for carrying out this request, and I do not see that this was possible consistent with the absolute right of ownership given.

In the actual case Mrs Douglas died before receiving payment, but she has given a title to certain trustees for the purpose of administering the fund. Now, the first purpose of this trust, as is usual, is the payment of the truster's debts; and her conveyance in the marriage-contract creates an obligation or debt which must be fulfilled. It seems to me, therefore, that even if the money had been paid over to her trustees they would have been bound to hand it over to the marriage-contract trustees as the payment of one of the truster's debts.

I come now to the authorities. The case of *Thurburn* is no doubt in some aspects against the judgment to be pronounced; but there were very special circumstances in that case. The main subject in dispute was heritable estate of considerable value, in regard to which there was a destination-over to the daughter's second son; and with regard to the residue there was the same peculiarity—a destination-over—for the money was to go to the children of the marriage. It has been observed that the Court were agreed in the ground of judgment in that case. I can hardly say so. The Lord Ordinary (Lord Barcaple) expressed his opinion very distinctly that "the truster's mere wish and intention, however plainly expressed, cannot exclude the operation of the clause in the marriage-settlement if it otherwise applies." And if we turn to the grounds of judgment adopted by the Judges who recalled the Lord Ordinary's interlocutor, they seem to me to be by no means the same. The Lord President (Lord Colonsay) says—"It is a matter of contention that whatever may have been Mr Thurburn's view, the parties themselves made an agreement which is obligatory upon them, and that Mrs Maclaine is disabled from taking this estate except under the condition that it shall go to the trustees in the marriage settlement—that is to say, that Mr Thurburn, or any other person who might be disposed to settle an estate on Mrs Maclaine, could not settle it except in such a way that it must fall under the provisions of the marriage-contract. What would be the effect of that? If it is an argument entitled to any weight, I think it would come to this, that as Mrs Maclaine cannot take the estate upon the condition on which it is given, she cannot take it at all, and consequently it cannot come to the marriage-contract trustees; and if she cannot take it at all, I think the next substitute in the destination would probably get it. But that, however, is not a question we need determine now." Lord Curriehill, on the other hand, said—"It is said that if Mrs Maclaine is to be an unlimited fiar, she is under an obligation to convey the subjects to the marriage-contract trustees. Now, I think that she has the power to convey. If she thinks proper to convey this estate to the marriage-contract trustees, it appears to me that the conveyance would be valid, as the substitutes have no *jus quæsitum* according to the view I take of the case." The opinion of my brother Lord Deas does not, so far as I see, touch the point, and Lord Ardmillan reverts to the view of the Lord President.

Since the case of *Thurburn* there have been several cases of authority in which the Court has enunciated the principle that when an absolute right of property is given to anyone under a condition, the condition is ineffectual unless a trust has been created or the means given of creating a trust. These cases are—*Allan's Trustees* v. *Allan*, referred to by your Lordship; *White's Trustees* v. *White;* and *Gibson's Trustees* v. *Ross*. In the last of these cases a testator directed his trustees to retain the residue of his estate till his only child (a daughter) should be married, and a child born of the marriage, and then to convey to the daughter and to her children equally, but subject to a power of appointment in the daughter, and declaring that neither the annual proceeds nor the fee should be subject to the *jus mariti* and right of administration of the daughter's husband, or subject to his or her debts or deeds or the diligence of his or her creditors, but that the same should be an alimentary provision for his daughter during her life; and he directed the trustees to make full provision to the above effect in the conveyance or conveyances to be executed by them. It was held that, the truster having given an absolute right of fee, the condition was ineffectual, being a mere expression of intention. Now, that decision was subsequent to the case of *Thurburn's Trustees*, and seems to me to impair whatever argument might be drawn from that case against the decision we are about to pronounce.

The Court recalled the interlocutor of the Lord Ordinary, repelled the defences, and found and declared in terms of the declaratory conclusions of the summons, and remitted to the Lord Ordinary to proceed with the conclusions for accounting.

Counsel for Pursuers (Reclaimers)—M'Laren—Darling. Agents—Lindsay, Paterson, & Co., W.S.

Counsel for Defenders (Respondents)—Lord Advocate (Watson)—Asher—Jameson. Agent—T. J. Gordon, W.S.

Tuesday, December 2.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

CALEDONIAN RAILWAY COMPANY *v.* PLAYFAIR AND OTHERS (WALKER'S TRUSTEES).

