getting an assignation of the bank's right as contained in the letter of July 1879. This is the letter granted by James Reid Haggart after he became of age. The record was closed on 20th October 1880, and up till that time there was no proposal on the part of the pursuer to accept the offer. A discussion took place on 6th January on the procedure roll, and apparently the Lord Ordinary threw out some views on the case which induced the pursuer to reconsider his position. The case then dropped for this purpose, and the pursuer lodged a minute in which he accepted of the offer. This is an acceptance precisely in the terms of the offer, and therefore, unless something intervenes to prevent the offer and acceptance having their effect they must receive their effect. I do not understand that anything took place except that both parties agreed to reconsider their position. I do not see that there was anything to intervene, but if so, I should have expected that the defenders would come forward at once, but this they did not do. A copy of the minute is sent to them, and they take no notice of it. Until 15th February they make no mention of it. There is a correspondence which shows that both of them contemplated an arrangement. The pursuer is pressing for a draft of the assignation, and the defenders do not refuse. In the meantime the case was on the roll and dropped, just because nothing else was done. I do not say that this was a tender—it was an offer to settle the case. The defence was that the defenders were not liable at all. The other alternative was that they were only liable in a fourth each, and they offered to pay this on getting an assignation. It was accepted in terms of the conclusions of the summons, and in terms of the offer. I am for recalling and remitting to the Lord Ordinary.

Lord Deas, Lord Mure, and Lord Shand concurred.

The Lords pronounced this interlocutor—

"Find that the cause has been settled by compromise between the parties on the footing that each of the defenders shall pay to the pursuer the sum of £134, 16s. 10d., on condition of the pursuers granting them an assignation to the bank's right contained in the letter of guarantee by James Reid Haggart, dated 25th June 1879: Remit to the Lord Ordinary to adjust the terms of the said assignation, and to dispose of all questions of expenses, including the expenses incurred in the Inner House."

Counsel for Pursuer (Reclaimer) — Brand. Agents—Irons & Speid, S.S.C.

Counsel for Defenders (Respondents)--M'Kechnie. Agents—Curror & Couper, S.S.C.

Friday, December 16.

FIRST DIVISION

[Lord Curriehill, Ordinary.

MOORE AND OTHERS (BELHAVEN UNITED PRESBYTERIAN CHURCH TRUSTEES) v. PATERSON AND ANOTHER.

Obligation—Personal and Real—Transmissibility—Where by Transmission the number of Creditors is increased.

One of the disponees of a Land Building Company, as part of the transaction by which he acquired a portion of the company's land, but by a separate and personal agreement, undertook within a period of twelve months from the date of the agreement to open up and form the continuation of an intended road through a strip of ground belonging, and known to belong, to a third party. The strip of ground measured 590 feet in length by 4½ in breadth. The Building Company did not themselves seek to enforce the obligation, but some years after its date, when they were in liquidation, their entire lands having been disposed of and their other purposes fulfilled, they assigned to another disponee of an adjacent parcel of their ground the right to enforce the obligation, but under the declaration that the assignation was granted "without prejudice to any rights already granted to other parties, or to our own rights to enforce by ourselves alone, or to assign said obligation to any other parties having a legal interest in the due implement thereof." The company had granted in all 35 conveyances of other parcels of this ground after the date of the original obligation. The owner of the strip in question having refused to sell the portion required for the road, except at a price of £1500, he having paid £142 for the whole strip, the assignee raised an action for specific implement of the obligation, or alternatively for damages. *Held* that the obligation was personal only, and that the company were not entitled to assign it so as to multiply the creditors therein, and action *dismissed.*

Obligation—Damages—Specific Implement.

Observed that it is within the discretion of the Court to say whether a pursuer is entitled to specific implement of an obligation, or to damages merely, and that the pursuers, in the foregoing circumstances, even if they had a title, were not in a position to obtain decree for specific implement of their obligation.

This reclaiming note was a sequel to the case of *Paterson* v. *M'Ewan and Others*, March 18, 1881, *ante* vol. xviii., p. 475, 8 R. 646. The question in dispute in both actions related to the formation of a road in the suburbs of Glasgow which was to be a continuation of the Victoria Circus Road, and was intended to connect that road and the lands of Dowanhill with the Great Western Road. In order to do this it was necessary that the road should pass through the estate of Kelvinside, and also through a narrow strip of ground, originally part of Kelvinside, which separated that estate from Dowanhill, and had been acquired by

M'Ewan, the defender in the other action, in the circumstances mentioned in the former report. The proposed road was to be 40 feet in breadth; the strip of ground through which it had to pass was 4½ feet wide by about 590 feet long. Paterson, the pursuer in the other action, and one of the defenders in the present, believing that M'Ewan had come under an obligation to him to make this road in so far as it passed through the strip, himself in 1873 undertook a similar obligation to the Victoria Park Feuing Company, Limited, which had purchased part of the estate of Kelvinside from Messrs Montgomery and Fleming, the original proprietors of the whole of that property. On 31st December 1879 the present pursuers, the trustees of the Belhaven United Presbyerian Church, as claiming to be in right of the Victoria Park Company in the obligation by Paterson, raised this action against him, in which they concluded that he should be ordained to implement his obligation, and failing that to pay damages. Paterson in consequence brought against M'Ewan the action of relief formerly reported, and that action having been decided in favour of M'Ewan, the present proceedings, which had in the meanwhile been suspended, were renewed.

