Tuesday, November 23.

FIRST DIVISION.

[Lord Low, Ordinary.

DUKE OF FIFE *v.* GREAT NORTH OF SCOTLAND RAILWAY COMPANY.

Sale — Sale of Heritage — Construction of Disposition — Railway — "Obligation to Preserve the Effective Drainage of" Lands.

Lands were disponed to a railway company in implement of a decree-arbitral following on a statutory reference, under a declaration that "the said railway company shall be bound and obliged to preserve the effective drainage of the lands in so far as the same may be interfered with by the railway works, and to keep up the works, fences, water-courses, and others falling upon them under the Railways Clauses Consolidation (Scotland) Act 1845, and protect and keep in repair the bottoms and sides of the streams deepened below the natural level by the railway company, and also to keep the same clear in so far as affected by the railway works."

Held (*rev.* judgment of Lord Low) that the declaration in the disposition was unambiguous; that it was therefore incompetent to interpret it by the decree-arbitral or by the terms of the Railways Clauses Act 1845; and therefore that the company were bound to preserve effective the drainage which had deteriorated in consequence of their diverting the course of a river for the construction of their railway.

Observations (*per* Lord Low) on the obligations imposed by the Railway Clauses Act on a railway company in regard to the drainage of lands interfered with by their works.

By a private Act of Parliament obtained in 1855 the Great North of Scotland Railway Company were empowered to acquire certain lands for the purposes of their undertaking. They exercised these powers, *inter alia*, with regard to certain lands belonging to the Earl of Fife's trustees. A reference was entered into for determining the sum to be paid for these lands, and by disposition dated 11th August 1859 the said trustees, in implement of a decree-arbitral, conveyed the lands to the company under the following conditions:—. . . "(4) That we and our foresaids shall be bound to free and relieve the said Railway Company of the feu-duty, if any, and of the public and parochial burdens other than poor-rates and prison and other assessments chargeable against the lands or railway *quâ* railway presently exigible from the portions of the lands hereby disponed, or which may be specially laid on railways by Act of Parliament, all in terms of said decreet-arbitral, declaring that the said railway company shall be bound and obliged to preserve the effective drainage of the lands in so far as the same may be interfered with by the railway works, and to keep up the works, fences, and water-courses, and others falling upon them under the Railway Clauses Consolidation (Scotland) Act 1845, and protect and keep in repair the bottoms and sides of the streams deepened below the natural level by the Railway Company, and also to keep the same clear in so far as affected by the railway works."

On 18th January 1896 the Duke of Fife raised an action against the Great North of Scotland Railway Company, to have it declared that the company were bound to implement the terms and conditions of the disposition of 1859, and in particular the clause or condition quoted above, and that the company had failed to implement the said clause There was also a conclusion to have the defenders ordained to execute such works as might be necessary to satisfy their obligation, and there was a conclusion for damages.

It is unnecessary to set forth the pursuer's averments and the defenders' answer thereto, the facts in the case being sufficiently indicated in the opinion of the Lord President.

The pursuer pleaded—"(1) The defenders having failed to implement the obligations incumbent upon them under the clauses of the disposition set forth in the summons, decree ought to be pronounced in terms of the declaratory conclusions and of the first petitory conclusion of the summons, with expenses."

The defenders pleaded, *inter alia*—"(2) The defenders having implemented the whole obligations incumbent upon them under the decree-arbitral of 1856, the disposition of 11th August 1859, and the Railways Clauses (Scotland) Act 1845, are entitled to absolvitor."

The finding in the decree-arbitral on which the defenders founded was in the following terms:—"We do further find that on implement by the said Railway Company of the foresaid findings in favour of the said Thomas Robertson Chaplin, as trustee foresaid, they shall be freed and relieved of all claims at the instance of each other under the said reference, and we decern accordingly: Fifth, we hereby repel all other claims made by the said Thomas Robertson Chaplin, as trustee foresaid, in the said reference, and find that the foresaid sums are in full satisfaction of all claims competent to him against the said Railway Company under the said reference, excepting always the obligation upon the said company to preserve the effective drainage of the lands, in so far as the same may be interfered with by the construction of the works, and to keep up the works, fences, water-courses, and others, falling upon the said company under the Railways Clauses Consolidation (Scotland) Act 1845, and protect and keep in repair the bottoms and sides of the streams deepened below the natural level by the Railway Company, and also to keep the same clear in so far as affected by the railway works."

