At advising—

LORD COWAN—Trust-deeds containing power to sell heritage, but not a direction to trustees to do so, may or may not have the effect of converting the subjects into personalty in succession. This will depend on the necessity of acting on the power for the due and proper administration of the trust. But, in general, trustees, although they have power by the deed, cannot sell, if their doing so is not for the interest of the beneficiaries, or if this effect would be to alter the character of their right in a question of succession. Here there is no express direction to sell the heritage, but the testator directs the whole of his heritable and moveable estate to be disposed of in the same way. Both are to form residue and be divided. The special provision which the trustees are bound to implement is —"On the death of my said wife, I hereby direct and appoint my trustees to divide the residue of my means and estate equally, share and share alike," between the seven parties interested. There is not to be any division of the heritable from the moveable estate, but both are to be included in one division. In order to carry out this provision, the amount must be ascertained, and this cannot be accomplished without a sale. Then there will be a fund, which may be divided. I cannot doubt therefore that the trustees have power under the deed to deal with the heritage as they propose. I am therefore of opinion that the first question must be answered in the affirmative.

The Court accordingly answered both questions in the affirmative.

Agent for the First and Second Parties—A. D. Murphy, S.S.C.

Agents for the Third Parties—M'Ewen & Carment, W.S.

Friday, June 28.

FIRST DIVISION.

MAGISTRATES OF PERTH *v.* LORD KINNOULL.

Superior and Vassal—Feu-Contract—Reddendo—*Implement—Change of Circumstances.*

In 1459 certain lands were granted for the consideration that the grantee and his successors should maintain and repair certain causeways. This obligation was inserted in all subsequent investitures of the estate, and was implemented by subsequent proprietors. But in 1865 the then proprietor refused any longer to fulfil the obligation, on account of the change in the circumstances and in the subjects. The superior brought an action against the proprietor to compel implement of the obligation; and also against a Railway Company, which had considerably altered the roads, to compel it to maintain the portions so altered. The Court assoilzied the Railway Company; and, in regard to the proprietor, held, that although the obligation was not extinguished, it could not, under the altered circumstances, be enforced, but should be converted into a money equivalent.

This was an action at the instance of the Lord Provost, Magistrates, and Town Council of Perth, against the Earl of Kinnoull and the Caledonian Railway Company, to compel the defenders to maintain and repair certain roads at Perth. The circumstances which led to the raising of the action were as follows:—

In 1459 the pursuers' predecessors, as representing the community of the burgh of Perth, made over to Robert Kinglassie, an ancestor of the defender Lord Kinnoull, lands called Gildherbar or Calsey Lands, of which they were the superiors. This grant was made upon certain conditions, specified in indentures entered into between the parties, and dated 8th May 1459. These indentures set forth that the honourable men, council, and community of Perth had set in fee and heritage to the said Robert Kinglassie their Gildherbar, with the pertinents, the boundaries of which were therein described,—the south boundary being the King's Calsey. There was reserved of the Gildherbar lands 4 ells in breadth, measuring from the north side of the said King's Calsey, and extending in length so far as the Gildherbar lay, so that the Gait and the King's Calsey might be made together for carts' load and common passage. The said Robert Kinglassie was also, as a condition of the grant to him, taken bound to uphold for ever, for passage for man and horse, the Calsey stretching from the Charterhouse gate to the burn of Craigie, now called St Leonard's Causeway, sufficiently as should effeir, with stone and sand; as also to uphold the Cow Calsey, now called Kinnoull Calsey, passing to Stirling, stretching to the strip and bridge lying at the calsey, for men, horse, and common passage; and to uphold in like manner the calsey passing to Methven, as it stretches from the east corner of St Paul's Chapel until it comes to the burn above Whitefriars, now called the Long Causeway. The indentures further stipulated and provided that these calseys should be upholden perpetually of the same breadth "as they now ar breader," on the said Robert Kinglassie's cost. These various stipulations and conditions were fortified by a clause of irritancy, to the effect that if the said Robert Kinglassie, his heirs or successors, should fail in all or any of the points foresaid, it should be lawful to the said aldermen, council, and community to have regress to the said Gildherbar, with the pertinents, at their own hands without any process of law,—the said Robert Kinglassie or his heirs getting previous warning to repair the calseys, as mentioned in said indentures; and that not being done, it was provided that the said aldermen, council, and community were to have recourse to the Gildherbar, with the pertinents. It was also stipulated that the said Robert Kinglassie and his heirs should give yearly to St John the Baptist's light a pound of wax on the feast of his nativity. The said aldermen, council, and community also granted absolute warrandice to the said Robert and his heirs, he and they "keepand all conditionis foirspoken." Robert Kinglassie thus acquired right to the lands of Gildherbar, which have now come to belong to the defender Lord Kinnoull; and the conditions contained in the foresaid indentures, upon which the lands were granted, have been regularly inserted in all the subsequent titles. Owing to change of circumstances, the causeways mentioned in the indentures gradually became totally changed in their character; and owing to railways being brought into Perth at that point, were also very materially altered, both in position and length; new roads being substituted for a great portion of the old causeways, and the new roads being five or six hundred yards longer than the old causeways. The predccessors of the defender, the