Railway—Compensation—Lands Clauses Consolidation Act 1845—*Railway Works "injuriously affecting" Lands.*

Terms of an undertaking granted by a railway company to certain parties, owners of property, who were opposing a Bill brought forward by the company in Parliament, on the faith of which the opposition was withdrawn, and which were *held* to bind the company to a submission to arbitration of a claim for compensation in respect of the property in question, the relevancy of the averment in support of the claim being reserved.

Opinion (*per* Lord Curriehill, Ordinary) that in order to found a claim for compensation in respect of railway works "injuriously affecting" land under section 6 of the Railway Clauses Consolidation (Scotland) Act 1845, the injury must be such as will permanently diminish the value of the land.

The respondents in this action, Patrick Playfair and others (Walker's trustees), were owners of certain subjects in the neighbourhood of Eglinton Street, Glasgow, and they claimed from the complainers, the Caledonian Railway Company, compensation in respect of their property having been injuriously affected by the execution of certain works by the complainers, in virtue of the powers conferred on them by The Caledonian Railway (Gordon Street, Glasgow, Station) Act 1873. For the purpose of settling the amount of compensation by arbitration, in terms of The Lands Clauses Consolidation (Scotland) Act 1845, the respondents nominated Mr George Bell, architect, Glasgow, to be arbiter on their part, and the complainers nominated Mr Thomas Binnie as arbiter on their part, but under protest that the respondents Walker's trustees had no right to any compensation, and that no dispute had arisen between the parties entitling the respondents to insist in the arbitration. Mr Bell and Mr Binnie accepted the office of arbiters and appointed as oversman in the reference Mr William M'Jannet, writer in Glasgow, who accepted the office on 14th March 1879. The complainers on 19th March presented this note of suspension and interdict in the Bill Chamber for the purpose of having the respondents Walker's trustees and the arbiters and oversman interdicted from proceeding with the arbitration. Interim interdict was granted on that day by Lord Adam, and was continued by Lord Gifford on 28th March 1879, on which day the note was passed for the trial of the questions upon which the parties are at issue. A record was afterwards made up in the case.

The facts, in so far as admitted, were as follows:—The respondents' property was occupied as a cotton mill, and was bounded on the north by Canal Street, on the east by Francis Street, and on the South by Victoria Street. The east front of their premises was parallel to and about 90 yards distant from Eglinton Street, which was one of the main thoroughfares of the portion of Glasgow on the south side of the Clyde. Canal Street and Victoria Street were public highways, and were, until the operations of the complainers after mentioned, level streets intersecting Eglinton Street at right angles, and affording direct and easy access between that street and the north and south sides of the respondents' property. At a considerable distance north of Canal Street there was another street named Cook Street, running westwards from Eglinton Street and parallel to Canal Street, but there was no communication between Canal Street and Cook Street except by Eglinton Street. In 1873 the complainers applied to Parliament for powers to make a new line of railway on the site of part of the west side of Eglinton Street. It appeared to the respondents that if the proposed operations were sanctioned by Parliament, Canal Street and Victoria Street and the access to Eglinton Street would be so much interfered with that their property would be seriously injured, and they accordingly joined certain other owners of property in the neighbourhood in petitioning Parliament against the complainers' Bill. While the Bill was in dependence in the House of Lords the committee of the House refused to hear the petitioners on the preamble, but intimated that they would be heard in support of clauses for the protection of their interests. Before any such clause came to be discussed, the complainers (through their agents Messrs Grahames & Wardlaw) prepared and offered to the petitioners the following undertaking provided they would withdraw their petition. And the petitioners (including the present respondents) in respect of the undertaking agreed to withdraw, and did withdraw, their opposition to the Bill—which thereafter was passed into law as "The Caledonian Railway (Gordon Street, Glasgow, Station) Act 1873."

The undertaking, which was in the form of a letter, was dated 4th July 1873, and addressed to the claimants, sealed with the common seal of the railway company, and signed by the secretary of the company, and was in the following terms:—"Gentlemen,—In consideration of your withdrawing all further opposition to this Bill, we, the Caledonian Railway Company, do hereby undertake, that if and so far as you are in the judgment of the arbiters or oversman or jury to be appointed under the Lands Clauses Consolidation (Scotland) Act 1845, as after mentioned, injuriously affected by the construction of any of the works authorised by this Bill, your claim for compensation shall not be barred by reason of our not taking any part of your respective lands, and the amount of such compensation, if any, if not agreed upon, shall be determined in the manner provided by the Lands Clauses Consolidation (Scotland) Act 1845 for the determination of cases of disputed compensation; but without prejudice to all claims competent to you, or any of you, under and by virtue of the said Act, and of any other Acts regulating the construction of railways, and in all cases where the lands of you, or any of you, or any part thereof, may be taken by us for the purpose of this Act."

