Lord President—I concur so entirely with all that Lord Deas has said on the question whether the provision inserted in the testing clause of this deed can be read as part of the deed, that I do not think it necessary to offer any remark.

On the other part of the case, as the Court is not agreed on the effect of the deed of settlement apart from that clause, I shall endeavour to explain what I think is its true construction, and what is the effect of the diligence used by the creditors. The leading provision as to the disposal of the residue is—"I appoint my trustees to hold, apply, pay, and convey the same, and the interest and other annual produce thereof, to and for behoof of the children of the marriage between me and Mrs Anne Kirkwood or Chambers, now deceased, equally among them, with the exception of my son the said William Chambers, and with and under the exceptions and modifications to be afterwards stated, payable in the case of such as are major six months after my decease." Now, I quite concede that the right given there in general terms is to be subject to the "exceptions and modifications" that follow, and is to be qualified by them; but it is material to observe that after this clause as to the disposal of the residue there occurs another clause, which is most important, and of whose meaning, taken by itself, there can be no dispute—"Declaring that the whole provisions in favour of my said children shall at my death vest in those surviving me." The meaning of that clause certainly is that the right of each child is to vest on the death of the testator, and but for what follows that vesting would be complete and absolute.

The sole question therefore is—How far is the effect of this clause taken off or modified by what follows? It would be strange if the effect of that modification were that in certain events the shares should not vest at death. That would simply undo what has immediately preceded, and that has not been done. But it is quite possible that a provision may vest and yet in certain events be subject to defeasance. An entailed estate, for instance, may vest fully in an heir of entail and yet be subject to defeasance. There have been instances of that in cases that have come before this Court; and if this is possible in the case of an entailed estate, it may certainly take place in consequence of provisions in a deed which were made with that purpose. If the clauses that follow are resolutive and not suspensive, vesting takes place as fully and completely as if there had been no conditions appended. The fallacy in the opinion of my brother Lord Shand, it appears to me, lies in this—that he has overlooked the distinction between resolutive and suspensive conditions. What is the effect of the conditions and exceptions that follow? As regards the first part of them, they are neither concerned with vesting nor divesting. They merely deal with the term at which the provisions are to be payable, and if there had been here a postponement of payment by the trustees in virtue of that power, the effect would be, not certainly to make this arrestment bad, but the right of the arresting creditors to make their arrestment effectual would have been postponed.

Passing over that clause, we come to a clause empowering the trustees to create new trustees or to constitute themselves new trustees, to provide that the beneficiaries are not to be entitled to more than the liferent of the provisions, and that the capital is to be settled on their children, "on such conditions and under such restrictions and limitations and for such uses as my trustees in their discretion may deem most expedient." Now, I quite admit that by that deed which the trustees have executed they divested the legatee, when it was executed, of the right which had previously vested in him. This is therefore a resolutive condition; but till it was executed the fee of the residue remained vested in the beneficiary just as if no such condition existed. From that it follows that the fee existed in the legatee subject to the diligence of his creditors; and on that simple ground I hold that the deed executed by the trustees had no effect on the arrestment previously used by the creditors.

The Court pronounced the following interocutor:—

"The Lords having resumed consideration of the reclaiming note and heard counsel, Recal the interlocutor of Lord Young, of date 22d February 1877, reclaimed against: Repel the defences; and decern in the furthcoming in terms of the first alternative conclusion of the summons to the extent of the sums of £2294, 1s. 10d. and £4, 6s. therein mentioned: Find the pursuers entitled to expenses, and remit to the Auditor to tax the account thereof and report."

Counsel for Pursuers—M'Laren—Keir. Agents—Adamson & Gulland, W.S.

Counsel for Defenders—Balfour—Mackintosh. Agents—Watt & Anderson, S.S.C.

Friday, November 9.

FIRST DIVISION.

[Sheriff of Lanarkshire.

MATSON *v.* WILLIAM BAIRD & COMPANY AND NORTH BRITISH RAILWAY COMPANY.

Reparation—Private Railway—Erection of Gates and Fences—Statutes 2 *and* 3 *Vict. cap.* 45; 5 *and* 6 *Vict. cap.* 55, *sec.* 9; *and Railways Clauses Consolidation (Scotland) Act* 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 69.

