deeds to take effect at their deaths their whole estates of which they should die possessed for behoof of J.G. Urquhart in liferent allenarly, and the children of the intended marriage in fee, and for that purpose to grant all necessary deeds to certain trustees.

By a codicil to their settlement Mr and Mrs Urquhart, on the narrative of the obligations they had undertaken in their son's contract of marriage, revoked the direction of their settlement as to the residue of Mr Urquhart's estate, and declared it to be at an end.

Mr Urquhart died in 1857, and his moveable estate was conveyed by his widow as his executrix to the marriage-contract trustees of his son, who also made up a title to his heritage.

Mrs Urquhart died in 1871.

After her death the trustees under the settlement and the trustees under the marriage-contract conveyed to the trustees of the marriage-contract the whole funds falling under the trust-settlement and marriage-contract.

In 1886 Mrs J. G. Urquhart had been married for nearly forty years, was sixty-one years of age, and there had been no child of the marriage.

Mr J. G. Urquhart contended that he was entitled, as heir-at-law and next-of-kin of his said father and mother, on procuring the consent of his wife, the said Mrs Jessie Kincaid or Urquhart, to obtain from the said marriage-contract trustees a conveyance of the fee of the said marriage-contract estate, subject to the said Mrs Jessie Kincaid or Urquhart's annuity, in respect that in the events that had happened the fee of the said estate now stood undisposed of; or otherwise, in respect that the fee thereof was vested in him (J. G. Urquhart), subject only to defeasance by the birth of children of his present marriage, which could not now take place. Mrs Jessie Kincaid or Urquhart, his wife, consented to the fee of the said marriage-contract estate being made over to him, subject to the burden of the annuity payable to her under the said trust-disposition and settlement, codicil, and marriage-contract.

The trustees maintained that the fee of the marriage-contract estate was vested in them, and that they were not entitled or in safety—at least without judicial sanction—to make over the estate to J. G. Urquhart, but were bound to hold it at least till the dissolution of his marriage.

This Case was stated by him and the trustees to settle the question thus arising, the trustees being first parties, and J. G. Urquhart second party.

The questions were—"(1) In the events that have happened, must the fee of the estate dealt with by the said marriage-contract be now held to stand undisposed of by the said John Urquhart and Mrs Elizabeth Grubb or Urquhart? (2) In the circumstances mentioned, is the second party now entitled to obtain a conveyance of the said marriage-contract estate, subject to the burden of the said annuity in favour of the said Mrs Jessie Kincaid or Urquhart, she being a consenting party to such a conveyance?"

Cases cited by the trustees (the first party)—*Coxton* v. *May*, 1878, L.R., 9 Chan. D. 388; *Haynes* v. *Haynes*, 1868, 35 L.J., Chan. D. 303; *Scheniman* v. *Wilson*, June 25, 1828, 6 S. 1019; *Shaw* v. *Shaw, ibid*, 1149; *Cameron* v. *Young's Trustees*, Feb. 8, 1873, 45 Jur. 272; *Fleming* v. *M'Lagan*, Jan. 28, 1879, 6 R. 588; *Blackwood* v. *Blackwood's Trustees*, Feb. 26, 1833, 11 S. 433; *Dickson*, June 19, 1886, 13 R.

Cases cited by the husband (second party)—*Lord* v. *Colvin*, July 15, 1865, 3 Macph. 1083; *Gordon* v. *Young*, 1865, 55 Scot. Jur. 272; M'Laren on Wills, ii. sec. 1400; *Pretty* v. *Newbigging*, March 2, 1854, 16 D. 667; *Adney* v. *Greatree*, 38 L.J., Chan D. 414.

The Court pronounced this Interlocutor:—

"The Lords having heard counsel for the parties on the Special Case, are of opinion, with reference to the first of the two questions therein stated, that the fee of the estate dealt with by the marriage-contract mentioned in the Case stands undisposed of by the deceased John Urquhart and Elizabeth Grubb or Urquhart; and with reference to the second of the said questions, that John Grubb Urquhart, the party to the Case of the second part, is entitled to obtain from the trustees acting under the said contract, the parties of the first part, a conveyance of the said estate, subject to the burden of the annuity provided to Mrs Jean Kennedy or Urquhart by the said contract: Find and declare accordingly, and decern."

Counsel for the First Parties—Dundas. Agents—J. & R. Peddie & Ivory, W.S.