Earl of Kinnoull, however, maintained and kept in repair the said three calseys, throughout their successive changes, down to the year 1865. In that year Lord Kinnoull, the father of the defender, gave notice to the pursuers of his intention to repudiate the obligation by a letter of date March 20, 1865, from his agent, Mr George Condie, writer in Perth, in the following terms:—"With reference to your late letters regarding the maintenance by Lord Kinnoull of certain calseys here, I am, by Lord Kinnoull's instructions, to communicate to you that, as the arrangement for the employment of a man upon these calseys will come to an end at Whitsunday first, it is not his Lordship's intention to renew it." In consequence of the position thus taken up by Lord Kinnoull, the pursuers, in August 1866, raised an action against his son, the defender, who had succeeded to the estate in February 1866. This action sought to have the defender found liable to maintain and repair the Long Calsey, which is a continuation of the High Street of Perth. Then, in the month of September 1868, the pursuers brought another action against Lord Kinnoull in the Sheriff-court, asking that the defender should be decerned to put all the three causeways, viz., the Long Calsey, St Leonard's Calsey, and Kinnoull Calsey, in repair. These actions were conjoined, and a record was made up and closed in the conjoined actions. The Sheriff allowed a proof of certain averments in the record, and thereupon the defender the Earl of Kinnoull appealed the case to the First Division of the Court of Session, by whom it was remitted to the Lord Ordinary, who, on the 16th July 1870, pronounced an interlocutor allowing, before answer, the parties a proof of their averments; which proof was taken before his Lordship on the 18th and 19th of October 1870. The Lord Ordinary thereafter pronounced an interlocutor in the following terms:—"*26th December* 1870.—The Lord Ordinary having heard parties' procurators, and considered the closed record in the conjoined actions, proof adduced, and whole process—sustains the appeal: Finds that the first and second of the common causeways mentioned in the titles and in the conclusions of the summons are situated within the extended police boundaries of the town of Perth; and that the third of the said causeways, with the exception of the portion to the west of Dovecotland, is also situated within the said police boundaries: Finds that the pursuers have failed to instruct that they have now any right or title to insist in the conclusions of the present actions, in so far as regards those portions of the said causeways which are situated within the said police boundaries: Therefore dismisses the actions, and decerns, reserving to the pursuers to establish in any competent process their claim to enforce against the defender the obligation in the indenture and other titles founded on by them to repair the portion of the causeway third above mentioned, and commonly called the Long Causeway, which is situated beyond the said police boundary, and between it and the burn crossing the high road near Cornhill; and to the defender his defences, as accords: Finds the defender entitled to expenses, of which appoints an account to be given in, and remits the same, when lodged, to the Auditor to tax and report." The pursuers reclaimed against this interlocutor to the First Division of the Court, by whom the case was partially heard; then consideration of the cause was superceded, in order that farther information might be obtained; and it was suggested by the Court that some settlement might be arranged between the parties.

The Magistrates of Perth, however, in 1871, brought an action of declarator in the Court of Session against the Earl of Kinnoull, and also against the Caledonian Railway Company.

The object of this action, and the relation it bears to the Sheriff-court actions, will be seen from the Lord Ordinary's note, and the opinion of the Lord President.

The Lord Ordinary (MURE) pronounced this interlocutor:—

"11*th January* 1872.—The Lord Ordinary, having heard parties' procurators, and considered the Closed Record and productions, reports the case to the First Division of the Court; and, with this view, appoints the pursuers to print and box this interlocutor and subjoined note.

"*Note.*—This action has been instituted to obviate some of the objections taken by the defender Lord Kinnoull to an action which was raised against him some time ago by the pursuers, as Magistrates of the burgh of Perth, and is at present depending before the First Division of the Court.