A horse having strayed from the public road by a level crossing, which was without gate or fence, upon a branch line of railway belonging to the proprietors of the ground, and from that at a distance of about half-a-mile having got upon the main line of the North British Railway Company, which, was likewise without gate or fence, and been killed—in an action of damages both the proprietors of the branch line and the railway company were assoilzied, on the grounds—(1) that under the Railway Statutes there was no obligation to erect gates and fences on private lines; (2) that at common law the public could not complain of the want of fencing at the junction with the main line; and (3) that the *locus* of the accident

was so distant from the highway as to take the case out of the rule of law regarding the fencing of dangerous places in the immediate neighbourhood of the public road.

Observations (*per* Lord President) on the opinions of the Court in the case of the *Monklands Railway Coy.* v. *Waddell*, June 21, 1861, 23 D. 1167.

Railway—Railways Clauses Consolidation (Scotland) Act 1845, *sec.* 69—*Statutes* 5 *and* 6 *Vic. cap.* 55, *sec.* 12, *and* 2 *and* 3 *Vic. cap.* 45.

Held (1) that upon a construction of the 69th section of the Railways Clauses Consolidation (Scotland) Act 1845, and the Statute 5 and 6 Vic. cap. 55, that the 12th section of the latter statute is the only section of that statute which applies to private or branch railways; and (2) that the regulations of the Act 2 and 3 Vic. cap. 45, are confined to railways constructed under statutory powers and open to the public.

Matson was proprietor of a valuable Clydesdale colt, which escaped at night, through no fault of the owner, from the field in which it was kept, and wandered along the public road for a distance of about two miles. There a private railway belonging to the Messrs Baird crossed the public road at a level crossing, and at a distance of about half-a-mile joined the main line of the North British Railway Company near Croy Station.

The colt, it was presumed, turned off the road and proceeded up the private line of railway till it came to the main line, where it was killed by a passing train. There were no gates at the level crossing to shut off the public road from the branch railway nor at the junction of the branch and main lines to prevent animals straying along the branch line, so that an animal thus straying should not get on to the main line.

The pursuer brought an action of damages for the value of the colt against the North British Railway and against the Messrs Baird before the Sheriff Court of Lanarkshire.

The Sheriff-Substitute (Galbraith) assoilzied the defenders, and the pursuer appealed to the Sheriff, who, on February 10, 1877, assoilzied the North British Railway Company, but found the Messrs Baird liable in damages for the loss of the colt. Against this interlocutor the Messrs Baird appealed.

The views of the Sheriff, and the arguments on both sides, will sufficiently appear from the opinions of the Court.

Appellants' authorities—Deas on Railways, 406–407, and cases quoted therein; *Bilbee* v. *London and Brighton Railway*, 34 L.J., C.P., 182; *Fawcett* v. *York and North Midland Railway*, 20 L.J., Q.B., 222.

Respondent's authorities—*Monklands Railway Company* v. *Waddell*, June 21, 1861, 23 D. 1167; *Gilchrist* v. *Ballochney Railway Company*, June 8, 1850, 12 D. 979; *Manchester, Sheffield, &c., Railway Company* v. *Wallis*, 23 L.J., C.P., 85.

At advising—

Lord President—This action was raised at Glasgow before the Sheriff against the North British Railway Company and against the Messrs Baird to recover damages for the loss of a horse which had strayed from the pursuer's field on to the North British Railway and was killed there by a passing train. The pursuer alleged fault against both the North British Railway Company and the Messrs Baird, who are owners of a private branch line which joins the main line of the North British near Croy Station, on the line between Edinburgh and Glasgow. The Sheriff has assoilzied the North British Railway Company, and this is not complained of, but he has found the Messrs Baird liable in damages, and against this they have appealed. It appears that the horse was pasturing in a field on the pursuer's farm, which field was proved to be sufficiently fenced, but the horse got out, in consequence, it is presumed, of some part of a gate being left unfastened by a trespasser—at all events, the pursuer does not appear to have been responsible in any way for its escape. Having got out of the field, the horse got on to a public road, and strayed along it for a distance of about two miles till he arrived at a point where a branch railway crosses the public road on a level. There were no gates either across the public road or across the branch railway, and therefore, there being open communication between the two, it was possible for the horse to pass on to the branch line, and it is supposed that he thus found his way along the branch line to the main line where he was killed. The ground on which the Sheriff gave his judgment is that the Messrs Baird were bound to have gates either across the railway or across the road, that there were statutory conditions imposed on them as conditions of their being allowed to make the line, and that they must be answerable for their neglect in not fulfilling them.

