the matter took place was this. The curator had taken a step—certainly a strange one—which manifestly involved future controversy with the present pursuer, for he had carried off the pursuer's intended bride to an asylum on the eve of the marriage, and in full knowledge of its imminence. He therefore thought it would be well to have on record something to justify this proceeding. Accordingly he thought it right, to use his own words, "immediately after removing Mrs Stevenson to the asylum, to take a statement from Bella Jamieson, and also from her sister Mrs Sinclair, and that was done in my presence in the office of Messrs Hill, Brown, & Company." The two women by arrangement were taken to the office, and there Mr Findlay, the curator's law-agent, took statements in writing from them both. He says he took these statements because of the very peculiar circumstances of the case, that Bella Jamieson's statement was the result of questions put by him and answers made by her, that it was reduced to writing at the same time, and was signed by her.

It thus appears that the document was the result of questions put by the agent of a gentleman wishing to prove that he had been right in acting as he had done. This I think brings the case within the rule cited, and renders the statement inadmissible as evidence.

LORD ADAM—This statement was not volunteered, but was the result of questions put by the agent of one of the parties to this action, and was then reduced to writing. I think that it was of the nature of a precognition, to which the objection is, that it is prepared on questions framed by a person interested to bring out a particular view of the case, and therefore unsafe as evidence.

This document was taken after Fairie had taken the strange step on the eve of the marriage of removing the woman to an asylum, which would necessarily lead to conflict with the present pursuer. To justify that proceeding it was needful to prove she was then of unsound mind, and that is the very issue before us in the present case.

LORD M'LAREN—I am of the same opinion. This is not strictly a precognition, because no action was then depending in which it was to be used as evidence, but in my view the objection to a precognition as hearsay evidence does not depend upon its being taken for use in a case actually in Court for which evidence is being got up, but upon this consideration, that it is the result of questions put by a party interested to establish his own case. Findlay was a person interested in one view of the case, and such a person is likely to put questions calculated to establish that view. In a statement so taken all the facts are not so likely to be brought out as if the person making it were emitting a purely voluntary declaration. There is no doubt that in the present case the statement was taken to support an opinion the curator had already formed, and upon which he had acted.

I think the case is ruled not only by the opinions in the *Lauderdale Peerage* case, but also by those in the *Dysart* case in 1881, which related to statements made with regard to an irregular marriage, and which support the view that one-sided statements are not to be accepted in evidence.

LORD KINNEAR concurred.

The Court refused to admit the statement as evidence.

Counsel for Pursuer and Respondent—Comrie Thomson—Cosens. Agent—A Laurie Kennaway, W.S.

Counsel for Defenders and Reclaimers—H. Johnston—Younger. Agents—Webster, Will, & Ritchie, S.S.C.

Tuesday, November 28.

SECOND DIVISION.

[Lord Wellwood, Ordinary.

ROBERTSON AND OTHERS (CAMPBELL'S TRUSTEES) *v.* THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY AND LAW.

Trust-Disposition—Construction—Obligation to Maintain Road—Road becoming City Street—Whether Obligation Subsisted.

In a disposition of part of a trust-estate the trustees bound themselves to construct a road and footpath as an access to the land of the disponee, who was bound "to pay a proportion of the expense of maintaining said road" for a certain time. The road was formed and maintained as a good country road for some years, but was subsequently included in the extended boundaries of a neighbouring city, and the trustees were called upon by the city authorities to execute certain works on the road which practically resulted in re-forming it into a city street. The trustees did did not deny their liability for this work, but sued the disponee, under the provision of maintenance, for a proportion of the expense incurred. *Held* that the obligation of the disponee did not cover the works required by the city, on the ground that these were neither of the character nor within the description of the maintenance contemplated by the disposition.

By disposition dated June 1875 the trustees of Sir George Campbell of Succoth, Baronet, sold and disponed to John Ewing Walker of Dalling Mhor, near Dunoon, in the county of Argyll, and his heirs and assignees whomsoever, all and whole part of the lands of Gilshochill and Lochburn, in Lanarkshire, containing 67 acres, but with and under the real burdens and provisions therein, *inter alia*—"(Fourth) our dis-