"That action was a petitory one, directed against Lord Kinnoull alone, and was originally brought before the Sheriff-court of Perthshire, in the name of the Lord Provost and Magistrates of Perth, as representing the community, in order to enforce an obligation contained in the titles under which parts of the Kinnoull estates were held of the town of Perth; and in respect of which it was alleged that Lord Kinnoull was bound to maintain the roads or common causeways described in those titles. The action was, however, met by the objection that the pursuers, as Magistrates of Perth, had no title to enforce the obligation; because, by the Police Statutes applicable to the town, the whole duty of maintaining the streets within the Police boundaries, including the causeways in question, which at one time lay upon the Magistrates, had been transferred to and imposed upon the Police Commissioners; and it rested with them, and not with the Magistrates of the burgh, to take proceedings against parties who might be bound to repair any portion of the streets, to the relief of the assessments levied for that purpose by the Commissioners. And it was further maintained on the part of the defender that, even if the obligation to uphold the old lines of causeway still existed, and was enforcible against him, he could in no view be liable to maintain those portions of the existing lines of causeway which consisted of new or substituted roads carried over the railways intersecting the town; and that, as regards those portions of the roadway, proceedings ought to have been taken against the Railway Companies, and not against the defender.

"To the first of these objections the Lord Ordinary, upon considering the provisions of the Police Statutes, and the evidence adduced relative to the management of the streets, came to the conclusion that effect ought to be given to the extent of holding that it lay with the Police Commissioners, and not with the pursuers *qua* Magistrates of the burgh, to enforce obligations of the present description, and he accordingly dismissed that action, reserving to the pursuers to establish in any competent process their right to enforce the obligation in regard to those portions of the causeway which were situated beyond the police

boundaries. And he at the same time intimated an opinion that it was against the Railway Companies, and not against the defender, that proceedings should have been taken to enforce the repair of those portions of the causeways which passed over the bridges built by the Railway Companies, with their immediate approaches.

"Against this interlocutor a reclaiming note was presented by the pursuers; and although no interlocutor appears to have been pronounced, the discussion was, as the Lord Ordinary understands, stopped by the Court, and the disposal of the case delayed, in order that parties might endeavour to affect an arrangement; or, if they failed in this, that an action of declarator might be brought to try the case, with all the parties interested in the question. No such settlement having been effected, the present action has been raised by the pursuers, not simply as Magistrates of the burgh of Perth, but as now reinvested, in respect of the Acts of Parliament and Provisional Orders founded upon in the Condescendence, with the whole duties and powers relative to the paving and management of the streets and roadways within the police boundaries of the town, which had been conferred upon the Commissioners by the Police Statutes; and they have called as defenders the Caledonian Railway Company as well as Lord Kinnoull, as now representing those Railway Companies by which the lines of the causeways were altered, and carried over the railways passing through the town.

"The conclusions of the Summons are somewhat complicated; but the pursuers appear to the Lord Ordinary, in substance, to seek to have it declared—1st, That the defender Lord Kinnoull is bound to keep in repair the whole of the common causeways in question, including the new or substituted portions, except the bridges constructed by the Railway Companies, and the immediate approaches thereto; and that the Caledonian Railway Company is bound to keep in repair the said bridges and their immediate approaches; or otherwise, 2d, That the defender Lord Kinnoull is bound to keep in repair such portions as still exist of the original lines of causeway, as specified in the Summons; and that the defenders the Caledonian Railway are bound to keep in repair the substituted portions or deviations of these causeways made by the Railway Companies under Acts of Parliament, including the bridges and their immediate approaches. There are also declaratory conclusions to the effect that the defender Lord Kinnoull is bound to contribute three-fourths, or such other reasonable proportion as may be fixed by the Court, of the total expense of repairing the causeways, with the exception of the bridges and approaches; and the Summons contains petitory conclusions framed with the view to carry out the law which may be declared under the declaratory conclusions."

The First Division heard counsel on the whole cause.

Fraser and Scott, for the pursuers, argued that, as regarded Lord Kinnoull, the obligation had never been extinguished, but was still existing. That, as it was the whole condition of the grant, the pursuers were entitled to demand implement, and the defender was bound to perform the obligation. That, if he did not do so, he had no right to keep the lands. That, as to the argument that the nature of the roads and expense of keeping them had increased enormously since the date of the grant, the answer was, that the value of the property had increased in a corresponding ratio. That, as regarded the Caledonian Railway Company, they were bound to keep up the new portions of the roads which they had substituted for the old, and the bridges with their immediate approaches.—(*The Queen* v. *The Inhabitants of Ely*, 19 L. J., 223, Magistrates Cases; *North Staffordshire Railway Company* v. *Thomas Dale and Others*, 27 L. J., 147, Magistrates Cases; *Rex* v. *Inhabitants of Kent*, 13 East., 220).

The Lord Advocate and Johnstone, for the Caledonian Railway Company, argued that all that could be asked from the Railway Company was that they should maintain the bridges and immediate approaches, and that they in fact had always done this. That, as to the substituted portions of the roads, there was no claim against the railway company to uphold them.