This portion of the North British Railway was originally the Edinburgh and Glasgow Railway, and was made by Special Act 1 and 2 Vict. cap. 58. By that Act permission was given to connect branch lines with the main line, so as to enable them to bring their traffic upon the main line from the coal-pits, or from whatever source their goods, or cattle, or whatever it was they desired to carry, might come. The connection made by the Messrs Baird with the main line of the North British Company was not made until somewhere about fifteen or sixteen years ago, and it has been assumed that that connection was made in virtue of the power conferred by the 69th section of the Railways Clauses Consolidation (Scotland) Act of 1845. It might perhaps be doubted whether that was so, or whether it was not made under the powers of the Special Act of the Edinburgh and Glasgow Company, but it is of very little consequence which of the two is the true view of the power, because the two Acts are substantially the same, and it has been assumed in argument that the 69th section of the Act of 1845 applies to this case. Now, that section provides that owners of adjoining land shall be entitled to make branches to connect themselves with the main line, and that is to be done under certain conditions. That power is given under certain restrictions under an Act entitled "An Act for the better regulation of Railways, and for the conveyance of Troops."

Now, the 69th section of the Railways Clauses Act is specially applicable to a particular subject—that is to say, branch railways; and it appears in the statute, like a great many other clauses, under that particular heading; and reference being made in that to a previous Act for the regulation of railways, one naturally turns to that portion of the previous

Act which deals with the same subject-matter, viz., branch railways, and we find in the previous Act, 5 and 6 Vict., cap. 55, only one section applicable to that subject. That is the 12th section, which provides that the Board of Trade are to order and direct that the powers of making branch lines are only to be exercised subject to such conditions as they shall direct. It is a clause which completely answers and corresponds to the reference in the 69th section of the Railways Clauses Act, and contains no obligation regarding the fencing of railways or regarding the construction of gates at level crossings. But the Sheriff is of opinion that the reference from the one statute to the other must be taken in a much more extensive sense, and that every provision contained in the Act 5 and 6 Vict., cap. 55, must be held as incorporated in the Railways Clauses Act for the purpose of regulating the construction and maintenance of branch railways.

Now, it appears to me that that is quite an untenable proposition. The Act 5 and 6 Vict., cap. 55, is an Act which has special reference throughout to what are called passenger railways, and almost every one of its provisions are directed to the construction and regulation of passenger railways, which of course do not comprehend branch railways that are made for the mere purpose of bringing on to the main line the traffic from some particular coal-pit on the line; and to say that all the provisions that the Legislature have thought fit to make, and all the conditions they have thought fit to impose upon the owners of passenger lines, such as the North British Company's line, are to be applicable to these branch lines, appears to me to be a mere absurdity.

Now, it is only by so construing the reference from the one statute to the other that the Sheriff is enabled to say that the 9th section of the Act 5 and 6 Vict., cap. 55, has been imported into the 69th section of the subsequent statute. No doubt if the 9th section is by the subsequent statute made applicable to branch lines, then the Sheriff is right; because it appears to me to be too clear for argument even that the 9th section is totally inapplicable to branch lines. The Act 5 and 6 Vict., cap. 55, in its interpretation clause distinctly provides that the word "railways" throughout the Act is to be understood as meaning passenger lines; and in this 9th section accordingly, where certain duties are imposed upon the owners of railways to fence their railways and to keep up gates at level crossings, that is with reference to passenger lines, and can be with reference to nothing else if proper effect be given to the interpretation clause. But even apart from the interpretation clause, I think it would be very clear upon the face of this statute itself that those provisions are intended to apply only to proper railways which are used for the conveyance of the public as passengers, and that they are totally inapplicable to such branch railways as we are dealing with here. Just let us consider for a moment what a branch railway of this kind is in reality. It is a pair of rails laid down upon the ground of a private proprietor to which the public are entitled to no access whatever, and with which nobody has anything to do except the owner of that private estate and the railway company with whom he effects a junction. Nobody else has any interest in the matter or any concern with it, and therefore to say that provisions which are made for the protection of the public and of adjoining proprietors in statutes for the regulation of what I may call public railways are to be applicable to a pair of rails laid down in a field, the private property of one private individual, seems to me to be altogether absurd; and therefore, without observation, I think it enough to say that the ground of judgment adopted by the Sheriff seems to me to be quite untenable.

