The Lord Ordinary (RUTHERFURD CLARK) found and declared in terms of the declaratory conclusions of the summons.

He added this note—"The first question is, whether the clause of the contract of marriage quoted in the fifth condescendence imposed any obligation on the truster, Mr Johnson. It was urged, that as he was not bound to make any further provision for his daughter, he might settle as he chose the condition of his own gift, or, in other words, that he could not put himself under any obligation with respect to the execution of a voluntary act. But in the opinion of the Lord Ordinary this view is not well founded. The truster was not bound to make any further provision on his daughter; but if he chose to do so he had very expressly bound himself to settle it in a particular way. There is nothing, it is thought, to prevent such an obligation from having legal force.

"The pursuer's interest in suing this action is to secure the life interest of the additional provisions which were settled by the truster on his daughter and her issue. It was maintained that the clause in question was to be construed as in favour of the daughter and her issue only, and that the pursuer could claim no benefit by it. The Lord Ordinary cannot accede to this view. He thinks that it must be held that the pursuer was stipulating for his own benefit as well as for that of his wife and children, and that inasmuch as he has a liferent interest in the provision settled by the marriage-contract he is entitled in like manner to a liferent interest in the additional provision contained in the trust-deed."

This judgment was acquiesced in by the parties.

Counsel for Pursuer—D.F. Kinnear, Q.C.—Burnet. Agents—Adam & Sang, W.S.

Counsel for Trustees—Asher—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for Tutor *ad litem*—Wallace. Agent—A. Forrester, W.S.

Friday, March 18.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

PATERSON *v.* M'EWAN AND OTHERS.

(Before Seven Judges.)

Feu-Contract—Implied Obligation—Right-of-Way—Conditional Obligation.

A feuar became bound under his feu-contract to make and maintain the continuation of a proposed road, so far as fronting his feu, as soon as a road should be opened up through an adjoining estate in connection with the proposed road. The feuar subsequently acquired by purchase a narrow strip on the adjoining estate, which crossed the line of the proposed road and ultimately came to be the only barrier in way of completing it. *Held* that his contract with the superior did not imply any obligation to give a passage through the strip for the purpose of forming the proposed road, even although the strip was acquired in the knowledge that it might sometime come to block the proposed road, and was of no value to the feuar except for that purpose.

In November 1863 the pursuer, who was then sole proprietor of the lands of Dowanhill, feued to the defender M'Ewan a plot of ground, part of said lands, described in the feu-contract as situated on the south side of an intended continuation of Victoria Circus Road, to measure 40 feet in breadth, and bounded on the north by the central line of the intended continuation of Victoria Circus Road, and on the east by the lands of Kelvinside. At the date when the feu-contract was entered into, the pursuer was not proprietor of any part of the lands of Kelvinside, but he had for some time been in communication with the proprietors of Kelvinside—Messrs Montgomery and Fleming—with a view to arranging for the continuation of Victoria Circus Road through Kelvinside and on to the Great Western Road. The proprietors of Kelvinside were, however, unwilling to accede to the pursuer's desire for a junction of the systems of roads upon the two estates, and the defender was accordingly authorised by the feu-contract to include within his pleasure grounds the half of the 40 feet of the breadth of the intended road until the ground so included was required for the formation and continuation of the road. But the deed provided "that the said James M'Ewan and his foresaids shall be bound and obliged, if required by the said first party, so soon as a road shall be opened up and completed through the lands of Kelvinside to the Great Western Road in connection with the said road or street called Victoria Circus Road, to open up, make, and continue one-half of Victoria Circus Road so far as the said road bounds the said plot or area of ground above disponed on the north, and to maintain the same in good order in all time thereafter for mutual communication between the lands of Kelvinside and the first party's lands of Dowanhill."

In September 1864 the defender purchased from Montgomery & Fleming, at the price of £142, a strip of ground about 4½ feet wide, part of the lands of Kelvinside, running along the boundary of the estate of Dowanhill, and across the intended continuation of the Victoria Circus Road to the Great Western Road. This strip was about 590 feet in length, and was conveyed to the defender by Montgomery & Fleming free from obligations of any kind relative to the formation of roads. In 1873 the pursuer acquired a considerable portion of the estate of Kelvinside, and at the same time came under obligation to the proprietors of an adjoining portion of Kelvinside to open up and form a continuation of a road then projected across the lands of Kelvinside through the strip of land in question belonging to James M'Ewan to join Victoria Circus Road. Shortly afterwards the projected road was formed up to the defender's strip, and the pursuer then called upon the defender to form the continuation of Victoria Circus Road through his (the defender's) land, in terms of the feu-contract, and to allow the road to be formed across the strip of ground, upon payment of compensation for the right of passage. This the defender refused to do, and so matters remained till 31st December 1879, when the trustees of the

Belhaven United Presbyterian Church, who had come to be in right of the obligation undertaken by the pursuer above referred to, raised an action against the pursuer concluding that he "should be decerned and ordained to open up and continue the said Victoria Circus Road through the strip of ground belonging to the defender James M'Ewan, so as to join the said road with the Horslethill Road, which runs to the Great Western Road, and failing his doing so, to make payment to said trustees of £1000 of damages."

The pursuer then raised the present action against M'Ewan to have it declared that he was bound (1) to open-up, make, and continue one-half of Victoria Circus Road of 40 feet in breadth so far as that road bounds his plot of ground; and (2) to permit the pursuer to open-up, make, and continue that road through the strip of ground 4½ feet wide above referred to, acquired by the defender from Montgomery & Fleming, upon payment of such compensation, if any, for said permission, as should be fixed by the Court.

The pursuer averred (Cond. 6) that the defender's purchase of the strip in question was "in fraud of the contract entered into between the pursuer and the said James M'Ewan, and without the knowledge of the pursuer, and it was made for the sole purpose of enabling Mr M'Ewan to attempt to prevent the road contemplated in the said feu-contract being made, and to evade his obligations to give ground for and to make, so far as passing through the ground feued to him by the pursuer, one-half of the said road. The strip of ground purchased has not been since its purchase, and cannot be, of any other use to the defender Mr M'Ewan or the other defenders."

The defender denied this, and narrated the circumstances in which the purchase was made, which were shortly as follows:—At the date when the defender agreed to feu the plot of ground in question, there stood near the boundary line between Dowanhill and Kelvinside a new stone wall, and in making his offer to feu the defender and his agents were under the impression that this wall formed the eastern boundary of Dowanhill. Accordingly, in the letter containing the defender's offer to feu, the plot of ground was described as bounded "on the east by the wall erected on the lands of Kelvinside." The pursuer accepted this offer without noticing the misapprehension under which the defender lay. On the faith of the contract so concluded the defender proceeded to lay out his ground, and to remove an old dyke and hedge which stood on the west side and within a few feet of the wall. Before the removal was quite effected, however, the defender learned that the old dyke and not the wall was the mutual boundary between Dowanhill and Kelvinside, and that there was thus a strip of ground (that to which the present action related) between the wall and the old dyke. The latter the Kelvinside proprietors called upon the defender to rebuild, and in order to avoid the necessity of doing so the defender entered into negotiations for the purchase of the strip, so far as adjoining his feu, from the proprietors of Kelvinside. They refused to sell so small a portion, however, but expressed their willingness to depart from their claim to have the old dyke rebuilt on condition that the strip of ground, the area of which extended to about 1000 square yards, should be purchased from them. The defender thereupon requested the pursuer, through a mutual friend (Mr Alexander), to purchase the whole of the strip lying to the north of the south side of Victoria Circus Road, the defender purchasing that portion of the strip which immediately adjoined his own feu. The pursuer refused to do this, and ultimately the defender, after a lengthened negotiation with the proprietors of Kelvinside, succeeded in purchasing a portion of the strip extending about 590 feet northwards from the southern boundary of his feu, and having an area about 386 square yards. This was the smallest portion of ground which he could succeed in inducing the proprietors of Kelvinside to part with. The defender further averred that he, "without admitting any legal obligation on him to do so, is ready and willing, and has never refused, to open, make, and continue one-half of Victoria Circus Road, so far as the road bounds on the north the plot or area of ground disponed by said feu-contract. As regards the portion of Kelvinside acquired by the defender as aforesaid, the titles thereto do not contain any restriction or obligation on them as regards the formation of any road, and he has refused to recognise any right on the part of the pursuer to compel him to make or permit to be made any such road, although he is, as he all along has been, ready and willing to negotiate for the formation of a road on such reasonable terms as may be mutually agreed on."

