Thursday, December 6.

FIRST DIVISION.

[Lord Hunter, Ordinary.

LEITH SCHOOL BOARD *v.* CLERK RATTRAY'S TRUSTEES AND ANOTHER.

Superior and Vassal — Contract — Road — Implement of Obligation by Grantor of Feu-Contract to Take Adjoining Feuars Bound to Pay Half-Cost of Road when his Lands are Compulsorily Acquired by Disposition.

A proprietor in feu-farm disponed, from himself, his heirs, and successors whomsoever, a piece of ground to a school board, under the condition that the board were to form a road along one side of the feu, and to maintain it "until the ground on the opposite side of said road is feued, whereupon the feuars there shall be bound, and I shall take them bound, to pay to my said disponees and their foresaids the one-half of the cost of constructing said proposed new road . . ., and I shall also take them bound to relieve my said disponees of one-half of the future maintenance thereof."

Later in the same year a railway company, under its compulsory powers, acquired the *solum* of the road and the land on the other side of it, which were conveyed to it by disposition. Subsequently the railway company sold as superfluous the land along the road and the purchaser feued it out. The obligation to relieve the school board was not repeated in any of the deeds.

In an action brought by the school board against the trustees of the grantor of their feu-charter, concluding for damages for breach of contract, *held* (*dis.* Lord Skerrington) that the grantor was in breach of his obligation to the school board, and that his trustees were liable in damages.

The School Board of the Burgh of Leith, *pursuers*, brought an action against Sir James Clerk Rattray's trustees and another, *defenders*, concluding for decree for payment of £350 damages for alleged breach of contract.

The pursuers *pleaded*, *inter alia*—"1. The defenders' author having committed a breach of the obligation above condescended upon, contained in the feu-charter granted by him in favour of the pursuers, and the pursuers having suffered thereby loss and damage as condescended on, the pursuers are entitled to decree as concluded for against the defenders as his representatives. 3. The defences, except as regards the question of the amount of the damage sustained by the pursuers, being irrelevant, should be repelled."

The defenders pleaded, *inter alia*—"1. The pursuers' averments being irrelevant the action should be dismissed. 2. The defenders not being in breach of any contract with the pursuers, are entitled to be assoilzied."

By the *feu charter* dated 23rd January, and recorded 14th April 1890, James Clerk Rattray sold, alienated, and in feu-farm disponed "from me, my heirs, and successors whomsoever" in favour of the pursuers, certain lands bounded on the south-east and south by a proposed new road, under conditions, provisions, obligations, and declarations, which included, *inter alia*, the following:—"(*Third*) That my said disponees shall be bound to make and maintain proper pavements along the whole length of the south, south-east and west sides of the said piece of ground of such a description as shall be required, not less than 6 feet wide, with proper kerb, and approved of by me or my foresaids or by the public authorities, and, as after mentioned, to construct forthwith, after the date of their entry, the said proposed road (which shall be 40 feet in width inclusive of footpaths), with suitable water channel in so far as opposite the subjects hereby disponed, the levels of which shall be provided by the superior's surveyor, and the said road shall be made up rough bottomed 8 inches deep with freestone or other metal broken to pass through a 3-inch ring and properly metalled with whinstone blue metal laid on 6 inches thick broken to pass through a 2-inch ring, and said water channel properly laid, all to the satisfaction of a surveyor to be named by me or my foresaids, and my said disponees and their foresaids shall thereafter be bound to maintain said roadway and water channel at their own expense until the ground on the opposite side of said road is feued, whereupon the feuars there shall be bound, and I shall take them bound, to pay to my said disponees and their foresaids the one-half of the cost of constructing said proposed new road (the said cost being fixed by a certificate under the hand of the said surveyor), and I shall also take them bound to relieve my said disponees of one-half of the future maintenance thereof."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (HUNTER), who on 23rd June 1916 found "that the late Lieutenant-General Sir James Clerk Rattray, by disposition granted by him in favour of the Caledonian Railway Company of date 11th and recorded 15th November 1890, disabled himself from fulfilling and thereby committed a breach of the obligation contained in the feu-charter granted by him on 23rd January 1890, whereby he obliged himself, upon the ground to the south of the proposed road described in said feu-charter being feued, to take the feuars bound to relieve the pursuers of one-half of the cost of making and maintaining said road: Finds that the defenders are liable to the pursuers in damages in respect of said breach of contract, allows a proof of amount of same," &c. On 21st February 1917, the parties having lodged a joint-minute agreeing as to the amount of the damages, he granted decree against the defenders for £152, 10s. 2d., with interest from the date of the summons in name of damages, reserving all questions as to the liability of the defen-

ders for the present or future maintainance of the road libelled.

