roadway, there being no such obligation imposed upon it by its Special Act, and section 39 of the Railways Clauses Consolidation (Scotland) Act 1845 not being applicable since the road was at the date of the construction of the railway a private road.

This case is reported *ante ut supra*, and the various sections of the different Acts of Parliament are given in the previous reports.

The Caledonian Railway Company, the defenders, appealed to the House of Lords. Glasgow Corporation, the pursuers, took a cross appeal.

At delivering judgment—

LORD CHANCELLOR—I think it is quite clear that both the appeal and cross appeal should be dismissed. Two of the roads in question, Broomfield Road and Cumbernauld Road, are public highways, and to them section 39 of the Railways Clauses Consolidation (Scotland) Act 1845 applies. Accordingly the Railway Company must maintain them. I can see no force in the argument that because certain sections of other Acts impose duties of maintenance or confer rights of interposition on other persons which may have become operative when those roads were taken within the city boundaries, therefore the 39th section ceases to have its full effect. Mr Clyde did not argue that this section was repealed but that it was "superseded," and only as to a part thereof. No doubt circumspect language is necessary in advancing such a contention, but I do not know what supersession means if it falls short of repeal.

In regard to Strathclyde Street the First Division decided in favour of the Railway Company. I agree that section 39 does not apply to this street, because when the bridge was erected it was not a public highway, as explained by the Lord President. The liability to repair, if it exists, must be found in the Caledonian Railway Act 1872. Taking sections 4 and 26 of that Act together with sections 46 and 49 of the Railways Clauses Consolidation (Scotland) Act 1845, I think the result is as follows:—If the Caledonian Railway Company exercised the powers given by the Act of 1872 they were to divert the old road and carry over the railway by a bridge another substituted road. They are not required to maintain the roadway of the substituted road, but they are required to carry it over the line by a bridge, and must therefore maintain the bridge and approaches.

It is impossible to suppose that being authorised to destroy an old road and directed to carry a new substituted road over their line they are at liberty afterwards to remove the support and so leave no road at all. But that is quite different from maintaining the roadway itself. The duty of doing that was on others before the diversion, and the Acts do not relieve those others from it. I should have so decided even without assistance from the authorities cited by the Dean of Faculty. I hesitate to add that section 7 of the Caledonian Railway Act 1872 applies to the repair of the roadway, for that section was not relied upon or faintly relied upon in argument. So I do not rest my opinion on that ground, though it seems at least arguable. I think the conclusion fairly follows from a consideration of the other sections to which I have referred.

LORD ASHBOURNE—I agree.

LORD ROBERTSON—I concur.

Their Lordships dismissed both the appeal and the cross appeal with expenses.

Counsel for the Pursuers (Cross-Appellants)—D. H. Campbell, K.C.—M. P. Fraser—Crawford. Agents—Campbell & Smith, S.S.C., Edinburgh—Martin & Company, Westminster.

Counsel for the Defenders (Appellants)—Clyde, K.C.—Orr Deas. Agents—Hope, Todd, & Kirk, W.S., Edinburgh—Grahames, Currey, & Spens, Westminster.

COURT OF SESSION.

Wednesday, November 4.

SECOND DIVISION.

M'EWAN'S M.-C. TRUSTEES *v.* MACDONALD'S M.-C. TRUSTEES AND OTHERS.

Succession—Vesting—Marriage-Contract—Construction—Declaration that Interests not to Vest until Period when Trustees Directed to Pay—Trustees Directed to Pay on Expiry of Liferent, but Shares also Stated to be Payable on Majority.

An antenuptial marriage contract provided that "after the death of the survivor" of the spouses the trustees "shall pay, dispone, and transfer the fee" of certain funds held by them to the child or children of the wife, "and the survivors or survivor of them equally, share and share alike, payable on the youngest . . . if a son, attaining the age of twenty-one years complete, and if a daughter, attaining the said age of twenty-one years complete or being married. . . . Declaring also that the provisions hereby conceived in favour of the whole children . . . shall not become vested interests until the period shall arrive at which the said trustees are directed to pay, dispone, and transfer the shares falling to them respectively." The children attained majority during the life of the survivor of the spouses.