The pursuer pleaded—"(2) The event having happened, or following to be held as having happened, on which the defender M'Ewan undertook to make and continue the road in question, the pursuer is entitled to decree as craved. (3) The defender M'Ewan not being entitled to defeat without just cause the foresaid obligation undertaken by him, or to prevent said road from being opened up, made, and continued from the Victoria Circus Road to the Great Western Road, by any act of his, and the only obstacle to the said road being opened up, made, and continued being the unreasonable and unjustifiable refusal of the defender to continue said road through said strip, the pursuer is entitled to decree as craved."

The defender pleaded that the pursuer's averments were irrelevant, and that he was under no legal obligation to comply with the pursuer's demands.

The Lord Ordinary allowed a proof, in the course of which the defender, who was examined, admitted that when he bought the strip of ground he knew that it crossed the line of the contemplated road, and that the acquisition of the strip made him master of the road. He further admitted that he could not say the strip had any commercial value apart from the power it gave him of blocking the road.

The Lord Ordinary dismissed the action with expenses, and appended to his interlocutor the following note:—[*After narrating the history of th case as given above*]—"The main ground of action is, that the defender acquired the strip of ground in question fraudulently and without the knowledge of the pursuer, and for the purpose of defeating or evading his obligation to form the continuation of Victoria Circus Road, and that

he is not now entitled to take advantage of his own fraud.

"The defender expresses his willingness to allow the communication to be made upon reasonable terms, but he disputes the right of the pursuer to compel him to sell any portion of the ground against his will.

"Now, it must be borne in mind that the obligation on the defender to form the road on his Dowanhill feu was conditional on a road being opened to the Dowanhill march by the proprietors of Kelvinside. But the purification of that condition depended entirely upon the will of the proprietors of Kelvinside for the time. They might never have made the road, and it is certain neither the pursuer nor the defender could compel them to do so, and until such road was made on Kelvinside the defender's obligation could not take effect. But if so, are the rights of parties altered by the fact that the defender is now proprietor of that part of Kelvinside which immediately adjoins Dowanhill? I apprehend that, *prima facie*, the defender is under no obligation to allow a road to be formed through his ground into Dowanhill. If, instead of acquiring this isolated strip of Kelvinside by purchase, he had succeeded to it as heir, or if he had in any lawful way acquired the whole of Kelvinside estate, I think it is clear that the pursuer could not have for a moment maintained his present demand.

"The mere fact therefore that the defender has acquired the property of this strip of ground since he acquired his Dowanhill feu is not of itself sufficient to render his obligation operative. Something more is necessary, and accordingly, in order to make his action relevant, the pursuer alleges in his condescendence that this piece of ground was purchased 'in fraud of the contract between the pursuer and the said James M'Ewan without the knowledge of the pursuer; and it was made for the purpose of enabling Mr M'Ewan to attempt to prevent the road contemplated in the feu-contract being made, and to evade his obligations to give ground for, and to make, so far as passing through the ground feued to him by the pursuer, one-half of the said road.' Now, it was in consequence of that statement that a proof was allowed, and the question—and the only one—is, whether the pursuer has succeeded in his proof? I think he has failed. I am quite satisfied, on the evidence of the defender, of his agent Mr Macleod, and of Mr Alexander, taken in connection with the letters referred to in the proof, that the pursuer was, between August and December 1863, aware that the strip of ground might be had from Montgomery & Fleming on moderate terms; that the defender was not himself anxious of having the ground, unless perhaps the part immediately adjoining his own feu, but that he was desirous that the pursuer should purchase the whole; and that the pursuer might have purchased it when the defender did if he had been so inclined. Indeed, I think the evidence shows that the purchase was in a measure forced upon the defender, and that it was not made for the purpose of enabling him to evade his obligations in the feu-contract.

"The pursuer having thus failed to prove his allegations of fraud, the relevancy of the action falls, and the result is that the action must be dismissed, with expenses."

The pursuer reclaimed, and after hearing counsel on both sides the Court appointed the case to be argued before Seven Judges.

Argued for the pursuer—The defender was, in terms of this feu-contract, bound to open up and make Victoria Circus Road upon the completion of a road through Kelvinside to the Great Western Road in connection with Victoria Circus Road. The only thing which prevented the fulfilment of that condition was the existence of the 4½ feet wide strip purchased by the defender. Confessedly that strip is of no other use to the defender than simply to block the continuation of Victoria Circus Road towards Great Western Road. The defender's own act having thus prevented the fulfilment of the condition under which he was bound, that condition must be held as fulfilled against him, and he is therefore bound at once to make and continue Victoria Circus Road. But inasmuch as simply to do that without at the same time affording a passage through the strip would be nugatory, the defender was impliedly bound not to hold the ground so as to defeat his own obligation, and was therefore bound to sell to the pursuer, at a price to be fixed by the Court, so much of the strip as was necessary for the continuation of Victoria Circus Road.

Argued for the defender—The defender was under no obligation, either express or implied, to sell any portion of the strip. The doctrine of law relied on by the pursuer, that if a debtor bound under a certain condition impedes or prevents its fulfilment, it is held as fulfilled against him, has no application to the present case. To apply it would be to hold that, whatever extent of land he held, and howsoever acquired, whether by purchase or by succession, he must needs part with it at the call of the pursuer if it be necessary to form the continuation of Victoria Circus Road. The extent of the ground which blocked the way, or its value, made no difference in the defender's obligations regarding it. None of the cases cited on the other side support the extension of the doctrine here contended for.

Authorities—Domat. i. 1, 4, 18; Pothier on Obligations, 121-2; Stair, i. 3, 80; Erskine, iii. 3, 85; Bell's Prin. sec. 50; Addison on Contracts, 243; *Beswick* v. *Swindells*, 3 Ad. and El. 868; *ex parte M'Clure*, L.R. 5 Chan. Apps. 737; *Rhodes* v. *Forwood*, 1 Ap. Ca. 256; *M'Intyre* v. *Belcher*, 14 C.B. N.S. 654; *Stirling* v. *Maitland*, 5 B. and S. 840; *Hotham* v. *East India Company*, Langdell's Cases on the Law of Contract, 789; *Clarke* v. *Westrope*, 25 L.J. C.P. 287; *Hall* v. *Conder*, 26 L.J. C.P. 288; *Telegraph Despatch Co.*, L.R. 8 Chan. App. 658; *Pirie* v. *Pirie*, 11 Macph. 949; *Campbell* v. *Watt*, Hume's Decisions, 788; *Mackay* v. *Dick & Stevenson*, 7 R. 778.