It was admitted that the claims lodged before the arbiters, and the other proceedings in the statutory reference, had been lost.

The Railways Clauses (Scotland) Act 1845 (8 and 9 Vict. cap. 33), sec. 16, enacts that "it shall be lawful for the company, for the purpose of constructing the railway or the accommodation works connected therewith, to execute any of the following works, viz.—they may make or construct in, upon, across, under or over any lands . . . within the lands described in the said plans [*i.e.*, the plans deposited with the sheriff-clerk] such temporary or permanent . . . bridges, . . . conduits, drains, . . . and fences as they think proper; they may alter the course of any rivers not navigable, canals, brooks, streams, or water-courses, and of any branches of navigable rivers, such branches not being themselves navigable, within such lands, for the purpose of constructing and maintaining tunnels, bridges, passages, or other works over or under the same, and divert or alter, as well temporarily as permanently, the course of any such rivers or streams of water, roads, streets, or ways, or sink the level of any such rivers or streams, roads, streets, or ways in order the more conveniently to carry the same over or under or by the side of the railway as they may think proper; they may make drains or conduits into, through, or under any lands adjoining the railway for the purpose of conveying water to or from the railway; . . . they may from time to time alter, repair, or discontinue the before-mentioned works or any of them and substitute others in their stead; and they may do all other acts necessary for making, maintaining, altering, or repairing, and using the railway; provided always that in the exercise of the powers by this or the special Act granted, the company shall do as little damage as can be, and shall make full satisfaction in manner herein and in the special Act, and any Act incorporated therewith, provided, to all parties interested, for all damage by them sustained by the exercise of such powers."

Section 60 enacts, that "the company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway . . . all necessary arches, tunnels, culverts, drains, or other passages either over or under or by the sides of the railway, of such dimensions as will be sufficient at all times to convey the water as clearly from the lands lying near or affected by the railway as before the making of the railway, or as nearly so as may be; and such works shall be made from time to time as the railway works proceed."

The defenders' private Act of 1855 incorporated the Railways Clauses Act.

The Lord Ordinary allowed a proof, the import of which sufficiently appears from the latter portion of the Lord President's judgment.

On 6th March 1897 the Lord Ordinary (Low) dismissed the action.

Opinion.—"The object of this action is to compel the defenders to implement an obligation imposed upon them by the disposition granted in their favour in 1859 by the pursuer's predecessors, of the land acquired from them by the defenders for the construction of their railway.

"The first question is as to the construction of the obligation. The first part of it runs as follows:—'Declaring that the said Railway Company shall be bound and obliged to preserve the effective drainage of the lands in so far as the same may be interfered with by the railway works, and to keep up the works, fences, water-courses, and others falling upon them under the Railway Clauses Consolidation (Scotland) Act 1845.'

"That is a very badly-expressed sentence, because there is no proper antecedent to the words 'falling upon them.' It is plain enough that these words were intended to refer to statutory obligations upon the Railway Company in regard to keeping up works, fences, water-courses, and others. It is not so clear, however, whether the obligation to preserve the effective drainage is also a statutory obligation, or whether it is a contractual obligation imposed by the disposition.

"There is no difficulty in seeing what is the nature of the obligation in regard to drainage if it is competent to look at the decree-arbitral.

"In the decree-arbitral the arbiters, after fixing the price to be paid by the defenders for the lands and for severance damage, and dealing with accommodation works, abatement of rents, public burdens, and the expenses of the proceedings, repelled all other claims made by the then proprietor of the lands, and found 'that the aforesaid sums are in full satisfaction of all claims competent to him against the said Railway Company under the said reference, excepting always the obligation upon the company to preserve the effective drainage of the lands,' and then the clause proceeds as in the disposition.

"In the decree-arbitral, therefore, there is no ambiguity. What is excepted is 'the obligation' to preserve drainage, and keep up the fences, &c., in terms of the Railways Clauses Act, and it is plain that it was that obligation and no other which was intended to be incorporated in the disposition.

"But the pursuer says that it is incompetent to look at the decree-arbitral to aid in the construction of the clause in the disposition, and that the natural interpretation of that clause is to impose upon the defenders the obligation to do whatever is necessary in all time coming to preserve the effective drainage of the lands.

"Now, I do not think that it is incompetent to look at the decree-arbitral.