The strip of ground in question lay almost due north and south. The proposed road was to cross the strip in a north-easterly direction, dividing it into two nearly equal portions, The estate of Kelvinside lay on the east side of the strip, that of Dowanhill on the west. The proposed road was at the time of the present proceedings completed through its entire length, with the exception of the part across the strip, and with the exception also of a longer part immediately to the west of the strip, which was situated between the properties belonging respectively to John Alexander, the other defender in this action, on the north side of the intended road, and to M'Ewan the owner of the strip on the south. Both these properties were feus from Paterson the proprietor of the whole of Dowanhill, and each feuar held under an obligation to complete the proposed road to the extent of one-half its width, and in so far as it was planned to pass through his property, as soon as the road should be completed through the estate of Kelvinside, and consequently through the strip, which was a part of Kelvinside. This obligation, in so far as it concerned M'Ewan, was the subject of the action formerly reported. The proposed road, immediately after passing through the strip into Kelvinside, bifurcated, one arm going off in a crescent form, at first eastward, but gradually inclining round to the south. This street was called the Dundonald Road, and was 30 feet wide. The other arm went to the north-east, and by joining a road called the Horselethill Road, formed the connection with the Great Western Road. This arm was 40 feet wide, which was the width of the portion common to it and the Dundonald Road.

The trustees of the Belhaven United Presbyterian Church, as pursuers of the present action, founded on the following titles:—

By minute of agreement, dated 9th, 11th, and 24th July 1873, the Victoria Park Company agreed to sell to John Alexander, merchant, Glasgow (one of the present defenders) and Robert Balloch, merchant there, Balloch as well as Alexander being a feuar on Dowanhill, the triangular piece of ground of the lands of Horslethill, on Kelvinside, estimated to amount to about 5205 square yards, bounded as therein described, and *inter alia*, "On the south-east partly by the middle line of an intended road or street of forty feet in total breadth, and partly by a continuation of said central line to the central line of the Horselethill Road, along both of which it extends 299 feet 7 inches or thereby, following the curve; and on the west-by-south by the strip of ground belonging to James M'Ewan, merchant in Glasgow, along which it extends 357 feet or thereby on the middle line of a stone wall, all as shewn in the proposed feuing plan." By this agreement all the parties became bound within twelve months to make and form the respective portions of the intended road opposite to their respective properties, and further Alexander and Balloch bound themselves, within the said period of twelve months, to open up and form a continuation of the said intended road through the said strip of ground belonging to James M'Ewan, merchant, and through their lands on the estate of Dowanhill, to join Victoria Circus Road, and to connect the other roads of Dowanhill with said intended road.

By subsequent minute of agreement between the above parties and the defender Paterson, dated 26th December 1873, it was agreed that Paterson should be substituted for Alexander and Balloch as the purchaser of the portion of Kelvinside in question, and in the second article of the minute he bound himself "to perform the whole obligations undertaken by and incumbent upon the third parties [Alexander & Balloch] under the foregoing minute of agreement, so far as still remaining to be implemented, in the same manner as if his name had been inserted in the agreement in lieu of those of the third parties; but declaring that the time allowed for opening up and forming the continuation of the said intended road through the properties belonging to James M'Ewan and the said John Alexander, to join Victoria Circus Road, and for connecting the other roads of Dowanhill with the said intended road, shall be extended to the period of one year from the last date of these presents;" and Alexander and Balloch were relieved of their obligation to make this road, "excepting always in so far as the continuation of said road passes through lands belonging to the third parties, or either of them, regarding which their obligations shall remain prestable and incumbent upon them respectively as qualified by the second article hereof." Following upon this minute, a formal disposition of the subjects was granted to Paterson by the Company and Alexander and Balloch, but in this disposition no reference was made to the obligation to make the road through M'Ewan's strip of ground.

By disposition dated 13th and 14th March 1876 the Victoria Park Company sold to John Marshall, writer in Glasgow, another part of Horselethill, extending to about 5582 square yards, bounded on the north-by-east, the north-north-east, and the north-east by the middle line of an intended road of thirty feet in total breadth, to be called Dundonald Road, along which it extended 347 feet 8 inches or thereby in a curved line, on the south by other parts of the lands of Horselethill, and on the west-by-south

by M'Ewan's strip of ground; and the Company became bound forthwith to make and form Dundonald Road, which was to be at last 30 feet in breadth, and was intended as "a public road for the use of the said disponee and his foresaids, and us and our successors in the remaining parts of the lands of Victoria Park; and we, the said Victoria Park Feuing Company (Limited), assign to our said disponee and his foresaids all right competent to us to compel the proprietors of the estate of Dowanhill to continue the said road through their ground, and to give us and our successors in the lands of Victoria Park right to use the same."

Thereafter on 25th May 1876 Marshall by contract of ground-annual disponed to the pursuers, as trustees for the Belhaven United Presbyterian Church, the portion of the ground above sold to him which was nearest to M'Ewan's strip, with his "whole right, title and interest, present and future, therein," and he specially assigned to them all right competent to him to compel the proprietors of the estate of Dowanhill to continue the said road through their ground and to give the pursuers right to use the same.