Counsel for the Second Party—Wilson. Agents—Macpherson & Mackay, W.S.

Thursday, November 25.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

BENHAR COAL COMPANY, AND LIQUIDATOR, *v.* NORTH BRITISH RAILWAY COMPANY, *et e contra.*

Contract—Agreement — Construction — Impossibility of Performance.

A railway company entered into an agreement with the Duke of A., under which they purchased from him certain land which included the site of a road called Hope's Road, which was valuable as an access to the land. The agreement provided that the railway company should form on the Duke's remaining land a certain road . . . "whenever they take possession of any portion of Hope's Road, and to pay for the ground required therefor at the rate of £400 per acre, . . the Duke to have it in his option either to require of the railway company that this road be made or that the cost of constructing said road, including the cost of the land at £400 per acre, and the cost of erecting larch fencing along north side of same, be paid to him in lieu thereof. Time of payment to be whenever the company take possession of any part of Hope's Road." A coal company thereafter acquired from the Duke the remaining lands, and encroached on the *solum* of the ground described in the above article as the "road coloured yellow on the plan," giving it out for feuing purposes. *Held* (*rev.* decision of Lord Kinnear, and *diss.* Lord Rutherfurd Clark) that on a sound construction of the agreement the coal company, who ad-

mittedly had come in right of the Duke, were not entitled to demand the money payment under it, in respect they had by their actings rendered the formation of the new road impossible.

In 1872 the North British Railway Company were promoting a bill in Parliament, which afterwards became the "North British Railway Act 1872." Pending its passing they entered into an agreement with a view to purchasing from the Duke of Abercorn certain parts of his lands of Easter Duddingston. The land consisted of 35 acres on the north side of the railway, and lay between Portobello and Duddingston. It was traversed near the middle by a road running north and south called Hope's Road, which was of importance as an access to the ground, and was used also to some extent as an access to the remaining and adjoining lands belonging to the Duke. The agreement provided that the company should purchase the land, including the *solum* of Hope's Road, at £400 an acre (reserving the minerals), and the fourth article of it ran as follows — "The company to form the road, coloured yellow on plan, not less than 40 feet in width, and according to section and specification hereto annexed, whenever they take possession of any portion of Hope's Road, and to pay for the ground required therefor at the rate of £400 per acre, and to give to the Duke, his tenants and feuars, the right of use of any extended road to the High Street that the company may form. The Duke to have it in his option either to require of the railway company that this road be made, or that the cost of constructing said road, including the cost of the land at £400 per acre, and the cost of erecting larch fencing along north side of same, be paid to him in lieu thereof. Time of payment to be whenever the company take possession of any part of Hope's Road." This proposed road was to run from Hope's Road to the Black Road, which crossed the ground near its eastern extremity, and when made would form the northern boundary of the ground for the whole distance from Hope's Road to Black Road, and be wholly on ground belonging to the Duke. The disposition following on the agreement was executed on 9th November 1875, the price agreed being duly paid.

The Duke also sold the remainder of Easter Duddingston to the Benhar Coal Company, who feued out considerable portions of their estate, and through misadventure their feuing-plan was made so as to encroach beyond their own boundary into the land of the North British Railway Company, a portion of whose land they actually feued off. This piece included the ground coloured yellow on the plan, and it was built over by the feuars. The latter, however, offered to give them a title to the land in return for payment of £200, and an agreement was made for such conveyance by the railway company. The railway company, while ready to implement this agreement, claimed also a discharge on the part of the Benhar Coal Company of the obligation to make the road or to pay the cost of doing so. These terms were refused, and an action was raised by the Benhar Coal Company, and the liquidator appointed, as being in right of the Duke, for the voluntary winding-up of that company, to enforce the agreement by ordaining the railway company to execute a conveyance of the ground for £200.

Another action was raised by the North British Railway Company against the Benhar Coal Company and the liquidators of the company, as admittedly coming in place of the Duke of Abercorn, to have it declared (1) "by decree of the Lords of our Council and Session, that the defenders are not entitled to enforce implement of the fourth article of the agreement between the Duke of Abercorn and the pursuers, dated 25th April and 4th May 1872, herewith produced, except in so far as it provides that the pursuers are to give to the said Duke, his tenants and feuars, the right of use of any extended road to the High Street of Portobello the pursuers may form, and that the pursuers are freed and relieved of all obligations to form the road referred to in said fourth article, and coloured yellow on the plan therein mentioned, and to pay for the ground required therefor, or to pay the cost of constructing and fencing the said road referred to in said fourth article."