At advising—

Lord President—In the year 1863, when the parties made the feu-contract which has given rise to the present question, the pursuer Mr Paterson was the proprietor of certain lands called Dowanhill, and immediately adjoining these lands, and lying between Dowanhill and the Great Western Road, there lay the lands of Kelvinside, belonging to Messrs Montgomery & Fleming. Both of these properties were in the immediate

neighbourhood of Glasgow, and were adapted and laid out for building purposes; and the pursuer, as the proprietor of Dowanhill, was very anxious to establish a connection by road between his lands and the Great Western Road through the adjoining lands of Kelvinside. But the proprietors of Kelvinside, on the other hand, were quite against any such communication being made, and positively refused to entertain any proposal to that effect. There seemed to be no prospect at all at that time of such a communication being made. But the pursuer, as proprietor of Dowanhill, did not altogether give up the expectation that such a communication might at some time be established, and therefore when he feued out to the defender M'Ewan the feu called Thorncliffe, which immediately adjoins the boundary between Dowanhill and Kelvinside, he inserted a condition in the feu-contract which provided for the possibility of such a communication being made hereafter. The subject itself is described as being "that part of the lands of Dowanhill situated on the south side of an intended continuation of Victoria Circus Road, to measure 40 feet in breadth, within the parish of Govan and shire of Lanark, containing so many poles, in which measurement both parties acquiesce; and it is described as bounded on the north by the central line of said intended continuation of Victoria Circus Road, along which it extends 108 feet 3 inches; on the west by the central line of a mutual wall"—which part of the description is immaterial; "and on the east by the lands of Kelvinside, along which it extends 263 feet 9 inches or thereby to the centre of the said intended continuation of Victoria Circus Road, following the bend and taken along a line at a mean distance from the west face of the old retaining wall or stone facing and the centre of the thorn hedge, as the said plot or area of ground is delineated on a plan or sketch thereof." Now, this Victoria Circus Road was intended to go up to the march between Dowanhill and Kelvinside, and in the event of a road being made through the lands of Kelvinside so as to join with the Great Western Road this south-west Victoria Circus Road would have been the part of the Dowanhill Road which would have immediately connected with that through Kelvinside. Accordingly, the feuar is taken bound, "if required by the said first party, so soon as a road shall be opened up and completed through the lands of Kelvinside to the Great Western Road, in connection with the said road or street called Victoria Circus Road, to open up, make, and continue one-half of Victoria Circus Road, so far as the said road bounds the said plot or area of ground above disponed on the north, and to maintain the same in good order in all time thereafter, for mutual communication between the lands of Kelvinside and the first party's lands of Dowanhill, and also to defray a rateable proportional part of the whole expenses of making, keeping up, and maintaining in good order in all time coming the drains or sewers formed or to be formed in said road."

The other clauses of the feu-contract appear to me to be immaterial in the question which we are now to determine. But this condition, or rather conditional obligation, which was imposed upon the feuar depended upon the fulfilment of a condition which was not within the power of either of the parties to the feu-contract. It was simply a casual condition, depending for its fulfilment upon an accident or upon the will of some third parties. As matters stood at that time, it was impossible that that condition could be fulfilled except with the consent of the proprietor of Kelvinside, and that consent was not at all likely to be obtained. It certainly could neither be fulfilled nor prevented by anything to be done by either the one party or the other to this feu-contract. The subject which Mr M'Ewan obtained possession of under this feu-contract was ground sufficient to build a villa upon, and he was entitled, in terms of his feu-contract, to occupy one-half of the width of Victoria Circus Road, as contemplated to be prolonged, in so far as it lay opposite to his grounds. Indeed, one-half of the *solum* of the road lay within the description of his feu, and therefore until he could be required to make that road he was entitled to occupy the *solum* of that part of the road as pleasure ground, which he accordingly did.

But there was another part of his feu—the eastern part—about which there was a misunderstanding. I do not think it is in the least degree of importance to inquire to whose fault that misunderstanding was attributable; but Mr M'Ewan was led to believe that his feu went up to a dry-stone wall on the east, which had been erected by Montgomery & Fleming, apparently with the purpose of showing their determination that there never should be any communication between the two properties of Dowanhill and Kelvinside. But they had built that wall 4½ feet within their own boundary, and the actual boundary between Dowanhill and Kelvinside was an old retaining wall and hedge, which lay 4½ feet west of the wall they built. Now, Mr M'Ewan, the defender, was under the impression that that drystone wall was his boundary, and he was proceeding to deal with the ground within that wall and to the west of it as part of his feu, but that was interrupted, and it then became a question how this matter should be settled, and consequently he became very desirous, very naturally, if he could, to obtain that 4½ feet in breadth within what he conceived to be the boundary of his own feu from Messrs Montgomery & Fleming. But Messrs Montgomery & Fleming were not willing to sell to him the part opposite to his own feu only, but would sell only the whole length of it as it is shown on the plan before us coloured green; and the strip of ground, as there shown, extends not merely along the east side of the defender's feu, but across the line of the intended road, and still further on to the north. In short, the portion opposite to Mr M'Ewan's feu is not much above one-third of the whole in length. Mr M'Ewan in the end bought the whole of that strip of ground between Montgomery & Fleming, and obtained a conveyance to it upon payment of the price of £142. It seems to be suggested—but I think there is no ground for the suggestion—that this property was acquired by Mr M'Ewan without the knowledge of the pursuer Mr Paterson, and that it was done with the intention of preventing the possibility of the fulfilment of that condition, viz., the making of the road through Kelvinside, or the junction of it with the Victoria Circus Road, which would have brought into operation the obligation that lay upon Mr M'Ewan under his feu-contract.

After full consideration I have come to be very clearly of opinion, in the first place, that Mr Paterson, the pursuer, might himself have acquired this ground, if he had chosen. It was not gone about in a hurry. He was made aware of it, and he had an opportunity of purchasing it if he had chosen; and I am just as clear, in the second place, that Mr M'Ewan did not acquire it for any sinister purpose—that his great object in buying it, to begin with, was to make his own feu complete up to the dry-stone wall, which bounded it on the east. I mention this circumstance, because I think it only fair to the defender to do so; but I am not by any means sure that even if the fact were otherwise it would at all affect the question of law which we have to decide.

Now, what has happened is this, that the pursuer has acquired as much of the estate of Kelvinside as would enable him to fulfil the condition under which Mr M'Ewan's obligation stands in the feu-contract,—that is to say, he is in a condition now to obtain a road through Kelvinside from the Great Western Road, down to the margin of the Dowanhill estate, but for the green stripe of ground which has in the meantime been acquired in property by the defender. But so long as that green stripe belongs to Mr M'Ewan, the defender Mr Paterson cannot make the road,—cannot make the junction between the road through Kelvinside and the Victoria Circus Road—unless he can compel the defender to consent to that road being made through the green stripe. This action is brought for the purpose of compelling that assent on the part of Mr M'Ewan, and the question comes to be, whether he is entitled to prevail in that demand?