Opinion.—"In this action the School Board of Leith sue the trustees of the late Lieutenant-General Rattray for payment of a sum of £350 in name of damages under the following circumstances:—The pursuers by feu charter, dated 23rd January and recorded in the register of sasines on 14th April both in the year 1890, feued from General Rattray an acre of ground at Craighall Avenue, Leith, upon which they erected a school. The ground so feued is described as bounded 'on the south-east and south by a proposed new road along which it measures 304 feet 6 inches or thereby.' The said proposed new road is now Craighall Avenue. Under the feu charter the pursuers were bound '. . . [*His Lordship quoted the clause, supra.*] . . .'

"Under an Act passed in 1890 the Caledonian Railway Company acquired from General Rattray the whole of his rights in the *solum* of the road, together with all the ground on the other side of the road *ex adverso* of the pursuers' feu. The construction of the road was commenced in 1893, and on 18th April of that year General Rattray's agents informed the pursuers that he had sold his interests in the roadway and adjoining ground, and requested them to arrange matters as to laying out the road direct with the engineers of the company.

"By disposition, dated 7th September 1909 and recorded 12th October 1909, the Caledonian Railway Company disponed to a Mr Inglis certain portions of the ground lying immediately to the south of Craighall Avenue, giving their disponee right of access so far as they were entitled thereto to the said subjects by Craighall Avenue. The representatives of Mr Inglis, who died in 1910, feued out part of the subjects, on which certain villas have been erected, and disponed the remaining portion of the ground acquired by Mr Inglis from the Caledonian Railway Company.

"Neither the Railway Company nor the feuars are under any direct obligation to the pursuers to repay them half of the cost of constructing the road. The pursuers have accordingly brought this action against the representatives of their superior. For the defenders it is maintained that General Rattray neither undertook any obligation to feu the remainder of the ground nor to dispose of it only by way of feuing. The clause might have been so expressed that the superior's obligation was conditional upon his actually giving off the ground in feu, and might have imposed no obligation upon him in the event of his disposing of the property otherwise. I do not think, however, that the words of obligation in the feu charter can be read in this limited or conditional sense. The parties contemplate that the ground will be feued, and the superior undertakes absolutely to secure that the feuars will become the pursuers' debtors for half the cost of constructing the road. In my opinion the superior cannot extinguish such an obligation by disponing the ground instead of granting a feu or feus thereof. I think therefore that the defenders are liable in damages for General Rattray having so acted as to disable himself from fulfilling the obligation undertaken by him. It does not appear to me to be an answer that as the Railway Company acquired under compulsory powers and got a statutory title to the ground General Rattray could not impose the obligations of feuars upon them. I do not see any reason why payment to the pursuers of half the cost of the road should not have been made part of the consideration for the ground disponed.

"It was argued in the debate that the pursuers were under no obligation to construct the road, as General Rattray had parted with his interest in the ground disponed to the Railway Company. This point is not raised on record. In any event, in view of the terms of the feu charter to the pursuers and the actings of the parties as disclosed in the correspondence, I do not think that it could be successfully maintained.

"If I am right as to the defenders' liability I think that I must allow a proof on the question of damages. The defenders plead that the pursuers cannot recover more than half the amount of the cost of the road as certified by their architect. As, however, the pursuers' claim is for damages and not under the contract, I do not think that that certificate is necessarily conclusive of the extent of the defenders' liability. I propose to pronounce an interlocutor finding that General Rattray committed a breach of the obligations undertaken by him to the pursuers under the feu charter, and that the defenders are therefore liable in damages, and allowing a proof as to the amount of such damages."

The defenders reclaimed. The case was argued by counsel for the Caledonian Railway Company, who had, in another action, been held bound to free and relieve the defenders of all claims against them by the pursuers in the present action.

Argued for the defenders (reclaimers)—The defenders were not in breach of their contract. The clause in question merely imposed an obligation upon the grantor of the feu-disposition and his heirs, and further it was only in the title of feuars that they were bound to insert the obligation of relief. The words "and my foresaids" which occurred a few lines earlier in the clause had been advisedly omitted. Consequently the words imposed a purely personal obligation which did not affect a singular successor in the superiority. The defenders had not feued the lands *ex adverso* of the road, and the feus which existed there were not held off the superior or his heirs. To substantiate the construction contended for by the pursuers words would have to be inserted into the clause which were not there. But if the clause did impose the obligation contended for by the pursuers, the Railway Company could not have been forced when taking the lands under their statutory powers to accept such a clause. In that case the superior had done the best he could, and the maxim *lex non cogit ad impossibilia* applied—*Bailley* v. *De Crespigny*, 1869, L.R., 4 Q.B. 180, *per* Hannen,

J., at pp. 184 and 186. The result was the superior was discharged of his obligation. *Clark* v. *School Board for London*, 1874, L.R., 9 Ch. 120, was referred to.