The railway company in their action pleaded —"(1) The defenders having by their own actings rendered it impossible to make the road referred to in article fourth of said agreement, the pursuers are entitled to decree in terms of the first declaratory conclusion. . . . (2) In consequence of the dealings of the defenders with the said ground and proposed road, the fourth article of said agreement can no longer be enforced against the pursuers."

The Benhar Company pleaded — "(1) The statements of the pursuers are irrelevant and insufficient in law to support the conclusions of the summons. (2) The terms of article 4 of said agreement, with the option there specified of taking payment if required, being binding on the pursuers, the defenders are entitled to be assoilzied."

The two actions were conjoined.

The Lord Ordinary (Lord Kinnear) pronounced this interlocutor:—"Having considered the conjoined actions in the action at the instance of the Benhar Coal Company against the North British Railway Company, decerns against the defenders in terms of the conclusions of the summons; and in the action at the instance of the North British Railway Company against the Benhar Coal Company, assoilzies the defenders from the conclusions of the summons.

"*Opinion.*—The only question between the parties is as to the construction of the fourth article of the agreement between the Duke of Abercorn and the North British Railway Company. They are agreed that the defenders are now in right of the Duke under that agreement, and that they have dealt with their land in such a manner as to disable them from furnishing the ground required for the construction of the road described in the fourth article. In these circumstances the pursuers maintain that they are relieved not only of their obligation to make the road, but also of the alternative obligation to make the payments stipulated in the same article of the agreement in the event of the Duke, or the defenders in his place, electing to demand these payments instead of requiring the road to be made.

"I think this construction of the contract cannot be sustained. The Duke stipulates for the formation of a road, not upon the land conveyed

to the railway company, but upon his own land, in the event of the company taking possession of the road called Hope's Road, the site of which is included in the conveyance to them, and if that were all there can be no question that he could not insist upon performance of this obligation unless he were in a position to give the land required for the formation of the road. But he further stipulates that he 'shall have it in his option either to require of the company that this road be made or that the cost of constructing said road, including the cost of the land at four hundred pounds per acre, and the cost of erecting larch fencing along the north side of the same, be paid to him in lieu thereof.' And in the event of his preferring to take the money instead of his road, he stipulates that the time of payment shall be 'whenever the company take possession of any part of Hope's Road.'

"It appears to me that this is an option to require either that a road shall be made or that money shall be paid in lieu of a road. The stipulation is for the benefit of the Duke and his tenants or feuars; there is no obligation on him to convey the road to the company in the event of its being constructed, or even to give them the use of it, and there is no obligation to construct a road in the event of his preferring to take money. It is not immaterial to observe that if instead of requiring a road to be made he elects to take the stipulated payments, such payments are to be made immediately upon the obligation coming into force by the company taking possession of any part of Hope's Road. It cannot be suggested therefore that the previous construction of the road by the Duke is an implied condition of his right to demand payment. Nor can I see any ground on which the company could interfere after the money had been paid, and insist upon its being applied in the construction of a road. The Duke might have sold his land after obtaining payment free from any obligation to the railway company, and in the event of his doing so the company would have no claim for repetition or damages. The only result therefore of the conduct of the defenders in making use of their land as they are said to have done appears to me to be that it determines their election. They cannot require a road to be made on their land if they cannot give the land for that purpose. But that will in no way affect their right to have a money payment in lieu of a road in the event of the obligation coming into force.

"The option for which the Duke has stipulated would have no meaning upon the pursuers' construction. There is no difference except in words between requiring of the railway company that a road shall be made and requiring them to pay for making it. But the contract must be supposed to contemplate a real alternative. I think it was intended to provide for any contingency in which the actual construction of the road might be unnecessary or inconvenient for the Duke of Abercorn."