"The decree-arbitral and the disposition are two successive steps in the process by which the Railway Company exercised their statutory powers and acquired the lands, and the decree is not like negotiations or a previous agreement which the disposition superseded. I therefore do not think that it is incompetent to read the

decree-arbitral in order to see what were the circumstances under which the disposition was granted, and what was the subject-matter with which it dealt. Again, it is not a question of controlling the words of the disposition. If the obligation in the disposition had been, upon a natural construction of the language used, different from the obligation in the decree-arbitral, I think that it would have been necessary to give effect to the former, either as superseding or being in addition to the obligation imposed by the decree-arbitral. But the only question here appears to me to be, to what does an ungrammatical and, if read literally, unintelligible sentence in the disposition refer? A reference to the decree-arbitral makes that clear, and shows that it refers to the obligation which had been already imposed by the decree-arbitral and to nothing else.

"The next question is, What are the obligations laid upon a railway company by the Railways Clauses Act in regard to drainage of lands interfered with by their works? I think that the only obligations are those contained in the 60th section of the Act under the heading of 'Drainage Works.'

"The provision is that the company shall make, and at all times thereafter maintain, all necessary culverts and drains 'either over or under or by the sides of the railway, of such dimensions as will be sufficient at all times to convey the water as clearly from the lands lying near or affected by the railway as before the making of the railway or as nearly so as may be, and such works shall be made from time to time as the railway works proceed.'

"Now, it is not disputed that the defenders carried out these directions when they were constructing the railway, and it is not said that at the time the culverts and drains were not sufficient. Nor do the defenders dispute their liability to maintain the works which they made.

"The pursuer's case is that the works originally made to provide for drainage are no longer sufficient, and that the defenders are bound now to do whatever is necessary to put the drainage of the lands in as good a state as it was in prior to the formation of the railway.

"The question has arisen in this way. At the place in question the river Isla followed a winding course, and to save the expense of building bridges, the defenders exercised the powers conferred by the 16th section of the Railways Clauses Act and diverted the river, making it run in a new channel for a considerable distance along the railway line. Chiefly by reason of debris brought down by two streams which flow into the Isla, banks of sand and gravel have been formed across its course, and the effect has been to cause an accumulation of silt in the new channel which has raised the surface level of the water considerably higher than it originally was. The result is that culverts and drains which when they were made had a sufficient outfall are now under water and of little use for drainage purposes. The pursuer does not say what he wants the defenders to do, but it is plain that what is required to make the drainage effective is to remove the banks which have formed across the river and clear out the new channel. Apart from the difficulty that the main bank is in the bed of the river below the new channel, and on lands to which the defenders have no right, they contend that they are under no obligation to keep the new channel or any part of the river free of natural obstructions.

"The defenders argued that the new channel was not a railway work in the sense of being one of the works authorised by their Act. As I have said, the new channel was made under the powers given by the 16th section of the Railways Clauses Act. But that Act was incorporated into the special Act, and it was by virtue of that incorporation that the defenders were able to exercise the powers contained in the general Act. Upon this point I need only refer to the judgment of Lord Cairns in regard to the analogous case of the diversion of a road in *Rangeley* v. *Midland Railway Company*, 3 Ch. App. 306. I therefore do not think the defenders can escape liability on the ground that the diversion of the Isla was not a work which they made under the authority of their Act.

"But that does not greatly advance matters, because the question remains—When a railway company have altered the course of a river, what obligation are they under, if any, to maintain the new course of the river and keep it from being silted up? I do not find in the statute any obligation of any kind laid upon a railway company in regard to the diverted part of a river. I shall consider presently whether the new channel of the river is to be regarded as part of 'the railway,' to which the obligation in regard to drainage works in the 60th section of the Railways Clauses Act applies, but apart from that provision the statute seems to contemplate that where the course of a river is altered the new course shall simply become part of the river, and that the railway company shall have no obligations in regard to it any more than they have in regard to other parts of the river. Of course that is on the assumption that the diversion is properly executed. If the work was unskilfully or negligently done, and injury followed to adjoining lands, I apprehend that the railway company might be liable in damages at common law.

"Upon the question whether the drainage provisions of the 60th section apply to the new channel of a river there is more difficulty. The drains which the company are by that section directed to make are to be 'sufficient at all times to convey the water as clearly from the lands lying near or affected by the railway as before the making of the railway.' The expression 'the railway' is defined in the Act as meaning 'the railway and works by special Act authorised to be constructed.' That may mean only the works which are specified in the special Act, and not works which

are only authorised by the incorporation into the special Act of the Railways Clauses Act. Further, it rather appears that the works referred to in the definition do not include all works which a railway company may make, because the expression 'the undertaking' is defined as meaning 'the railway and works of *whatever description* by the special Act authorised to be executed.' On the other hand, in the case of *Rangeley* to which I have referred, Lord Cairns said that the 16th section of the Railways Clauses Act appeared to him 'to show conclusively that the diversion of the footway was part of the works authorised by the company's Act.' Further, if a company diverts a river for the purpose of making their line, there is the same reason for compelling them to restore drainage intersected by the new channel as there is for compelling them to restore drainage intersected by their line.