It is contended that the case falls to be decided by the application of the well-known rule of law, that where a condition is prevented from being fulfilled by the party who is bound in the conditional obligation it shall be held as fulfilled, and the doctrine of potestative conditions has been largely dwelt upon in the argument. I am of opinion that that rule of law has no application to the present case. It is quite true that if a man has it in his power to perform conditions the fulfilment of which gives rise to a binding obligation against himself, then he is not entitled to refuse so to do; and still further, if he obstructs or prevents the condition from being fulfilled, the condition will be held in law as being fulfilled. But that relates only to the subject-matter of the contract in which the conditional obligation is contained, and I am not aware that the rule has ever been extended thus far, that whatever other rights or properties he may have the use of which might conduce to the fulfilment of the condition, he is bound in law to make that use of those independent rights and properties. And yet that seems in truth to be the contention of the pursuer here. It was put in argument against the pursuer—Supposing that the defender had acquired the entire estate of Kelvinside, whether by purchase or succession, would he have been obliged in that case to consent to the making of a road through that estate, so as to join the lands of Dowanhill to the Great Western Road?—and I do not think that the pursuer's counsel faced that question or gave it an affirmative answer. And yet unless that could be maintained, I cannot see how he can prevail in the present case. Surely the accident of a man's property being more or less will not make the rule more or less applicable. It is said that this is a very narrow stripe of land, and that the possession of the whole estate of Kelvinside would have been a very different matter. So it would, in point of fact, but is it a different matter in point of principle? Is a man bound, in order to enable a condition to be fulfilled, the fulfilment of which brings into operation a building obligation against himself—is he bound to give or sacrifice another property which he has acquired? I think that must be answered in the negative, whether the property be large or small. And therefore it appears to me that the doctrine which is founded upon is quite inapplicable to the present case.

But if it were otherwise, I do not think it would benefit the pursuer. What is the obligation that would be brought into operation by holding this condition as fulfilled? It is an obligation to form the part of the road which is represented by the yellow colour upon the plan. That is the whole obligation in the feu-contract. But suppose that were done to-morrow, it would not serve the pursuer's purpose unless he could also force his way through the green stripe. Holding a condition as purified or fulfilled is a very different thing from the condition being fulfilled or purified in point of fact, and in this case the condition cannot be fulfilled in point of fact without the green stripe being placed at the disposal of the pursuer; and therefore it always comes back to the same question—Is the pursuer entitled to deal with this green stripe as if it were his property instead of being the property of the defender, and is he entitled to compel the defender, the absolute and unqualified owner of that stripe of ground, to submit either to sell it to him or to have a servitude constituted over it in this way? I apprehend there is no doctrine of law that can possibly reach a case of this kind.

It is said, no doubt, in another view of the case, that there is an implied obligation in this feu-contract to do everything that is necessary to lead to the fulfilment of this contract—an obligation implied in this contract that whenever it comes to be within the power of the defender to further the fulfilment of this condition which is to lead to the conditional obligation being operative against himself, he is bound to do so. Now, I can only say that that is an implication of a very startling kind indeed. I do not doubt that a man may so contract as to bind himself to sell a property that he may afterwards acquire at a price to be fixed by arbitration. Such a thing is possible; but it would be a very anomalous contract, and I think it would require to be very clearly expressed in order to be binding. That such an obligation should be implied in any contract is to me a very novel idea. I know of no way in which a man can be bound beforehand to sell or submit to a servitude being created upon a property that he shall afterwards acquire, unless it shall be either by express contract or by force of an Act of Parliament; and as we have neither the one or the other in this case, I am very clearly of opinion that that argument on the part of the pursuer fails also.

I am therefore for adhering to the interlocutor of the Lord Ordinary.

Lord Justice-Clerk—I cannot say I have found much difficulty in coming to a conclusion on this case. And I should have been quite content to have left the grounds of judgment on the opinion that your Lordship has now delivered, and in all points of which I entirely concur. But as your Lordships of the First Division have asked for our assistance in the disposal of this case, it is only right I should shortly indicate the grounds upon which I concur.

There are only two points in the case on which I shall make any remarks. The first is as to a matter of fact that was discussed at the debate, viz., whether this stripe of ground in dispute was acquired for the purpose of evading the provision in the feu-contract which your Lordship has already referred to? The second is, whether the principle which prevails in regard to conditional contracts, where the party bound has himself prevented the fulfilment of the condition, and so entitled the other to hold that the condition is fulfilled, has any application to the present case? With regard to the first—the matter of fact—it is said that the motive which induced the purchase on the part of M'Ewan was to enable him to prevent the making of the road up to his original boundary, and so evade the fulfilment of his obligation. But I am quite satisfied that this is not the fact. M'Ewan made the purchase for the purpose of avoiding a lawsuit with the conterminous proprietors Messrs Montgomery & Fleming, and with no other object. The whole course of the correspondence makes this clear; and the fact, which cannot be disputed, that M'Ewan before his purchase was desirous that the pursuer should purchase the ground, and asked Mr Alexander, a mutual friend and a neighbouring feuar, to ascertain the pursuer's views, is conclusive on this subject. The pursuer, no doubt, denies that Mr Alexander ever made the proposal to him, but that is of no consequence in this case. The only matter of any importance is that M'Ewan made the proposal to Alexander, which is entirely inconsistent with the idea that his object in making the purchase was to avoid the obligation of the road.

I do not, however, think that M'Ewan was induced to give the price he did for this otherwise useless stripe of 4½ feet by the knowledge that it would enable him to part with it substantially on his own terms. Before the main road could be made—if it ever was made—the pursuer or anyone else would have to buy out M'Ewan, as he would have had to buy out Montgomery & Fleming. There could be no reason why the pursuer should obtain his way-leave from M'Ewan more cheaply than he could have got it from Montgomery & Fleming. He was not injured by the transaction in any way whatever, and had no concern with it. So stood matters in 1864, and so they have continued for nearly ten years, during which the pursuer had no right to the ground over which the projected road had been intended to be made, and no steps have been taken towards its construction. During this interval M'Ewan was the unrestricted owner of the stripe. He might have sold it or built over it as he pleased. In 1874 the pursuer at last bought up the proprietary interests in the ground of Montgomery & Fleming by a series of conveyances the details of which are immaterial. He has made the road to the margin of the stripe, and he now contends that he is entitled to a way-leave over this property without payment. I am of opinion that there is no foundation whatever for that claim.

In the second place, in regard to the principle of law contended for, it was attempted at the debate to bring this case within the well-known category expressed by the 161st *regula juris*, on which the civil law and our own law on this subject is founded. The whole of this important branch of our jurisprudence was fully considered in the case of *Pirie*, 11 Macph. 941. I do not propose to enter upon any general discussion of it now, because I am of opinion with your Lordship that it can have no application here. But some distinctions must be attended to. The rule in question only applies to conditions which qualify contracts which are capable of being specifically performed independently of the condition. I may say that the application of it to contracts is a stricter and less favourable case than the application of it to legacies. But when a case relates to a subject-matter the existence of which depends on an uncertain or future contingency or event, then if the contingency or event never happens, the only result is that there is no obligation. It is plain that in such a case there is no room for holding a condition as fulfilled, because unless the contingency or event happens, the contract becomes incapable of the only meaning the parties intended. And as your Lordship has already shown, no better illustration of the truth of what I am saying could be got than the attempt to apply the rule to the condition here. The rule is that the condition shall be held as fulfilled—but what better will the pursuer be of that? Can he compel the defender to make the bit of road through his feu and unite it to nothing? The fallacy is, that the only thing the parties were bargaining about was the continuation of the road made up to the boundary of M'Ewan's feu, and nothing else. And therefore it is plain that until the road was physically made up to the boundary of M'Ewan's feu there was no obligation. For instance, if a man undertakes to give a right of access through his ground to a projected railway station, if the station is never made there is no contract. If a contractor undertakes to do the plaster-work of a house when the mason-work is finished—if the mason-work is not finished his contract never exists. And so here it was not truly a condition of the contract. It was what might be called a *causa sine qua non*, without which the subject-matter of the contract never could exist. I am therefore inclined to think that this is a condition annexed to an obligation otherwise complete—a something outside the contract altogether—and an event without the occurrence of which neither party was under any obligation or responsibility, and which was left to take place or not as the proprietor of the ground for the time might see fit. Nor will it escape observation that while on the one hand the contract gives no right to the pursuer to perform any act on the ground of the other, on the other hand, if his present demand succeeds he would have everything which his contract provides for him in the most favourable event, and in addition a right-of-way through land which was not within the contract, which does not belong to him, and for which he gave no consideration.

