in the case of *Black* that the pithead was near any path or public way whence persons could by wandering easily fall into danger. This is not to say that the same rule would be followed in regard to all open pits, but I do not wish to carry the case of *Black* any further than the case itself goes. So with regard to liability under the common-law I do not think that there has been shown negligence on the part of the defenders either as regards the fencing of the pit or as regards the opening of the gate. I should be disposed to say that negligence has not been established, and that in consequence of the attention paid by the men to Sinnerton an omission took place in not closing the gate, so that that accident happened which would not otherwise have occurred.

I was greatly struck with one incident in the case. The accident was said to have taken place in May, not far from the longest day, and before eleven o'clock in the evening, but the pursuer has not made any statement to the effect that the night was too dark to allow Sinnerton to see that the gate was open. I think it must have been light enough for anyone who was taking care of himself to see his way about and notice that the gate was open. I think that the judgment of the Sheriff-Substitute ought to be affirmed.

Lord Rutherfurd Clark—I am of the same opinion.

The Court affirmed the Sheriff-Substitute's interlocutor.

Counsel for Pursuer — Gardner. Agents — Sturrock & Graham, W.S.

Counsel for Defenders—Graham Murray—C. N. Johnstone. Agents—J. & F. Anderson, W.S.

HOUSE OF LORDS.

Tuesday, June 22.

(Before Lords Blackburn, Fitzgerald, and Halsbury.)

MACKINNON (GILMOUR'S TRUSTEE) *v.* THE GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

(*Ante*, vol. xxii. p. 875, and 12 R. 1309.)

Carrier—Railway—Agreement—Unequal Rates. A railway company agreed with certain coalmasters to carry their coal at so much per ton per mile when carried a distance exceeding six miles, and further, that if they should charge any other trader for distances above six miles for the same description of traffic "lower rates" than those stipulated in the agreement, they should give the coalmasters who were parties to the agreement a corresponding reduction in the rates payable by them. *Held* (*aff.* judgment of Second Division) that "lower rates" meant lower rates per ton per mile, and *therefore* the company having charged another trader lower rates per ton per mile, *held* that the coalmasters were entitled to a corresponding reduction, though owing to the distance for which this trader's coal was carried the lump sum payable by him was greater than that paid by the coalmasters who were parties to the agreement.

This case is reported in Court of Session, July 15, 1885, *ante*, vol. xxii. p. 875, and 12 R. 1309.

The defenders, the Glasgow and South-Western Railway Company, appealed to the House of Lords.

At delivering judgment—

Lord Blackburn—My Lords, this is an appeal against an interlocutor of the Lords of the Second Division of the Court of Session in Scotland dated 15th July 1885, affirming an interlocutor of the Sheriff-Substitute, and ordaining the defenders to make payment to the pursuers of the sum of £148, 16s. 1½d. with interest.

The question turns upon the construction of an agreement which is set out, and of which I think only the second, ninth, and eleventh articles are in any way important. The pursuers, who are coal-owners in Ayrshire, made an agreement with the Glasgow and South-Western Railway Company, the second article of which was—"The second party respectively shall, subject to article eleventh hereof, as from the said date, pay to the first party, for and in respect of the traffic of the second party before mentioned, the charges following." It refers to the charges which are in the schedule, which I need not at present read to your Lordships. I need only state that there are such charges, and that those charges are made to depend upon the distance for which the coals have been carried along the railway.

The first eight articles are not important to read. The ninth is this—"It is hereby provided and agreed that in the event of the first party," that is to say, the railway company, "charging to any other trader for distances above six miles, for the said description of traffic, to any station or place, lower rates than those stipulated in this agreement to be paid by the second party," that is, the traders, "then and in that event the first party shall give to the second party a corresponding reduction in the rates payable by them for their traffic of a similar description to such station or place while and so long as such lower rates are charged against such other trader." It is admitted that the railway company do charge to Troon (taking one place for instance) from Lanemark Colliery, New Cumnock, a rate which is considerably lower than the rate in the schedule, and that they do continue to charge against the pursuers the scheduled rate, which is higher consequently than that which they actually do charge to the Eglinton Company. An attempt has been made unsuccessfully both before the Sheriff-Substitute and before the Court below (and I think rightly unsuccessfully) to argue that the ninth article which I have just read has the effect of saying that so long as they do not charge to anyone else a lower sum to Troon than the sum which they charge to the pursuers to Troon, it does not matter how much further they may carry gratis, throwing the extra distance into the bargain. I do not think that that can be the true construction of the agreement. It does not seem to be the meaning of the words, and certainly according to my view of it, it is not what the parties would be likely to intend. That being the unanimous opinion of the Sheriff-Substitute and of all the Judges of the Second Division, I

do not think it necessary to dwell further upon that point.