On 17th and 18th December 1879 the Victoria Park Company, then in liquidation (its objects having been fulfilled), and its surviving liquidators, granted to the pursuers an assignation of which the following is an excerpt—"And further, considering that the obligation intended to be assigned by the said Victoria Park Feuing Company (Limited) to the said John Marshall in the before partly recited disposition in his favour, and intended to be assigned by the said John Marshall to the said Alexander Moore and others, as trustees foresaid, by said contract, was the obligation on the part of the said Thomas Lucas Paterson, John Alexander, and Robert Balloch, for their several and respective interests, constituted by the said recited agreements, to open up and form a continuation of the said then intended road of forty feet wide through the said strip of ground belonging to the said James M'Ewan, and through their the said John Alexander and Robert Balloch's land, on the estate of Dowanhill, to join Victoria Circus Road, and to connect the other roads of Dowanhill with the said intended road, and that within the period of one year from the last date of the said second partly recited agreement; and whereas doubts have arisen whether the said obligation has been effectually transmitted by us, the said Victoria Park Feuing Company (Limited), to the said John Marshall, and by the latter to the said Alexander Moore and others, as trustees foresaid; and whereas we have been requested, in order to the obviation of said doubts, to grant these presents in manner after written, which we have agreed to do; Therefore we do hereby, without prejudice to the rights already granted to and vested in the said Alexander Moore and others, as trustees foresaid, but in corroboration thereof, *et accumulando jura juribus*, assign to the said Alexander Moore and other trustees the obligation on the said Thomas Lucas Paterson, John Alexander, and Robert Balloch, for their several and respective interests constituted by the said recited agreements, or either of them, to open up and form a continuation of the said then intended but now formed road or street of forty feet in total breadth, through the said strip of ground belonging to the said James M'Ewan, and through the said John Alexander and Robert Balloch's lands, on the estate of Dowanhill, to join Victoria Circus Road, and to connect the other roads of Dowanhill, with the said then intended and now formed road of forty feet in breadth, and that within the period of one year from the last date of the said second partly recited agreement; with power to the said Alexander Moore and others, as trustees foresaid, to enforce implement of said objection, and to prosecute in their own names all competent actions for said purpose: Declaring that these presents are granted without prejudice to any rights already granted to other parties, or to our own right to enforce by ourselves alone, or to assign said obligation to any other parties having a legal interest in the due implement thereof, and also that our granting these presents does not imply any warrandice or obligation on us to uphold these presents in favour of the said trustees."

The pursuers averred—"The Victoria Park Feuing Company (Limited) was formed in or about 1870, for the purpose of acquiring a large area of ground, part of the estate of Kelvinside, lying to the south of the Great Western Road, Glasgow, and of feuing out or otherwise disposing of it at a profit. Of the land so acquired (called 'Victoria Park') the said triangular piece of ground, containing 4660 square yards or thereby acquired by the defender Mr Paterson, and the said piece of ground, containing 5582 square yards and 5 square feet or thereby acquired by the said John Marshall, were parts. The feuing plan of Victoria Park was exhibited to the pursuers before they purchased from Marshall the said piece of ground containing 1788 square yards, and it was represented to them that the said intended road of 40 feet in breadth was to be continued through the strip of ground belonging to the said James M'Ewan, and connected with Victoria Circus Road and the other roads on Dowanhill estate, and they acquired the said ground as a site for a church, and have erected thereon a church, on the faith of the said road being so continued and connected. The said continued road would be the natural and only convenient means of communication between the said church and the houses on Dowanhill estate, in which a considerable number of the members of the said church reside." And the pursuers further averred—"The want of the said continued road causes serious loss and inconvenience to the pursuers and the persons using their property. The value of their property is thereby materially lessened. In the event of the continuation of the road not being formed as concluded for, the pursuers will suffer loss and damage, which they estimate at the sum of £1000."

The pursuers concluded for declarator against Paterson that he was bound to open up and form the road through the strip in question, and for decree against him; also for decree against the other defender Alexander, ordaining him to open up the road so far as it passed through his ground; and in the event of either defender failing to implement these decrees for damages, against such defender, estimated at £1000.

The defender Paterson, besides referring to the feu-contract between him and M'Ewan which gave rise to the action of relief, averred that

M'Ewan had paid £142 for the entire strip in question, and that he refused an offer by the proprietors of Dowanhill to pay him for the said strip of ground so far as required for the said intended road or street, and extending to the north-west thereof, the sum of £400. This sum was more than the cost to him of the whole strip with compound interest and all expenditure by Mr M'Ewan. It was a condition of the said arrangement that Mr M'Ewan, in addition to said payment, should retain free of cost so much of the said strip of ground as lay south of the said intended road and on the east of the plot of ground feued by him from the defender. This offer, which was made to avoid litigation, Mr M'Ewan also refused. In 1876, when Mr Marshall purchased his ground, and the pursuers purchased from him the ground for their church, it was notorious, and was known to the pursuers and to the great number of, if not all, the parties whom they represented, and to Mr Marshall and the sellers to him, that Mr M'Ewan had purchased the said strip of ground, and refused to allow a continuation of Victoria Circus Road to be made across it.

The other defender Alexander expressed his willingness to make his portion of the road as soon as the part through the strip should have been made, and on 7th July 1880 the action was sisted as against him.

The pursuers pleaded, *inter alia*—"(1) The defenders being bound, under the deeds founded on, to open up and form a continuation of the road referred to of forty feet in breadth through the grounds mentioned, the pursuers are entitled to decree of declarator and implement as concluded for. (2) The pursuers are entitled to damages in the event of the continuation of the road not being formed."

The defender Paterson pleaded, *inter alia*—"(2) The pursuers are not entitled to declarator, in respect that their title gives them no right to enforce the formation of the road across Mr M'Ewan's strip of ground, and to the south-west of it, and that the road and connection to the north-east of the said strip have already been formed. (3) The assignation of 1879 confers no right on the pursuers to insist on their present claims, in respect—1st, That it was *ultra vires* of the granters to grant the same; 2d, that at its date the Victoria Park Feuing Company (Limited) had divested themselves by formal conveyances of all the lands through which the road in question passed, and no right or title with regard to the formation of the said road remained in their person at the said date; 3d, that there is no such agreement as it narrates and proceeds upon; 4th, that the obligations in the minutes of agreement of July and December 1873 had been discharged by implication before the date of the said assignation; and 5th, that the obligations in the said minutes of agreement are enforceable only by and against the parties thereto, and are not assignable. (4) The pursuers and their immediate author having acquired the site of the said church in the knowledge that owing to the position taken up by Mr M'Ewan it was impossible that the continuation of the road in question could be formed by the defender, and under a title which conferred no right to have the said continuation formed, they are barred from now insisting in the present action. (7) The action ought to be dismissed in respect—1st, That the defender has all along been willing to make the continuation of the road in question, if it be possible for him to do so; and 2d, that if it be impossible for him to do so without the permission of Mr M'Ewan and the parties vested in his property, and if he cannot obtain that permission, the action seeks to enforce an obligation the performance of which is impossible. (8) The pursuers are not entitled to decree for damages in respect—1st, That their statement of damages is irrelevant; 2d, that they have no title or interest to sue for the same; 3d, that their averments of damage are unfounded in fact; and 4th, that they acquired their property and chose the site for their church in the knowledge of the position taken up by Mr M'Ewan, and of the consequent impossibility of the road in question being made if he could prevent that being done."