The formal claim and notice, in which £2600 was demanded as compensation for injury, loss, and damage to property, was based on the ground that the railway company "have demolished the houses and shops and other buildings forming the west side of Eglinton Street at this place, and substituted therefore a railway, thereby permanently taking away the thoroughfare from that part of the street. They have also shut up Canal Street and diverted Victoria Street to the south, thereby causing a detour to all traffic entering or leaving the claimants' property, of 1032½ feet on the north and 150 feet on the south entrance, and they have further injured the gradients of these accesses from 1 in 712 to 1 in 19 on the south entrance, and from 1 in 158 to 1 in 34 on the north entrance. They have also obliged the claimants, in place of their former level entrances into Eglinton Street, to enter a narrow street or road called Salkeld Street, which neither has nor ever can have shops or buildings or thoroughfare, and by these operations they have greatly diminished the value of the claimants' property." In the record the respondents further averred that they had a special interest in these streets, which had been formed and maintained by them and their predecessors, and which formed the special, and indeed the only, accesses to their property, and that the construction of railway works "across the line of the foresaid streets cuts off the access between the respondents' property and Eglinton Street, the leading thoroughfare of the district, and necessitates a long detour for all carts, carriages, and passengers coming to or leaving the respondents' works. The direct

access which the respondents formerly had by the said street to Eglinton Street rendered their property more valuable, and by the construction of the complainers' said works it has been permanently damaged and its value greatly diminished." The complainers' answer was that the respondents' property "has sustained no permanent or peculiar physical injury, and although the respondents in using Victoria Street as altered have to use at some distance from their property a somewhat steeper gradient than before, they have to do this in common with all the members of the public who require to use the said streets;" and they maintained that the injury which the respondents alleged was not such as could be made a ground of compensation under any of the statutes.

As already mentioned, arbiters and an oversman were nominated, but under protest on the part of the Caledonian Railway Company, who thereafter presented this suspension, on the ground that the injury which the respondents alleged in their claim was not such as could be made a ground of compensation under any of the statutes—in point of fact, that the respondents had not made a relevant allegation of injury.

The Lord Ordinary (CURRIEHILL) repelled the reasons of suspension and recalled the interim interdict, and decerned, holding that the grounds of damage alleged were relevant, and that the Court ought not to interfere to prevent the arbitration from proceeding.

In the note appended to his interlocutor his Lordship said (regarding the effect of the undertaking)—"I am inclined to think that that letter does not amount to an absolute undertaking to submit to arbitration whatever claim for compensation the respondents might bring forward on the ground that their property was 'injuriously affected.' I think that the true meaning of the undertaking was this, that although no part of the respondents' lands was taken by the railway company for the purposes of their Act, they were nevertheless to be entitled to insist before arbiters or a jury upon all claims, on the ground of their lands being injuriously affected, which would have been competent to them had any part of their lands been taken. I do not think that the letter, when fairly construed, binds or was intended to bind the railway company to submit to arbitration any claim by the respondents for compensation unless they were in a position to allege that their lands were 'injuriously affected' within the meaning of the various Consolidation Statutes regarding such claims."

His Lordship then gave his reasons for holding that the complainers were entitled, in terms of the 6th section of the Railway Clauses Consolidation (Scotland) Act 1845, to insist in a claim for compensation as being "injuriously affected" by the operations of the company.