But when the case was argued before us another ground of action was adopted by the pursuer, which perhaps is liable to the objection that it is not stated upon record, but which nevertheless has been dealt with in argument, and which it is quite right that we should dispose of. It is said that the defenders Messrs Baird & Company were bound under the Statute 2 and 3 Vict. cap. 45, to have gates across the level crossing of the turnpike road and the private railway. That statute is an Act to amend the Highways Act of the 5th and 6th Will. IV., cap. 50, which was exclusively an English Act, but this Act of the 2d and 3d Victoria is extended to Great Britain, and therefore is applicable to Scotland. It provides "that wherever a railway crosses, or shall hereafter cross, any turnpike road or any highway or statute-labour road for carts or carriages in Great Britain, the proprietors or directors of the company of proprietors of the said railroad shall make and maintain good and sufficient gates across each end of such turnpike or other road as aforesaid at each of the said crossings, and shall employ good and proper persons to open and shut such gates, so that the persons, carts, or carriages passing along such turnpike or highway shall not be exposed to any danger or damage by the passing of any carriages or engines along the said railroad;" and then there is a provision for a penalty in case of neglect of this duty.

Now, it is perfectly clear to my mind, upon the reading of this statute, that it is intended to apply to railways of the same kind as those which are provided for in the 5th and 6th Vict., cap. 55, viz., railways that are used by the public. I will not say that it is necessarily confined to passenger railways, but it is certainly confined to railways constructed under statutory powers, open to the public—and for these reasons. The statute speaks, in the first place, of the company of proprietors of the railway, plainly pointing at such a railway as is formed under a Special Act of Parliament. In the second place, it must be observed that there was no need whatever for any provision of this kind in regard to the crossing of a turnpike or other public highway by a private railway, because no private railway has any right to cross a turnpike or other public highway on the level. It is only statutory railway companies that have such powers conferred upon them by Parliament. If a private railway is to cross a turnpike or other public highway on the level, it can only be by the special licence and permission of the trustees or other persons who administer the highway; and those trustees have it in their power to impose any conditions they think fit on allowing a private railway so to cross their road upon the level. They require no protection such as is afforded by this Act of Parliament; but where railways constructed under Special Acts have power to cross highways upon the level road, it would necessitate all precautions being taken that that

shall only be done upon such conditions as are necessary for the public safety, the trustees of the highway having no power whatever to impose such conditions. They must be imposed by statute or they cannot be imposed at all, because the special power of crossing is given by statute, and if gvien unconditionally the trustees could not oppose its being done in any way most convenient for the railway company. It is therefore to guard against that that this Act was passed. And what is it that it provides? What is the object of the enactment? The object of the enactment is to prevent passengers along the highway being injured or subjected to danger by the passage of trains along the rails. But if that is the object, and the only object, of appointing gates to be put up across the railway or across the highway, then where there are no trains passing it is not necessary to have gates. The only object of directing the construction of gates is to protect the passengers on the highway against the danger of carriages or trains passing on the railway; but during the night, when this accident occurred, there could be no reason for leaving those gates shut, and they might have been lawfully open. Therefore it appears to me that in no point of view can this statute have any application to the present case. In the first place, I think it is quite clearly not applicable to private railways; and, in the second place, the obligation that it imposes would not amount to this, that the owner of every private railway was bound to keep the gates continually shut whether trains were passing or no.