Held that there was no vesting until the death of the surviving spouse, the shares being "payable" on majority having no effect in the way of accelerating vesting. *Question* if that would under other circumstances have postponed the period of vesting.

Marriage Contract — Trust — Succession— "Whole Means and Estate, heritable and moveable, real and personal, now belonging"—Spes Successionis.

By her antenuptial marriage contract a wife assigned, disponed, and conveyed to trustees "all and sundry the whole means and estate, heritable and moveable, real and personal, wherever situated, now belonging to her or to which she may acquire right during the subsistence of said intended marriage."

The wife had an interest in the marriage contract funds of her mother, but her share therein by express declaration did not vest until the death of a life-renter, her father, who had a power of appointment. The father survived the husband.

Held that, in the absence of anything in other portions of the deed to show that the wife's *spes successionis* was intended to be included in the conveyance by her, it was not carried to her marriage-contract trustees.

Duncan Wilkie Paterson, S.S.C., Edinburgh, and others, the trustees acting under an antenuptial contract of marriage between the Rev. John M'Ewan, D.D., and Miss Mary Crawford (afterwards M'Ewan), dated 8th December 1858 and recorded 4th February 1859, *first parties;* the said Duncan Wilkie Paterson and others, the trustees acting under an antenuptial contract of marriage between the Rev. Kenneth Macdonald and Miss Margaret Steven M'Ewan (afterwards Macdonald), daughter of the said Rev. John M'Ewan and Miss Mary Crawford or M'Ewan, dated 21st February 1882, *second parties;* the said Mrs Margaret Steven M'Ewan or Macdonald and Kenneth John Macdonald, the only child of her marriage, *third parties*, presented a special case for the opinion of the Court. The subject-matter of the case was the share of her mother's estate, under her parents' antenuptial marriage contract, which fell to the said Mrs Margaret Steven M'Ewan or Macdonald.

Dr and Mrs M'Ewan had two children—a son, William Crawford M'Ewan, born 2nd October 1859, and a daughter, the said Mrs Margaret Steven M'Ewan or Macdonald, born 15th November 1860. Mrs M'Ewan died on 19th January 1863, and Dr M'Ewan died on 30th March 1907. Both the children survived their parents. The Rev. Kenneth Macdonald died on 5th July 1906.

By the antenuptial contract of marriage between Dr and Mrs M'Ewan, Mrs M'Ewan transferred to the trustees therein the sum of £10,000, which sum was to be free of all her husband's legal rights and was to be devoted *inter alia* to the following purposes, these purposes being, as events turned out, the only effective ones, viz., (1) for an alimentary liferent for Mrs M'Ewan herself; (2) for an alimentary liferent for her husband should he survive her, burdened, however, with the maintenance and upbringing of the children of the marriage; and (3), as provided in the fifth purpose, "after the death of the survivor of the said Reverend John M'Ewan and Mary Crawford, the said trustees shall pay, dispone, and transfer the fee or property of the said trust estates above conveyed to the child or children of the said Mary Crawford, not only of the present intended marriage, but also of any future marriage she may enter into, in such proportions, if there shall be more than one child, as the said Mary Crawford shall direct and appoint by a writing under her hand, and in case of her death without making such division the said Reverend John M'Ewan, if he shall survive her, shall have the same power of division, and failing any such division then to the said children and the survivors or survivor of them equally among them, share and share alike, payable on the youngest of the survivors of them, if a son, attaining the age of twenty-one years complete, and if a daughter, attaining the said age of twenty-one years complete or being married, whichever of these events shall first happen: Declaring that if any of the said children shall die leaving lawful issue, such issue shall be entitled, equally among them, to the share or respective shares which his or their parent or parents would have been entitled to if alive: Declaring, nevertheless, that it shall be lawful to, and in the power of, the said Mary Crawford, whom failing, of the said Reverend John M'Ewan, in the terms above mentioned, to divide and apportion among the issue of the body of any deceasing child the share which would have belonged to the parent of such issue in case the said parent had survived: Declaring also that the provisions hereby conceived in favour of the whole children of the said Mary Crawford and their issue shall not become vested interests until the period shall arrive at which the said trustees are directed to pay, dispone, and transfer the shares falling to them respectively; with power, nevertheless, to the said trustees, and they are hereby authorised, if they shall think proper, after the death always of the survivor of the said Reverend John M'Ewan and Mary Crawford, to pay and apply the whole or such portion as they may think proper of the free yearly interests and profits of the said trust estate and effects, as long as they shall not have become vested as aforesaid, for and towards the maintenance, education, and upbringing of such of the said children, or the issue of such of them who may have predeceased leaving issue, as shall presumptively be entitled to the said shares themselves, and that aye and until the same respectively shall become vested interests as aforesaid; and which sum or sums so to be expended out of said yearly interests and profits as aforesaid shall be held as general trust expenditure, and shall not be charged against the child or children or their issue on whose account said expenditure may be made." (The powers of appointment hereby conferred were never exercised.)