The Lord Ordinary (CURRIEHILL) on 19th March 1881 pronounced this interlocutor:—"The Lord Ordinary having considered the cause, Finds (1) that the defender Paterson became bound to open up and form a continuation of the road referred to in the summons, through the strip of ground belonging to James M'Ewan, and that the pursuers are in right of and entitled to enforce said obligation; Finds (2) that in respect the said James M'Ewan declines to allow the defender Paterson to form the said road through his said strip of ground, except upon terms which the said defender refuses to agree to, as being exorbitant and unreasonable, and which appear to the Lord Ordinary to be unreasonable, and further, in respect that the said defender cannot compel the said James M'Ewan to allow the formation of said road through his said strip of ground on any other terms, the said defender is unable to implement said obligation, therefore finds that decree for specific implement ought not to be pronounced against the said defender, but that the claim of the pursuers against the said defender resolves into one of damages, and appoints the cause to be enrolled that the amount of damages may be ascertained, &c.

His Lordship added the following note:—

"*Note.*—The pursuers, who are the trustees for the Belhaven United Presbyterian Church in Glasgow, have raised this action for the purpose of compelling the defender Thomas Lucas Paterson to open a road between the lands of Dowanhill and Kelvinside, and particularly through the strip of ground situated on the confines of these two properties, and belonging to James M'Ewan. The defences are various—(1) That the pursuers have no title to sue the action; (2) that it is impossible for the defender to make the road without the consent of M'Ewan, which is withheld; and (3) that the pursuers having acquired their property in the knowledge that M'Ewan refused his consent, are barred from insisting in the action. It is impossible rightly to understand the position of parties without knowing the previous history of the property. The estates of Kelvinside and Dowanhill are conterminous. Kelvinside belonged to persons of the names of Montgomery and Fleming, and was subsequently acquired by the Victoria Park Feuing Company (Limited). Dowanhill belonged to the defender Thomas Lucas Paterson, who has feued the greater part of the lands, and particularly the two lots of ground conterminous with Kelvinside, one of these being feued

to the defender James Alexander, and the other to the said James M'Ewan. In the feu-rights granted by these two feuars respectively, Paterson took each feuar bound, if required by him, 'as soon as a road should 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 is included within the boundaries of the said plot or area of ground above disponed, 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.'

"The Victoria Circus Road here mentioned intersects the lands of Dowanhill, and it would undoubtedly have been of great advantage to the feuars of Dowanhill to have had a communication with the Great Western Road through the lands of Kelvinside, but of course it depended entirely upon the will of the proprietors of Kelvinside whether or not any road should be formed connecting Dowanhill with the Great Western Road. It appears that there was a narrow strip of ground on the borders of the lands of Dowanhill and Kelvinside as to which M'Ewan, after acquiring his feu from the defender Paterson, laboured under some mistake. He imagined that it formed part of the lands of Dowanhill, and he accordingly included it in his garden ground, as his feu-contract gave him right to use for that purpose the ground intended for the road until the proprietors of Kelvinside should carry their road up to the march. It turned out, however, that the strip of ground in question was part of Kelvinside, and after considerable negotiations and communings, M'Ewan, to avoid further dispute, purchased the strip of ground, and he has ever since used it as his own. So long as Montgomery and Fleming remained proprietors of Kelvinside, it would appear that it was not considered advisable in the interest of the feuing of Kelvinside to connect that estate with Dowanhill. The lands of Kelvinside, however, were afterwards acquired by the Victoria Park Feuing Company (Limited), who entered into negotiations with the parties interested in Dowanhill for the purpose of having a through communication opened between the two properties.

"The history of these will be found in various agreements and other deeds"—[*His Lordship here narrated the important clauses of the deeds of* 1873 *and* 1876, *and with reference to the last observed*]—"The Dundonald Road here mentioned was to unite with the Horselethill Road, and was intended to form a communication with Dowanhill. There is no express assignation of the Feuing Company's right to compel Paterson to continue the road through M'Ewan's ground; all that is expressly given being all right competent to them to compel the proprietors of Dowanhill to continue the road through their lands. But M'Ewan, as well as Paterson, was then, and still is, a proprietor of the lands of Dowanhill, and it appears to me that it would be very hypercritical to say that this express assignation did not naturally include the right competent to the Feuing Company under the agreement to compel Paterson to make that road. In any view, however, that right was part of the Feuing Company's right and interest in the subjects, and I am inclined to think that the general assignation was sufficient to carry the same.

"Shortly after obtaining this disposition, Marshall, by a contract of ground-annual, disponed to the pursuers, the trustees for behoof of the Belhaven United Presbyterian Church, part of the ground which he had purchased from the Victoria Park Feuing Company (Limited), with his 'whole right, title, and interest, present and future, therein,' and he specially assigned to them all right competent to him to compel the proprietors of the estate of Dowanhill to continue the said road through their ground, and to give the pursuers right to use the same. Marshall, of course, could not assign or convey to the pursuers any right he himself did not acquire, but if I am right in thinking that the assignation in his favour included a right to compel Paterson to make the road through M'Ewan's strip of ground, that right was assigned by him. Doubt, however, seems to have been raised upon this point, and on 17th and 18th December 1879 the Victoria Park Feuing Company (Limited), then in liquidation, and the surviving liquidators"—[*His Lordship here quoted the portion of the agreement of* 1879 *above narrated, but omitting the concluding declaration*].