That ground of action therefore, I think, fails equally with the one which was sustained by the Sheriff; and it only remains to consider another argument advanced on the part of the pursuer, to the effect that the circumstances of this case are sufficient to subject the defenders Baird & Company to liability at common law. Now, it is necessary in dealing with this ground of action to keep distinctly in view the precise circumstances of the case. This wandering colt travelled two miles along the highway before it reached the branch railway, and it had to travel half-a-mile along the branch railway before it reached the place of danger, viz., the North British line; and it is said the North British line, being a place of danger, should have been so fenced that nobody could get on it, neither man nor beast. We are altogether out of the statutory obligations of fencing and erecting gates in considering this question, and it must be observed that the breach in the fence of the North British Railway Company was made by Baird & Company for the purpose of connecting this private line with the main line. Now, if people in the same neighbourhood or parish, or people in the same county, or the public generally, have a right to have that fence maintained in its integrity, then I quite understand the ground of action which is now attempted to be set up. But the railway company are under no common law obligation to maintain a fence along their line, and Baird & Company are certainly under no such obligation. Therefore if this fence had gone down altogether, the pursuer of this action could never have complained of it either under the statute or at common law, for nothing is better settled than this, that the obligation of a railway company to fence its line is a purely statutory obligation and not a common law obligation; and, in the second place, that the only creditor in that obligation is the proprietor or occupant of the adjoining land. If the fencing of a railway were left to common law, how would the obligation stand? Simply in the same position as the mutual rights and obligations of any two adjoining proprietors. The adjoining proprietor would be entitled to call upon the railway company, or the railway company would be entitled to call upon the adjoining proprietor, to erect a march fence at their joint expense. That would be the law as between those two parties. Would anybody else have anything to do with that? Most certainly not. The public, or any other more distant owner, has nothing to do with a march fence between me and my neighbour. They cannot insist on our making a march fence; and just as little can this pursuer, who is the occupant of land at a considerable distance, insist upon it at common law that those two proprietors, the North British Railway Company and Messrs Baird & Company, should erect a march fence between their two estates. The obligation therefore to erect a march fence being purely statutory, and there being no such obligation at common law at all upon the railway company, and the obligation further becoming one which is owed to the adjoining proprietor and to nobody else, it seems to me to follow of necessity that if that fence were removed altogether the pursuer of this action could have no action of damages for any loss or injury sustained by this horse finding its way on to the North British Railway through some unfenced fields which lie between him and this line.

But then it is said that Messrs Baird & Company made a road to this danger, and made a road which connected the danger with the highway. Now, there is a sort of plausibility in that at first sight, but I think it disappears upon an examination of the facts. It is very true that a dangerous piece of property in the immediate neighbourhood of a highway which is not fenced, and against the danger arising from which the public are not in some way protected, has been made in various cases the ground of subjecting the owner of that dangerous piece of property in damages. But it is an essential condition of that common law liability that the danger shall lie so near the highway as to create a very great risk of persons or of cattle wandering a very little way from the highway and so encountering the danger. But what is the state of the fact here? Why, so far from this being an imminent danger or a danger in the immediate proximity of the highway, it is rather upwards of half-a-mile from the place at which the branch railway crosses the turnpike road. Now, it is impossible to say that that is an imminent danger or a danger to property in the immediate proximity. I think that would be stretching the doctrine a great deal too far; and seeing that all those matters are really made the subject of legislation—everything connected with fences and gates as regards the main line of rails, which is the point of danger, is made the subject of special legislation—it would be very difficult indeed to say that the common law imposes some additional obligation which the Legislature has not thought fit to import. And therefore, upon the whole matter, I think this common law ground of action

will not do any more than any of the statutory grounds.