The Railway Company reclaimed, and argued—Both parties had a right of use in Hope's Road. It was thought possible that the railway company might shut it up, and therefore it was to guard against this contingency that the fourth article of the agreement imposed an obligation on them to form the road coloured yellow on the plan in that event, and to pay for the ground required therefor at the rate of £400 per acre, the Duke, however, having the option either to require the railway company to construct it or to pay the cost of its construction, including the cost of the land at £400 per acre, and the cost of fencing it. The actings of the Benhar Coal Company had rendered this impossible, and therefore on every reasonable construction of the agreement the obligation to pay flew off. The true view of the agreement was, that the option was not between making the road and only taking money without making it, but between the railway company and the Duke himself making it. It would be unjust that the Benhar Company should claim the money after making the construction of a road, which was the true subject of the bargain, impossible.

The Benhar Coal Company replied— The Lord Ordinary's construction of the agreement was correct. The Duke agreed to sell part of his land to the company. The part contained Hope's Road, which was very valuable as an access to those parts of his land on the north. He therefore made it a condition that the road should not be shut up. But in certain eventualities it might be necessary to do so, and if this should be done, then his lands to the north would be made less valuable. It was just, then, that he should get compensation for the reduced value. The agreement pointed out two ways—(1) in kind, by giving another; (2) in money payment. It was therefore in his option to say whether he desired to have the new road or a substitute in money. His access to the ground had been shut up by the feuing operations, and therefore he had had to make other roads on valuable grounds. The money payment was compensation for Hope's Road.

At advising—

Lord Young—The question between the parties in this case is in regard to the import of an agreement made between the North British Railway Company and the Duke of Abercorn in 1872, at a time when the railway company were promoting a bill in Parliament with a view to take land in which the Duke was interested as proprietor in the land, and also as interested otherwise in the operations which were to be carried out. That agreement was made in order to facilitate the passage of the bill through Parliament by conciliating the Duke. The agreement was embodied in the bill, and it is now embodied in the Act of Parliament which was passed. According to the agreement the railway company and the Duke came to terms for the sale by the latter to the former of certain portions of land, and the question as to the construction of one of the clauses of the agreement comes before the Court in circumstances of rather an unusual character. The Duke sold a portion of his remaining land, adjoining to the bit which had been sold to the railway company under the agreement, to the Benhar Coal Company, and the Benhar Coal Company found it the most profitable or advisable mode of using up that land to feu it—at least to feu a portion immediately adjoining one of the portions of land which had been taken by the railway company, and paid for by them, and of which they were in possession. But through some inadvertence their feuing-plan was made so as to encroach beyond their own boundary into the land of the North British Railway Company, and they had actually feued off a

portion of the railway company's land of which the railway company had been in possession, and so they found themselves in a scrape. But they and the office-bearers of the North British Railway came to an agreement, whereby seemingly they were relieved of all difficulty, the railway company agreeing to give them a title to the land which they had inadvertently included in the feuing-plan upon certain terms with which we are familiar. Now, the first action before us is to enforce that agreement, and there is really no difficulty about that, because the North British Railway Company are quite willing to implement the agreement, and have been so all along. As to the first action, therefore, I repeat that there is no difficulty whatever.

But in the course of the correspondence connected with that matter it appeared that the Benhar Coal Company, feuing so as to encroach into the land of their neighbour, the railway company, had of course feued out the whole of their own land up to the boundary between them and their neighbour. Along that boundary—the Benhar Coal Company's boundary, formerly the Duke of Abercorn's—there is a strip of ground about 40 feet wide, which appears from the agreement and particulars, to which I shall immediately refer, was destined for a road in a certain event. Of course that strip being taken up by feuars, the feuars built villas, and made gardens, and so on, upon it, and it was no longer available for the purpose contemplated by the agreement. And the question which the correspondence in regard to the first difficulty suggested was this, what was to be done in the event of the road being required? The suggestion was, Well, the road cannot be made, but there is an alternative in the agreement, which alternative is that money may be paid and received instead of the road being made. The Benhar Coal Company, as coming in place of the Duke, will certainly no longer require a road, but they will or they may require payment of a certain sum of money as the price of dispensing with the making of the road. That is what was said, and that is what led to the second action, which is a declarator at the instance of the North British Railway Company that in the actual circumstances the obligation to make the road has ceased, and that at all events the right of the Duke, or of the Benhar Coal Company as coming in place of the Duke, to demand a sum of money as an alternative to requiring the road to be constructed, is no longer operative or binding. Now, that is the question which was argued to the Lord Ordinary and decided by him. It is also the question which was argued to us. It really arises only in the second action, which is at the instance of the North British Railway Company. And that question depends—as the Lord Ordinary points out in his note—on the import and construction of the fourth head of the agreement.