But then there comes a matter which it is somewhat difficult to understand. After that ninth article there comes the tenth—"The present agreement shall subsist and endure until the first day of February in the year 1890." Then comes the eleventh article, which quite evidently relates to a new subject, which begins thus—The second article had provided that "the second party respectively shall, subject to article eleventh hereof as from the said date, pay to the first party" the rates in the schedule. Then this eleventh article comes in and says—"It is specially agreed that notwithstanding the rates or charges before specified, the first party shall be entitled to charge, and the second party shall be bound to pay, rates or charges similar to those which may for the time being be charged to and paid by the Eglinton Iron Company in respect of the carriage of common and fireclay bricks and tiles, and coal and dross, for land sale and shipment, not exceeding the scale of rates and charges paid by the second party, immediately preceding the first day of January 1874, and in the event of any consideration being given to the Eglinton Company for raising them, a similar consideration shall be given to the second party to this agreement." Now, what is the meaning of that? The contention has been that the effect of that article is to say that so long as the Eglinton Company are charged as much as or more than the pursuers, the pursuers have no right to complain, and no right to redress though the ninth clause is broken—that they cannot recover on that ground. It is difficult to understand this eleventh stipulation without having seen the whole of the agreement with the Eglinton Company and knowing the facts about it, so as to see what that agreement actually was. The only thing that it is material to consider at present is—Does the mere fact (which is all that is averred—and I think it is not at all disputed) that the Eglinton Company do actually pay a higher sum, deprive the pursuers of the right to recover the £148 which, according to the construction I have already put upon the previous article of the agreement, has been wrongfully extorted, if I may use the phrase, from them in consequence of the railway company having carried more cheaply the coals from the Lanemark Colliery? I cannot see it. It is very difficult indeed to construe this agreement without having the whole of the Eglinton agreement before us and seeing what the Eglinton Company were doing; but this much I may say—it is what the Lord Justice-Clerk says—indeed it is the whole of what he says upon this point—they say "if the Eglinton Company are charged no more than the charge now made against the complainers, they are not within the ninth clause at all. But I am not prepared to give effect to that contention, and on the whole matter I think the company is here in the wrong."—(See *ante*, vol. xxii., p. 878). I thoroughly agree in that. I have felt rather a desire myself to say a little more than merely to say that I am not prepared to give effect to that contention, but upon looking at it I find that it all comes round to that. The burden is very strong indeed upon the company to show that article eleven does bear such a construction as to nullify article nine which goes before it. They have not given any grounds for that, and consequently, my Lords, I do not think I can go much further than to repeat again what the Lord Justice-Clerk has said, namely, that I am not prepared to give effect to that contention.

That being so, I think that the interlocutor appealed against is right, and that the appeal now lodged ought to be dismissed with costs, and I move your Lordships accordingly.

Lord Fitzgerald—My Lords, I entirely concur in the judgment just delivered. I only desire to say as to article eleven that I have found great difficulty in understanding the argument as to its effect and operation, and I am not at all sure that I have a very clear conception of it at present, but I certainly do decline to offer an opinion upon an agreement which is not before us, and which if it was to be relied upon in the manner in which it has been relied upon to-day by the Lord Advocate, ought to have been put forward prominently by the defenders, and ought to have been before your Lordships now.

There is one point I may advert to. As I understand the case as it stands, it is this. The condition of things at the time this agreement of 1875 was entered into was that the coalmasters were then paying rates under the agreement of 1874. The Eglinton Company were then paying rates in a lesser degree under their own special agreement which is not before us. The object and intention of the parties seem to have been to equalise these two things. The result was, as I understand by the answer to an inquiry which I made in the course of the argument, that the schedule of rates under this agreement and the rates payable by the Eglinton Company represented the same thing; they were equal in degree as I understand it, and there has been no change of circumstances since. The Eglinton rates have not been altered. There is indeed a statement that they have been diminished in reference to one particular colliery, but that being objected to they were immediately increased again, and potentially the state of facts is the same now as it was when this agreement was entered into in 1875.

My Lords, we construe every agreement not according to circumstances which may arise, but according to the circumstances existing at the time the agreement was entered into. We have not the Eglinton agreement before us, and I am at a loss to see what effect it can have upon article nine of this agreement. Article nine speaks of the "rates stipulated in this agreement:" These are the rates, and if there had been any change of rates under article eleven, that change of rates would still represent rates "stipulated for in this agreement," and would leave as to these rates article nine in full force. The truth is that there has been no change. I do not know that the case comes before us in a light in which we ought to express any opinion upon it so far as regards the Eglinton agreement. Upon the statement which is before us, therefore, I quite agree with my noble and learned friend that as to this article eleven the less said the better; but I cannot refrain from making this observation, that the whole language of article eleven points to an increase of rates and not to a diminution—it points to an authority to charge on the one side, and a liability to pay on the other. You will find that the only

additional stipulation is that in the event of the railway company having bribed the Eglinton Company to submit to an increase of rates, it shall give exactly the same bribe to the coal-masters as it has given to the Eglinton Company.