ponee and his foresaids shall have access to said lands by a road of fifty feet in width, running from the south-east corner of the Free Church Manse feu in Church Street, Maryhill, through other lands belonging to us as trustees to the lands hereby disponed, as shown in the said plan annexed hereto, and also by a footpath ten feet in width, leading from Hill Street, Maryhill, to the lands hereby disponed, through the other lands belonging to us as trustees foresaid, which road and footpath are to be made by us at our own expense, and shall be immediately completed by us in so far as they are not already made: Declaring always that our said disponee and his foresaids shall have the fullest right of passage over said road and footpath now and in all time coming: (Fifth) Our said disponee shall be bound, as by acceptance hereof he hereby binds himself and them, to pay a proportion of the expense of maintaining said road of fifty feet and footpath, along with others using the same, in proportion to the extent of ground held by each party, until we, as trustees foresaid, or our foresaids, come to feu the ground on the sides of said road and footpath, or either of them, when this obligation shall cease, and we or our foresaids shall be bound to maintain said road and footpath in good order in all time thereafter: Declaring, however, that the said John Ewing Walker and his foresaids shall have right to open said road and footpath at any time for the purpose of forming and repairing drains and sewers, and laying and repairing gas and water pipes, our said disponees always being bound to restore said road and footpath."

The trustees accordingly made the road, which consisted of a metalled surface with water channels of rubble whin causeway stones, 40 feet wide, about 840 feet in length, and lying within the burgh boundaries of Maryhill. The pursuers feued ground on the west side of the said road extending along the road 257 feet 11 inches for an Episcopal church and parsonage, but they had not feued any other ground along the sides of the said road.

Mr Walker having died, the land originally disponed to him was at the time of the action in the possession of various parties, some, including Robert Law, as singular successors in virtue of conveyances in their favour, and others, including the Scottish Union and National Insurance Company, in virtue of bonds and dispositions in security.

At Whitsunday 1891 the municipal boundaries of the city of Glasgow were extended so as to include the burgh of Maryhill. Under the provisions of the Glasgow Police Act 1866 the Master of Works served a notice, dated 3rd December 1891, upon Sir George Compbell's trustees, calling upon them to put the said road into a state of repair by putting in new water channels of square dressed whinstone setts, 4 feet broad, and cover said street with a good coating of hand-broken whinstone metal, the whole to be rolled until a uniform and smooth surface is obtained. To meet the requirements of the Master of Works it was estimated that a sum of not less than £400 would require to be spent on the road. The operations and costs are fully detailed in the Lord Ordinary's opinion. Upon this being done the roadway would be taken over by the town, and thereafter upheld by it.

Before proceeding with the repairs required by the Master of Works the trustees called upon The Scottish Union and National Insurance Company and Robert Law to pay a proportion of the expense which would be incurred in making the alterations required by the Master of Works. They declined to do so, and the trustees brought an action to have it declared that they were each bound to pay a proportion of the expense of repairing the road.

The defenders founded on the feu, fronting the road, which the pursuers had granted.

The pursuers pleaded—"(1) The defenders being each of them subject to the real burden or real condition founded on as successors of the original disponee in parts of the lands disponed are bound to contribute in terms of the first conclusion of the summons."

The defenders pleaded—"(1) The pursuers' statements are irrelevant. (3) *Separatim*—The defenders The Scottish Union and National Iusurance Company being in possession of the said lands of Lochburn solely in virtue of the decree of maills and duties condescended on are under no obligation as aforesaid. (4) The operations directed by the Master of Works not being of the character nor within the description of those contemplated by the disposition, the defenders are not liable to contribute to the expense of the same. (5) The condition upon which by the terms of said disposition any claim on the disponee to maintain the road was to cease and determine, having been purified as condescended on, the defenders should be assoilzied."

Upon 13th December 1892 the Lord Ordinary (WELLWOOD) sustained the 5th plea-in-law for the defenders, and assoilzied them from the conclusions of the summons.

Upon 20th January 1893 the Second Division recalled this interlocutor, and remitted the case to his Lordship, "with instructions to proceed therein as accords."

The Lord Ordinary allowed a proof, the result of which, so far as material, is stated in his Lordship's opinion.

Upon 1st June 1893 the Lord Ordinary pronounced this interlocutor—"Sustains the 4th plea-in-law for the defender, dismisses the action, and decerns.

"*Opinion.*—It is admitted that the defenders are not primarily bound to obtemper the order of the Master of Works, as they are not proprietors of any land or heritage adjoining the part of Church Street in question, or having right of access by it in the sense of section 318 of the Glasgow Police Act of 1866. The parties bound to implement that order are the pursuers, and the present action is truly one of relief,

or rather for declarator of right of relief of part of expense to be incurred in executing the works ordered. The summons does not contain any petitory conclusions.