"I do not think, however, that that is a question which it is necessary to determine in this case, because it appears that the drainage works which the defenders made when they constructed their line and the new channel were designed in view of the fact that the river, instead of following its old course, ran alongside the line, and were intended to preserve drainage which had been affected both by the new channel and by the line.

"Further, I think that it is plain that the defenders cannot now be called upon to execute new works, because by the 65th section of the Act it is provided that the company 'shall not be compelled to make any further or additional accommodation works . . . after five years from the opening of the railway for public use.'

"The question, therefore, comes back to this, whether the defenders are bound to clear away banks which have formed and silt which has been deposited in the bed of the river, so as to reduce the level of the water in the new channel to what it originally was. For the reason which I have given, I do not think they are under obligation to do so. Further, what it would be necessary for the defenders to do in order to cure the evil complained of rather strikingly illustrates what would be the consequences of holding that such an obligation as that for which the pursuer contends attaches to a railway company in regard to the diverted portion of a river. The evidence seems to me to leave no doubt that the main cause of the silting up of the new channel is a bank which has been formed across the river below the mouth of the Auchinhove Burn, and also below the new channel. Now, it is possible that removing the silt from the new channel might so increase the scour of the water that the bank lower down would be carried away; but that would not necessarily, or even naturally, be the result of cleaning out the new channel. And if that result did not follow, the cleaning out of the new channel would be of no use. The bank below the Auchinhove Burn happens to be upon the pursuer's lands, and no doubt he would grant permission to the defenders to remove it. But it is a mere accident that it happens to be upon his lands, and if it had been upon the lands of a third party, the latter would have been under no obligation to allow the defenders to clear the bank away, and would probably have objected to any interference with the bed of the stream. That shows that if, when a railway company diverted a river, they became bound to secure the drainage of the lands through which the new channel ran in all time coming from injuries arising from natural alterations upon the bed of the river, the obligation might, and often would, be one which it would be altogether beyond their power to carry out. If, therefore, such an obligation was intended to be imposed, I think that it would have been provided for and defined in the Act, and I may observe that there is a striking contrast between the way in which the Act deals with the diversion of a river and the diversion of a road. In regard to the former, power to divert is given and nothing is said about any obligation to maintain. In the case of roads, on the other hand, there are the most ample provisions in regard to the company's obligations whether the road is diverted temporarily or permanently.

"I have hitherto been dealing only with the first branch of the obligation imposed upon the defenders in the disposition. There is a second branch which runs thus—'and protect and keep in repair the bottoms and sides of the streams deepened below the natural level by the Railway Company, and also to keep the same clear so far as affected by the railway works.'

"I do not know what stream upon the pursuer's lands that can refer to unless it be the Drum Burn, which comes underneath the railway line into the Isla. There is no objection, however, taken to the Drum Burn, except that it has been brought into the Isla at right angles instead of with a slope down stream, with the result that debris which it brings down is deposited in the bed of the Isla instead of being carried away. That, however, is an objection to the works as originally constructed. It was not contended for the pursuer that the part of the obligation to which I am now referring applied to the new channel of the Isla, and I do not think that an entirely new channel could be described as a stream deepened below the natural level. I therefore do not think that the second branch of the obligation aids the pursuer.

"There remains a question in regard to the stream called Kempcairn Strype. Prior to the formation of the railway that stream flowed into the river Isla above the point of diversion, and no part of the stream was upon the pursuer's lands. The defenders made a culvert for the purpose of carrying the stream underneath the railway into the Isla as formerly, Subsequently, however, the culvert was disused, and the stream was conducted in a ditch along the south side of the railway and into the part of the old channel of the Isla, for which the new channel was substituted. I think that that change has been undoubtedly prejudi-

cial to the pursuer's lands which lie to the south of the railway, because the old channel of the Isla becomes in times of flood filled with water which has no proper means of getting away, and the result is that the surrounding lands are flooded.