By the antenuptial contract of marriage between the Rev. Kenneth Macdonald and Margaret Steven M'Ewan (afterwards Macdonald), Mrs Macdonald assigned, dis-

poned, and conveyed to the trustees therein named for the purposes therein mentioned "All and sundry, the whole means and estate, heritable and moveable, real and personal, wherever situated, now belonging to her or to which she may acquire right during the subsistence of said intended marriage (but excepting from the conveyance all legacies or gifts not exceeding the sum of one hundred pounds sterling each which may be bequeathed or given to her, and also excepting her paraphernalia and the provisions hereinbefore made in her favour by the said Kenneth Macdonald, all of which are hereby reserved to herself alone, and from which her husband's *jus mariti* and right of administration or otherwise are expressly excluded and hereby renounced by him), together with the whole rights, titles, and vouchers of the means and estate hereby conveyed: Declaring that the said trustees shall hold the said means and estate in trust only for the purposes and with and under the powers, conditions, and declarations after specified, viz. . . ."

The case stated—"Questions have arisen in regard to the rights of the second and third parties to the one-half share of the estate conveyed to her marriage-contract trustees by Mrs Mary Crawford or M'Ewan, now falling to her daughter Mrs Macdonald. The second parties *maintain* that the share of said estate falling to Mrs Margaret Steven M'Ewan or Macdonald, vested in her upon her attaining majority, which she did prior to her marriage, and that it was consequently carried by her said marriage contract to her marriage-contract trustees, the second parties. If it should be held that such share did not vest in her until the death of her father Dr M'Ewan, which was subsequent to the dissolution of her marriage, then the second parties maintain that upon a sound construction of her said marriage contract she thereby conveyed to the second parties, as trustees thereunder, the *spes successionis* which she had to it. The first parties are accordingly, in either view, bound, according to the contention of the second parties, to convey the estate in their hands effeiring to such share to the second parties. The third parties maintain that no vesting took place until the death of Dr M'Ewan, which they contend is the period provided in the marriage contract, that the marriage contract of Mr and Mrs Macdonald did not carry any *spes successionis* in the third party, Mrs Macdonald, at its date, and that consequently the half falling to Mrs Macdonald is payable to her on her own receipt. They alternatively maintain that even if a *spes successionis* in Mrs Macdonald's share of the funds put in trust by her mother was conveyed by her marriage contract, such conveyance did not become effectual, in respect that her said interest did not vest until after the dissolution of the marriage. . . ."