The Solicitor-General and Gloag, for Lord Kinnoull, argued that the obligation must be held to be extinguished, as it was now impossible to keep up the causeways in the manner specified in the indenture; to attempt to do so would be to destroy the road. That there could be no claim against Lord Kinnoull to keep up the roads of the present day under the obligation of 1459, on account of the changes in the characters of the roads, and the increase of expense, and that, besides there was hardly any part of the original causeway now in existence; and that, under the provisions of local statutes, the Magistrates were themselves bound to keep those roads in repair, being within the boundaries of the burgh.

At advising—

Lord President—We have before us two cases—first, an appeal for Lord Kinnoull from the Sheriff-court; and second, an action of declarator for the Magistrates of Perth against Lord Kinnoull. In the appeal there are two actions brought up—(1) an action at the instance of the Magistrates of Perth to compel Lord Kinnoull to maintain the High Street of the burgh, also called Long Calsey; and (2) an action at the same instance to compel Lord Kinnoull to maintain two other causeways, viz., St Leonard's Causeway and Kinnoull Causeway. In these actions Lord Mure, having taken a proof, has given a judgment which is still unrecalled. In that judgment his Lordship "Sustains the appeal: Finds that the first and second of the common causeways mentioned in the titles and in the conclusions of the summons are situated within the extended police boundaries of the town of Perth; and that the third of the said causeways, with the exception of the portion to the west of Dovecotland, is also situated within the said police boundaries: Finds that the pursuers have failed to instruct that they have now any right or title to insist in the conclusions of the present actions, in so far as regards those portions of the said causeways which are situated within the said police boundaries: Therefore dismisses the actions, and decerns, reserving to the pursuers to establish in any competent process their claim to enforce against the defender the obligation in the indenture and other titles founded on by them to repair the portion of the causeway third above mentioned, and commonly called the Long Causeway, which is situated beyond the said police boundary, and between it and the burn crossing the high road near Cornhill." Now, the reason

why the Lord Ordinary pronounced this finding was, that the defender set on record certain statutes by which the streets were vested in the Police Commissioners, with power to make assessments for the maintenance of these streets; and the Lord Ordinary thus came to the conclusion that the pursuers were divested of all interest in the greater part of the subject-matter of dispute. This conclusion on the part of the Lord Ordinary is not surprising; for, while the defender set forth all the statutes depriving the Magistrates of power over the roads within the police boundaries, the pursuers did not explain subsequent statutes, reinvesting them in the administration. The Magistrates are now invested with the care of the streets; and that being the case, of course we cannot sustain the Lord Ordinary's interlocutor. But in the Lord Ordinary's Note other considerations are suggested. He calls attention to the fact that the lines of road have been diverted by railways, and that the length of the diverged lines of road extends in all to about 1500 yards of entirely new roadway; and after deducting from this new roadway the length of the abandoned portions of the old causeways, there remains from 500 to 600 yards of roadway, which the defender is called upon to maintain in excess of the length of the original causeways. Then he calls attention to the circumstance that the Railway Companies have carried roads across the railways by bridges, and that the 39th sect. of the Railway Clauses Act provides that, where public roads are so carried over railways, the bridges, with the "immediate approaches, shall be executed, and at all times thereafter maintained, at the expense of the Company." So the Lord Ordinary thinks that the defender would have an undue burden imposed upon him by having to maintain a greater length of road than was originally intended; that as to the bridges and immediate approaches, the Railway Company is liable to maintain them; and that, in these circumstances, it would be difficult to give the pursuers in the Sheriff-Court actions a judgment in terms of the conclusions of the summons.

When this case was brought here by reclaiming note the difficulty seemed very formidable; and, until it could be shown for how much the Railway Company was liable, Lord Kinnoull's obligation could not be ascertained. So we superseded consideration of the cause, and gave the Magistrates time to prepare information on these matters; at the same time suggesting that a settlement might be come to between the parties, and that it was a fitting case for arbitration. The Magistrates, however, did not adopt this suggestion, but brought a new action—an action of declarator; and to this action we must now turn our attention. Here they sue not only as Magistrates, but also as vested with all the powers and jurisdictions of police, paving, watching, lighting, and others granted to the Commissioners of Police of said burgh, under the Local Act, 2 Vict. c. 43, or any other Act, and also as vested with all the duties, rights, and liabilities with respect to roads and streets within the royalty and extended royalty of the burgh of Perth; and they call as defenders Lord Kinnoull, and also the Caledonian Railway Company, as standing in the place of all the separate railway companies who have made alterations on the said roads. The conclusions of the summons are as follows:—(1) There is, in the first place, a conclusion against Lord Kinnoull to maintain the Long Calsey, Leonard Calsey, and Kinnoull Calsey, excepting the bridges after specified constructed by said railway companies in the course of the foresaid alterations, and immediate approaches thereto. (2) Then, in the second place, there is an alternative to find Lord Kinnoull liable to maintain the portions of the calseys not affected by the alterations made by railway companies, and to find the Caledonian Railway Company liable to maintain the portions so altered. (3) In the third place, there is a second alternative, to have Lord Kinnoull ordained to pay three-fourths, or such other proportion as may be fixed by the Court, of the whole calseys, or of the original portions of them. (4) In the fourth place, there is a conclusion for decerniture for the sums expended by the pursuers in repairing and maintaining the causeways; and (5) in the fifth place, there is a third alternative that, in case of the pursuers not obtaining decree against Lord Kinnoull, they should be found entitled to have regress to the lands of Gildherbar, called Calsey Lands.