"Now, no part of the Kempcairn Strype is upon the pursuer's lands, and the waters of it do not affect his lands until they are discharged into the old channel of the Isla. The defenders therefore argued that it did not fall within their obligation, which referred only to the pursuer's lands. I am not satisfied that that is necessarily a good answer. The culvert by which the Kempcairn was originally conducted underneath the railway was an accommodation work designed to preserve the drainage so far as that stream was concerned. No doubt that was an accommodation work primarily for the benefit of Lord Seafield through whose lands the railway passed at that point. But if a railway company, instead of maintaining an accommodation work, allow it to fall into disuse, with or without the consent of the proprietor for whose benefit it was intended, with the result that the lands of an adjoining proprietor are injured, I am not prepared to say that the latter has not a good title to object, and to require that the original accommodation work should be maintained.

"But it is not proved that the diversion of the Kempcairn Strype was made by the defenders. No doubt they seem to have acquired from Lord Seafield a strip of ground on the south side of the railway corresponding to the ditch by which the Kempcairn is brought from the disused culvert towards the old channel of the Isla. But that piece of ground only extends about half-way from the culvert to the old channel, and the ditch from the remainder of the distance is upon Lord Seafield's ground. There is also evidence to the effect that the ditch was made by Lord Seafield's tenants.

"While, therefore, it may very well be that the pursuer is entitled to prevent the Kempcairn being brought along the south side of the line into the old channel, I do not think that he can do so in this action, because, even if the form of the action is appropriate for the purpose, which I doubt, the proper parties are not called.

"The pursuer also claims damages. The ground upon which damages are claimed is, that the defenders have not implemented the obligation in the disposition as construed by the pursuer by from time to time executing such operations as are necessary to preserve the effective drainage of the lands. From the evidence it appears that what, according to the pursuer's view, the defenders ought to have done, was to keep the course of the Isla clear, and prevent its being silted up. If I am right in thinking that no such obligation was imposed upon the defenders, it follows that damages cannot be claimed upon that ground."

The pursuer reclaimed, and argued—The defenders were under an explicit conventional obligation, in addition to their statutory obligations to maintain the effective drainage of the lands. The clause in the disposition, being unambiguous, settled once for all the extent of their obligation, and it was incompetent to look behind it at the decree-arbitral. The measure of the pursuer's right as fixed by the clause in question was to have things kept in the same satisfactory state as prevailed before the construction of the railway in 1856. It was no answer for the defenders to say that new operations would be required from time to time in order to maintain the effective drainage of the lands. The obligation was capable of fulfilment, and must be fulfilled. Even assuming, however, that the defenders were right in contending that the disposition must be construed by aid of the decree-arbitral and the Railway Clauses Act, it would be found that the phraseology of the decree was practically identical with that of the disposition. As regards the statute, a distinction must be drawn between the aggressive powers conferred by section 16, and the powers to make accommodation works conferred by section 60. An obligation to maintain drains, culverts, &c., was imposed by the latter section, while the former alone dealt with the diversion of streams, which was the real cause of the mischief here. But section 16 conferred a power to do all acts necessary for maintaining the railway. That implied an obligation to maintain the railway, and a diverted stream was in truth as much a part of the railway as a cutting or an embankment. A railway company would have no right to damage the lands of adjoining proprietors by letting an embankment fall to pieces, and no more was it entitled to injure adjoining proprietors by means of a diverted stream which failed to drain the lands as effectually as the stream in its original bed.

Argued for the defenders—Unless by contract some duty was imposed upon the defenders with regard to the river, the pursuer could not succeed. No such duty or obligation was imposed by the clause in the disposition founded on. Even if it were to be looked at alone, the reference to the statute towards the end applied to the whole clause, just as the reference to the decree-arbitral at the beginning applied to the whole. It was ungrammatical and difficult of construction; it was also the last stage in a series of statutory proceedings which must be regarded as a whole, and therefore it fell to be interpreted in the light of the decree-arbitral—*Gordon* v. *Gordon's Trustees*, October 28, 1881, 9 R. 50, *per* Lord Young at p. 76; *Burnett* v. *Great North of Scotland Railway Company*, February 24, 1885, 12 R. (H.L.) 25, *per* Lord Fitzgerald at p. 34. When the decree-arbitral was looked at, it was found to impose no further obligation on the defenders than that "falling upon the company under the" Railway Clauses Act. That statute must therefore fix the measure of the defenders' obligations. Now, whatever other duties might be imposed on the company by section 16, the duty of maintaining any-

thing was not imposed. Section 60 no doubt imposed a duty to maintain accommodation works, but the diversion of a river was not an accommodation work. On the contrary, it was expressly named among the operations which section 16 gave power to carry out. Once any operation authorised by section 16 had been successfully carried out and accepted by the adjoining proprietors as satisfactory—which was the case here—a railway company was relieved of all obligation so far as that operation was concerned.