"Now, if that is a validly executed assignation, there cannot be a doubt that it effectually transmits to the pursuers the right to enforce the obligation in the agreement of 1873. But it is maintained for the defender Paterson that the assignation conveys no right to the pursuers to insist upon the formation of the road, in respect that it was *ultra vires* of the granters to grant the same. I confess I do not quite appreciate the grounds of the objection. So far as I can gather from the argument at the bar, the defender means that the right to enforce the formation of the road through M'Ewan's strip is a right of value to the Feuing Company; that if it was not assigned by the original conveyance to Marshall, and by Marshall's conveyance to the pursuers, it still remains vested in the Feuing Company, but that company, being now in liquidation, had no power to part with it except by sale, either under authority of the Court or by authority of a meeting of the shareholders specially convened for the purpose. It appears to me, however, that the narrative of the assignation must be taken *pro veritate*, and it is there distinctly stated by the liquidators of the company, under the seal of the company, and as the result of an extraordinary general meeting of the company held in terms of the statute, that it was the intention and meaning of the original conveyance to Marshall that the right in question should be assigned to him, and after the liquidators and the meeting were satisfied upon that point I think it would have been taking an undue advantage of a clerical omission if they had refused to grant this assignation, and I cannot so hold it to be *ultra vires*.

"The defender, however, further says that the assignation is ineffectual, in respect that at its date the Feuing Company had divested themselves by a formal conveyance of all the Kelvinside lands through which the road in question passed, and consequently that no right or title remained in their persons at the said date. In point of fact, it appears that the Feuing Company is not as yet divested of the whole of the Kelvinside property;

but however that may be, it does occur to me that it would be a very strong proposition to maintain that the right to enforce the formation of the road, so mutually advantageous to the company, and the purchasers from the company, and which was undoubtedly intended to be included in the conveyance to that purchaser, should be held to have been sopited and extinguished merely because of a clerical omission in the original conveyance, and because in the interval all the other properties belonging to the Feuing Company which the enforcement of this condition would have benefitted had been alienated by the company to third parties. If, indeed, the assignation had been granted to a stranger, the case might have been different, but being granted to the person, and the only person, who could possibly benefit by it, and who all along was intended to benefit by it, I think it would be inequitable to sustain this contention.

"The defender further maintains that the obligations were not transmitted, but that plea was not seriously insisted in, and I have no difficulty in repelling it. It would indeed have been a comparatively meaningless obligation if the Feuing Company were not to be entitled to assign that right to parties purchasing the remainder of their ground. The obligation appears to me to have been contracted for by the company for the express purpose of being assigned, and as little force does there appear to me to be in the objection that the obligation fell because it was not enforced within twelve months after its date. The twelve months were allowed as a period of grace to Paterson. He was not to be compellable to form the road for twelve months, but in the event of his failure to do so within that time, then the other parties to the agreement were to have the right to enforce it. I have therefore no hesitation in arriving at the conclusion that Paterson undertook the obligation to form the road through M'Ewan's strip of ground, and that obligation has been transmitted to the pursuers, and that it still subsists against the defender Paterson.

"With reference to the defender's fourth plea-in-law—that the pursuers are barred from insisting in the present action in respect that at the time they and their immediate author acquired the subjects they were in the knowledge that M'Ewan refused to allow the defender to make the road through his strip of ground, and that it was therefore impossible for the defender to implement that obligation—it is clear that the plea must be repelled. The defender, though allowed a proof of his averments in support of it, adduced no evidence.

"But though I hold the obligation to have been effectually undertaken by Paterson, and that the pursuers have a good right, title, and interest to enforce it, it appears that the defender is unable to implement it in consequence of the position taken up by M'Ewan. The defender has certainly done everything in his power to implement it, for he raised an action against M'Ewan for the purpose of enforcing some supposed right which he had to compel him to submit to the formation of the road, but in that action he has been unsuccessful. In that state of matters it seems to be clear that the pursuers' claim must resolve into one of damages, and that decree for specific implement ought not to be pronounced. This is one of those obligations the performance of which is not naturally impossible, although it is not within the defender's power, and in that case the rule obtains *loco facti impræstabilis succedit damnum et interesse.* Erskine, iii. 3, s. 84, says—'But all facts in themselves possible are the subject of obligation, though they should be beyond the power of the party bound, who ought not to have undertaken what he knew or might suspect could not be performed by him.' Findings, therefore, are pronounced to the effect that the obligation was duly undertaken by Paterson, that it was not within his power to implement it, and that the claim of the pursuers therefore resolves into one of damages, for ascertainment of which the cause is ordered to the roll.

"It is right to explain that the foregoing judgment was prepared in November 1880, but was, by arrangement with the parties, withheld in order that the result of the reclaiming note against my judgment of the 28th June 1880 should be known, dismissing Paterson's action against M'Ewan. The judgment was only yesterday (18th March 1881) adhered to by the seven Inner House Judges."

"*Addition to Note.—26th May* 1881.—The cause was put to the roll on the last day of the Winter Session, 19th March, in order that I might pronounce judgment in terms of the interlocutor prefixed to the foregoing note, and that the mode of ascertaining the damages might be settled. But before I had signed the interlocutor, and just as I was beginning to explain my views on the case, the counsel for the pursuers rose and tendered a minute to the effect that M'Ewan had now offered to sell the strip of ground to Paterson for the sum of £1500, and on condition of Paterson paying the whole of his (M'Ewan's) expenses in the previous action, as the same should be taxed as between agent and client. The case therefore stood over during the vacation in order that if possible M'Ewan and Paterson might come to terms as to the sale of the ground. On the case being called yesterday the counsel for Paterson stated that he had offered £400 for the ground, but that M'Ewan declined to part with it on any lower terms than those specified in the pursuers' minute. These terms Paterson declines as exorbitant and unreasonable, and his counsel maintained that they were such as to render his purchase of the ground virtually impossible. I confess I entertain the same views. I have therefore signed the interlocutor which I originally proposed to issue, having made on the margin such alterations as were rendered necessary by the altered conditions of the case. The question of damages will now be disposed of."