Now, it is desirable, in the first place, to dispose of the case as regards the Caledonian Railway Company. The defence of the Railway Company consists of three parts—first, that the Company is not liable to repair the substituted roads, as distinguished from the bridges and immediate approaches; second, that as regards the Glasgow Road Bridge, the Company is not liable to keep it up, as it did not make the bridge, and does not represent the Company which did; and third, that as regards the other two bridges, the Company has never disputed its liability to maintain them and the immediate approaches, and has, in point of fact, done so.

As regards the first of these points, I am clearly of opinion that under the Act of 1845 the Railway Company is not bound to repair the substituted portion of the roads, as distinguished from the bridges and immediate approaches. In the second place, it is not disputed that the averment of the Railway Company as to the Glasgow Road Bridge is true; and, in the third place, it is quite confirmed that the Company has all along admitted and fulfilled its liability in regard to the other two bridges. There is thus no case against the Caledonian Railway Company, and I am of opinion that, as regards the two bridges which the Company is bound to maintain, the action should be dismissed as unnecessary, and that *quoad ultra* the Caledonian Railway Company should be assoilzied.

Now, we come to the question between the Magistrates and Lord Kinnoull, and it is a question of considerable delicacy. The original obligation is contained in the indenture of 8th May 1459, by which the burgh of Perth set in fee and heritage "thair gildherbar" to Robert Kinglassie. Then in the indenture follows a reservation in the following terms:—"Reservand furth of the gildherbar four ellis of breid fra the northsyd of the Kingis calsay, and of lenth as the gildherbar lyis sua that the gait and the Kingis calsay may be maid togeddir for cartslaid and common passage." Then comes the consideration for which the conveyance is made—"And also the said Robert sall uphauld for ewir for passage for man and hors the calsay streikand fra the charter hous yet to the burne of Craigie sufficientlie as effeiris, with stane and sand, and als sall uphauld the Cow Calsay passand to Strewiling, streikand to the streip and brig now lieng at the calsay, and for men, hors, and commen passage, as is foresaid, and in sicklyke manner the said Robert sall uphauld the calsay passand to

Methven, as it streiks fra the east nik of Sanct Paullis Chappell quhill it come to the burne abone the quhyt frieris: The quhilkis calsayis foirsaidis sall be uphauldin perpetuallie of the samyne breid as they now ar breader on the said Robertis cost, and gif it sall happin the said Robert, his airis or successouris, to failzie in all or any of thir poyntis foirsaid, it sall be lesum to the saidis aldermen, counsall, and communitie to have regress to the said gildherbar." Now, I think that this obligation is a condition of the right, and would go with the lands into whosoever's hands they might fall, and we find that the obligation has been repeated in all subsequent investitures of the estate. Thus the obligation is binding—it is not extinguished in any way,—and is still subsisting. But this goes only a short way to solve the difficulty of the case, for the difficulty is to see how the obligation is to be enforced under existing circumstances. The causeways at the time of the indenture were, of course, very different from the roads of the present day, and besides, all the causeways (except a small part of one of them) are within the boundaries of the burgh, and are therefore subject to a large amount of traffic, so the obligation to maintain them is very different from the obligation to maintain the original calsays. It is argued, however, that the lands have increased very much in value; but it is hardly consistent with the feudal relations to say that because the value of the subject has increased, the *reddendo* should be increased also. Then, Lord Kinnoull argues that the utmost that can now be asked of him is to keep up the causeways in the same way as was stipulated for in the indenture. To this the Magistrates answer that it would be of no use, and that it could not be done even if Lord Kinnoull were to try. Now, is this the same thing as saying that the obligation has come to an end? The alterations upon the roads, which have been made necessary by the advance which has taken place in every respect since 1459, have made the roads of the present day as different as possible from the original causeways—they are both ways, but there the likeness ends. Then, it is not immaterial to observe that the length of the roads is increased. It does not matter how this has been done, but there is no doubt of the fact that Lord Kinnoull is asked to maintain five or six hundred yards more of road than he was in the original obligation. Now, in these circumstances, the question is, Whether the obligation is not to be enforced because it is impossible? or Whether, on the other hand, Lord Kinnoull is in all time coming bound to maintain streets of the burgh instead of the original causeways, no matter what difference there is either in kind or in expense? The difference of expense, at the present time, is, no doubt, great, and it may be that traffic will increase to such an extent that some new kind of road may be necessary, twice as expensive as the present roads. If this were to take place, would the obligation comprehend the maintenance of these new roads? Now, either one or other of the above alternatives is inequitable. The obligation is not extinguished, and, on the other hand, it cannot be extended in the way asked. But the question remains, what middle course can be adopted? It seems to me that the only solvent is money, and that in the end it must come to a pecuniary conversion. On what principle that conversion is to be made I am not at present prepared to say. Attention of parties has not been turned to that point, and it is a subject upon which they should be heard.