At advising—

LORD PRESIDENT—In constructing their railway, the Great North of Scotland Railway Company diverted the river Isla at a part of its course where it formed a bend. The new course cut the arc, so to speak, and thus saved the company from having to form two bridges. The new channel was formed alongside of the railway—the land both for it and for the railway being acquired from the Duke of Fife.

From the configuration of the ground, the land at this part of the Isla was not easily drained; and the disposition, which formed the title of the Railway Company to the land so taken from Lord Fife, contains this clause—"Declaring that the said Railway Company shall be bound and obliged to preserve the effective drainage of the lands in so far as the same may be interfered with by the railway works." The present action is rested on the allegation that the works of the Railway Company have so interfered with the drainage of the lands that it has ceased to be effective, and the company, who are defenders, are called on to restore the drainage to a state of efficiency.

Now, the Lord Ordinary's opinion contains a great deal of discussion about the statutes and about a decree-arbitral which is narrated in the disposition. In my view the first question is, what is the meaning of the obligation which is founded on? and is there any ambiguity in its terms? Unless there is such an ambiguity, I do not think that we have got anything to do with the decree-arbitral or with the statutes.

Now, the obligation which I have read seems to me to be perfectly intelligible, and to contain no ambiguity at all. The company undertake to keep the drainage of the lands effective so far as their works interfere with it. There is no question which are "the lands"; they are the lands portions of which are disponed to the company (as is made clear by a reference to the immediately preceding clause on p. 16 at G). Now the diversion of the Isla was a work which manifestly interfered with the drainage of the land which formerly drained into the old course of the Isla, and now must necessarily drain into the new course. Accordingly it is quite intelligible that the company should undertake to keep the drainage of the lands effective.

In this view I cannot affect to find any difficulty in construing the clause primarily in question, and I have therefore no need to inquire whether the decree-arbitral or whether the railway statutes contain any such obligation. Whether they do or do not, there is the obligation written plain in the disposition.

It is attempted, however, to perplex the clause upon which I have commented by saying that it is qualified by the words "falling upon them under the Railways Clauses Consolidation (Scotland) Act 1845," which occur a little further on. I do not think that these words are attached to or apply to the clause in question. They seem to me, in the structure of the sentence, to apply solely to the words which they immediately follow, viz.: "and to keep up the works, fences, watercourses, and others." Limited to those words, they are intelligible, although the expression is slightly inaccurate or elliptical, for it is not accurate to describe works as falling upon the company,—what falls on the company being not the works but the keeping up the works. With this limited application, the reference to the Acts is good enough sense, although the expression is faulty, and the words of qualification are satisfied. With the more extended application, the construction becomes painfully difficult, for the substantive which is to be described as "falling upon the company" is the very complex one "the effective drainage of the lands in so far as the same may be interfered with by the railway works." Once this connection is assumed, the defenders proceed to make the adjective eat up the substantive, for they say that the words which I have so often quoted mean nothing more than "drains," the reason being that the maintenance of drains is all that falls upon the company under the Railways Clauses Act.

I regard this as an illegitimate process of construction. The question whether the words about the statute apply to the words about effective drainage is at least an open question; the words do not necessarily apply to them,—they do not primarily apply to them,—they are satisfied without applying to them. Whether they do or do not apply to them must be determined, in part, by considering, first, what is the natural meaning of the words to which it is proposed to apply them, and then whether the epithet to be applied harmonises with or is repugnant to that meaning. If the result of that consideration be to show that the proposed application creates a repugnancy, then it is also proved that the epithet does not apply. To make up your mind that the epithet applies, and then construe the substantive by the necessities of the adjective, is the course of reasoning adopted by the defenders, and, in my judgment, it is fallacious.

I may add one remark on the construction of the passage in the disposition. The reference to the stautory obligations of the company seems to be introduced for the purpose of making it clear that the obligation about the effective drainage was not to come in place of the class of statutory obligations germane to that subject

This being done, the deed proceeds to lay on another obligation, which is admittedly conventional and not statutory.