Argued for the pursuers (respondents)—The defenders were liable in damages for breach of contract. The clause in question could be construed broadly or narrowly. But if it was construed narrowly that construction must be adopted throughout. If the broad construction was adopted to the effect that feuars included disponees, then the defenders had failed to fulfil their obligation. If the narrow construction was adopted to the effect that the obligation need only be inserted if and when the superior or his heirs feued the subjects *ex adverso* of the road, applying that construction throughout the defenders had bound themselves not to dispose of the lands otherwise than by feuing. The reference to deviations from the feuing plan did not entitle the defenders to abandon that plan altogether; that would be against the *bona fides* of the contract—*Henderson* v. *Nimmo & Colquhoun*, 1840, 2 D. 869; *Fleming* v. *Newport Railway Company*, 1883, 10 R. (H.L.) 30, *per* Lord Watson at p. 35, 20 S.L.R. 536. The word "feuar" did not mean in such a contract as the present a feuar holding *de me* directly off the superior, but a feuar of the land *ex adverso* of the road holding off anyone not necessarily the same superior. That construction was consistent with the intention of the parties. There was no difficulty about the transmission of the obligation, such a clause of relief occurring in a grant of feu was *inter naturalia* of the feudal relationship and transmitted with express assignation—Bell's Lectures, p. 690; *Stewart* v. *Duke of Montrose*, 1863, 4 Macq. 499; *Sinclair* v. *Marquis of Breadalbane*, 1846, 5 Bell's App. 353. The breach of contract occurred when the superior had disabled himself from fulfilling his obligation, not when he had in fact failed to carry it out—Pollock, Contracts (8th ed.), p. 452. Compulsory purchase had not been pleaded, but if it was relevant to consider that matter it could be met by a plea of bar.

At advising—

LORD PRESIDENT—I premise that no proposal came from the bar for the amendment of the defence in this action, and that being so we are bound, I think, to give judgment on the record as it stands.

In my opinion the defence stated is irrelevant, and there was no other course open to the Lord Ordinary than to find that the defenders' predecessor had committed a breach of contract, and, consequently, that the defenders were liable in damages.

I shall recite the facts of the case only in so far as necessary to make my view on the law clear. In January 1890 the defenders' predecessor feued to the School Board of Leith a plot of ground. Its south-eastern boundary was a proposed new road. In terms of the feu-contract the School Board undertook to construct the road and thereafter to maintain it until the ground on the opposite side of the road was feued, whereupon the feuars would be bound—and the defenders' predecessor undertook to take them bound—to pay to the School Board the one-half of the cost of construction of the proposed new road, and also the defenders' predecessor undertook to take the feuar bound to relieve the School Board of one-half of the cost of the future maintainance thereof.

In November of the same year the defenders' predecessor by disposition conveyed the ground to the Caledonian Railway Company, but he did not take the Caledonian Railway Company bound to pay to the School Board one-half of the cost of construction of the road and of its subsequent maintainance. The question we have to consider is whether that was a breach of contract on the part of the defenders' predecessor. I am of opinion that it was.

The question depends upon the construction of the clause which I have just referred to. What is the defence to the action? The sole defence is to be found in the 9th answer, in which the defenders say that their predecessor did not feu the land *ex adverso* of the ground feued to the School Board and therefore was under no obligation to insert any clause for the protection of the School Board in the conveyance granted by him to the Railway Company. In other words, no breach of contract was committed because the conveyance to the Railway Company took the form of a disposition and did not take the form of a feu-contract. The defenders' predecessor deliberately chose, according to the defence stated in the 9th answer, to execute a disposition and not a feu-contract, and thereby, he says, escaped from his obligation. It is not said he was compelled by law to grant to the Caledonian Railway Company a disposition and was precluded from granting a feu-charter. For aught that appears he could, had he chosen, have given a feu-charter to the feuar. Nor is it said that he could not legally impose upon the Caledonian Railway Company the obligation to make the road in favour of the School Board. For aught that appears he could have inserted a valid obligation so to do just as easily as he could have inserted the confessedly invalid clause which is recited in the 9th Answer. In short, it is said there was no breach of contract committed, because he deliberately chose to convey the ground by a disposition and not by a feu-contract.

Exactly the same defence might have been stated—and would no doubt have been stated—if the disponee had been a private individual and not the Caledonian Railway Company. In short, if the conveyance had been granted to anybody, exactly the same defence was open as was stated in this record. It appears to me that we have here therefore a very clear but ineffectual effort to escape from a contractual obligation, which ought and must be followed by the usual consequences.