Now, as regards the appeal, I think the result of this opinion is that these Sheriff-court actions cannot be maintained, and the sooner they are got rid of the better, so I think that we should simplify the process before us by disposing of the case in so far as it concerns the Caledonian Railway Company by dismissing the Appeal, and by limiting consideration to the question how the conversion is to be made.

Lord Deas—I entirely agree with your Lordship in the chair as to the position of the Caledonian Railway Company, and the result at which your Lordship has arrived as regards them.

Then, as regards the obligation sought to be enforced against Lord Kinnoull, I am of opinion that the obligations made upon the vassal by the indenture of 1459 were and are binding upon him and his successors. The obligation to maintain the causeways was the whole consideration of the grant of the lands, and there is nothing in law or in practice to prevent that obligation from being enforced. So, if matters had been in the same position as they were at the time of the grant, there would have been no doubt but that the parties who made the grant would have been entitled to implement of the obligation. The difficulty arises from the change of circumstances, which has made the causeways different now from what they originally were, both as regards their construction and the expense of maintaining them. Then the roads themselves have been made five or six hundred yards longer than they were originally, and I suppose that little remnant of the original causeways exists. Again, the change which has been made as to the construction of the roads may be still further extended, as, for example, if it should be found necessary to lay the roads with asphalt, or to introduce tramways. So I agree with your Lordship that it would be somewhat extravagant to hold that this obligation is still to be enforced in its terms—if to maintain the roads of the present day could be called enforcing the obligation in its terms. Strictly speaking, it is impossible to enforce the obligation in its terms, and so the question arises, whether money, the universal solvent, should not be used here, and I have no doubt that it should. The difficulty—the only one in the case—is as to the principle upon which this conversion should be conducted. I do not know that we can take the obligation here as it originally was. There may be an increase in the *reddendo* by difference in circumstances. If a person was bound to pay some hundred of hens yearly, I doubt if it would be a good answer to a demand for payment to say that hens were ten times as dear as when the obligation was made. So we cannot affirm as a universal proposition that a *reddendo* cannot increase. But in the present case it is absurd to say that the increase of expense consequent upon the increase of traffic is not to be taken into consideration.

As to the Inferior Court actions, I agree with your Lordship that the sooner they are out of Court the better, and it is a sufficient reason that they are now at an end, and should be dismissed.

Lord Ardmillan—I concur with your Lordship in the chair that the Caledonian Company is entitled to absolvitor.

Then, as regards the obligation of Lord Kinnoull, it is so clear on the whole defence, and so set into the titles of the estate, that it cannot be held to be extinguished. But the way in which the pursuers propose to enforce it is quite inconsistent with the original obligation, and also inconsistent with the proper keeping up of the roads. To enforce the obligation in its terms would be to destroy the roads, and to enforce it not in its terms would be unfair to Lord Kinnoull. So the only way is that proposed by your Lordship in the chair, viz., to convert the obligation into a money equivalent.

Lord Kinloch—I agree with your Lordship in the chair as to the proper mode of dealing with the appeal from the Sheriff-court. There is thus left before us only the process of declarator.

I have no doubt whatever as to the title to sue in this case, to which an objection has been taken. The Magistrates of Perth are seeking enforcement of a contract entered into by their predecessors with the predecessor of Lord Kinnoull. That the thing sought to be enforced is not a money payment, but repair of certain roads, seems to me to make no difference. It is not the less the stipulation of the contract, sued on by one of the contracting parties. Even if the party interested in the roads had not been the inhabitants of Perth, but some third party, the Magistrates would still have a legal title to sue on what is their own contract. It only makes the case clearer when it is the inhabitants of Perth in whose interest the Magistrates of Perth are pursuing.