But secondly, this rule or brocard of the civil law has no application to cases in which the act done is an incident of other transactions, and done in the exercise of a separate and independent right. This was laid down in the case of *Pirie*, and is the teaching of the civil law and all the authorities referred to in that case. I refer to the passages in Pothier's work on obligations with regard to the case of *Pirie*. This is in the line of common sense, for it is too plain to require illustration that if in 1863 M'Ewan had bought all the intervening ground between his feu and the Great Western Road, he might have made the road or not as he pleased, and the pursuer could not have interfered with any use to which the property was turned. I think the plea of the pursuer is a misapplication of a very sound and important principle of law to a state of facts lying entirely outside of it. It seems to fall within another and a much more simple category. The pursuer wishes to have the use of the defender's land without paying for it, although he can show neither title nor contract to support his pretensions. If he wishes it, he must acquire it, in my opinion, as M'Ewan did, by paying for it.

Lord Deas—This action bears to be founded upon the clauses of a feu-contract entered into between Mr Paterson and Mr M'Ewan, dated 30th November and 1st December 1863, and registered on 3d December in the same year. I will shortly notice the clauses which are chiefly founded on. [*After referring to the clauses quoted above, his Lordship proceeded*:—]

Now, it will be observed that this contemplated junction of the two roads so as to make a continuous passage between Dowanhill and the Great Western Road could not be effected without the consent of the proprietors of Kelvinside—then Messrs Montgomery & Fleming—whose boundary with Dowanhill included what is now called the green stripe, or at least that part of it which Mr M'Ewan acquired. It will further be observed that by the clauses in this feu-contract now relied upon by Mr Paterson, neither he nor Mr M'Ewan are expressly taken bound to acquire from the proprietor of Kelvinside the necessary ground or the necessary consent for carrying the Victoria Circus Road through Kelvinside so as to join the Great Western Road. Mr M'Ewan could not be said to be bound by the clauses of his contract to do it, for he is not bound to do anything till the road had been opened up and completed through Kelvinside in connection with the Victoria Circus Road, and his obligation then was conditional on Mr Paterson requiring him to implement that obligation. His obligation was "to open up, make, and continue one-half of Victoria Circus Road, so far as the said road bounds the said plot or area of ground above disponed on the north, and to maintain the same in good order in all time thereafter for mutual communication between the lands of Kelvinside and the first party's lands of Dowanhill." It is difficult to find in this anything beyond an obligation on the part of M'Ewan to be at the expense of making and maintaining a specified portion of road when Mr Paterson should find himself in a situation to require this to be done, and then only is Mr Paterson to require him to do it. This leads me very strongly to the result that if Mr Paterson meant to enforce against Mr M'Ewan his obligation to pay the expense of forming and maintaining the specified portion of the road, it was incumbent on him (Paterson), as a condition precedent, to find the means of making that condition prestant by transacting with those without whose consent that portion of the road could not be made at all. Now, though the obligation was on Paterson, and not on M'Ewan, to find the ground on which the continuation of the Victoria Circus Road was to be formed, if M'Ewan without the knowledge of Paterson, or while Paterson had as yet no opportunity of acquiring the stripe, had purchased it himself, and then pleaded the existence of that stripe of property in bar of his obligation to make or be at the expense of one-half the road across his ground, I should have held this an unjustifiable proceeding and plea on his part, although even then it would have been very difficult to see that specific implement was the fullest and appropriate remedy. Certainly the rule was well illustrated and correctly applied by the Lord Justice-Clerk, that where a party under a conditional obligation is himself the cause of the condition not being accomplished, it shall be held as if it were accomplished, but that rule could not be so applied as to solve the present case.

Well, the mutual obligation of the parties stood in this position under the terms of the feu-contract—M'Ewan being bound to make one-half the breadth of the extension of the Victoria Circus Road for a certain distance, or, in other words, to be at the expense of doing so,—and it so happened that the property of the *solum* of this stripe of ground which now forms the bone of contention between the parties came to be sold. If in this state of matters M'Ewan, without the knowledge of Paterson, or without his having the ability to interfere, had purchased the property of the green stripe, and that against his obligation to make a portion of the road, I should certainly have thought that this was not according to good faith, although even then there might have been a legal difficulty as to the principle on which it was competent for Paterson to claim redress. But the decision in the case of *Pirie*, and the citation of authorities as to conditional obligations given in the voluminous opinion in that case by the Lord Justice-Clerk, and rightly applied to the circumstances that occurred there, would certainly not suffice to solve the present case, unless the circumstances under which M'Ewan purchased the green stripe were those which I have just supposed. In *Pirie's* case the rule applied was that if he who is under a conditional obligation himself renders the accomplishment of the condition impracticable the condition shall be held as fulfilled. But the soundness of this rule can carry us no length at all in solving this case. I shall not follow out the supposed case of a purchase of the ground in bad faith any further, because it cannot be said to occur in the present case. The case which actually occurred is, that when the *solum* of the stripe came into the market, although no offer of it was made to Paterson, he was made quite aware that it was for sale, and it was not till after Paterson had expressed his intention not to become the purchaser that M'Ewan came forward and made an offer, which the seller, after a correspondence on the subject, accepted. Cir-

cumstances known to your Lordship in the chair prevented me from reading the somewhat voluminous papers in this case till after Mr Asher had concluded his very able argument for Mr Paterson, which had been briefly replied to by the Dean of Faculty, who had more encouragement than Mr Asher had to be brief. I have now, however, read the whole of these papers, and particularly the parole evidence bearing upon the point to which I have just alluded, viz., the knowledge of Paterson that the stripe in question was for sale. Paterson does not admit that he even knew that the stripe of ground in question was in the market, or that M'Ewan might immediately purchase it if he did not. So far there is an apparent conflict between his evidence and the evidence of some of the other witnesses. But I am satisfied it is a conflict of memory rather than a conflict of testimony. I see no reason to think that Mr Paterson stated other than what he believed to have occurred. But we have a want of recollection to an extent which ought to satisfy himself that his defective memory ought not to be put against the distinct recollection of other and impartial witnesses, such as Mr Alexander, who evidently is as favourable to Mr Paterson as he is to Mr M'Ewan, and who, in a letter of 11th November 1863, gave the import of a conversation he had had with Mr Paterson the day before, to the effect that Mr Paterson would decline to purchase the *solum* of the stripe if it were offered to him. At the date of that letter the contract with M'Ewan had not been executed, but its terms had been finally adjusted, and it was signed by M'Ewan two days thereafter. Now, I cannot say I am satisfied that one of the objects or prospective objects of acquiring this stripe of ground had relation to the obstruction it might make to this road.

