON *v.* THE NORTH BRITISH RAILWAY COMPANY.

Reparation—Contributory Negligence—Railway.

In an action of damages raised by a widow against a railway company as responsible for the death of her husband, it was proved that the deceased was, as a passenger upon a winter night, at a station belonging to the defenders. Access from the one platform of this station to the other could only be obtained by means of a level-crossing over the line. The deceased, in order to reach his train, had to go over the level-crossing, and in doing so was knocked down by an express, and died shortly afterwards of the injuries received. There was evidence of warning having been given by the station-master, but it was not proved that the warning was given timeously, or that it had been heard by deceased. The jury returned a verdict for pursuer.

In a motion for a new trial on the ground that the verdict was against evidence—*held* (1) that although the railway company might not be bound in law to provide a bridge at their station for the benefit of those crossing, the question of whether or not they had