The *questions of law* submitted, *inter alia*, were—"(1) Did the share of the said deceased Mrs Mary Crawford or M'Ewan's estate, to which her daughter the said Mrs Margaret Steven M'Ewan or Macdonald, the third party, is entitled under the antenuptial contract of marriage between her parents, vest in the latter at her majority? Or (2) did it vest in her at the death of her father, the said Rev. John M'Ewan? (3) If her said share did not vest till the death of the said Rev. John M'Ewan—(*a*) was a *spes successionis* thereto carried by her said antenuptial contract of marriage with the said deceased Rev. Kenneth Macdonald? and (*b*) if a *spes successionis* was so carried, is the conveyance effectual to entitle the second parties to receive payment of the funds in dispute, notwithstanding that vesting did not take place during the subsistence of the marriage?"

The first parties Mr and Mrs M'Ewan's marriage-contract trustees only sought for a valid discharge in respect of the daughter's share.

Argued for the third parties—Mrs Macdonald's share did not vest until the expiry of her father's liferent; in the destination to children there was a clause of survivorship, referable to that point of time. There was also an express declaration against vesting until the period when the trustees were directed to pay and that was on the death of the liferenter. Her interest therefore was a mere *spes successionis*, and if it were transferred to her marriage-contract trustees it must be as property belonging to her at that date, as no change occurred *stante matrimonio*. A mere *spes successionis*, however, was not property—*Morison* v. *Reid*, March 10, 1893, 20 R. 510, 30 S.L.R. 477—and therefore did not come within the conveyance to her marriage-contract trustees.

Argued for the second parties—The declaration against vesting was referable only to the clause as to payment upon majority, and vesting then took place—*M'Kay's Trustees* v. *Gray*, July 8, 1903, 5 F. 1086, 40 S.L.R. 770. But even if Mrs Macdonald's interest was merely a *spes successionis*, a *spes successionis* might be assigned so as to give a good title when it came to be vested—*Trappes* v. *Meredith*, November 3, 1871, 10 Macph. 38, 9 S.L.R. 29. The *acquirenda* clause of Mrs Macdonald's marriage-contract was in terms competent to carry a *spes successionis*—*Wyllie's Trustees* v. *Boyd*, July 10, 1891, 18 R. 1121, 28 S.L.R. 855.

LORD LOW—The first and second questions in this case relate to the period at which the share of the estate of the deceased Mrs M'Ewan which fell under her antenuptial contract of marriage, and to which her daughter Mrs Macdonald was entitled, vested in the latter. That depends upon the construction of Mrs M'Ewan's marriage contract. By the marriage contract she conveyed £10,000 sterling, consisting of moneys and investments detailed in the contract, to trustees, and the purposes of the conveyance, so far as it is necessary to refer to them were these—*first*, that she (Mrs M'Ewan) should enjoy the alimentary liferent of the estate; *second*, that in the event, which happened, of her husband surviving her, and there being children of

the marriage, he should have the liferent of the estate, subject to the maintenance, education, and upbringing of the children; and *third*, in the event (which happened) of there being children of the marriage, it was provided that "after the death of the survivor of the said Reverend John M'Ewan and Mary Crawford, the said trustees shall pay, dispone, and transfer the fee or property of the said trust estates above conveyed to the child or children of the said Mary Crawford, not only of the present intended marriage, but also of any future marriage she may enter into, in such proportions, if there shall be more than one child, as the said Mary Crawford shall direct and appoint by a writing under her hand; and in case of her death without making such division, the said Reverend John M'Ewan, if he shall survive her, shall have the same power of division, and failing any such division, then to the said children and the survivors or survivor of them equally among them, share and share alike." Now what happened was that Mrs M'Ewan died in 1863, while Mr M'Ewan survived until 1907, and neither of them left any deed of appointment to the £10,000. The result was that the direction which took effect was that upon the death of Mr M'Ewan the trustees should pay, dispone, and transfer the fee of the property of the trust estate to the "said children and the survivors and survivor of them." It is plain that the period to which that survivorship clause refers is the date of the death of the survivor of the spouses—in the event which happened, the death of Mr M'Ewan—and it is a settled principle of construction in such cases that when there is a survivorship clause like that, vesting of the fee is necessarily postponed till that event.