But even though the preventing of the continuation of the road had something to do with the purchase, I do not see that that will entitle the pursuer to succeed in this action. It was for the pursuer to find the means of continuing that road, and without that it is plain that M'Ewan could not be called upon to fulfil the obligation of making his portion of the road. And even if there had been more to the same purpose, I do not see that that in point of law would enable the pursuer, whose obligation, as I read it, was all along to find the ground, to succeed. If he let that ground slip through his fingers, I do not see that that gives him any right now to the specific kind of relief that is concluded for in this action. It was Paterson's duty to acquire the ground for the making of the road, and he could not have understood that it was to be got for nothing. And then M'Ewan comes forward and purchases it. Whatever may be said about it, it is exceedingly unreasonable to suppose that he would allow this road to be made at the rate of the £142 which he paid for the ground. You cannot give any power to compel the defender to part with it except upon his own terms. It is admitted on all hands that if the pursuer wants this stripe of ground he must pay for it—either the price of the land or compensation for a servitude over it. But how are we to fix the sum that is to be paid either as the price of the land or the price of a servitude? There is no arbitration practicable. I am not aware that we have any power to compel the parties to go into an arbitration in order to fix this price. In short, I cannot see any power that we have, upon any principle or practice in our law, to fix a price for this ground or servitude, or compel the parties to agree to it. That appears to me to be an obstacle to the success of this action.

Without saying more about the matter, I am of opinion that in point of law we have no power to decern in terms of the conclusions of the summons.

Lord Mure—On the question of fact raised in this case I have had no difficulty in coming to the conclusion at which the Lord Ordinary has arrived, viz., that the pursuer has entirely failed to prove the allegation of fraudulent acquisition of the ground in question on the part of the defender, upon which the pursuer's case as laid appears to me mainly to rely. The allegation is very distinct as put in the condescendence, and it appears to me that there is not only no proof of this allegation, but that it is, on the other hand, very clearly proved — (1) That the defender was obliged to buy the ground in question in 1863 in order to avoid a law-suit with the proprietors of Kelvinside, into which he was likely to be led through the mistake of the pursuer in giving a wrong description of the boundary of the defender's feu in the disposition of the property; and (2) that the pursuer might at that time have himself acquired the ground in question, but declined to do so, and that it was only after the pursuer had so declined to acquire the ground that it was purchased by the defender. That, I think, is clear upon the evidence of Mr Alexander and Mr Macleod, and the correspondence which passed between the parties at the time—particularly Mr Alexander's letter of 11th November 1863, in which he narrates in writing, to the agent for the defender, the import of a conversation he had had with the pursuer on the previous day, in which the pursuer positively declined to acquire that property, and he depones to that in his evidence.

The ground therefore having been fairly acquired in open market, and absolutely necessary for the defender in the position in which he had been placed through the act of the pursuer relative to the misdescription of the boundary, the question of law arises, Whether the defender is bound to give up the use of that ground to the pursuer to enable him to open up the road through Kelvinside to the boundary of the Dowanhill ground. On that question I entirely concur in the result at which the Lord Ordinary and your Lordship have arrived, and substantially on the same grounds. I think the doctrine of law upon which the pursuer relies has no application to the circumstances of the present case. It was next to stated at the discussion that that doctrine would have had no application if the whole property of Kelvinside had been acquired by the defender either by succession or by purchase, and I am of opinion with the Lord Ordinary that it would not, and that being so, I can see no grounds of law upon which the pursuer can maintain that it can apply to the stripe of ground in question. It appears to me to come to this, that by the arrangement between the pursuer and defender about the opening up of the road in a certain event the ground in

question is said to have been made subject to a servitude of road, in the option of the pursuer, of which there is no mention in the titles, and to which it would not have been subject in the hands of any other party. I think there is nothing to lead to such a conclusion in law, and I cannot hold that the defender was in the circumstances of the case debarred from purchasing that property except under an obligation to make it subject to a servitude of having a road made through it, in a question with the pursuer, when it suited the convenience of the pursuer, to have that done. I see no foundation for such a claim on the part of the pursuer, and accordingly I concur in thinking that the interlocutor of the Lord Ordinary should be adhered to.

Lord Shand—The defender Mr M'Ewan by the feu-contract of 1863 bound himself to open up and make and maintain one-half of the public road through the ground of his feu, if required to do so by the pursuer, so soon as a road should be opened up and completed through the lands of Kelvinside to the Great Western Road in connection with the Victoria Circus Road on the pursuer's lands of Dowanhill. It may be assumed—and it is no doubt the fact—that the defender obtained his feu at a rate of feu-duty considerably lower than he would otherwise have paid if he had undertaken no such obligation—for the performance of the obligation inferred not only the giving up of a part of the ground feued, but the expense of making and maintaining a road and footpath and an ornamental railing of the particular description specified in the feu-contract. The defender's obligation was conditional. He became bound to make the road only when a road or communication was opened up through the lands of Kelvinside to the Great Western Road, and now when he is asked to perform his obligation it is maintained on his behalf that the condition which alone can make the obligation enforceable has not been purified.

It appears to me that so far as regards the ground of the defender's feu to which the obligation applies, this defence cannot be successfully maintained, because the defender is himself the party who by his voluntary act has rendered the fulfilment of the condition in his own favour on which he now insists impossible. The right of ownership acquired by him in the stripe of ground at Kelvinside, on the eastern boundary of his feu, prevents the pursuer from opening up a road through the lands of Kelvinside to the Great Western Road without the defender's consent, though he is otherwise now in a position to do so, and that consent is withheld. I am of opinion that on principle, and in accordance with the authorities cited by the pursuer, the defender cannot plead the non-fulfilment of the condition as a ground for freedom from his obligation, the fulfilment of the condition having been rendered impossible by his own act.

But this observation applies only to the obligation which the defender undertook, and that obligation in its terms refers only and exclusively to that part of the lands of Dowanhill which the defender acquired by his feu-right. The projected road cannot be made without passing over a stripe of 4½ feet in breadth of the lands of Kelvinside which the defender has acquired, and he refuses to allow the road to pass over this ground. The pursuer maintains his right to make the road over this stripe of the defender's property, paying compensation for the use of the ground also on the ground that it was an implied condition of the feu-right of 1863 that the pursuer should do nothing voluntarily for the sole purpose of frustrating the making of the road in question between Dowanhill and Kelvinside, and that he cannot be allowed, in violation of this obligation, to prevent the road being made over ground which he now holds for the purpose only of enabling him to defeat the implied condition in his feu-contract—which, I may observe, is a totally different case from that of the acquisition or possession of part of the estate of Kelvinside for some other object or purpose. The decision of the case really turns upon the question whether there is such an implied condition in the feu-contract, for if there be not, and if the pursuer cannot insist on his right to make the road over the stripe of Kelvinside belonging to the defender, and so cannot open up a communication between his property of Dowanhill and the estate of Kelvinside, he has no interest and no right to have a road made through the defender's feu. The defender denies that there is any implied obligation upon him of the nature contended for, which could prevent his acquiring an independent right to the ground on the Kelvinside boundary of his feu, and using that right in the same way as any other proprietor, and he contends that even if the contract could be construed as containing the implied obligation contended for, his violation of that obligation would give rise to a claim of damages only, but would not entitle the pursuer to insist on the road being made through his property not forming part of his feu.

On this latter point I shall only say that if it could be shown that according to the sound construction of the feu-contract the defender had undertaken not to do any act by which the pursuer's purpose of making a road through Kelvinside should be frustrated or prevented, it appears to me to be clear that his acquisition or possession of a stripe of ground, held in violation of his obligation, could not prevent justice being done between the parties, and that the pursuer would be entitled to the remedy he asks, and not limited to a claim of damages, to which he could only be driven if it could be shown that the defender could not in fact fulfil his obligation by suffering the road to be made. On the question whether according to the sound construction of the contract there was an implied obligation on the defender of the nature contended for, I confess I was throughout the argument, until its close, disposed to think that the pursuer was right in his contention. It is, I think, impossible to read the feu-contract, with its careful provisions which relate to the subject in dispute, without seeing that it was in the contemplation of both parties that the road in question would be opened up—at least, would in all probability be opened up, though some time might elapse before the pursuer would be in a position to have this done. It was obviously of much importance to the pursuer that he should have the road opened up sooner or later for the benefit of his unfeued lands of Dowanhill, and in order, as the contract expresses it, to make a mutual communication between the lands of Kelvinside and the first

party's lands of Dowanhill. The defender was of course well aware that it was to secure this object and advantage that the pursuer stipulated that a part of the feu should form one-half of the breadth of the road as soon as he could arrange with the owners of Kelvinside to have a communication made; and there can, I presume, be no doubt that the defender obtained his feu on lower terms than he would otherwise have done because of his obligation to give up a part of it and to make the road in dispute through it.