In regard to the question whether the averments of injury to their lands made by the respondents were such as would in law entitle the complainers to compensation, his Lordship, in coming to the conclusion that the averments were relevant, said—"The next and the truly important question in this case is, whether the averments of injury to their lands made by the respondents are such as if proved to the satisfaction of arbiters or of a jury would in law entitle them to compensation? Questions of this kind are always attended with more or less difficulty, and there have been numerous decisions both in this country and in England—several of them judgments of the House of Lords—all of which, however, it is not very easy at first sight to reconcile. But I think on a careful study of these cases it will be found that the principle which runs through them all is this — that in order to found a claim for compensation in respect of railway works 'injuriously affecting' land, the injury must be a real injury—that is, it must physically injure or otherwise permanently diminish the value of the lands. Personal inconvenience to the proprietor, which he shares with the rest of the public, will not ground a claim for compensation. There must be some special or peculiar damage done to the lands by reason of the construction of the works, and the damage, as I have said, must be of a permanent and not a temporary character. It will depend very much upon the facts ascertained by the arbiters or the jury whether or to what extent the claim for compensation is well founded."

His Lordship thereafter referred to and commented upon the cases (1) of the *Caledonian Railway Company* v. *Ogilvy*, 1855, 2 Macq. 229, which he distinguished from the present case as follows:—"In the present case there are positive averments of injury to the respondents' property by the actual shutting up of two direct accesses to Eglinton Street by the substitution of a deviation road upon steep gradients instead of practically level roads, and by the deviation road being so constructed that the access to Eglinton Street is now long and circuitous, in place of being short and direct, and is moreover made in the form of a mean and narrow street, in which there would be little thoroughfare and few shops of any consequence. In short, it is averred that the operations of the railway company have 'injuriously affected' the respondents' lands by impairing the accesses to them, and thereby diminishing their value as commercial subjects." (2) *Chamberlain* v. *The West End of London and Crystal Palace Railway Company*, 1862, 2 B. and S. 605 and 617, which his Lordship stated closely resembled the present. (3) *Beckett* v. *The Midland Railway Company*, 1867, L.R., 3 C.P. 82. (4) *The Metropolitan Board of Works* v. *M'Carthy*, 1874, L.R., 7 E. and I. Apps. p. 243.

His Lordship concluded as follows:—"I have quoted at length these passages from the opinions of Lord Chelmsford and Lord Penzance [*i.e.* in the case of the *Metropolitan Board of Works* v. *M'Carthy*] because it appears to me that they are in every sentence applicable to the present case. The averment of the respondents is that the direct and level access which they had by means of the highways called Canal Street and Victoria Street to the great public thoroughfare called Eglinton Street was a valuable accessory to their property, and that the obstruction of that direct access, and the substitution of a circuitous deviation road of greater length, of steep gradients, and passing through a new and mean street, has permanently diminished the value of the property. These averments, if true, appear to me to be as relevant to found a claim for compensation under the Railways Clauses Act as the corresponding averments in the cases of *Chamberlain*, *Beckett*, and *M'Carthy*. It will, of course, be the duty of the arbiters to determine upon the evidence laid before them to what extent, if any, the respondents'

premises have in point of fact been permanently injured and diminished in value. It may be that they are situated at such a distance from Eglinton Street that a direct access to it by means of Canal Street and Victoria Street was of little or no value; but that is a matter, as I have said, for the arbiters, and not for the Court to determine. I am therefore of opinion that the arbitration must proceed, and that the present suspension ought to be refused with expenses."

The complainers having reclaimed, their Lordships of the Second Division did not decide the question of the relevancy of the grounds of damage, but reserved their opinion upon that point, holding that the complainers were bound by the undertaking quoted above to proceed with the arbitration in the meantime, though the question as to the relevancy of the grounds of damage might be raised at a later stage.

At advising—

LORD JUSTICE-CLERK—In considering the important questions which have been argued to us in this case, it is necessary to keep in view the nature of the application and the circumstances under which it has been presented. The Caledonian Railway Company under this note of suspension and interdict have applied to the Court to exercise their prohibitory power to restrain certain persons said to have been nominated as arbiters and oversman in a question between the complainers and respondents, from acting on such nomination, or proceeding to consider the matters said to have been submitted to them. It appears from the prayer of the note of suspension that one of these arbiters was nominated by the complainers themselves, and that the procedure which they desire your Lordships to prohibit is the direct result of their own act.

It does not alter the unusual nature of this demand that the nomination of the arbiter by the complainers was under protest, or that if they failed to appoint an arbiter they ran the risk, if they proved to be in the wrong, of leaving the nominee of the respondents as sole arbiter in the matter. The fact remains that the complainers desire that we should interfere by way of interdict with the course of proceedings initiated by themselves, and the remedy they pray for is one which could only be granted on clear and exceptional grounds.