If I am wrong in all this, and if I am to read the record as if it were amended—if, in short, I am not to read the defence as stated in the 9th answer, but am to infer

that, because the conveyance is in favour of the Caledonian Railway Company, therefore it must be in the form of a disposition, and, once more, because it was in favour of the Caledonian Railway Company, it was illegal and impossible for the defenders' predecessor to insert the requisite obligation in the conveyance—then it appears to me that no good answer has yet been stated to the pursuers' claim that there should have been inserted in the disposition a clause or clauses binding the Railway Company, in the event of the ground lying to the other side of Craighall Avenue and *ex adverso* of the pursuers' feu being feued out by them or their successors, to insert in all feu rights which they might grant a clause or clauses binding the feuars to pay to the pursuers one-half of the cost of constructing the road and one-half of the cost of the future maintenance thereof.

In my opinion it is far too narrow a construction of this clause to say that it is only applicable where there is a direct relationship of superior and vassal created between the defenders' predecessor and anyone into whose hands the ground on the opposite side of the road might come. Accordingly, whichever view is adopted of the meaning of this obligation in the feu-contract, I am of opinion that the defenders' predecessor committed a breach of that contract, and that the appropriate consequences necessarily follow.

I am therefore for adhering to the Lord Ordinary's interlocutor.

LORD JOHNSTON—By feu-charter dated 23rd January and recorded 14th April 1890 General Clerk Rattray feued to the Leith School Board a piece of ground as the site of a school to be built by them, bounded on the west by Craighall Road, and "on the south-east and south by a proposed new road along which it measures 304 feet 6 inches or thereby," afterwards named Craighall Avenue. He took his feuars bound to construct the said proposed road of 40 feet in width so far as opposite the subjects feued, and to maintain it until the ground on the opposite side was feued, "whereupon the feuars there shall be bound, and I shall take them bound, to pay to my said disponees and their foresaids one half of the cost of constructing said proposed new road."

The school buildings were designed to face Craighall Avenue, now completed, and it is the main access to the school. The *solum* of the road was not conveyed in whole or in part to the School Board, and General Clerk Rattray's grant therefore gave them a proper servitude over it.

In the session of 1890 the Caledonian Railway Company obtained powers to take compulsorily from General Clerk Rattray the land to the south of Craighall Avenue for the purpose of their undertaking, and by disposition, dated 11th and recorded 15th November 1890, the company acquired what ground they needed. That portion immediately *ex adverso* of the School Board's feu became ultimately surplus land, and the company in 1909 disposed of it to a Mr Inglis. Neither in the conveyance by General Clerk Rattray to the Railway Company, nor in theirs to Mr Inglis, was the obligation which General Clerk Rattray undertook to impose on his feuars so imposed. The School Board having in 1893 made the road, and the Caledonian Railway Company having refused to acknowledge any claim against them for the half of the cost, the School Board, after long correspondence, have been compelled to raise this action to recover. They sue General Clerk Rattray's trustees, he having died in the interim. They do so on the ground that he has breached his obligation, and that the defenders are liable to them in damages for the loss they have sustained, measured by the half cost of making the road.

We are not in this action concerned with the terms of General Clerk Rattray's conveyance to the Railway Company, except that it conveys *separatim* to the company "all and whole the ground to be given off for the formation of a road 40 feet wide, but only in so far as I have right and interest in said ground to be given off" for said road. The conveyance contained also a clause of relief in favour of General Clerk Rattray of his obligations in regard to the land disponed, and in particular in regard to the said road. As the School Board have no *jus quæsitum* in the agreement between General Clerk Rattray and the Railway Company, whatever it may amount to, contained in the conveyance by the former, they have had no alternative but to sue their superiors, and it is with regard to that action alone that we are just now concerned.

Although the deed on which their title rests is a feu-charter and therefore unilateral, it embodies an agreement which from the moment it was accepted, or at any rate recorded, constituted a mutual agreement, under which each party has obligations as well as rights. Unless the compulsory taking by the Railway Company sopites that obligation, it is still a binding condition of the School Board's right so far as their superior is concerned, and a consideration for the obligations which they undertook to him, including that of paying a substantial feu-duty. The transaction between General Clerk Rattray and the School Board bears *in gremio* that the General's lands were laid out on a feuing plan and open to feu as building ground. There can be no doubt, therefore, that when the parties came to bargain about the making of Craighall Avenue they had in view that the land on the south side of it would sooner or later be feued in the ordinary way, creating the proper feudal relation of superior and vassal between the proprietor and the feuars, and hence the language of the clause. But I do not read the clause as debarring General Clerk Rattray from parting with the land in question on any other form of title, provided he placed his grantees under the stipulated obligation to the School Board. I think that I am entitled to look to the substance and not to the letter of the obligation, and that General Clerk Rattray if he did not, or even could not, adhere to the letter, was bound to implement the