These considerations point at least very strongly to this, that it must have been the understanding of parties that the defender should not by his voluntary act seek to defeat the pursuer's purpose of opening up the communication contemplated. This purpose was avowed on the face of the contract; it was recognised in the terms of the defender's obligation; and in consequence the defender got his feu at a lower rate of price than he would otherwise have done. And for my part, I would willingly in the circumstances have construed the contract as containing the implied obligation on the defender for which the pursuer contends. But on full consideration I feel constrained to agree with your Lordship that the deed cannot be read as having this effect, and that whatever may have been the understanding of the parties, or either of them, the defender was left free, if he thought fit, by the purchase of the piece of ground on his Kelvinside boundary, practically to secure that the road should never have been made, and that what was intended as a road on his feu should thus virtually be free from the obligation he had undertaken. In the case of *M'Intyre* v. *Belcher*, referred to in the discussion, Mr Justice Williams is reported to have said that—"The Court should be careful not to infringe the golden rule that contracts are to be construed, not by what one feels to be right, but by what is expressed in or is necessarily to be inferred from the language of the parties,"—and applying that rule to the present case, I have come to the conclusion that the legal obligation on the defender, which it is said is implied from the terms of the contract, is neither expressed in nor necessarily to be inferred from the language of the deed.

I have only to add that if such an obligation had been made out, I should have held that the defender was not relieved of it by the circumstances which immediately led to his purchase of the stripe of ground in question; for I think it was proved that one of the objects he had in view was, that he would thereby acquire the key to Dowanhill at this point. He says in his evidence:—"I knew quite well that the possession of the stripe made me master of the road." And apart from this, and because confessedly the only value to him of the 4½ feet of ground *ex adverso* of his feu is to block the road and enable him to avoid his obligation to the pursuer, I refer again to the evidence of the defender, where he is asked regarding the stripe in question—"Apart from the power it gives you of blocking the road, has it any commercial value?"—and he answers—"I cannot say it has a commercial value, but I have not gone into that question."

I must further say that I should not hold the pursuer barred from making the present demand on account of his failure to buy the ground when the defender purchased it; for it appears to me that the only ground offered to the pursuer was of much larger extent than that which the defender got, and would have been of no possible use to him at the time; and I think he was fairly entitled to believe, from the terms of the feu-contract of 1863, that if the defender became the purchaser, he would not use his acquired right to defeat entirely the obligation he had thereby undertaken by putting a prohibitive price upon the privilege of using the road. But, as I have said, I think the pursuer's case fails on the question of legal obligation on the defender, under the deed of 1863, to refrain from acquiring the independent right he now pleads; and on that ground I agree in thinking that the interlocutor of the Lord Ordinary should be adhered to.

Lord Young—In the view which I take of this case, it is a very short and clear one, depending exclusively upon the clause in the feu-contract between the parties Mr Paterson and Mr M'Ewan, being the only passage to which we were referred in the argument. The material—I think the only material—conclusion of the summons—there are formally four—but I think the only material conclusion, is that which I am going to read. It is for declarator that the defenders are bound to permit the pursuer "to open up, make, and continue the said road of forty feet in breadth through the adjoining strip of ground about 4½ feet wide, also now or lately belonging to the said James M'Ewan"—I omit words superfluous, and proceed—"upon payment to the defenders, or one or other of them, of such compensation, if any, for the said permission as our said Lords may fix and determine." There is to that a corresponding decerniture concluded for—that is to say, to enforce the right by the conclusion which I have read sought to be declared. The only other conclusion of declarator, with the corresponding conclusion for decerniture, is, I think, of no significance in the case. It relates to the formation of the road through the feu which the defender—I speak in the singular, for convenience omitting all notice of the trustees—holds of the pursuer Mr Paterson. The conclusion with regard to it is of no significance, for a reason which I pointed out at an early stage of the debate, that the defender by his averments and pleas says he is not concerned about that at all. He says that "as regards the pursuer's demands in the present action, the defender M'Ewan, without admitting any legal obligation on him to do so, is ready and willing, and has never refused, to open, make, and continue one-half of Victoria Circus Road, so far as the road bounds on the north the plot or area of ground disponed by said feu-contract, and the other defenders are ready and willing, and have never refused, to permit this to be done." And the plea with reference to that conclusion—for the pleas are divided into two heads, and this is the second head—is, "As regards the opening up, formation, and continuation of the Victoria Circus Road, so far as the line of said road bounds the defender's feu foresaid, the conclusions of declarator and *ad factum præstandum* are nimious and unnecessary." I repeat, therefore, that the material, and the only material, conclusion is that which I have read, seeking to have it declared that the defender is under an obligation to the pursuer to permit him to acquire, at a price to be fixed by this Court, a servitude over a piece of

ground, admittedly the defender's property, in fee-simple. Well, if such an obligation exists—and it conceivably might—this Court undoubtedly has jurisdiction to enforce it. If the fee-simple proprietor of any piece of ground, whether it be 4½ feet wide or 4½ miles wide, is under an obligation to anybody to permit a servitude of road to be constituted over it, and the road to be formed, upon being paid such price as the value of the road as this Court should appoint, we might enforce that obligation, though perhaps we should think it was taking some little liberty for the parties so contracting to appoint this Court as referee to determine the price.

Now, I put it at a very early stage of the argument to the pursuer's counsel—Is the defender under any obligation to the pursuer except that which is expressed or implied in the feu-contract? and he said—"No, there is nothing else." There is plenty of printing here, but there is nothing else to impose any obligation upon the defender in favour of the pursuer except what is expressed or implied in the clause of the feu-contract to which I have referred. Then the question is, Does that clause express or imply an obligation upon the defender in the event—then a future and unknown event—of his acquiring a portion, greater or less, of Kelvinside, to sell a servitude over it at such a price as the Court may appoint? That is really the whole question in the case. It is admitted that it does not express any such obligation. It is admitted that it does not imply any such obligation if the whole of Kelvinside had been acquired, or even a considerable part of it. But it is said that as the stripe of ground is only 4½ feet wide there is implied an obligation to sell a servitude over the 4½ feet. I asked Mr Asher to formulate the obligation under this head, not expressed, but which, he said, was implied by this clause, that if the feuar shall hereafter acquire a stripe of Kelvinside 4½ feet wide, or perhaps of somewhat but not much greater width, or anything less, he shall then be under an obligation to sell a servitude of way over it to the superior of his adjoining feu upon such terms as this Court should fix. Now, that is reducing it to absolute extravagance; and that is the whole case. There is nothing else in it. If the obligation is not in that clause, expressed there—which it is not—or implied there—which it just as clearly is not—it is nowhere to be found at all.