I consider it equally clear that the obligation to repair the roads contained in the original contract of 1459 was a valid and effectual obligation *ad factum præstandum*, enforceable at that time by actual and literal implement. There may be some difficulty as to the precise extent of the obligation. It seems tolerably clear that, as to two of the causeways, the Cow Causeway and St Leonard's Causeway, the obligation was only to maintain the roads for the passage of men and horses. I have more difficulty as to the Long Causeway, as to which there is some indication of its breadth being such as to provide for the passage of carts. But to whatever extent the obligation went, it was an obligation enforceable by actual fulfilment, both at the time and, I do not doubt, for long afterwards.

But the question is raised before us, whether actual fulfilment can now be insisted in to the effect of Lord Kinnoull being compelled to repair the roads in their existing condition, and for their existing purposes. I am of opinion that no such obligation lies on Lord Kinnoull. I consider the obligation in the contract to be incapable of being stretched so as to compel Lord Kinnoull to repair the roads as they now exist. Circumstances have so changed that an obligation to do this would, in my apprehension, be an obligation altogether different from that in the contract, and much more stringent and severe. The scanty traffic, chiefly, if not entirely, carried on by men and horses, in the year 1459, presents no image of the traffic carried on now by those passing to and from a large and thriving burgh, or communicating with a whole net-work of railways. I do not mean to say that the obligation was not compatible with a certain increase of traffic, making the slow and deliberate progress appropriate to the fifteenth century. But the present is not the increase appropriate to the time of the contract, and capable of being then fairly contemplated. The traffic now is essentially a different thing from that existing, or any which could be anticipated at the date of the contract; and to enforce on Lord Kinnoull the duty of making provision for such traffic would not be to enforce the obligation of the contract, but one wholly different.

There are other circumstances of change which cannot be left out of view. For more than half a century back there have been public boards entrusted with the entire maintenance and repair of the roads or streets within the burgh of Perth. It is no doubt open to be said that this general authority is not inconsistent with certain portions of these streets being repaired by Lord Kinnoull. But I think it cannot be held to have been intended by the statutes that any exception should be made from the generality of the obligation laid upon the statutory boards. It never could be intended that the streets generally should be repaired by the statutory board according to their own judgment and discretion, but that little bits of these streets should be repaired in some different way, and on some different design, by some one else. And if it be said that all must be done on one uniform plan, authorised by the statutory board (which is the only reasonable assumption), there at once arises the difficulty that Lord Kinnoull's obligation to repair under the contract 1459 was not one to be fulfilled at the dictate, or according to the plans, of any public board. He was entitled to repair at his own hand, according to the reasonable construction of an agreement of that date, which, whatever it may be held to be, is something wholly different from the modern plans of these statutory boards. The repairs of the causeways mentioned in the deed of 1459 were, according to the very words of the contract, to be made "with stane and sand." How can this be made to enforce an obligation to pave and macadamise the streets according to the mode statutorily in use?

Another considerable change has arisen from the operation of certain railway companies, in diverting the roads in question, and substituting for certain portions of these, roads running in different lines, and of much greater length. Here, also, it may be said that the obligation may be judicially limited to what properly may belong to a road of the original line and length. But this again is an unsatisfactory view, and practically would be very difficult to carry out. It would not be an actual repair of existing roads, but a calculated repair of hypothetical roads, which is something very different from what was contemplated by the contract of 1459. A much more reasonable inference is to hold that these changes import (with the other circumstances) an impracticability of enforcing against Lord Kinnoull an obligation to repair the roads in their presently existing condition. Combining the whole circumstances together, I have come to the conclusion that such an obligation cannot be held to lie against Lord Kinnoull under the contract 1459.

It does not necessarily follow that Lord Kinnoull is to be absolved from all obligation under the contract 1459. This would be simply to give him the property without his paying any part of the price. The whole extent of what is proposed is, to absolve him from literal fulfilment in the altered circumstances. But he still must fulfil his obligation in the most approximate mode known to the law. What he is fairly bound to is to pay a pecuniary commutation proportioned to the true obli-

gation. There are many analogies in the law favourable to such a charge. It may be a matter of nicety to fix the precise sum of commutation, or to find *media* for declaring it in the present action. But on those points I desire to hear parties.

In regard to the Caledonian Railway Co., also called as defenders, I think they are entitled to get free of the action so far as directed against them. It is clear that, after forming and making over the substitute roads required by their operations, they are not liable in any part of the maintenance of these roads. They thereby restore matters, constructively, to their original position, and are no further liable. They are liable under the statutes for the maintenance of "the bridges and immediate approaches;" but this obligation they admit, and express their willingness to fulfil. In so far as there may arise any controversy as to the precise extent of road covered by the phrase "immediate approach," or as to the apportionment of liability between the Caledonian Co. and some other railway company or individual, the present action is not suited for the determination of such a controversy. The proposed disposal of the action will leave all such questions open.