In the view which I take of the disposition, I have no occasion, and I do not think I have any right, to examine the decree-arbitral. I may say, however, that if the decree-arbitral be examined, the true inference seems to be that Lord Fife's trustee, Mr Chaplin, had made a claim (*plus* his other claims for compensation) either for money or (if the company chose to give it) for an undertaking to keep his drainage right; that the company had offered an obligation; and that the arbiters accordingly repelled his claim "excepting always the obligation," that is to say, on the footing that an obligation was granted. If the decree-arbitral meant that Mr Chaplin was to be remitted, as regards drainage, to his rights under the Railways Clauses Act, then his claim would have been repelled *simpliciter*, and no exception have been made of an obligation. Indeed here, as well as in the construction of the disposition, the defenders' argument is that the obligation founded on was mere superfluous words.

The observation which I have made on the decree-arbitral suggests that its effect depends on the record on which it adjudges. We were told that, in fact, the claims submitted to the arbiters have been lost; and all this rather confirms one's belief in the soundness of letting the disposition tell its own story.

The view which I have now presented of the case gives rise to this issue of fact—have the works of the defenders so interfered with the drainage of the pursuer's lands as to render it ineffective?

I regret that the reasoning of the Lord Ordinary has followed lines which did not involve an examination of the evidence bearing on this issue. We have not therefore the aid of his Lordship's appreciations of the testimony given before him. It seems to me, however, that the pursuer has succeeded in establishing his case. I shall briefly state the propositions of fact which lead to this conclusion.

Prior to the diversion of the Isla the fields on either side of the old course were effectively drained. This is practically uncontroverted. Now the drainage is ineffective, the drains leading into the new channel being practically drowned by the heightened level of the surface of the river in the new channel. This raising of the level of the water in the new channel is due to the silting up of the river both within that channel and immediately below its lower end. That silting up has been caused to a substantial extent by the action of the Drum Burn, a tributary of the Isla which formerly entered the old channel and now enters the new channel from the south, and also to a substantial extent by the action of the Aultmore Burn, a tributary which enters the Isla from the north, a little below the mouth of the Drum Burn. It is impossible to distinguish the exact contribution of either burn to the obstruction and to the weakening of the scouring power of the Isla; and it is manifest that the effect of the contribution of the one has been heightened by the effect of the contribution of the other. It is, however, quite possible to see how the diversion of the Isla has affected the result.

In the days of the old course the Drum Burn joined the Isla at an entirely different angle from that which we see now—to use the accurate expression of the defenders' counsel, the old Isla adopted the course of the Drum. Now, on the contrary, the Drum enters the new channel at right angles. It stands to reason, and is abundantly attested, that the direct result of this is that the deposit of the Drum is thrown right athwart the Isla, to the obstruction of that not too active stream. Thus weakened in its scouring power by the action of the Drum, the Isla has next to encounter the Aultmore, and here again the affluent joins at an angle, not so bad as in the case of the Drum, but different from, and less favourable than, that at which the junction was effected before the diversion. Very large quantities of shingle are deposited by the Aultmore within the new channel and immediately below it.

The general facts of the case point to the diversion of the stream as the cause of the very palpable change which has thus taken place. The defenders, have, however, offered some contrary explanations. They say that the deposits by the Drum Burn were caused by drainage operations within its basin long after the formation of the new channel, which have thrown more water into the stream, and they say, also, that at one time shingle was put into the upper part of the burn, and was carried down to the Isla. To a certain extent this is true; and it appears that the first silting began just after the drainage operations, and was ascribed at the time to that cause. An examination of the evidence leads me to think that this explanation is inadequate to account for the proved action of the Drum, and that the result is due to the alteration of the angle of the junction.

The defenders sought at the proof to throw the whole blame for the existing condition of things on the Aultmore Burn, proceeding upon what is seen to be the erroneous assumption that the deviation of the channel by the company ceased at a point above the entrance of the Aultmore. The plans, I think, show that the Aultmore now enters the Isla within the sphere of the company's alteration of the course of the Isla. For the reasons already stated, I think that those operations have made the action of the Aultmore injurious to the pursuer's drainage, where formerly it was harmless. The explanation that the Aultmore's silting is merely the accumulated result of time cannot, I think, be accepted.

