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

her surviving him, £50,000, in addition to her marriage-contract provisions, and also the lands of Balornock, in the Barony Parish of Glasgow, and the lands of Auchinearn, in the parish of Cadder, county of Lanark, and expressly excepted these lands from the lands by his trust-settlement directed to be entailed, and directed his trustees to include in the entail the lands and estate of Milton only. The disposition contained a clause of absolute warrandice in these terms, "I grant warrandice." He also bequeathed to her the whole residue of his estate with the exception of Milton and of any special bequests by him. By subsequent codicils he lef ther additional provisions.

He died in February 1883, survived by his wife, but without issue. At the date of his death there was existing a bond and disposition in security, dated 9th November 1882 and recorded in January 1883, for the sum of £250,000 affecting the lands of Milton and also the lands of Balornock and Auchinairn, which under the codicil of 1st November 1876 he had disponed with absolute warrandice to his wife.

His brother, and disponee of Milton, Captain Stirling Stuart of Castlemilk, maintained that this bond for £250,000 was apportionable as in a question between him and the widow, and that the estate of Milton was entitled to relief from a share thereof in the proportion of the respective values of the estates of Milton on the one hand, and Balornock and Auchinairn on the other. The widow maintained that the bond fell to be met entirely out of the estate of Milton.

This Special Case was presented by Mr Crawfurd's trustees as parties of the first part, his brother Captain Stirling Stuart of Castlemilk as party of the second part, and the Dowager Duchess of Montrose, the widow, as party of the third part.

The question for the opinion of the Court was as follows:—"Is the bond for £250,000 entirely chargeable against the estate of Milton, or, as in a question between the party of the second part and the party of the third part, is the estate of Milton entitled to the relief out of Mr Stirling Crawfurd's residuary estate from a share thereof in the proportion of the respective values of Milton on the one hand, and Balornock and Auchinairn on the other?"

Argued for first and third parties—This bond was a heritable debt secured upon three heritable estates at Mr Crawfurd's death, on each and every part of them. But in the case of the two estates left to the executrix the clause of warrandice prevented recourse against her for payment. The bond, however, also remained heritable, even after the obligation was given effect to, because it still remained charged on Milton. If the operation as between heirs of apportioning the catholic security were not gone through, recourse would be taken against the executrix by the creditor. If she paid it in whole or part she would be compelled to pay a heritable debt, and must have relief against the heir. She had not merely a general recourse against an heir of line or an heir-general, but a recourse against the heir on whose estate this was already charged, and who in this case had taken the estate on which the debt was charged. The obligation fell, then, to be fulfilled by the estate of Milton—*Coventry* v. *Coventry*, July 8, 1834, 12 S. 895; *Strong* v. *Strong*, January 29, 1851, 13 D. 548; Erskine, ii. 3, 27; *Macalister* v. *Macalister's Trustees*, Feb. 20, 1866, 4 Macph. 495; *Bell's Trustees* v. *Bell*, Nov. 8, 1884, 12 R. 85; *Duncan, &c.*, June 22, 1883, 10 R. 1042; *M'Leod's Trustees et al.*, June 28, 1871, 9 Macph. 903.

The second party replied—He was entitled (Bell's Prin., sec. 1926) to rateable relief of the bond corresponding to the proportional value of his estate and these of the third party. The obligation in the clause of warrandice was simply one to indemnify against eviction. The question was not different in the present case because of the existence of a heritable bond over the property. In that case, as in all other cases, eviction was the event on which the claim arose, and the claim was one for indemnification, or, in other words, for damages against the executrix—Bell's Prin., sec. 894; Stair, ii. 3, 46. There was nothing in the reason of the thing, or in the presumed intention of the granter of the warrandice to show that this portion of the catholic burden should be put on one part of the estate left, instead of falling upon his general means. The general rule of law, then, must take effect, and the obligation in the clause of warrandice being a personal one to indemnify by payment of money, the executrix must discharge the obligation without recourse against the taker of the heritable estate. The cases cited were cases of intestacy, in which necessarily the heir in heritage was bound to pay the heritable debts. *Strong* v. *Strong* and *Coventry* v. *Coventry* (*supra*) were cases of relief against general disponees, and had no application.