Now, that fourth head of the agreement is in the following terms—and it will be borne in mind when I read it, that it was an agreement made to facilitate the passage of the bill through Parliament—I suppose really made when it was in the course of passage—and therefore one of those more or less hurriedly prepared agreements which are made as arranging differences between proprietors and opponents of bills in Parliament—I say the fourth head is in these terms—"The company to form the road coloured yellow on plan, not less than 40 feet in width" (that is, the strip of ground to which I have referred), "and according to section and specification hereto annexed, whenever they take possession of any portion of Hope's Road, and to pay for the ground required therefor at the rate of four hundred pounds per acre, and to give to the Duke, his tenants and feuars, the right of use of any extended road to the High Street that the company may form." I repeat that the road coloured yellow on the plan is the strip of ground to which I referred, immediately adjoining the ground sold by the Duke to the North British Railway Company, and which is now included in the feuing-plan of the Benhar Coal Company on which feuing operations have been executed. I stopped at the words "that the company may form" in the meantime, although it is upon the subsequent words that the question immediately arises, for I think a great deal depends upon the true meaning and import of the words which I have read. I have to point out in the first place that the Hope's Road which, if a road at all, must have been a private road, was a road the *solum* of which prior to this agreement belonged to the Duke of Abercorn. It crossed the railway from the south side, proceeding on the north side to Portobello. By agreement the *solum* of that road is sold to the North British Railway Company, and they become proprietors of it with liberty to shut it up, although of course in the meantime, and while it remains open, the Duke, or those having his rights, continue to be entitled to use it. For all that, the ground on which it was made is sold to the railway company and paid for by them. I do not know if it is expressed in words that those in right of the Duke were to continue to use it, but I think that is the plain meaning of the agreement until the railway company require to shut it up in such a manner as to prevent its continuance as a road. When the railway company require to shut it up, then the substitute road was to be made. Now, what is the meaning of the words, even so far as I have read, "the company to form the road coloured yellow, whenever they take possession of any part of Hope's Road." "Taking possession of that road," does not mean what that language used in its ordinary sense imports, for the railway company took possession of Hope's Road in 1872 when they purchased it and paid for it, and were infeft in it. It was their property, therefore, just as much as it was the Duke's. They were in possession. The taking of possession therefore must in this agreement—made in circumstances I have explained—be construed to mean "whenever you so use the *solum* of this ground as to prevent it being used as a road thereafter, then you are to make a substitute road." They are to make a substitute road along another piece of ground, by which the railway may be crossed at another place, that being the strip coloured yellow, 40 feet wide, and they are to pay for that ground and make the road upon it, so that it may be a complete substitute road, as I think it was intended to be. The purchase was made and paid for just as Hope's Road. The right of use would be the same as it was in the case of Hope's Road, with a right to the Duke, and those having his authority, to use the new road just as they had a right to use Hope's

Road, notwithstanding that the *solum* had been got and paid for by the railway company. I think, in short, it was intended to be a substitute in every way, and a substitute for the one party as well as for the other. I see nothing in the language of this agreement to interfere with the conclusion by which I am led by common considerations of good sense to think that the one road, when it was made, was to be in all respects indistinguishable from the other. Of the *solum* of that other the North British Railway Company were proprietors, having bought and paid for it. Of the *solum* of this new road the North British Railway Company were to be the proprietors, they buying and paying for it. Their paying for land to the north thereof is just buying it—paying the price of it is just buying it—and there is no reason in the world for distinguishing between the one and the other if the new road is to be made.

But there is an alternative, which does not, I think, dispense with the making of the road, although it is on that construction that the case is here. I do not mean to say that summarises the whole argument of that particular side, but here again the question is upon the construction of the clause in the agreement to which I have already referred. That clause, after what I have read, goes on—"The Duke to have it in his option either to require of the railway company that this road be made, or that the cost of constructing said road, including the cost of the land at £400 per acre, and the cost of erecting larch fencing along north side of same, be paid to him in lieu thereof. Time of payment to be whenever the company take possession of any part of Hope's Road."