I should like only to add this, that I think a proof ought not to have been allowed here. I think there was no room for evidence at all. I think there was no relevant allegation of any obligation to the effect sought to be declared, for it appears upon the record that the pursuer can found upon nothing except this clause of the feu-contract, and it is for the Court to read that and determine the import and effect of it; and I do not think that the averment of the pursuer is of any relevancy at all. Of course nobody is entitled to act in fraud of an obligation which he has come under, and he shall not be entitled to plead anything which he has done voluntarily, even although quite honestly, as a reason why he shall not fulfil his obligation. But what is sought to be enforced here is an obligation arising in respect of the purchase of a piece of Kelvinside. He could be under no obligation to grant a servitude of road over that until he bought it. If after he bought it he was under the obligation, why, the pursuer would prevail by force of the obligation which he established to that effect. But if he was not under the obligation, and refused to allow the thing to be done voluntarily, what in the world can it signify that he had it in his mind when he made the purchase that he would not be under the obligation, and would refuse to do the thing voluntarily?—that is to say, when he made the purchase he intended to do the thing which he is doing, and which we find he is entitled to do. I do not see any significance in that at all.

I am of opinion that the action should be dismissed. That is the form in which the Lord Ordinary has put the interlocutor, and it is probably not necessary to interfere with it. I should myself rather have assoilzied the defenders from the conclusions of the summons.

Lord Craighill—I agree with all the members of the Court in thinking that the interlocutor of the Lord Ordinary should be adhered to. I have come to this conclusion without any hesitation, because it appears to me, on a consideration of that which is to be found in the printed papers and of the argument and of the authorities which we have had from the bar, that the case is not attended with any difficulty. The defender M'Ewan is the vassal of the pursuer Mr Paterson, the ground forming the feu of Thorncliffe being held of the pursuer, and the purpose of the present action, as I understand, is to enforce an obligation said to have been undertaken by the pursuer in this feu-contract, which is the ground of action.

There are two conclusions, with reference to one of which there is in truth no controversy between the parties, that conclusion having reference to the opening up of the road so far as that road was to be a boundary of the defender's feu. With reference to the other conclusion, strange to say, that is a conclusion which relates to a piece of land which is no part of the feu, and which, so far as I can discover, is not made matter of obligation or of contract between the parties. The only thing, so far as I can discover, about which there is a contract between the parties is this feu held by the defender of the pursuer; and as regards the formation of roads, the only obligation imposed upon or undertaken by the defender is that relative to the opening up of the Victoria Circus Road in so far as that road is *ex adverso* of the defender's feu. It is no doubt perfectly true that the obligation relative to the opening up of this part of Victoria Circus Road being made conditional there, is a reference to the condition upon which the obligation is to become prestant. The condition upon which the defender became bound to open up this part of the road was that when there was a connection formed through the lands of Kelvinside from the Great Western Road to Dowanhill, then, provided this other condition was fulfilled, viz., that he was required by the pursuer himself so to do—he should open up this road, and thenceforward become bound for its maintenance. At the time this feu-contract was entered into these lands of Kelvinside did not belong to the pursuer, and they did not belong to the defender, and we look in vain in the contract for any obligation undertaken by the pursuer to ac-

quire these lands, or, if he acquired them, to open up a road through from the Great Western Road to his lands of Dowanhill. He might have acquired them, and yet, for anything the feu-contract contains, he might have dedicated these lands to an entirely different purpose from that to which reference was made in the feu-contract. It is not said that the pursuer was under any obligation to get these lands. It is not said that if he got them he was bound to form a road through them; and certainly, even if it were said, I should think we should look in vain through the feu-charter for anything by which such an obligation would be constituted. Now, is there anything by which an obligation not imposed upon the pursuer is imposed upon the defender.—Was he bound to acquire these lands? It is not stated. If he did acquire these lands, was he bound to use them to any extent in opening up a road from the Great Western Road to the march of Dowanhill? There is nothing in the contract about that—nothing whatever. The only thing about which he entered into a contract with or undertook an obligation to the pursuer was this, that once there was a road opened up through Kelvinside to the march of Dowanhill, and once he was called upon by the pursuer to open up this Victoria Circus Road so far as opposite to his feu, then that obligation would be upon him. But the parties made no reference to Kelvinside. There was no obligation undertaken by the one to the other with reference to the acquisition of these lands or with reference to the use to which these lands were to be put once they were acquired.

It appears to me that the reasons which were urged on the part of the pursuer here for asking decree in terms of the second conclusions of the summons to be pronounced are reasons which are not supported, in so far as fact is concerned, by the proof which has been led, and in so far as legal principle is concerned, are not supported by those principles and those authorities to which reference was made in the argument. It would be in vain for me to go over or bring forward the reasons by which I am influenced in coming to this conclusion as regards this last point, because I think those reasons have been made plain in the opinions that have already been given.

The Lords adhered.

Counsel for Pursuer—Asher—Jameson. Agents—J. & J. Ross, W.S.

Counsel for Defenders—D.-F. Kinnear, Q.C.—Ure. Agents—Smith & Mason, S.S.C.

Thursday, March 17.

FIRST DIVISION.

MOLLESON AND ANOTHER *v.* FRASER AND OTHERS (FRASER'S TRUSTEES).

Public Company—Liability of Promoters—Where Promoter dies before Formation of Company.

A promoter of a company put down his name in an informal memorandum for £1000 of stock He took an active share, by correspondence and otherwise, in the formation of the company, representing to several persons who became shareholders that he would take £1000 of stock; and he was one of the seven persons who signed the memorandum of association, entering his name there as for one share of £10 only. Before the company was actually formed he died, the two events taking place on the same day. The company failed. *Held* that his trustees were not liable as contributories, except to the extent of the single share for which he had signed the memorandum of association, in respect that there was no other contract with the company.

In October 1876 William Fraser, Town Clerk of Inverkeithing, and three other persons purchased the Inverkeithing Foundry at a price of £4400. Thereafter the following memorandum was written by Fraser, and signed by him and by a number of other persons:—"This foundry having been purchased at the low price of £4400, which is considered to be not nearly half its value, it has been proposed to form a joint-stock company to carry the works on. The proposed capital to be £20,000, the half of which it is expected will be sufficient, leaving the half uncalled up. On the company being formed, the works will be made over by the purchaser to the company." The subscribers to this memorandum marked figures for various sums of money after their signatures, amounting in all to £5650. Against Fraser's name there was £1000, of which £500 was stated as paid. Thereafter Fraser, as secretary to the promoters, conducted a variety of correspondence with a view to getting up the proposed company, in which he repeatedly stated that he had put himself down for £1000. He also attended meetings of the promoters, and was in the draft prospectus of the company mentioned as its secretary and solicitor. It did not, however, appear from correspondence that the purchasers of the foundry had in making the purchase definitely committed themselves to the formation of a company if they found that a private re-sale of the works would be more to their advantage.

It was eventually agreed that a company should be formed, of limited liability, with a capital of £25,000, divided into 2500 shares of £10 each. The memorandum and articles of association were dated on the 1st March 1879. Of the seven parties who, in terms of the Companies Act of 1862 (25 and 26 Vict. cap. 89, sec. 7), are required to sign the memorandum of association, Fraser was one, putting down his name for one share. The company was registered on 3d March, Fraser, along with two directors, signing the notice sent in terms of the statute to the Register of Joint-Stock Companies for Scotland. On the day following Mr Fraser died.

Meetings of the directors were held on 10th March, the 16th April, and 4th June; and the minute of the last mentioned meeting bears that "The secretary intimated that he had received applications for shares from the following parties, viz.—[Here follow their names]. The directors proceeded to allot shares to the following, who had agreed to become shareholders of the company in terms of the prospectus and articles of association of the company, in addition to those above mentioned, who were also alloted the shares standing against their respective names:—[Then follow the names of those who signed the memorandum written by Mr Fraser as mentioned