The pursuer reclaimed, and argued—The case must be brought up to one of impossibility of performance. When the performance can be brought about by the payment of a sum of money, however large, the performance cannot be treated as impossible. Here, by the payment of £1500, the defender Paterson would be in a position to perform his obligation. Decree for specific implement ought therefore to be granted against him—Bell's Comm. (5th ed.) i. 335.

Argued for defender Paterson—Even if the pursuers had a title to sue, there had been undue delay. The obligation was one intended to be performed within a short period—one year from the date of the agreement—and to ask that it

should be performed years afterwards, when the whole circumstances had changed, was obviously unjust. Admittedly, the question might have been one of damages only, *i.e.*, if M'Ewan had absolutely refused to sell the strip—and the measure of damages was very different now from what it had been a year after the parties had made the agreement. That was in a question with the Victoria Park Company. But the pursuers here had no title. The right in the company was intransmissible, and at any rate it had not been transmitted in the present instance. It was personal and intransmissible—*Magistrates of Arbroath* v. *Strachan's Trustees; Lord Advocate* v. *Magistrates of Stirling; Leith Dock Commissioners* v. *Colonial Life Assurance Company.* The obligation was, at all events, not transmissible in the way that had been attempted here. It was plain from the assignation of 1879 that the Victoria Park Company thought they might assign to each of their disponees, and also reserve to themselves, the right to sue an action of damages in the event of M'Ewan's absolute refusal to sell. That was to increase indefinitely Paterson's obligation. There were now many proprietors of what had been the Victoria Company's lands, and each of these had his measure of damages; the total amount was greatly in excess of what the company could have got for their unbuilt-on land. But the obligation, even if transmissible, had not been validly transmitted. The disposition of 1873 was ineffectual as a transmission of this right, and the assignation of 1879 was bad as being a gratuitous alienation of property by liquidators. Further, assuming that the pursuers had a title to sue, they could only get damages. The exorbitant price asked for the strip made the case one of practical impossibility. If M'Ewan had asked £100,000 the pursuers' argument would have been the same. It was in the discretion of the Court to give or to withhold specific implement.

Replied for pursuers—As to the obligation being personal and intransmissible, the fact that heirs were not mentioned does not make it personal—*M'Callum's Trustees* v. *M'Nab.* The cases of the *Leith Dock Commissioners* and the *Magistrates of Arbroath* related to grants, not to obligations. As to the obligation being intransmissible in this way, the measure of damages was the same to the Victoria Company in 1873, and to them and their numerous assignees now, for the prospective value of their property had to be kept in view. The argument that liquidators could not transfer gratuitously was unsound. This was a solvent company that was being wound up under sec. 129, subsec. 1, of the Companies Act 1862 (25 and 26 Vict. cap. 89). Further, the pursuers were entitled to specific implement. That was the general rule of Scotch law, and there was nothing to take the present case out of that rule. The obligation could in fact be fulfilled without paying any very exorbitant sum.

Authorities — *Magistrates of Arbroath* v. *Strachan's Trustees*, January 28, 1842, 4 D. 538; *Lord Advocate* v. *Magistrates of Stirling*, February 5, 1846, 8 D. 450; *Leith Dock Commissioners* v. *Colonial Life Assurance Company*, November 22, 1861, 24 D. 64; *M'Callum's Trustees* v. *M'Nab;* Bell's Comm. i. 335 (5th ed.); Stair, i. 16, 17; Erskine, iii. 3, 34.

After the arguments had been concluded, the pursuers and the defender Paterson lodged a joint minute of admissions, in which they concurred in stating, *inter alia*—"(1) That the quantity of ground originally belonging to the Victoria Park Feuing Company was 34 acres 3 roods 15 4/10 poles, of which about 10 acres were conveyed by the said company to purchasers or feuars prior to July 1873, and the remainder, about 24 acres, was conveyed subsequent to that date. (4) That the list lodged herewith of conveyances (35 in number) granted subsequent to July 1873 by the Feuing Company is correct. (5) That in none of these conveyances is there any reference to the obligation to open up or continue the forty feet road referred to through the lands of Dowanhill to join Victoria Circus Road, except it be in the one to Mr John Marshall, of the 5582 5/9 square yards, which is before the Court, and is respectfully referred to, and regarding which neither party makes any admissions. (7) That the report prepared by Mr Armour, C.E., as to the number of houses built on the said 34 acres 3 roods 15 4 10 poles is correct." That report was as follows:—"Having inspected those portions of the lands of Horselethill of the estate of Kelvinside, lying within the parish of Govan and county of Lanark, now known as Victoria Park, and taken measurements of the permanent buildings erected on the portions thereof which were disponed subsequent to 9th July 1873, as delineated and coloured green by me, of date 15th November 1881, on a copy of the P.O. map of Glasgow and suburbs, I find that at this date there have been erected two churches, three villas, one hundred and fifteen self-contained lodgings, ten tenements of dwelling-houses only, and three tenements of shops and dwelling-houses."

It was also intimated to the Court that M'Ewan was now willing to sell the way-leave for £1000.

The Lords made avizandum.