At advising—

Lord Justice-Clerk—The question here relates to the bond for £250,000 charged over the estates of Milton, Balornock, and Auchinairn. Milton belongs to the second party as the heir on whom it was to be entailed, the two latter estates being settled on the widow the Dowager Duchess of Montrose. The question is, whether the obligation of warrandice contained in the original settlement of the two estates on her is prestable by the personal representative of the granter of that conveyance, or is a charge on the heir in heritage? On that, as a general question, I have no doubt whatever. It does not follow in the least that because a man disposing of his real estates comes under an obligation in regard to it, the obligation is a debt against the heir, being heritable in its character. It may be exactly the reverse. That is common in practice. The disponer dispones his lands to a disponee, and undertakes over and above that disposition to clear the estate of a subsisting debt or burden, perhaps, which affected it, or to relieve the disponee for the future of the burdens that may affect the estate, *e.g.*, augmentations or cases of that kind. These are personal prestations, and it does not alter the character of the obligation that it refers to a landed estate. The obligation of warrandice here is exactly in that position, because the effect to which that obligation is pleaded is that Mr Stirling Crawfurd undertook that no burdens should be on the estate, and then subsequently he borrowed £250,000 and charged the sum on the three estates. It is said that his having done so was contrary to his obligation of warrandice, and I shall assume that it was. I was not alto-

gether satisfied in the course of the debate, and I am not altogether satisfied yet, that when he bound the three estates to repay the debt he intended to impose an obligation of relief between the one and the other. I do not, however, raise the question as there may be a good answer to it. What I mean to say is simply this, that this is a simple obligation to relieve the two estates of any burden that might be imposed upon them. Then I think the obligation, supposing it to subsist, is one on the personal representatives of the granter.

Lord Young—I am of the same opinion. The deceased Mr Crawfurd left at least three properties—Milton, which went to his brother as heir-at-law succeeding under a special disposition, and Balornock and Auchinairn, which also by disposition went to the widow. There was a catholic security for debt over the whole three estates without distinction—that is, a heritable security for £250,000. It was conceded, and very properly I think, that where there is a catholic security over two or more estates, and these are given by the owner to different parties, the catholic security is to be divided amongst them according to the proportional value of the estates, and this is a case for applying the rule. But in the disposition to the widow of the two estates given to her there is a clause of absolute warrandice, and it was conceded, and the case was argued on the footing that such a clause imports an obligation to clear any debt from the property warranted. The most familiar instance of that is that where a man sells an estate burdened with debt with a clause of absolute warrandice he is under obligation to the purchaser to clear it off. In that specimen instance no doubt he is bound, and if he dies before fulfilment or enforcement of the obligation it would be good against all his representatives in heritage or *in mobilibus*. But as in a question between heirs it is clear beyond all question that the obligation must be fulfilled by the executor. It is a personal obligation for which the executor is primarily liable to the creditor in it. The Solicitor-General stated quite accurately, I think, that the right conception of a clause of warrandice is an obligation to indemnify in case of eviction, but I do not think the argument gains much by the observation. I think it is put clearer thus—It is a claim for just so much money as will enable the holder of an estate to clear off the debt which he is under the warrandice entitled to have cleared. Now, that amount in this case is just the proportion of £250,000 effeiring to the lands conveyed by the disposition in which the clause of warrandice occurs. The question was more than once put to Mr Balfour, "Why is that claim for money heritable?" "Because," he said, "it is to pay off heritable debt." What has that to do with it? The creditor in the £250,000 is no doubt creditor in a heritable debt, because he has a heritable security over the three estates, but the creditor in the obligation clause in the warrandice is not a creditor in a heritable debt. The third party here, the widow, holds no security for that obligation. If it was a security over any heritable estate, it would be over Balornock and Auchinairn, which being her own is no heritable security to her. Therefore there is confusion in the argument that this obligation is heritable because it is to pay off a heritable debt. I could bind myself to pay off a heritable debt by writing on the piece of paper an obligation to do so, but it would not be a heritable obligation although the debt were heritable, but a personal one, and would be made good against me as long as I lived, and after my death against my executor, on the simple ground that it is personal.