There was some reference made in the course of the discussion to the observations of the Judges in the case of the *Monklands Railway Company* v. *Waddell*, June 21, 1861, 23 D. 1167, and in consequence of the observations which I see I made in that case I think it right to make an explanation. I am reported to have said that "a great peculiarity in the case arises from the circumstance that the gap through which the cattle in point of fact got on the railway should have been stopped by a gate across the branch railway, and the contention of the defender was, that assuming the pursuer to be in a position to enforce against the railway company the obligation to fence, yet, as this gap in the fence was caused by an operation by Cross"—that was, the only owner of the branch line—"the obligation of putting up a gate lay on Cross and not on the railway company, and that therefore the pursuer had no action against the railway company. That defence raised a different and a much more difficult question than that which I have disposed of. And I am not satisfied to rest my judgment on that ground. I do not doubt that Cross would be liable to relieve the railway company from any damage that might happen in consequence of the want of a gate, and I am not disposed to raise doubts as to Cross' liability to the owner of the adjoining lands." Now, it does not sufficiently come out there, but it was quite present to the minds of the Court at the time, that Cross, who was the owner of the private railway, was not the occupant of the adjoining land upon which that railway rested. The occupant of the adjoining land was a different person, and the pursuer of the action had sought to identify himself with that occupant of the adjoining land, and so to put himself in the position of being creditor in the obligation of the railway company to fence their line. That was the peculiarity of the case, and the view which I stated there was, that if the pursuer of the action was to be taken as the occupant of the adjoining land, and a creditor in the obligation of the railway company, then, if Cross was the party who made the breach in the railway company's fence, and so subjected them in damages to the occupant of the adjoining land, Cross would undoubtedly be liable to relieve the railway company. But in the present case, as I have already had occasion to notice, the occupant of the adjoining land is also the owner of the private railway, and accordingly he is the only person who is creditor in the railway company's obligation to fence; and if both the creditor and the debtor in that obligation agree to make a breach in that fence for the purpose of letting in Baird & Company's private line to join the main line, there seems to me to be nobody else that can interfere with it or can say they are prejudiced by what they have done.

On the whole matter, therefore, I am for altering the Sheriff's judgment and assoilzieing Baird & Company.

Lord Deas concurred.

Lord Mure—I have come to the same conclusion. I think the exposition which your Lordship has given of the meaning and application of these two sets of statutes is quite conclusive against the claim so far as rested upon neglect of a statutory duty.

I am free to admit that as the question of common law was first put to us very plausibly by the counsel for the respondent, I had thought that there might probably be some difficulty upon that question, and I observed in reading the case of the *Monklands Railway* the expressions in your Lordship's opinion, and also, I think, in the opinion of Lord Benholme, which seemed to give some weight to the argument that was pressed upon us, but I am quite satisfied upon looking further into that case, and after the explanations which your Lordship has now made with regard to it, that the circumstances were materially different from those that occur here. The question, therefore, at common law is exactly as your Lordship put it, viz., where a party makes a railway on his own property from a public road to a public railway at a considerable distance, and horses or cattle, or human beings it may be, get upon that railway, where they have no right to be, or upon that road where they have no right to be, and come to the public railway where there is a dangerous place, is the proprietor of the ground or of the railway or of the road liable to make good any damage which may have occurred? Now, I think, looking to the fact that this dangerous spot was, as your Lordship has said, upwards of half-a-mile from the point on the public road where the horse seems to have got off, and that the horse got there by straying, there is no liability attaching to the owner of that railway any more than there would have been to the owner of an occupation road leading from the public road to the railway at that distance. If a man or a horse strays from the public road through an opening in the fence made for an occupation road, and wanders through another man's farm for a distance of half-a-mile, and stumbles in the dark upon a dangerous spot on the railway, I do not think there is any obligation at common law to make the proprietor of that ground, or the proprietor of the private railway which has been made across that ground, responsible either for the loss that may arise or the damage that may be sustained by a horse or human being coming through that gap. It is too remote from the locality of the public road, on which alone there was any right of passengers to be, to bring in the common law liability; and it is quite different in that respect therefore from the cases to which your Lordship has referred, where an unfenced coal-pit close to the side of a public road, or an unfenced quarry, has been held to subject a proprietor in damages for such an occurrence. At common law, therefore, I am satisfied that there is no foundation for this claim either on general principles or in respect of any other opinions that were delivered in the case quoted by your Lordship.

Lord Shand concurred.

William Baird & Company were therefore assoilzied, as the North British Railway Company, the other defenders, had previously been.

Counsel for Defenders (Appellants)—Lord Advocate (Watson)—Balfour—M'Kechnie—J. P. B. Robertson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Pursuer (Respondent)—Kinnear—R. Johnstone. Agent—John Gill, Solicitor.