"The declaratory conclusions of the summons are as follows:—'First, that the defenders are bound, each of them, to pay a proportion of the expense of repairing, in terms of the Glasgow Police Act 1866, the private street known as Church Street, Maryhill, Glasgow, along with the pursuers and others using the same and similarly bound, the proportion being according to the extent of the ground held by each of the parties so bound; and second, that the proportion of the said expense which shall fall to be paid by the defenders the said Scottish Union and National Insurance Company, is forty-three and one-third per centum or thereby of the whole, and that the proportion thereof which shall fall to be paid by the defender the said Robert Law is sixteen and one-half per centum or thereby of the whole, or such other proportions as shall be determined by our said Lords in the process to follow hereon.' The summons and condescendence are framed for the purpose of raising one question, viz., whether the works ordered by the Master of Works are as a whole of such character as to fall within the obligation contained in the fifth condition of the disposition in favour of Walker. The case is not framed for the purpose of raising the question whether the road was actually in disrepair, or what were the causes of and who were responsible for its being in that condition. The action proceeds on the assumption that the order of the Master of Works is conclusive upon that question.

"I have heard a full argument upon the question whether the fifth condition in the disposition to Walker is or is not a real condition which runs with the lands. I am disposed to think it is a real condition which is binding on singular successors. It has a natural connection with the subjects possessed by the defenders, and it is a continuing obligation intended to affect the lands, which though not necessarily permanent will subsist until the pursuers have feued out all the ground abutting on the road. It does not admit of being implemented or discharged by one payment or performance. I therefore think that it comes within the class of cases of which *Clark*, 1 Macq. 668, is an example, and is distinguished from the obligations which admitted of being performed and discharged once for all, and were therefore held not to run with the lands in the cases of *Coutts* v. *The Tailors of Aberdeen* and *The Magistrates of Edinburgh* v. *Begg*, 11 R. 322. I do not think it necessary to say more upon this point, as I am of opinion, that assuming it in favour of the pursuers, they are not entitled to obtain the declarator they seek. On the evidence I hold it proved that the works ordered by the Master of Works are of a materially different character from those contemplated in the condition in question. The road which the original disponees undertook to help in maintaining was a suburban road, well constructed, and adapted to the class of feuing then contemplated in the burgh of Maryhill, but of comparatively simple and cheap construction.

"The road was formed in 1874, but it was not until 1891 that the municipal boundaries of Glasgow were extended so as to include the burgh of Maryhill. I do not think it can be held that when the disposition of 1875 was executed any of the parties had in contemplation such an extension of the boundaries of Glasgow and the application to Maryhill of the provisions of the Glasgow Police Act 1866.

"Now, a leading proposal which underlies the order of the Master of Works is not merely to put the road into the state of repair according to the standard on which it was formed, but to have it reconstructed or at least materially improved according to the standard and requirements in force in Glasgow, so as to admit of it being taken over and maintained as one of the streets of Glasgow in all time coming by the town.

"The pursuers' argument is that the works ordered are merely repairs according to the enlightened views and requirements of the time, and that the original disponees must be held to have contemplated such a development. I cannot adopt this view, and I think a conclusive test of its unsoundness is that if the pursuers had done the same work at their own hand they could not have recovered the full proportions of the cost from the defenders. The road was originally constructed at a cost of £441. Of that sum works costing £234 are still available, having been done once and for all. Thus only £207 is left to represent work which might be required for repair or done over again. The cost of the repairs which the pursuers propose to make amounts to £400. I hold it proved that the road can be not merely repaired but made as good as new for £135. That includes a thorough re-metalling, much more than would be necessary for ordinary maintenance from year to year, and a few necessary repairs to the water channel, the expense of the latter being not more than £13. On the other hand, the Master of Works has ordered new water channels of square dressed whinstone sets of 4 feet broad, which will cost £150, and the class of metalling ordered is of a much superior kind to that which was required for the road in its original state. I understand that the pursuers do not now claim from the defenders any part of the expenses of the kerb, but deducting £91 on that head there still remains a difference of £175 between the cost of work ordered and the outside cost of repairs which would make the road as good as new.