The only consideration which affected my mind here was, whether the deceased, having made his widow, who took Balornock and Auchinairn, his executrix and residuary legatee, so that his bounty to her would be diminished if she had to pay this, is not to be taken as if he intended that it should be paid by his brother who took the estate of Milton? It is fair to notice that she is made the residuary legatee and executrix as early as 1876, but it is according to the rule of our law that every last will and testament is to be taken as speaking in the last moments of the rational existence of the deceased—what he may have put on paper till then is immaterial with us. He keeps it in his repositories till his death, and then it is taken as his last will. He might have altered the paper written in 1876, and if he had done so, and had given the residue of his estate, after satisfying his debts, to a third party, what reason could the widow suggest for passing over the third party, and going against the person to whom the deceased had given Milton. She happened to her great advantage to be the person to whom in the last moments of his life he destined the residue of his estate, and therefore she is the person to satisfy the obligation on which she founds here, and she has the means to do it. I am satisfied, then, on these considerations, that she has no claim against the heirs who succeeded to Milton, to make him meet out of that estate the whole of this bond for £250,000. That estate is entitled to relief against her as executrix in proportion to the respective values of Milton and of the estates conveyed to her.

Lord Craighill—I concur.

Lord Rutherfurd Clark—I also concur. The third party is a disponee under a *mortis causa* disposition of two estates which were burdened with a certain amount of debt charged by the disponer. The disposition contained a clause of warrandice, and under it she claimed to have her estate freed from the burden of debt. It is admitted on both sides that her claim to that extent is well founded. The only question is, on whom does the fulfilment of the obligation lie—that is to say, does it lie on the heir in heritage or on the executrix. I cannot entertain any doubt on the point, because the obligation is simply personal. All personal obligations must be fulfilled by the executor, because they are primarily obligations on him.

The Court pronounced this interlocutor:—

> "Find that the bond of £250,000 is not entirely chargeable against the estate of Milton, and that that estate is entitled to relief out of Mr Stirling Crawfurd's residuary estate from a share of the said bond in the proportion of the respective values of Milton on the one hand and Balornock and Auchinearn on the other: Find and declare accordingly: Find the parties of the first and third part liable in expenses to the party of the second part."

Counsel for First and Third Parties—Balfour, Q.C.—Guthrie. Agents—John C. Brodie & Sons, W.S.

Counsel for Second Party—Sol.-Gen. Robertson, Q.C.—C. K. Mackenzie. Agents—Graham, Johnston, & Fleming, W.S.

Friday, November 26.

SECOND DIVISION.

[Sheriff of Forfar

SAMSON *v.* DAVIE.

Parent and Child—Bastard—Indigent Mother.

Held (diss. Lord Young) that an illegitimate son is bound to support his indigent mother.

Elizabeth Lindsay or Fairweather, who was aged sixty-six, and had become unable to earn her own maintenance, applied to Charles Samson, inspector of poor, Kirriemuir, and received from him up to 29th June 1885 parochial relief to the amount of £4, 3s. He raised this action against Robert Davie, whom he alleged to be her illegitimate son, for this sum, and to have him ordained to relieve the board of all such aliment as they might find it necessary in fulfilment of their duties to afford the pauper subsequent to 29th June 1885.

The defender denied liability as not being truly the pauper's son, and also pleaded that the action was irrelevant.

The Sheriff-Substitute (Campbell Smith) dismissed the action as irrelevant.