The pursuers have a separate accusation against the defenders' works relating to the Kempcairn Burn. Their case is that this stream formerly joined the Isla above the point of divergence of the old and the new channels, that by this channel it not only safely reached the Isla, having done no harm to the lands, but that, having joined

the Isla, it, so far as it went, added to the scouring power of that stream. Unfortunately the company did away with this old course of the Kempcairn; and all the witnesses agree that this was a mistake. But then, having diverted the stream, the company seem to have bought ground from Lord Seafield, and formed a course for it which ended in a water-course in Lord Seafield's land, which water-course again led into the old course of the Isla. A tenant of Lord Seafield afterwards made a new water-course, which, however, led like the other into the old course of the Isla. There is no doubt at all that the result has been to gorge the old channel with what sometimes is a large quantity of water having a very inadequate escape, and to add to the water-logged condition of the pursuer's lands. The odd defence of the defenders is, that as they did not directly conduct the water into the old channel, but only led it into a water-course, which again leads to the old channel, they are not responsible. I cannot accede to this view. The diversion of the Kempcairn from its proper access to the Isla, and the throwing it on to this other part of Lord Seafield's lands, which drain into the old channel, was one of the works of the defenders, and on the evidence I consider it proved that this has contributed to injure the drainage of the pursuer's lands. The mere fact that the defenders, in order to cure this, may have to get something done by Lord Seafield's leave, cannot release them from the fulfilment of their contract obligation; and the same remark applies to the similar difficulty raised by the defenders about the possibility of some of the necessary remedial works on the bed of the Isla having to be executed on lands not belonging to themselves.

The operative conclusion of the summons has been subjected to criticism, some of which is just, but probably an effective decree might be founded upon it. In the meantime it might be in accordance with practice to pronounce a declaratory finding and continue the cause with a view to enabling the defenders to put things right if they are minded to do so. I would propose that we should recal the Lord Ordinary's interlocutor, and find that the railway works of the defenders have interfered with the drainage of the pursuer's lands so that it has become ineffective, and that the defenders have failed to fulfil the obligation incumbent on them under and in terms of the disposition of 11th August 1859 to preserve the said drainage effective. By adopting a declaration of this kind we shall protect the defenders against the suggestion that we are enforcing against them any obligation arising out of the statutes, or from anything other than the specific conventional obligation undertaken in this particular deed.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court recalled the interlocutor of the Lord Ordinary, and found "that the railway works of the defenders have interfered with the drainage of the pursuer's lands so that it has become ineffective, and that the defenders have failed to fulfil the obligation incumbent on them under and in terms of the disposition of 11th August 1859 to preserve the said drainage effective."

Counsel for the Pursuer—Guthrie, Q.C.—Clyde. Agents — J. K. & W. P. Lindsay, W.S.

Counsel for the Defenders — Balfour, Q.C. — Ferguson. Agents — Gordon, Falconer, & Fairweather, W.S.

Thursday, November 4.

SECOND DIVISION.

[Sheriff-Substitute of the Lothians and Peebles.

SAWERS *v.* KINNAIR.

Lease — Sequestration in Security of Rent currente termino—Removal Terms (Scotland) Act 1886 (49 *and* 50 *Vict. c.* 50), *sec.* 4.

The tenant of a shop under a lease for five years ending Whitsunday 1900 became bankrupt on 14th May 1897. The judicial factor on his sequestrated estates paid the rent due on 15th May, but did not intimate abandonment of the lease till 28th May. The landlord on 21st May presented a petition for sequestration in security of the rents payable at Martinmas 1897 and Whitsunday 1898. Interim sequestration was granted, but was recalled in respect of consignation on 27th May.

Held that under the Removal Terms (Scotland) Act 1886, sec. 4, the year for which the rents sought to be secured were payable did not begin till noon on 28th May 1897, and that the landlord had no right of hypothec over the tenant's effects for these rents until the year for which they were payable had begun to run —*Thomson* v. *Barclay*, February 27, 1883, 10 R. 694 (interpreting the practically identical provision in sec. 3 of the Removal Terms (Burghs) (Scotland) Act 1881) *followed.*

This was a petition for sequestration in security of rent presented in the Sheriff Court at Edinburgh by Mrs Henrietta Lauder or Sawers against William Kenneway Kinnair, dressing-case maker, Edinburgh, and Charles J. Munro, C.A., Edinburgh, judicial factor on his sequestrated estates. The pursuer prayed the Court in common form for sequestration of the furniture, goods, and effects in the premises leased by him from the pursuer in security and for payment of £17, being the half-year's rent due at Martinmas 1897, and of the further sum of £17, being the half-year's rent due at Whitsunday 1898.

The pursuer averred — "(Cond. 1) The pursuer is heritable proprietrix of the premises and others situate at No. 13 South