"It seems to me that the works ordered by the Master of Works amount, if not to reconstruction, to such a renovation and improvement of the road as clearly to exceed maintenance in the sense of the disposition. This is not only proved by the defenders' witnesses, but admitted by the pursuers' witness Alexander Faill, who

constructed the road in 1874. He says in cross-examination—'If the whole of the rubble stones were taken out of the water channels, and they were replaced by square dressed stones, that would amount to a reconstruction of the water channels, and not a repair. That would be much more costly than mere repair. I would describe it as an improvement of the water channels. (Q) And I suppose you would say the same thing with regard to the metalling with 2 in. instead of 2½ in. metal, blinding with ground whinstone or granite, and rolling with steam roller?—(A) Yes, that makes a more complete and rapid road.'

"It might have been otherwise if the Master of Works had merely ordered ordinary repairs, such as the pursuers might have executed at their own hand, and charged the defenders with a proportion of the expense, and if the repairs ordered had been the same in character though slightly more expensive than the work originally done, the defenders might still have been bound to contribute. But here the character of the work ordered is materially different, as is well shown by contrasting the cost of the new water channels, £150, with the expense of repairing the old ones, £13. Whether the pursuers in another action may succeed in recovering any part of the expense I do not think I am called upon to say, as the action is not raised to try that question, and no evidence has been led as to the causes of the disrepair or as to the parties who were responsible for the openings in the road to which the disrepair seems to be confined or mainly due. The work now required is made compulsory by supervenient legislation, by which in such cases it has been repeatedly held that obligants in clauses of relief are not bound. As illustrations in point, I may refer to the cases of *Scott* v. *Edward*, 12 D. 1077, and *Dunbar's Trustees*, 15 R. (H. of L.) 221.

"In this view of the case, the action as laid fails against both defenders, and it is not necessary to consider the separate plea (3) stated for the Insurance Company. But the question has been argued, and I may state shortly how it at present strikes me—The Insurance Company are sued as the successors of the original disponee, but I do not think that is their proper designation or character. They are not proprietors of the lands; they are, *ex facie* of their titles, merely encumbrancers, heritable creditors in possession for limited purposes under a decree obtained in an action of maills and duties. The claim against them is not put on that ground, which involves a consideration of the extent of their intromissions, and the emergence and extent of the obligation to maintain the road during the time of their possession. If the pursuers in another action can make good a claim of relief of a more limited character than that now put forward, the judgment which I have pronounced will not foreclose them from raising the question of the Insurance Company's liability for a proportion on the ground of intromission."

The pursuers reclaimed, and argued—The defenders really sought relief from the obligation imposed by the disposition of 1875. This road was an access to their property, and they had agreed to maintain it as a road until the pursuers had feued all the ground on each side, although the amount of their obligation would lessen as the feuing increased. The defenders admitted that they were bound to maintain the road as it was originally made, and unless they could show that it was really a new subject they were asked to maintain, then the Court must hold that it was within the contemplation of parties that this road might one day become a Glasgow street. But on the evidence it was plain that all the defenders were asked to do was to maintain the same kind of road as they had agreed to do, although perhaps in a better and more expensive style. The Scottish Union and National Insurance Company were liable just as any other proprietor would have been; they had had assigned by decree of maills and duties the subjects which had been disponed to Walker, and were in his place. The holder of subjects under a decree of maills and duties had a title of "constant possession"—*Prudential Insurance Company, Limited* v. *Cheyne*, June 4, 1884, 11 R. 871.

The respondents argued — They were asked to construct a street in Glasgow according to the conditions of the Master of Works, which was a different thing from the scope of their obligation to maintain a country road. When the parties made their bargain there was no question of Maryhill being incorporated with the city of Glasgow. This alleged obligation did not run with the land against a singular successor. There is nothing in the conveyance to show that the subject itself was meant to be affected, and it was not a necessary or natural burden of the defenders' right, because the road to be maintained was merely an access to their property, and the pursuers were bound to have furnished that in any case—*Tailors of Aberdeen* v. *Coutts*, August 3, 1840, 3 Ross' Leading Cases, Lord Brougham, 287; *Magistrates of Edinburgh* v. *Begg*, December 20, 1883, 11 R. 352; *Tennant* v. *Napier Smith's Trustees*, May 31, 1888, 15 R. 671. The Insurance Company could not be held liable in any case for the upkeep of the road, as they were not proprietors of the lands upon which that burden was laid; they were merely security-holders. Possession under a decree of maills and duties did not invest the holder with the rights of a proprietor; they could not be called upon to pay feu-duty—*Liquidators of the City of Glasgow Bank* v. *Nicolson's Trustees*, March 3, 1882, 11 R. 689. They could bring an action of poinding the ground—*Henderson* v. *Wallace*, January 7, 1875, 2 R. 272. They are not infeft in the subjects like a proprietor or holder of a bond and disposition—*Scottish Heritable Security Company* v. *Allan, Campbell, & Company*, January 14, 1876, 3 R. 333, *per* Lord President, 340. A holder of heritable subjects under a decree of maills and duties can only draw the rents so as to pay his debt, and all that

he could be liable for must be a direct counterpart of the rent he draws. The obligation to uphold the road was not in that position.