Now, I should have thought at first sight, although I quite see and appreciate the argument of the Lord Ordinary upon a critical examination of the words, that the meaning of this was that the Duke may require you to make it, or, in his option, require you to supply him with the money necessary to make it himself. But the road is to be made in any case. That is quite a common alternative. We are familiar with it in the conclusions of summonses. A party asks that another party shall be ordained to do a certain thing, or to pay the cost of doing it to the other party so that he may do it himself. That is just a power to exact a fine in lieu of performance; it is a power to require a party with whom you contract to execute operations himself or provide you with the funds for doing it. And in order to effectuate what I have no hesitation in concluding to be the import of the agreement and the meaning of the parties, I should have no hesitation whatever in reading in the words "The Duke to have it in his option to require of the company that this road be made by them, or that the cost of constructing said road, including the cost of the land and fencing, be paid to him." The whole language employed is on the notion that the road is to be made. But what is the cost of constructing a fence and making a road which is never made or constructed at all? You may reach a certain sum in putting such a question with more or less difficulty. Suppose that ground were now to have a road made upon it, and suppose the road were made according to certain plans, and fenced in a certain way, what would the cost be? I daresay you could approach the cost of the operations. But it is rather a curious way of estimating a fine that is to be paid in the option of one party in lieu of having the road made. I repeat that the whole language implies that the road is to be made, and that the Duke may require the company to make it, or that the cost of constructing it, including the cost of the land and the cost of the fencing, shall be paid to him. Then he is to construct it and fence it. He is to have a substitute road made for the Hope's Road, the railway company being, of the new road as of Hope's Road, the proprietors of the *solum* for which they have paid, and there being the same right of use in both cases. Now, it appears to me to be a question, although it is not presented here, whether the railway company have not a remedy against the Duke or those coming in place of him, if they have done anything which would render it impossible for them to use Hope's Road, so that it shall no longer be continued as a road, and yet at the same time made it impossible to construct the new road which was contemplated to be made in its stead. But, as I say, that question does not arise here. The only question is, whether the Duke or the Benhar Coal Company may take up this position? "Now, we do not want the road but the money. We therefore ask that there shall be ascertained" (in the Court of Session, I suppose, and after that in the House of Lords) "what it would cost to construct the road here if it were constructed, and what it would cost to fence it if it were fenced, and then to have decree for that sum of money, which is to be put into our pockets, not to construct a fence or a road, but to be kept there as *solatium* for going without it." I cannot so construe the agreement. I think it is not the fair import of the words. I think it is contrary to the good sense of the thing and the fair meaning of the parties, and but for the difference in opinion which I know to exist I should have thought it a very clear matter indeed. The Lord Ordinary notices these words as affording a strong argument on the subject—"Time of payment" (that is, the time of payment for constructing the road, including the cost of the land and the cost of erecting larch fencing along the north side of the same) "to be when the company take possession of any part of Hope's Road." There must be some foundation for the argument here, as the Lord Ordinary thinks so, but I confess I do not see it. The language is repeated—the language requiring the company to form the road and fence it. They are to do that whenever they take possession of Hope's Road. "Whenever they take possession of any part of Hope's Road" they have to form the substitute road. I have pointed out that these words require construction, for possession of Hope's Road is taken when the purchase is completed and the company is infeft. They are in possession of Hope's Road, but it is when they stop the use of it as a road that seems to be the meaning implied in the agreement. Whenever they do that, they must set about making the substitute road without any undue or unnecessary delay. Or if they were to pay the Duke the cost of it at the same time it might not have been full payment, for I suppose in a case, which is admitted to be a possible one even by those taking the Lord Ordinary's view, if the Duke had proceeded to make the road himself it would not have been

considered a reasonable demand on the part of the Duke to say, "Oh! let us estimate beforehand what the cost would be, and let the money be paid down before me at the time when Hope's Road is stopped." I think a good answer to that would have been, "No, no; go on and make the road; pay the workers as the work proceeds, and you may have the money by instalments." But "whenever" here simply means that the Duke is not to be out of pocket—he is not to be in advance of the cost—he is to be indemnified with funds to be provided by the railway company.

Now, the road is not to be constructed. If it is of any importance to the railway company they must go without it, for houses have been built upon it. If it otherwise would have been of use to the Benhar Coal Company they must also go without it, for they have built houses upon it. And I think that makes an end of this part of the case, excepting of course the question which I have mentioned is not before us, in which the railway company would seem to have a good ground of complaint in respect that the means of making at their expense the substituted road contemplated and agreed upon in the agreement have been taken from them. I say whether they have any remedy there or not I do not say. But the Duke or the Benhar Coal Company, who have now come in his place, can have no remedy since they have rendered the formation of the road altogether impossible.