At advising—

Lord President—The facts of this case are peculiar, and the obligation which it is sought to enforce is one of an unusual kind. In the year 1864 the two estates of Kelvinside and Dowanhill belonged respectively to Messrs Montgomerie and Fleming and to the defender Mr Paterson. They adjoined one another, and being within a short distance of Glasgow were obviously destined very soon to be covered with buildings. At that date a person of the name of M'Ewan acquired a strip of ground lying on the south side of the Kelvinside estate, and immediately adjoining the Dowanhill estate belonging to the defender. That strip of ground was only 4 feet wide, but it was of a considerable length in comparison with its breadth. It lay between the two estates, and consequently formed an obstacle to the formation of any road connecting them at that part of their mutual boundary. This continued down to 1873. By that time the Victoria Park Feuing Company had acquired a considerable portion of the estate of Kelvinside adjacent to this strip of ground and to the estate of Dowanhill, and they were in the way of selling off for building purposes small portions of the ground they had thus acquired. The entire ground acquired by the Victoria Park Feuing Company appears to have been about 34

acres. Now, in these circumstances Mr Paterson, the defender, purchased from the Victoria Park Company a portion of the 34 acres lying immediately to the north of the strip of ground belonging to Mr M'Ewan, and as a part of the transaction by which he acquired that portion he came under the obligation which is sought to be enforced in this action; but that obligation is not contained in the title, and is not even mentioned in the disposition which was granted by the Victoria Park Company to the defender; it is found in a separate writing, and is a mere personal obligation.

The particular portion of the Victoria Park Company's ground which was thus acquired by Mr Paterson had originally formed the subject of a transaction between the Victoria Park Company and two persons named Alexander and Balloch, who purchased it from them; Alexander and Balloch, however, appear to have bought the ground in the interest of Mr Paterson, as appears from a letter of that date, and accordingly the bargain was transferred to Mr Paterson. But the obligation with which we have here to deal is to be found in the original minute of agreement between the Victoria Park Feuing Company and Alexander and Balloch. In the fourth article of that agreement, "The third parties"—that is to say Alexander and Balloch, the purchasers of the ground—"bind themselves within the said period of twelve months to open up and form a continuation of the said intended road" (that is, a road leading to the estate of Kelvinside) "through the said strip of ground belonging to James M'Ewan, merchant, and through their lands on the estate of Dowanhill, to join Victoria Circus Road, and to connect the other roads of Dowanhill with said intended road." Now, on the transfer of the purchase of this ground to Mr Paterson there was a minute of agreement entered into between the Victoria Park Feuing Company, Alexander and Balloch, the original purchasers, and Mr Paterson, the defender, which bears date 26th December 1873. This minute of agreement narrates the circumstances of the transaction, and that the purchase had been transferred to Mr Paterson, and in its second head there is this provision—Mr Paterson is to be bound, "as he hereby binds himself, to perform the whole obligations undertaken by and incumbent upon the third parties under the foregoing minute of agreement, so far as still remaining to be implemented, in the same manner as if his name had been inserted in agreement in lieu of those of the third parties; but declaring that the time allowed for opening up and forming the continuation of the said intended road through the properties belonging to James M'Ewan and the said John Alexander to join Victoria Circus Road, and for connecting the other roads of Dowanhill with said intended road, shall be extended to the period of one year from the last date of these presents;" and Alexander and Balloch are relieved of their obligation to make this road, "excepting always in so far as the continuation of said road passes through the lands belonging to the third parties, or either of them, regarding which their said obligations shall remain prestable and incumbent upon them respectively as qualified by the second article hereof."

Now, this obligation, which was thus transferred to and undertaken by Mr Paterson, is very peculiar in this respect, that it is an undertaking by him to make a road not only through land belonging to himself, but through land belonging to another person who was no party to the agreement, viz., Mr M'Ewan, whose strip of ground lay between the estates of Kelvinside and Dowanhill. It will be observed that this obligation is one undertaken in favour of the Victoria Park Company, and that it is to be performed within a period of twelve months. It is not in the least degree an undertaking or obligation resembling those that are sometimes imposed upon feuars by a superior of building ground, which are intended to be for the benefit of the whole feuars under the same superior. We are very familiar with obligations of that kind, and they are generally enforceable at the instance of all parties who have an interest in their performance. But here we have an obligation which was to be performed at once, and once for all. A road was to be made which was to have the effect of opening up the Victoria Park Company's ground by an access to the south. The only creditor in this obligation *ex facie* of the minute of agreement is the Victoria Park Company, and the Victoria Park Company are entitled to have the obligation fully and completely performed, and performed once for all within twelve months from the date of the agreement.

It is contended upon the part of the defender that this obligation of the defender was not transmissible by the Victoria Park Company to other parties. And if it were necessary for the case of the defender to hold that this obligation was absolutely intransmissible, I should hesitate to affirm that proposition. But although this obligation may have been transmissible to this effect, that in the event of the Victoria Park Company selling their estate as a whole to somebody else—the entire 34 acres—they might be entitled to assign this obligation also, as being a valuable right connected with that estate of theirs, it is quite a different question whether they are entitled with reference to such an obligation to multiply the creditors in that obligation by giving a right to enforce it to every person who buys a piece of ground from them to build a house upon. It rather appears to me, however, from what followed the constitution of this obligation, that this last was the point of view from which the Victoria Park Company were at one time at least inclined to look at this matter. Very soon after the transaction with Mr Paterson they granted a disposition of a piece of ground to a person of the name of Marshall, who is the predecessor of the pursuers, and in that disposition they gave him right to various roads, and they inserted an assignation which has been variously construed as comprehending or not comprehending the obligation of Mr Paterson. It seems to me extremely doubtful whether this disposition either assigned, or was intended to assign, the obligation to make the road through the strip of ground belonging to Mr M'Ewan, for there is certainly no mention of that special obligation in the disposition; but in consequence of that being at least very doubtful, they afterwards at a subsequent date granted a separate assignation in favour of Mr Marshall's successors. So late as the year 1879 they granted this special assignation to the present pursuers, the terms of the assignation being to the following effect:—They say that the obligation con-

tained in the minute of agreement with Mr Paterson was intended to be assigned, and they describe it as being an obligation to open up and form a continuation of the said intended road of 40 feet wide through the said strip of ground belonging to the said James M'Ewan, and through the said John Alexander and Robert Balloch's land on the estate of Dowanhill to join Victoria Circus Road, and accordingly they do assign that obligation in regular form, and the assignation is followed by this declaration:—"Declaring that these presents are granted without prejudice to any rights already granted to other parties, or to our own right to enforce by ourselves alone, or to assign said obligation to any other parties." Now, the footing on which they proceed here plainly is, that they were not only entitled to assign this right not only to the pursuers as coming in place of Mr Paterson, but to any other persons who might buy ground from them for the purpose of building, or to use it themselves as regards the ground which they still retained in their own hand. In short, they deal with it as an obligation which any person deriving right from them, and having an interest to have the road opened, is entitled to enforce against the defenders. The question comes to be, whether that is the true construction of this obligation? If it be so, it is certainly an obligation of a very onerous and also of a very unusual kind.