spirit or substance. This he has not done in dealing with the Caledonian Railway Company. He has not expressly taken them bound to recompense the School Board for their expenditure on the one-half of the road, nor could he insist upon doing so as they were entitled to require a statutory title from him. But it was a question of money. No doubt there was some little difficulty at the time in 1890 in adjusting matters with the Railway Company, as when General Clerk Rattray disponed to the Railway Company the road had not yet been made and the School Board's claim had not yet emerged. But still it was, if not *de presenti* at anyrate *de futuro*, a question of money, and I think that if General Clerk Rattray did not effectually transfer it to other shoulders, as he was bound to do, he remained liable to make it good himself, as he could always do by a payment in money.

After he had granted his feu-charter in favour of the School Board General Clerk Rattray's unfeued estate was affected by the servitude which he had granted of a road or right-of-way to the School Board over Craighall Avenue, and he and his representatives in the estate (subject to possible question if it was entailed), and if necessary his heirs *in mobilibus*, lay under an obligation *ad factum præstandum* to eventuate in a money payment, for it was not the *factum præstandum* but the payment of money of which it was the precedent which was the end and the result of the obligation. By so much the value of his estate was affected in one way or another, for he must place some at least of the future feuars on his estate under pecuniary liability beyond their feu-duty and to third parties not their superior. When General Clerk Rattray came to deal with the Caledonian Railway Company, although the company took under compulsory powers, and although General Clerk Rattray was bound to give them a statutory title, there was nothing in the statutory provisions as to title to prevent such title embodying conditions of the conveyance, or to void such conditions if so embodied. I have always understood that the sole and essential merit of the statutory title was that it abolished the feudal relation between the Railway Company and the holder of the *dominum directum*, and created a title very much akin to a freehold title in England.

When General Clerk Rattray came to negotiate with the Railway Company for terms there were a good many considerations *pro* and *con*. On the one hand there stood the obligation on General Clerk Rattray. On the other hand there was the servitude right-of-way. The Railway Company might if they pleased interfere with the servitude under their compulsory powers, in which case they opened up questions of compensation under the Railway Clauses Acts, or they might leave the right-of-way practically unaffected. And over-riding and covering both these considerations there was the compensation to be paid to General Clerk Rattray. In the final phase it was still just a question of money, and I cannot think that the adjustment of the sum to be paid to General Clerk Rattray was arrived at without taking into consideration the obligation under which he lay to the School Board of Leith. If it was, either because the parties omitted to consider it, or believed they could ignore it *sibi imputent*, one or the other or both, with that the School Board are not concerned. I do not think that this is a case to which the ordinary rule of intervening statutory impossibility applies, but rather an exception to that rule. Accordingly I think that the pursuers are entitled to decree as concluded for. But I cannot say I quite like the terms of the Lord Ordinary's interlocutor. I think that the late General Clerk Rattray was disabled by circumstances from fulfilling *in terminis* or in form his obligation to the pursuers, and remained bound to fulfil it in substance by paying the sum of money in which it would have resulted. In this he has failed. But whether this results in a claim to a surrogatum to avoid failure or to damages for failure is immaterial.

LORD MACKENZIE—I reach the same conclusion as the Lord Ordinary, although the ground of my opinion is somewhat different.

The clause in the feu charter to the School Board is said by them to be capable of being construed in their favour upon any of three grounds—(1) because the expression feu ought to be read as equivalent to feu or dispone; (2) if feu is to be limited to its strict meaning, then that the superior came under an implied undertaking not to part with his property except by way of feu; and (3) that there is a burden on the superior if he parts with the property by disponing it to take all means in his power to fulfil his obligation towards his feuar.

The last ground appears to me to be sufficient to support the pursuers' argument. The clause inserted in the conveyance to the Railway Company falls far short of this. The superior ought to have done his best to secure the insertion of a clause in the terms indicated in the alternative of condescendence 9, which is as follows:—"A clause or clauses binding the said Caledonian Railway Company, in the event of the ground lying to the south side of Craighall Avenue and *ex adverso* of pursuers' feu being feued out or disponed by them or their successors, to insert in all feu rights or conveyances which they or their successors might grant a clause or clauses binding their feuars or disponees to pay to the pursuers one-half of the cost of constructing the said road, and one-half of the future maintenance thereof."