These are the views I take of the case, and they lead me to the opposite conclusion from that which the Lord Ordinary has reached. There has been no question as to the performance by the railway company of the agreement which they made to let the Benhar Coal Company out of the scrape into which they fell by making them entitled to the ground. That does away with the first action. Upon the second the form of judgment may require some consideration. But the result of it is simply this, that the Benhar Coal Company are not in a position to demand any money payment under this clause of the agreement.

Lord Craighill.—Prior to 1872 there was acquired by the North British Railway Company from the late Duke of Abercorn 35 acres of land on the south side of the railway, and lying between Portobello and Duddingston. On this ground there was a road known as Hope's Road, and it formed part of the purchase. Whether this road was a public road or only a service road for the Duke and his tenants is uncertain, but this is immaterial, inasmuch as the purchase of the ground forming the *solum* of the road necessarily gave to the railway company right of use. As no restrictions or limitations were put upon the use of the land, it was thought possible that the railway company might shut up this road, and for this contingency there was introduced into the agreement an article by which the railway company were put under specified obligations. This was done by article 4 of the agreement. Stated generally, the obligation imposed on the railway company was to form a road, coloured yellow on the relative plan, whenever they took possession of any part of Hope's Road, and to pay for the ground required therefor at the rate of £400 per acre. On this obligation there was superinduced a clause by which the Duke was to have it in his option either to require of the railway company that this road be made, or that the cost of constructing the said road, including the cost of the land at £400 per acre, and the cost of erecting larch fencing along the north side of the same, be paid to him in lieu thereof. These last were not independent provisions, but were merely ancillaries for the working out of the fundamental obligation. There are specified two ways in which the obligation on the railway company might be fulfilled—the one by the Duke requiring the road to be formed by the railway company, the other by the Duke requiring that the cost of constructing said road, including the cost of the land at £400 per acre, and the cost of fencing, should be paid to him in lieu of making the road themselves. This was the agreement according to my interpretation. Things—save in one particular—have thus remained as they were when the agreement was concluded. The particular referred to is this—The ground which was to be the *solum* of the road, in place of being reserved for its formation, has been sold or feued by the Duke or by the present defenders, who have come to represent the interests which he held. What was undertaken by the railway company has thus been rendered impossible, and the question now is, whether as the road cannot be formed the railway company are bound on the call of the defenders to pay to them what would, including the price of the land and the cost of fencing, be the cost of its formation. Parties have differed on the subject. The railway company say that as the road cannot be formed they are free from the obligation of making the road, and also free from any obligation to pay the expense which by its formation must have been incurred. The Benhar Company resist this view, and say, that though they cannot call upon the pursuers to form the road, yet they are entitled to require that the money representing what would have been the cost shall be paid to them, inasmuch as in their view of the contract though there had been no change of circumstances, they could have exercised the alternative option, and, once they got the money, have kept it free of any obligation, though for it the pursuers were to receive no consideration whatever.

The present action accordingly was raised by the pursuers to settle this controversy. The Lord Ordinary has decided in favour of the defenders. But I am unable to concur in this conclusion, and think that his interlocutor should be recalled, and that decree should be granted in favour of the railway company in terms of the first conclusion of the summons.

Both parties are agreed that the road which was to be made on the ground coloured yellow, in substitution for Hope's Road, cannot now be formed. The land that was to be the *solum* has been turned to other uses, and the Benhar Company admit that as a consequence the relative obligation on the railway company to make the road has been extinguished. But has not this the effect of extinguishing both parts of the obligation contained in the first clause of article 4 of the agreement? The first part of the obligation is to form the road; that admittedly is extinguished. The second part of the obligation is to pay "for the ground required therefor" at the rate of £400 per acre. That was what was to be