Agents for Pursuers—Hill, Reid, & Drummond, W.S.

Agents for Earl of Kinnoull—Mackenzie & Kermack, W.S.

Agents for Caledonian Railway—Hope & Mackay, W.S.

Friday, June 28.

GREENOCK AND WEMYSS BAY RAILWAY CO. *v.* CALEDONIAN RAILWAY CO.

Railway—Administration—Tolls and Rates—Joint Committee.

Held (in accordance with judgment of 8th July 1871, in a question between the same parties) that it was for the Caledonian Railway Co., in the first instance, to fix the tolls and rates to be charged on through traffic from Glasgow and Paisley to the station of Upper Greenock, on the Wemyss Bay line, and that the joint committee of the two Companies have only power to decide what portion of the gross fare is to be allocated to the Wemyss Bay Co. in respect of the portion of their line traversed.

This was an appeal from the Sheriff-court of Lanarkshire at Glasgow.

The connection between the two Railway Companies will be found more fully explained in vol. viii, p. 634. It is sufficient to say that, in accordance with an agreement sanctioned by Act of Parliament, the traffic on the Wemyss Bay Railway, including the fixing of the rates to be charged in respect of the said traffic, is managed by a joint committee of six persons—three named by the directors of the Caledonian Co., and three by those of the Wemyss Bay Co. The Wemyss Bay Railway commences at a point on the Caledonian Railway about half-a-mile west of Port-Glasgow, and runs to Wemyss Bay. There is no station at the point of junction. The first station on the Wemyss Bay line after leaving the Caledonian line is at Upper Greenock, about two miles from the junction. There are also two other stations at Greenock, belonging to the Caledonian Railway Co. and the Glasgow and South-Western Railway Co.

Previous to April 1871, the fares charged by the different railway companies from Glasgow and Paisley to Greenock were, for third-class passengers, 6d. single, and 1s. return—a fixed sum being apportioned out of the gross fare by the joint committee to the Wemyss Bay Co. for each passenger booked to Upper Greenock, in respect of the part of their line traversed. On the 13th March 1871 Mr Ward, general superintendent of the Caledonian Railway Co., wrote to Mr Keyden, secretary to the Wemyss Bay Co., announcing that the Glasgow and South-Western and Caledonian Companies had resolved to alter the fares, on and after 1st April, between Glasgow and Paisley and Greenock; and, in particular, to raise the third-class fares to 9d. single, and 1s. 6d. return.

The Wemyss Bay Co. refused to consent to an alteration of the third-class fares to Upper Greenock; and presented a petition to the Sheriff for interdict against the Caledonian Railway Co. "from issuing and circulating, or causing to be issued and circulated, bills, time-tables, or other notices or advertisements denoting the said increased rates of ninepence and one shilling and sixpence for third-class passenger traffic between Glasgow and Paisley and Upper Greenock, and from exacting from the public the said increased rates, aye and until the matter of the said rates shall have been submitted to and fixed by the said joint committee, or, in the event of their differing in opinion, been settled by arbitration."

On 14th July the Sheriff-Substitute (GALBRAITH) dismissed the action, holding that the question was ruled by the decision of the Court of Session, pronounced July 8, 1871 (vol. viii, p. 634), in a question between the same parties, by which it was determined that the powers of the joint committee were limited to the regulation of the rates and fares to be charged on the Wemyss Bay Railway, and did not extend to the regulation of through fares from Glasgow to stations on the Wemyss Bay line.

The Sheriff (BELL), on appeal, recalled, and granted interdict as craved, holding that the present question was not decided by the judgment of the Court of Session.

The Caledonian Railway Co. appealed.

WATSON and JOHNSTONE for them.

SOLICITOR-GENERAL and BALFOUR in reply.

At advising—

LORD PRESIDENT—This case bears a striking resemblance to the one which we decided last year The prayer of the petition is—(*reads prayer of petition*). To grant this prayer would be to reverse our decision of last July. We held that the joint committee have nothing to do with fixing the rates from Glasgow. It follows of necessity that the Caledonian Railway Co. must fix, in the first instance, the gross rates to be charged from Glasgow and Paisley to Upper Greenock; but it is necessary to reconcile with that the action given to the joint committee by the agreement (Article 11) to regulate the fares on the Wemyss Bay line. The only way of reconciling the rights and interests of the parties is that the joint committee shall settle what part of the gross fare is to go to the Wemyss Bay Co., and that is what has hitherto been done. It is plain that the prayer of the petition cannot be granted. That would be sufficient for extricating the present question. The point at issue between the Companies is very distinctly stated in Article 11 of the