So far there is no difficulty, but there are two other directions in the contract which affect the question of the precise period of vesting. In the first place, after the clause which I have quoted directing the trustees "to pay, dispone, and transfer the fee or property" of the estate to the children surviving the longest liver of the spouses, it is provided that the shares of the children shall be "payable" on the youngest child, if a son, attaining majority, or if a daughter attaining majority or being married, and then it is declared that the provisions in favour of the children "shall not become vested interests until the period shall arrive at which the said trustees are directed to pay, dispone, and transfer the shares falling to them respectively." Now, it is to be observed that the period there referred to—the period, namely, when the trustees are directed "to pay, dispone, and transfer" the estate—is the death of the surviving spouse, and I am inclined to think that the declaration as to vesting was intended to make it clear that vesting was to take place at the death of the surviving spouse, although actual payment was postponed until the youngest surviving child should attain majority or be married. But, however that may be, it is plain that the question raised in this case is not affected. It may be that the direction postponing payment until the majority or marriage of the youngest surviving child might postpone the time of vesting until after the death of the surviving spouse, but it could by no possibility accelerate vesting so as make it take place prior to that date. I am accordingly of opinion that the first question should be answered in the negative and the second question in the affirmative.

The next question is in regard to the estate which was conveyed to her marriage-contract trustees by Mrs Macdonald, the only daughter of Mrs M'Ewan. I should explain that Mr and Mrs M'Ewan left only two children, a son and a daughter, so under their marriage contract each of these children was entitled to one-half of Mrs M'Ewan's estate.

The question is whether Miss M'Ewan, who afterwards became Mrs Macdonald, conveyed her half of the estate to her marriage-contract trustees. Now if I am right in what I have said with regard to vesting, it is plain that until the death of her father Mrs Macdonald had only a *spes successionis*, because she was married in 1882, and, as I have said, her father did not die until 1907, while her husband Mr Macdonald died in 1906. Therefore when Mrs Macdonald was married she had only a *spes successionis* in regard to the share of her mother's estate, and when her marriage with Mr Macdonald was dissolved by his death in 1906, she had still only a *spes successionis* in regard to that estate. The question is whether that *spes successionis* was or was not conveyed to the trustees under her marriage contract. Now the terms in which she conveyed the estate belonging to her to her trustees were these—"For which causes and on the other part the said Margaret Steven M'Ewan hereby assigns, dispones, and conveys to and in favour of the said . . 'trustees' . . all and sundry the whole means and estate, heritable and moveable, real and personal, wherever situated, now belonging to her, or to which she may acquire right during the subsistence of said intended marriage."

Now, if the *spes successionis* was carried by that conveyance at all, it must have been by the first part of it, where she conveys all means and estate now belonging to her, because, as I have pointed out, the nature of her interest in her mother's estate did not change during the subsistence of the marriage, so it never fell under the conveyance of estate "to which she may acquire right during the subsistence of the marriage." I have no doubt that a *spes successionis* is not properly described as estate "now belonging to" the person who has that *spes successionis*. That, I think, is made very clear if one reads the opinion of Lord Rutherfurd Clark as to the nature of a *spes successionis* in the case of *Reid* v. *Morrison*, 20 R. 510. The case of *Wyllie's Trustees*, 18 R. 1121, indeed, shows that the very words which are used here may include a *spes successionis* if from some other part of the settlement it is plain that it was intended to be included, and in that case it was held that there were such clear indications from other parts of

the deed that a *spes successionis* was intended to be included in the general conveyance of the estate "now belonging to" the truster that the Court gave effect to that contention. But the case is also an authority for the view that unless you find in other parts of the deed something to show that a *spes successionis* was intended to be carried, such conveyance will not include it. Now, I think, one searches the marriage contract here in vain for anything which would enlarge the natural meaning of the words used, and therefore I have come without hesitation to the conclusion that whatever the parties to the marriage contract had in their minds, Mrs Macdonald did not in fact include in the conveyance to the trustees the *spes successionis* which she had in regard to her mother's estate. That being so, I am of opinion that branch (*a*) of question 3 should be answered in the negative, and that it is unnecessary to answer branch (*b*) or question 4.