At advising—

LORD TRAYNER—In 1875 the pursuers or their predecessors, the trustees of the late Sir George Campbell, disponed a piece of ground situated at or near Maryhill to Mr John Ewing Walker, under which the disponee acquired right not only to the ground disponed, but also to the use of a certain road and footpath (which had been made at the expense of the disponees) as an access to said ground. The disposition contained a provision to the effect that (for a certain time) the disponee and his assignees should be bound to pay to the disponers "a proportion of the expense of maintaining" the said road and footpath; and the present action is brought for the purpose of having it declared that the defenders are liable in respect of that obligation to make payment of a proportion of the expense attending the execution of works upon said road ordered by the municipal authorities of Glasgow. The defenders are (1) Mr Law, who is vested as proprietor in a part of the land so disponed under a singular title flowing from Mr Walker; and (2) the Scottish Union and National Insurance Company, who are in possession of part of said land as heritable creditors under a security title granted by Mr Walker.

It appears that in 1891 the municipal boundaries of Glasgow were extended so as to include the burgh of Maryhill, within which the said road and footpath are situated; and that in December of that year a notice was served on the pursuers by the Master of Works, acting under and in terms of the Glasgow Police Acts, calling upon them to execute certain works (described in Cond. 6) on said road and footpath, which are rather of the character of re-forming the road than merely maintaining it, and which would have the effect of greatly improving its condition. The pursuers are undoubtedly, in the first place, the parties bound to obtemper the order or notice of the Master of Works, and so far as appears from anything that has been said, the only parties to whom the Master of Works could validly issue his order or notice. But admitting this, the pursuers maintain that under the provision I have referred to, contained in the original conveyance, the defenders, as assignees of Mr Walker, are liable in a proportion of the expense to be incurred in the execution of the works which the Master of Works has required to be executed. The defenders maintain that their obligation as Mr Walker's assignees does not cover or extend to the execution of such works as are now required to be performed, which are, they contend, neither of the character nor within the description of those contemplated by the disposition. The Lord Ordinary has sustained this defence, and in my opinion rightly sustained it. The only obligation on Mr Walker or his assignees was to pay a proportion of the expense of "maintaining" the road and footpath; and there does not appear to me to be any difficulty in ascertaining what that obligation means or imposes. The road, which was a country road at the date of the disposition, used as an access to the pursuers' feus, was to be maintained in its then character and state of efficiency. But what is now to be done, and for the expense of which the defenders are sought to be made liable, is something of an entirely different description. The road is now to be covered with whinstone metal, with new water channels of square dressed stone put down at the side of the footpath, which really is to make this road into a proper street within the city, and not in any sense to maintain it as a country road such as it was in 1875. That this is so is sufficiently evidenced by the pursuers' averment, which is, that "upon this being done the roadway will be taken over by the town, and thereafter upheld by it." The parties to the disposition of 1875 could not intend the obligation there expressed to cover such a radical change, because in 1875 it was not contemplated that a road in or near Maryhill would become a Glasgow street. Besides, the obligation in question is not to pay or relieve the pursuers from the payment of a burden laid upon them by statute, and arising under statute subsequent to the date of the obligation. On this ground I should have been disposed to have sustained the defenders' first plea-in-law, viz., that the action is irrelevant, for there is no averment by the pursuers that the defenders are liable to relieve them of an obligation imposed on them by statute such as is set forth in the conclusions of the summons. But it is sufficient to dispose of the case to sustain the defenders' fourth plea, as the Lord Ordinary has done, and I am of opinion that the Lord Ordinary's judgment should be affirmed. In disposing of the case on this ground it is unnecessary to notice the special defence urged by the Scottish Union and National Insurance Company, that as encumbrancers only, although in possession, they are not liable for the proprietor's obligations.

The LORD JUSTICE-CLERK—That is the opinion of the Court.

The Court affirmed the Lord Ordinary's interlocutor.

Counsel for Reclaimer—C. S. Dickson—Macfarlane. Agents—Tait & Crichton, W.S.

Counsel for Respondents—Jameson—Dundas. Agents—Cowan & Dalmahoy W.S.