The Lord Ordinary has explained very lucidly the circumstances under which this question has arisen, and I need not resume them in detail. The complainers in the Parliamentary session of 1873 promoted a private Bill which had for its object to authorise certain operations in the immediate vicinity of the property of the respondents in the City of Glasgow. The respondents took steps for the purpose of opposing the Bill, as they alleged that the proposed works would seriously injure their property; and pending the consideration of the Bill before the Parliamentary Committee the parties came to an agreement under which the respondents undertook to withdraw their opposition in consideration of certain concessions made by the complainers. It is necessary to attend with some care to the precise words and effect of that agreement. I agree with the Lord Ordinary that it cannot be read as conceding any part of the respondents' alleged claim. What it does is, as I read it, to provide that the operation of the proposed works of the railway company shall be considered by arbiters chosen under the Lands Clauses Act; that if these arbiters shall find that the property of the respondents has been injuriously affected by these operations, the railway company will not plead against the claim for compensation that no part of the respondents' property is actually taken by the company; and that in that case the amount of damage shall be settled by the arbiters. Such is the contract between the parties. The respondents, proceeding under this agreement, intimated their claim to the complainers and nominated their arbiter. The complainers, although under protest that there was no dispute to be settled by arbitration, and no claim which could be the subject of it, appointed theirs; and an oversman was nominated by the arbiters. It is to stop the further progress of this arbitration that the complainers have now presented this application, and they support it on the ground that the claim of the respondents discloses no ground on which compensation could be awarded. It is contended that the claim does not allege any injury to have been suffered by the respondents on their property which is not equally borne by the public, and the cases on this head, which are more numerous than consistent, were fully commented on in the argument.

I do not propose to give any opinion on the difficult questions which were the subject of that discussion, nor even to decide how far or at what stage they may eventually come before us. Under any circumstances I should have thought it an advantage, if not essential, to ascertain as matter of fact the nature and effect of the operations of the railway company before coming to any conclusion as to the claim of the respondents. But after fully considering the topics which were urged before us, I have formed a clear opinion that the agreement between the parties binds them to leave the ascertainment of these matters of fact to the arbiters in the first instance, and that there is no ground on which we can be warranted at this stage of the proceedings in interposing between the arbiters and their consideration of the matters submitted to them.

LORD GIFFORD—The distinguishing peculiarity of the present case is that by a formal agreement or Parliamentary undertaking the Caledonian Railway Company, who are the present suspenders, and the late Mr Walker's trustees, who are the respondents, have themselves arranged and fixed the mode in which any compensation due to Walker's trustees should be ascertained and determined. The undertaking or agreement is dated 4th July 1873, and it is sealed with the common seal of the Caledonian Railway Company.

Both parties to the present action therefore have deliberately superseded the common course of procedure in cases of disputed compensation, and have provided for themselves special procedure, and to some extent special rules of law, which they both agree shall be followed out and adopted in reference to the claim of compensation now insisted in by Walker's trustees.

Both parties admitted that the formal Parliamentary undertaking is now binding and effectual. The Caledonian Railway Company very properly

stated that even if the agreement were exposed to technical or formal objections they would not plead such objections, but viewing the agreement as binding in honour and good faith they were anxious and desirous fairly and fully to implement it, and accordingly ultimately the only question between the parties came to be, What is its true import and effect, and is there anything to prevent it from being formally and exactly carried out?

Now, it appears to me that there is no serious difficulty in carrying out the agreement of both parties according to its exact terms, and I can see no reason for adopting any other course of procedure than that which both parties have stipulated for and provided for themselves.

The terms of the agreement appear to me to be unambiguous. The undertaking, which is addressed to Mr Walker's trustees, begins—"In consideration of your withdrawing all further opposition to this Bill"—now that has been done; the opposition has been withdrawn—"we the Caledonian Railway Company do hereby undertake"—and then follow the terms of the undertaking, which begin with a condition—"if and so far as you or any of you are in the judgment of the arbiters or oversman or jury to be appointed under the Lands Clauses Consolidation (Scotland) Act 1845, as aftermentioned, injuriously affected by the construction of any of the works authorised by this Bill"—then so and so shall happen.

Now, this condition seems to me to imply that the first thing to be done is to ascertain whether in the judgment of the arbiters, oversman, or jury the property of Walker's trustees is, and if so to what extent it is, injuriously affected by the construction of the authorised works. It is a condition-precedent of the whole agreement that it is only to come into force and apply at all if the statutory arbiters, oversman, or jury shall find that the respondents' lands have been injuriously affected. Until this condition is purified nothing at all can follow on the agreement.