"*Note.*—. . . The question whether a bastard is bound to support his pauper mother is, so far as I am aware, not settled by any clear or direct authority. It has remained a subject of interesting speculation and fascinating doubt for generations, and I am sorry to be compelled to take a step towards putting an end to its indeterminate character, and still more to decide it in a way which I think not in accordance with natural right. But for the fettering considerations of settled civil law, I should have felt inclined to hold that the obligations of parent and child to give support against want ought to be reciprocal and coextensive—that as the mother or father was bound to support the child when helpless, so the child ought to be bound to support either parent in case of ill-health, or old age or poverty, as is indeed, I believe, the usual custom in Scotland when human affections assert themselves independently of legal regulations and of civil law; but passing from natural right to civil law, I am met with the insuperable obstacle that except to one effect the civil law does not recognise the relation of parent and child as existing between illegitimate children and the persons who have produced them. A bastard is pronounced by a host of authorities to be *filius nullius*, that is, being interpreted, not a child at all, but a mere physiological product having no rights of any kind except the right to live and remain in the world at the expense of the temporary pair who have irregularly and improperly introduced it to life. So soon as a bastard is able to support itself, it is an alien to legal relationship—without legal father or legal mother. The bastard inherits nothing from his father whatever fortune that father may leave. The bastard may make a fortune and die unmarried and childless. His fortune will go to the Crown as *ultima hæres*, and if the father get any part of his deceased bastard's estate, it will only be through the generosity of the Crown. The same thing would happen with the mother of a wealthy bastard. And here I touch the principle that separates the bastard from all legal ties, except those, by marrying and otherwise, he or she may form for himself or herself. In law the defender here is nobody's son. He has no mother at all, and therefore no mother for whom he is bound to bear the burden of giving her bread when she is old and destitute. I may have doubts of the real humanity of such a bastard son, but he has at least as much humanity as the law ascribes to him, which is physiological humanity, with the right to escape from starvation in infancy and until he becomes self-supporting."

On appeal the Sheriff (Combrie Thomson) recalled the interlocutor, repelled the plea of irrelevancy, and remitted the case to the Sheriff-Substitute for further procedure.

"*Note.*—I am of opinion that an illegitimate son is legally bound to maintain his indigent mother."

A proof was then allowed. From the proof it appeared that the defender was truly the illegitimate son of the pauper. He was born in 1839, so that he was forty-seven years of age at the date of this action. In his youth she had neglected him. He had only seen her twice in his life; he was supported till he was able to support himself by his mother's mother, and had when she became old and feeble contributed to her support. He had risen to the position of farm overseer which he now occupied solely by his own efforts.

The Sheriff-Substitute gave decree for the £4, 3s. sued for, and reserved the pursuer's claims for future relief.

The defender appealed, and argued—There were two questions here—1st, Was an illegitimate son bound to support his indigent mother? 2d, Assuming the affirmative, were there not exceptional circumstances in this case which render it expedient that the obligation be not enforced? *On the first question*—It had arisen for the first time in the Court of Session, and must be answered in the negative. There was no authority for answering in the affirmative, and no *dicta* in the text-writers to that effect. Baron Hume says that "there is no obligation in a natural child to aliment his reputed father—at least it is an extremely doubtful question" — Hume's MSS. Lectures, i. 97; and the Lord President Inglis had expressed the same opinion in *Corrie* v. *Adair*, February 24, 1860, 22 D. 897. A bastard was in the eye of the law *filius nullius*, and there was no reciprocity of obligation between the father and the child. The French law was the same, M. D'Aguesseau le Chancelier in his Dissertations on the Roman law stating it thus—"Ces mêmes lois ne prouvoient pas qu'il y eût une liaison assez etroite entre un père et son fils bastard pour obliger ce dernier à le nourrir s'il etait en necessité."—Ulpian's Digest, xxv. 3, 4, 4. Before the days of Constantine neither the putative father nor mother could succeed the bastard. The English law also did not recognise the obligation. The bastard could neither be heir to any-