There is no averment by the defenders that the superior tried to get such a clause inserted in the conveyance to the Railway Company but was prevented because they pleaded their compulsory powers. Upon this point the *onus* is upon the defenders and not upon the pursuers. The case of *Baily* v. *De Crespigny* founded on by the defenders does not appear to me adverse to this view.

The result is that the superior has failed to fulfil his obligation, and is therefore liable in damages.

LORD SKERRINGTON—I am of opinion that the pursuers' averments are irrelevant, and that the action should be dismissed.

I agree with the defenders' counsel in thinking that the clause which we are asked to construe has been bungled. No reason can be suggested why the burden of paying to the pursuers one-half of the cost of forming the proposed new road should not have been imposed rateably and in proportion to his frontage upon every person who might in the future acquire a building lot situated upon the opposite or south side of the road irrespective altogether of the form of his title. And yet it was not seriously argued by the pursuers' counsel that according to any known principle of interpretation the Court was entitled to amend the clause by construing the words "feued" and "feuars" as equivalent to "disponed" and "disponees." The words "feued" and "feuars" have a technical meaning in the language of Scots law, and the pursuers' counsel admitted that he was unable to point to anything in the context which made it certain as a matter of necessary implication that these technical words were used in some inaccurate and arbitrary sense. While, however, I see no reason to doubt that the clause fails to accomplish in one material respect what may be conjectured to have been the object of its authors, that circumstance affords no reason for adopting an interpretation which deprives the clause of all binding effect so far as regards General Clerk Rattray and his representatives. I unhesitatingly reject the very bold argument of the defenders' counsel to the effect that the General had it in his power to free himself at any moment from the obligation in question by the simple expedient of conveying away the ground lying on the south side of the proposed road either to a purchaser or even gratuitously, provided always that his conveyance was not by way of subinfeudation. Equally I reject the view of the Lord Ordinary which, if I understand it rightly, implies that the clause must be construed as prohibiting any alienation by General Clerk Rattray of the property of the ground in question otherwise than by subinfeudation. The correct view seems to me to lie between these two extremes. General Clerk Rattray, as I read the clause, bound himself absolutely to the effect that if the ground on the other side of the road should ever be feued a certain obligation in favour of the pursuers should be imposed upon the feuars. It is not *hujus loci* to consider, and we were not asked to consider, (*a*) whether each feuar must be taken bound to repay one-half of the cost of the road or only a proportion of such half corresponding to his frontage, and (*b*) whether the clause requires the constitution of a real burden or real condition (which would require some technical skill so long as the road had not been made and the cost ascertained), or whether on the other hand it would be enough to impose a personal obligation upon the first feuar, as was done in the case of *Magistrates of Edinburgh* v. *Begg*, 1883, 11 R. 352, 21 S.L.R. 243. According to the construction of the clause which I have suggested as the correct one General Clerk Rattray remained at perfect liberty to alienate the property out and out either for value or gratuitously. On the other hand, if he voluntarily elected to part with the property he could not, of course, plead that the obligation which he had undertaken in favour of the pursuers had by his own voluntary act become impossible of fulfilment. Equally it would be irrelevant, when charged with having failed to fulfil an obligation conceived in absolute and unqualified terms, to plead that when he parted with the property he had taken all usual and reasonable precautions to protect the pursuers, though unfortunately these precautions had proved ineffectual.

For the foregoing reasons, I should have considered that the pursuers' pleadings contained a relevant averment of a breach of contract for which the defenders as gratuitous successors of General Clerk Rattray were answerable if it had been alleged, not merely that the feu-disposition of February 1912 referred to in condescendence 6 failed to impose upon the feuar any obligation to repay to the pursuers a proportion of the cost of constructing the road, but also that the grantor of this feu-disposition was a person who derived his title from or through a voluntary conveyance granted by General Clerk Rattray. It appears, however, from the 4th article of the condescendence that the only disposition granted by General Clerk Rattray upon which it is possible to found as having conduced to the alleged breach of contract committed in the year 1912 was a disposition by the General in favour of the Caledonian Railway Company dated 11th November 1890. The pursuers produce and refer to a copy of this deed, which is thus made part of their averments. It is a disposition in the statutory form permitted by section 80 of the Lands Clauses Consolidation (Scotland) Act 1845 and relative Schedule A. The disposition bears that the price had been paid pursuant to the Caledonian Railway (Edinburgh, Leith, and Newhaven Extension Lines) Act 1890, and that the subjects were disponed according to the true intent and meaning of the said Act. In the absence of any averment by the pursuers to the effect that the Railway Company had no compulsory power to acquire these subjects I must assume that the transaction between General Clerk Rattray and the Railway Company was compulsory and not voluntary. If that be so it seems to me to be impossible to hold that the pursuers can have any claim as for breach of contract against the representatives of General Clerk Rattray in respect of something which followed from his having been compulsorily deprived of the ground in pursuance of an Act of Parliament which was not in existence at the date of the pursuers' feu-charter, and which the grantor and grantees of that deed are not alleged to have had in contemplation when the deed was delivered and accepted. It is true that the Railway Company's Private Act became law some time in 1890, and that the pursuers' feu-charter was granted in January of the same year. If, however, any significance was to be attached to this coincidence it was for the