I may say in passing that by the words "injuriously affected," as they are used in this first clause of the agreement, I understand is meant the mere question of fact—Whether the value of the lands is pecuniarily prejudiced? The word "injuriously" does not mean here illegally or wrongfully; that is or may be a question of law which the statutory arbiters, oversman, or jury cannot possibly settle. A valuation jury and arbiters have in general no broader power than to assess pecuniary damage. They can only value and fix money compensation. They are statutory valuators and nothing else.

But both parties here have agreed that this statutory valuation is the very first thing to be got in the present case, and that all other questions shall only thereafter arise. I think this agreement lawful, and that it must receive effect, and therefore to the arbiters or jury both parties must first of all go.

Now, in one point of view, this is enough for the present case without going into any of the difficult questions referred to in the elaborate note of the Lord Ordinary. For what is it that the Caledonian Railway Company seek in the present suspension and interdict? It is to interdict the arbiters and oversman from acting or proceeding in the arbitration, and to interdict Walker's trustees from appearing and pleading in the arbitration, and from acting upon any orders which may be issued by the arbiters or oversman—that is, to interdict the respondents from doing the very thing which by the Parliamentary agreement of 4th July 1873 both parties expressly agreed and covenanted should be done. It seems to me quite impossible to grant such an interdict as this, and therefore I concur in the result which the Lord Ordinary has reached without at all entering into the legal considerations which he has considered in his note, and without finding it necessary to do so.

The Caledonian Railway, however, seem to have been apprehensive that if the arbitration were allowed to proceed, this would be equivalent to admitting or affirming the relevancy in law of the various claims made by Walker's trustees, so that it would or might follow that whatever sums the arbiters or oversman fixed were payable absolutely by the Caledonian Railway, and it is upon this view that we have had an elaborate argument that the claims made by Walker's trustees, or some of them, are not relevant or sufficient in law to infer the payment of any compensation whatever.

It is no doubt true that in ordinary cases of railway or other compensation under the Lands Clauses Act we have allowed the parties to raise the legal question whether any relevant claim for compensation exists, and that before going to the arbiters at all, and this may often be an expedient enough way of determining a pure question of law when such sufficiently arises, and when the question of law can be equally well decided before as after the award of the arbiters. In such case the expense of an arbitration may often be saved. But the peculiarity of the present case is that both parties have expressly agreed that the question of law or relevancy of the claim shall not be the first question to be decided, but that first of all there shall be a valuation of pecuniary injury by arbiters or by a jury, and I see very important objects to be served by beginning with the money question, and no reason whatever for varying the agreement of the parties and taking the procedure in a different order.

In England there is generally—I think almost always—a valuation by the statutory arbiters or by the jury before any question is raised or tried as to the legal right to recover compensation in respect of the construction of the railway works, and it is often extremely advantageous to have the pecuniary results assessed in detail and distributed under the various heads or grounds on which damage or compensation is claimed. The Court are thus enabled to see precisely what are the grounds upon which the claim for compensation rests, and enabled to say whether in point of law these grounds are sufficient to sustain the claims in whole or in part.

In the present case I think this preliminary investigation into the pecuniary results, and an analysis of the claim into its various parts or elements, is peculiarly desirable—indeed, I think I may say almost indispensable—for the due consideration of the ulterior questions of law; and this also was evidently the view of both the parties to the agreement.

The agreement proceeds to provide that after the valuation has been got, the validity or sufficiency in law of the claim of compensation shall be determined, and as no other tribunal for this

is covenanted for, it must be left to the ordinary Courts; and then this special agreement is come to regarding the question of law, namely, that "your claim" (that is, the claim of Walker's trustees) "for compensation shall not be barred by reason of our" (that is, the railway company) "not taking any part of your respective lands." This is simply a covenant whereby a plea in bar is waived or departed from—the claims shall not be barred on certain grounds—and I assume that the Court will give effect to this covenant in considering the legal question of liability, but it does not arise at the present stage of the procedure.