LORD ARDWALL—I entirely concur, and I think it is a very clear case.

LORD JUSTICE-CLERK—I also concur in the opinion which Lord Low has expressed so fully and so well, and I have nothing to add.

The Court answered the first question in the negative, the second in the affirmative, branch (*a*) of the third in the negative, and found it unnecessary to answer branch (*b*) or question four.

Counsel for the First Parties—Skinner. Agents—Erskine Dods & Rhind, S.S.C.

Counsel for the Second Parties—Hunter, K.C.—Wilton. Agents—Galloway, Davidson, & Mann, S.S.C.

Counsel for the Third Parties—Morrison, K.C.—Munro. Agents—Paterson & Salmon, Solicitors.

Tuesday, November 3.

EXTRA DIVISION.

[Lord Mackenzie, Ordinary.

HONG-KONG AND WHAMPOA DOCK COMPANY, LIMITED *v.* THE NETHERTON SHIPPING COMPANY, LIMITED.

Contract — Breach — Implied Condition — Impossibility of Performance.

A shipowner, who owned a vessel which had been damaged by fire and towed into Singapore, entered into a contract by correspondence with a firm in Hong-Kong for the repair of the vessel in Hong-Kong, "the vessel to be delivered at the port of repair" by the shipowner. The shipowner thereafter informed the repairers that the vessel was to be sold as she lay at Singapore. The repairers raised an action of damages for breach of contract against the shipowner. The defender averred that, both by the custom of the shipping and shipbuilding trade and by common law, it was a condition of the contract (which was within the contemplation of both parties when the correspondence took place) that it should be commercially possible; that the contract was also by the custom of trade and by common law subject to a condition that the defender should be able within a reasonable time to send the vessel to Hong-Kong; that after the conclusion of the contract the authorities at Singapore declined to allow the vessel to be towed even after certain contemplated repairs were made, and while not finally agreeing to her being towed on any terms, required that at all events repairs should be made which would have involved an unreasonable expenditure having regard to the value of the vessel, and would have taken such time that the ship when repaired could not have been towed to Hong-Kong owing to the dangers of the typhoon which would have been prevalent by the time the repairs were completed. *Held* that these averments were irrelevant, and that the defender was liable in damages.

This was an action by the Hong-Kong and Whampoa Dock Company, Limited, against the Netherton Shipping Company, Limited, Glasgow, for £2500 damages for breach of contract.

The following narrative of the facts is taken from the opinion of the Lord Ordinary (MACKENZIE):—"The defenders were the owners of the s.s. 'Netherton,' which in February 1907 was seriously damaged by fire, and was towed into Singapore in a damaged condition. Negotiations were entered into between the pursuers and the defenders with a view to the repair of the vessel, which resulted in the contract in question being concluded. The pursuers sent representatives to Singapore, received the conditions and specification of the damage repairs required, and a tender, dated 18th March 1907, was thereafter submitted by them.

"Its terms were as follows:—'I beg to submit tender for repairs to hull, engines, and boilers of the s.s. "Netherton" in accordance with the plans and specifications supplied by your good selves, as follows:—

Repairs to hull—Dollars, two hundred and thirty thousand eight hundred and sixty-nine only	$230,869.00
Repairs to engines and boilers—Dollars, ten thousand seven hundred and eight only . .	10,708.00
	$241,577.00

Time to complete repairs 170 days, one hundred and seventy days.' This amount is equal to about £24,157 sterling.

"The pursuers, in answer to a telegram that the price was prohibitive, replied by code telegram on 25th March that they would undertake the repairs for $206,000—equivalent to about £20,600—the vessel to be delivered at Hong-Kong at ship's expense and risk. On 27th March the pursuers