pursuers to make this clear. It follows, in my judgment, that the present case is one to which the maxim *lex non cogit ad impossibilia* applies according to the pursuers' own averments. In other words, the obligation undertaken by General Clerk Rattray was presumably intended to impose a restraint upon his free will in a matter in which he was free either to act or to abstain from acting, but it was presumably not intended to guarantee the pursuers against the consequences of future legislation.

The pursuers' counsel argued that it would have been only reasonable, and so far as appears from the defenders' pleadings not impossible, for General Clerk Rattray to have insisted that the statutory disposition by him to the Railway Company should contain a clause creating some *jus quæsitum* in favour of the pursuers. Counsel did not formulate the clause to which, according to his contention, it was the General's duty to endeavour to obtain the consent of the Railway Company. I can only conjecture that the clause ought to have stipulated that if the Railway Company should thereafter permit the proposed road mentioned in the pursuers' feu-charter to be constructed on their land, and if the ground on the south side of that road should come to be sold as superfluous, the pursuers should have the same rights in a question with the Railway Company as they would have possessed in a question with the General if the Railway Company had not compulsorily acquired the subjects. The answer to this argument is that it is either unnecessary and superfluous, or, alternatively, that it proposes without any legal justification, to substitute a new and different obligation in lieu of any obligation which *ex hypothesi* has been extinguished by operation of law. If General Clerk Rattray and the pursuers are assumed to have made their bargain in contemplation of the fact that the Railway Company had already applied to Parliament for compulsory powers, it would, or at any rate it might, follow that the obligation undertaken by the General in favour of the pursuers remained unaffected and unprejudiced by the fact that the ground was subsequently compulsorily purchased by the Railway Company. In this view a breach of contract was committed in February 1912, because the General and his representatives had failed to perform an absolute obligation to the effect that the feuar should be taken bound to repay to the pursuers a proportion of the cost of constructing the road. It would therefore be irrelevant to inquire whether or not the General had omitted to adopt some precaution in the interests of the pursuers which would have been usual and reasonable in the circumstances. On the other hand, if it is assumed that the compulsory sale to the Caledonian Railway Company was not in the contemplation of the parties at the date of the pursuers' feu-charter and that the General was accordingly released by operation of law from the absolute contractual duty undertaken by him in that deed, I fail to discover any legal justification for the suggestion that the General in some way became subject to a new and different obligation, viz., to do all that was reasonably possible in the new and altered circumstances for the protection of the pursuers. The pursuers' counsel seemed to think it material that the Caledonian Railway Company had consented to the insertion in the statutory disposition of a clause of relief. He argued from this fact that the Railway Company would, or at least might, if requested, have allowed a clause to be inserted which would confer a *jus quæsitum* upon the pursuers in a question with the Railway Company and its disponees and feuars. In short, we were asked to assume that because the Railway Company had agreed to a clause of relief (which it no doubt considered to be perfectly innocuous) it would have been equally ready to reconstitute gratuitously in favour of the pursuers an obligation which the law itself had extinguished and which, if revived, would make the Railway Company and its disponees and feuars responsible for a part of the cost of the proposed road. Obviously if the Railway Company could elect, as it subsequently did, to allow the proposed road to be made upon its land (thus preventing a formidable claim for compensation at the instance of the pursuers in respect of loss of access) it was in its interest that no part of the cost of construction should fall upon persons who might in the future take from the Railway Company or its disponees feus of the ground on the south side of the road. I cannot hold that General Clerk Rattray was under a legal obligation to ask the Railway Company to confer a pecuniary favour upon the pursuers. The alternative view is that the General was under a legal obligation to purchase the Railway Company's consent to the creation of a *jus quæsitum* in favour of the pursuers by agreeing to its retaining from the purchase price of the subjects one half of the estimated cost of making the road. This suggestion if well founded in law would make the General responsible for the consequences of a compulsory sale to exactly the same extent as if the sale had been entirely voluntary on his part. The true solution of the whole difficulty is to be found in the consideration that the pursuers as creditors in the obligation undertaken by the General in their favour in their feu-charter have been injured by the compulsory acquisition of the adjoining property by the Railway Company. If the Legislature gave them a claim for compensation in respect of that injury, they ought to enforce that remedy against the Railway Company. On the other hand, if no right to compensation has been conferred upon them the pursuers must just be content to bear the loss.