LORD HALSBURY—My Lords, I cannot help thinking that the question which is raised upon article 9 of this agreement is absolutely free from doubt. I think that when the words "lower rates than those stipulated in this agreement" and "a corresponding reduction in the rates" spoken of in the latter part of the clause are looked at, it is *luce clarius* that what the parties were contemplating was the proportionate relation of the charges to be made to the work to be done by the company. Therefore I am of opinion that the first contention of the appellants here must fail.

With reference to the eleventh clause, I must confess myself unable quite to follow the reasoning of the Sheriff-Substitute, and to some extent of one of the learned Judges in the Court below, but I do not propose to give any exposition of my own of this eleventh clause, because I believe that the materials are not before your Lordships which would sufficiently enable us to form a precise notion of what the clause contemplates. It is enough in this case to say that I think it would be an unreasonable construction of the agreement as it stands to suppose that clause eleven is intended to over-ride and control the effect of clause nine. I can conceive of a number of circumstances, and amongst them I can conceive of an agreement with the Eglinton Company such as would render the provision of clause eleven not an unreasonable and not an unintelligible one, saving nevertheless all the rights which are conferred by clause nine upon the parties to this agreement.

Under these circumstances, my Lords, I quite concur with the rest of your Lordships on the judgment which has been moved by the noble and learned Lord on the woolsack.

Interlocutor appealed against affirmed, and appeal dismissed with costs.

Counsel for Pursuer (Respondent)—Moulton, Q.C.—M'Laren. Agents—Durnford & Co. for Gordon, Pringle, Dallas & Co., W.S.—James Robertson, Kilmarnock.

Counsel for Defenders (Appellants) — Lord Advocate Balfour, Q.C.—Sir R. Webster, Q.C.—R. S. Wright. Agent—W. A. Loch for John Clerk Brodie & Sons, W.S.

COURT OF SESSION.

Wednesday, June 23.

FIRST DIVISION.

HIGGINBOTHAM'S TRUSTEES *v.* HIGGINBOTHAM.

Husband and Wife—Marriage-Contract—Income not Conveyed for Purposes of Contract—Radical Right.

By an antenuptial contract of marriage the whole estate of which the wife was then possessed, or to which she might succeed, was conveyed to trustees for the purposes therein specified, viz., for behoof of the husband, in the event of his survivance, in liferent to the extent of one-half, and for behoof of the children of the marriage in fee. There was no direction as to the income of the estate *stante matrimonio*. Subsequent to the marriage the wife succeeded to moveable estate. *Held* that as the wife had only divested herself of her estate in so far as she had directed it to be applied to certain purposes, she was entitled, in virtue of her radical right, to the income of her estate during the subsistence of the marriage.

By antenuptial contract of marriage, dated 3d October 1863, Charles Titus Higginbotham made certain provisions for his wife and children, and in security of the obligations so undertaken, assigned to the trustees therein named a policy of insurance on his own life effected in contemplation of the marriage.

On the other hand the wife, Mrs Agnes Ker or Higginbotham, assigned, disponed, conveyed, and made over to the trustees therein named her whole estate, heritable and moveable, then belonging to her, or to which she might succeed during the subsistence of the marriage, for the ends, uses, and purposes therein set forth, viz.—"For behoof of the said Charles Titus Higginbotham in the event of his surviving her, in liferent for his liferent alimentary use allenarly, and not affectable by his debts or deeds or the diligence of his creditors, but to the extent of one-half only of her said means and estate, and for behoof of the child or children of the said intended marriage in such proportions as she may appoint, or if no appointment be made by her, equally in fee, and failing a surviving child of said marriage for behoof of her own nearest heirs or assignees."

Children were born of the marriage.

Mrs Higginbotham succeeded to certain moveable property in 1877, which the marriage-contract trustees received in virtue of the conveyance in the marriage-contract.

This was a Special Case to which Archibald Galbraith and Others, the marriage-contract trustees, were the parties of the first part, Mr and Mrs Higginbotham the parties of the second part, and the children of the marriage and their *curator ad litem* the parties of the third part.

The case set out that the marriage-contract made no provision for the application of the income of the funds conveyed by Mrs Higginbotham in trust during her own life, and that the parties of the first part were advised that without judicial authority they were not in safety to part with the income.

The parties of the second part maintained that it having been solely through inadvertence that no provision was made in the contract for the application of the income of Mrs Higginbotham's funds during her life, and there being no direction to accumulate such income, Mrs Higginbotham was entitled to receive the income already accrued, and to receive the whole income of the funds as it fell due during the subsistence of the marriage, and during her own life in the event of her surviving her husband.

It was maintained on behalf of the parties of the third part that the trustees were bound to