paid for it. But no road can now be formed, and therefore it appears to me as a corollary that the obligation to pay for the ground is also extinguished—just as much extinguished as the obligation to form the road. What is there, therefore, for whicht he railway company are under obligation? Nothing that I am able to discover from the argument. No doubt there is that second alternative in the subsequent part of the article, but that obviously has no application to, or in other words is inoperative in, existing circumstances. As the road cannot be formed there is no room for the option for which the agreement made provision. If the defenders, who represent the Duke, cannot ask the railway company to form the road, there is no option in the matter, for the first alternative is away. By their own act they are precluded from requiring that the road be made, and they are equally precluded from asking payment of the sums which they claim. The reason is plain—the obligation on the pursuers to pay has been extinguished. The efficacy of the second alternative depended on the fundamental obligation that the railway company shall form the road and pay for the land required for its formation. As the road cannot now be formed they are no longer debtors. The clause by which originally they were bound cannot be brought into operation, and the consequence is that the right of the defenders to demand payment must fall with the obligation on the pursuers to form the road and pay for the land. The defenders cannot still be creditors when the railway company have ceased to be debtors. The fallacy of the defenders' contention is that their right is what it would have been if there had been nothing in the agreement except a right on the part of the defenders to require, and an obligation on the pursuers to give, what would be the cost of construction of the stipulated road irrespective of all considerations as to its formation. But here we have a series of provisions connected with one another, that on which the defenders rest their case depending for its efficacy on the continuance of the fundamental obligation undertaken by the railway company. When that fails those which follow fall to the ground.

This is the conclusion to which I have come, and therefore I think the pursuers are entitled to judgment.

Lord Rutherfurd Clark—I agree with the Lord Ordinary. I can reach no other conclusion than that at which he has arrived, and that for the reasons he has given in his note. I do not think it is necessary to add anything to these reasons.

Lord Justice-Clerk—I agree with the majority of your Lordships. I think that that result is the result at which, looking at it as a matter of fair dealing, we ought to arrive. It is clear that circumstances have so altered that it would be difficult to compel the North British Railway Company to fulfil the obligation in terms seeing that the ground does not appear to be available, and seeing also that no method can be suggested of approximating the price. I concur with Lord Young and with Lord Craighill upon these matters. Probably we shall just have to reverse the findings of the Lord Ordinary and assoilzie the defenders.

The Court pronounced the following interlocutor:—

"Having heard counsel for the parties in the reclaiming-note for the North British Railway Company against Lord Kinnear's interlocutor of 20th May last, pronounced in the conjoined actions, Recal the said interlocutor: Dismiss the action at the instance of the Benhar Coal Company (Limited) against the said railway company: In the action at the instance of the said Railway Company against the said Coal Company, Find and declare in terms of the first conclusion of the summons.

Counsel for North British Railway Company—Balfour, Q.C.—Asher, Q.C.—Comrie Thomson—Dickson. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for Benhar Coal Company—Sol.-Gen. Robertson, Q.C.—Graham Murray. Agents—J. & F. Anderson, W.S.

Friday, November 26.

SECOND DIVISION.

STIRLING CRAWFURD'S TRUSTEES *v.* STIRLING STUART AND ANOTHER.

Warrandice—Heir and Executor—Effect of Clause of Warrandice.

A testator appointed his widow his executrix and residuary legatee. He left her also two estates in heritage, which he conveyed to her in absolute warrandice, and a third estate he directed to be entailed upon his brother. These three estates he had burdened with a catholic security. In a question between the widow and the brother as to whether the latter's estate was, in consequence of the warrandice clause in the disposition to the former, to bear the whole burden of the debt in the security—*held* that the obligation of warrandice, though connected with heritage, was personal in its nature, and that the brother's estate was entitled to relief out of the residue in the proportion of the respective values of the estate given to him on the one hand and those given to the widow on the other.

William Stuart Stirling Crawfurd of Milton executed a trust-disposition and settlement, dated 21st October 1853, by which he conveyed *mortis causa* his whole estate to trustees for the purpose, after payment of debts, &c., of conveying Milton, and any other lands and heritages in the county of Lanark which should belong to him at his death, to the heirs of his body, whom failing to his brother Captain James Stirling Stirling Stuart of Castlemilk and the heirs of his body, with a further destination, under the fetters of a strict entail. By this deed the residue of his estate, failing his own issue, was to be given to the person who should succeed to Milton on his death.

In 1875 he married the Dowager Duchess of Montrose, the third party to this case, and by his antenuptial contract of marriage made certain provisions to her.

By deed of nomination dated 24th July 1876 he nominated his wife to be his sole executrix. By a codicil dated 1st November 1876 he, *inter alia*, disponed and bequeathed to her, in the event of