In my opinion the interlocutor reclaimed against ought to be recalled, the first plea-in-law for the defenders should be sustained, and the action should be dismissed. After carefully listening to what has fallen from your Lordships I confess that I have some difficulty in knowing whether your Lordships are or are not prepared to affirm the Lord Ordinary's judgment as it stands, and

if not, what is the nature and date of the breach of contract of which the defenders are to be found guilty.

The Court varied the interlocutor of 23rd June 1916 by deleting therefrom the words "disabled himself from fulfilling and thereby," and with that variation adhered to the interlocutors of 23rd June 1916 and 21st February 1917.

Counsel for the Pursuers (Respondents)—Constable, K.C.—Ingram. Agents—Shiels, Macintosh, & Ward, W.S.

Counsel for the Defenders (Appellants)—Blackburn, K.C.—Pitman. Agents—J. & F. Anderson, W.S.

Counsel for the Caledonian Railway Company—The Lord Advocate (Clyde, K.C.)—Watson, K.C.—Gentles. Agents—Hope, Todd, & Kirk, W.S.

Tuesday, December 11.

FIRST DIVISION.

[Sheriff Court at Hamilton.

ARCHIBALD RUSSELL, LIMITED *v.* DOCHERTY

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 8 (1) *and* (2), *Third Schedule—Industrial Disease—Liability of Last Employer—Duty to Give Information as to Previous Employers.*

A workman employed as a miner was disabled by miner's nystagmus and brought an arbitration for an award of compensation against the mineowners who were his employers at the date of disablement. He had not been employed in mining in the twelve months before disablement. He had given the employers all the information he possessed as to his employment during these twelve months, but the information given was not sufficient to enable them to take proceedings against other employers within the year before disablement. It was proved that the workman must have been affected by nystagmus before he entered the employment in which disablement occurred. *Held* (1) that the information given by the workman was sufficient in the sense of section 8 (1) (*c*) (*i*) of the Act, as it was in fact all the workman possessed, though it did not enable the employers to take proceedings against prior employers within the year before disablement; (2) that proof that the disease was not contracted while the workman was employed with the defenders did not, under sec. 8 (1) (*c*) (*i*), free them from liability to pay compensation.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) enacts—Section 8—"(1) Where (*i*) the certifying surgeon . . . certifies that the workman is suffering from a disease mentioned in the Third Schedule of this Act, and is thereby disabled from earning full wages at the work at which he was employed . . . and the disease is due to the nature of any employment in which the workman was employed at any time within twelve months previous to the date of the disablement . . . whether under one or more employers, he . . . shall be entitled to compensation under this Act as if the disease . . . were a personal injury by accident arising out of and in the course of the employment, subject to the following modifications:—(*a*) The disablement . . . shall be treated as the happening of the accident . . . (*c*) The compensation shall be recoverable from the employer who last employed the workman during the said twelve months in the employment to the nature of which the disease was due; provided that (i) the workman or his dependants if so required shall furnish that employer with such information as to the names and addresses of all the other employers who employed him in the employment during the said twelve months as he or they may possess, and if such information is not furnished, or is not sufficient to enable that employer to take proceedings under the next following proviso, that employer, upon proving that the disease was not contracted whilst the workman was in his employment, shall not be liable to pay compensation; and (ii) if that employer alleges that the disease was in fact contracted whilst the workman was in the employment of some other employer and not whilst in his employment, he may join such other employer as a party to the arbitration, and if the allegation is proved, that other employer shall be the employer from whom the compensation is to be recoverable; and (iii) if the disease is of such a nature as to be contracted by a gradual process, any other employers who during the said twelve months employed the workman in the employment to the nature of which the disease was due shall be liable to make to the employer from whom compensation is recoverable such contributions as in default of agreement may be determined in the arbitration under this Act for settling the amount of the compensation. . . . (2) If the workman at or immediately before the date of the disablement . . . was employed in any process mentioned in the second column of the Third Schedule to this Act, and the disease contracted is the disease in the first column of that schedule set opposite the description of the process, the disease, except where the certifying surgeon certifies that in his opinion the disease was not due to the nature of the employment, shall be deemed to have been due to the nature of that employment, unless the employer proves the contrary.

The Third Schedule as amended by the Order of the Secretary of State dated July 30, 1913 (S.R. & O., 1913, No. 814) contains in correlated columns, "The disease known as miner's nystagmus" . . . and "Mining."

Archibald Russell, Limited, *appellants*, being dissatisfied with an award of compensation under the Workmen's Compensation Act 1906 by the Sheriff-Substitute at Hamilton (SHENNAN) in an arbitration