The agreement next proceeds that the amount of compensation shall be determined under the Lands Clauses Consolidation Act 1845. At first sight this appears to contemplate two appeals to the statutory arbiters or jury, and possibly this may be necessary if the first award does not exhaust valuation questions, or does not contain materials to enable the Court to discriminate between certain claims or to deal with the whole claims. It is quite possible in the event of a claim being only partially sustained in law that recurrence must be had to the arbiters or jury to divide or to fix the pecuniary amount. But if proper care be taken in the primary proceedings before the arbiters or jury no second inquiry into pecuniary value will be required. It will be the interest of the parties to require and take care that a separate valuation or assessment be placed by the arbiters or jury upon every distinct and separate ground of damage, so that if the Court sustain the sufficiency in law of some of the claims, and reject the sufficiency or validity of others, then being all separately valued, full materials for an exhaustive and final judgment will exist in the award or verdict of the arbiters or jury.

I am of opinion, therefore, in accordance with the Lord Ordinary's interlocutor, that the present note of suspension and interdict should be refused, and that the respondents should be allowed to insist in the proceedings before the arbiters, and the arbiters and oversman to proceed in common form.

I am only anxious to add, however, that in coming to this conclusion I have not proceeded to any extent upon a consideration of the validity in law of any of the respondents' claims, although as to some of them we had a good deal of ingenious argument. The compensation claimed by the respondents is rested upon alleged injury or damage of various kinds. These different claims involve very different legal considerations, and it will not be possible ultimately to dispose of them without invoking the aid of different and even dissimilar legal principles. For example, the claim in respect of altered gradients is quite different in kind from the claim apparently founded on the fact that the railway company have taken away the houses and shops on one side of Eglinton Street and have substituted a railway wall or embankment. But I think that the time has not come for deciding all or any of these questions. It may easily be figured that the respondents may ultimately succeed in some of their claims and may fail in others, but on all of these points of law I reserve my opinion entire. I think it best to abstain from forming an opinion until the full materials for judgment are placed before the Court.

Lord Rutherfurd Clark (who was called in in the absence of Lord Ormidale)—I may say that I am quite prepared to decide at this stage the question decided by the Lord Ordinary as to the relevancy of the damage averred by the respondents, but as your Lordships have decided that the claim cannot go to the arbiters upon the letter granted by the railway company, I think it unnecessary to express my opinion.

The Court adhered.

Counsel for Complainers (Reclaimers)—Lord Advocate (Watson)—Johnston—Keir. Agents—Hope, Mann, & Kirk, W.S.

Counsel for Respondents—Asher—Lorimer. Agents—Ronald & Ritchie, S.S.C.

Wednesday, December 3.

SECOND DIVISION.

[Sheriff of Aberdeen.

MILNE (INSPECTOR OF NEWHILLS) *v.* HENDERSON (INSPECTOR OF MONQUHITTER) AND SMITH (INSPECTOR OF KINELLAR).

Poor — Settlement — Pauper Lunatic — Relief to Able-bodied Father for Imbecile Son.

A lunatic resided in family with his father, an able-bodied man, who was however unable to support him. For six years the parish of K gave relief to the father merely for behoof of the son. The father had acquired a settlement by residence, but had lost it by non-residence, unless he had been pauperised by the aid given him for his son. After the father's death, *held* (1) that the son took the settlement of his father; (2) that the father was not pauperised by the relief given him for behoof of his son; and (3) that in the circumstances the parish liable for the support of the lunatic was that of the father's birth.

Observations upon the case of *Palmer* v. *Russell*, Dec. 1, 1871, 10 Macph. 185.

This was an appeal from the Sheriff Court of Aberdeenshire in an action at the instance of John Milne, Inspector of Poor, parish of Newhills, against Andrew Henderson, Inspector of Monquhitter, and Alexander Smith, Inspector of Kinellar, alternatively, for payment of £6, 11s. disbursed by Milne on behalf of Alexander Lovie. He was a harmless lunatic or imbecile, son of James Lovie, and was born in the parish of Dyce. In December 1871, when relief was first given to Alexander, he was sixteen years of age and lived with his parents. He was never forisfamiliated. His father, who had been born in the parish of Monquhitter, was an agricultural labourer, and had been many years resident in the parish of Kinellar prior to 1868, but in that year he left it, and was absent till 6th May 1874. He again lived there between May 1874 and May 1877, when the relief to Alexander was discontinued; and removing to the parish of Newhills, James Lovie died there in the receipt of parochial relief in February 1879. That parish had since August 1878 supported Alexander, and it was for