Now, one can quite understand that parties in the position of the Victoria Park Company, desiring to have this road made with a view to the general improvement of their building ground, should take an obligation from Mr Paterson that as a condition of his obtaining certain ground from them he should see that this road was made, but as to assigning this obligation to everyone else, and keeping it up as a standing obligation for a long series of years, I do not think that that was in the contemplation of the parties to the original agreement at all. It appears to me that it was an obligation which was intended to be enforced by the Victoria Park Company themselves, or by any successors of theirs in their entire estate, but not a thing to be given out in parcels to every person who might buy a piece of ground from the company however small, being a portion of their estate of 34 acres. The hardship of such a construction to the defender becomes very apparent when we consider what has been done with the estate of the Victoria Park Company. We have a joint minute of admissions in which it is stated that the quantity of ground originally belonging to the Victoria Park Company was 34 acres 3 roods and 15 poles, of which about 10 acres were conveyed by the company to purchasers or feuars prior to July 1873, and the remaining 24 acres were disposed of subsequent to that date. There were thirty-five conveyances, apparently of different pieces of ground, for building purposes granted by the company subsequent to 1873. And it is further mentioned "that in none of these conveyances is there any reference to the obligation to open up or continue the 40 feet road referred to through the lands of Dowanhill to join Victoria Circus Road, except it be in the one to Mr John Marshall," about which the parties are not agreed whether it contains such an assignation or not. I am humbly of opinion that it does not contain such an assignation, and therefore that in none of these conveyances which this company gave out did they give to the purchasers any right to enforce this obligation. But the contention is that the company were entitled by separate assignation to give to anyone of their purchasers a right to enforce this obligation against Mr Paterson. And here it occurs to me to observe what a very peculiar obligation this was, in respect Mr Paterson was bound to construct a road through the land of a third party who was not bound by the agreement, nor in any way concerned with it. Of course the construction of the road became a *factum imprestabile* if Mr M'Ewan, the third party, chose to refuse to sell his ground or to allow the road to be made. The consequence would then be that every one of those thirty-five persons who got conveyances after 1873, and all those who obtained conveyances before, would, according to the view of the Victoria Park Company, be entitled to receive from them, whenever they chose to give it, a separate assignation to this obligation of Mr Paterson, and every one of them accordingly would, in the discretion of the Victoria Park Company, and if they chose, have a good action for damages against Mr Paterson for the non-performance of this obligation. I have come to the conclusion that this is not what was intended by the parties in 1873. I do not think that they then contemplated that the creditor in this obligation should be anybody but the one party who for the time was in right of the estate which belonged to the Victoria Park Company. I do not think that it was in the power of the company to multiply indefinitely the number of creditors in that obligation, and consequently I am of opinion that the pursuers, as coming in place of Mr Marshall, notwithstanding that they have obtained this separate assignation from the Victoria Park Company, have no title to enforce this obligation. I am therefore unable to concur in the finding of the Lord Ordinary, upon which his whole interlocutor is based—"That the pursuers are in right of and entitled to enforce said obligation." I think the interlocutor ought to be recalled and the action dismissed on the ground of want of title.

Lord Shand has just suggested to me, and I quite agree with him, that we should also express an opinion upon the other question which was argued before us, viz., assuming that the pursuers have a title to enforce this obligation, whether it can be enforced in the form of a specific implement, or of damages only? Now, in the circumstances of this case, I think it is within the discretion of the Court to say which of these remedies the pursuers would be entitled to; and it appears to me that the appropriate remedy in the present case would be, not a decree *ad factum præstandum*, but a decree for damages only.

Lord Mure—I am of the same opinion. This claim seems to me from its nature to resolve itself into one of damages. That appears from the terms of the special assignation of 1879, which proceeds on the supposition that the Victoria Park Company had the power of conveying to each of their disponees the right to raise an action of damages unless the defender was able to have this road made, because an action of damages is the alternative in the event of their not being able to

obtain specific implement. This shows the very peculiar nature of this obligation—that an action of damages at the instance of each of thirty-four persons would be the practical result of holding that the obligation might be enforced in whole or in part according as the Victoria Park Company choose. The question is whether the special nature of this obligation is not such as to prevent it from being assigned, at least to the effect of giving each of these feuars a title to sue, and it seems to me that, looking to the very peculiar nature of the obligation, it is one which was not intended to be assigned in this way.

Lord Shand—I entirely agree with your Lordships on both points.

The obligation founded on was originally granted in July 1873 by John Alexander and Robert Balloch, who are parties to a minute of agreement of that date with the Victoria Park Feuing Company, and they by that agreement bound themselves within twelve months "to open up and form a continuation of the said intended road through the said strip of ground belonging to James M'Ewan." That obligation was really undertaken on an arrangement with Mr Paterson, the defender, he being the party truly interested, and was directly adopted by him in an agreement with the Feuing Company, embodied in the deed of December 1873, in which he undertook to pay the price of the ground purchased, and to perform the obligations undertaken by Messrs Alexander and Balloch, but subject to a declaration that the time allowed for opening up and forming the road should be extended to a year from December 1873. The result of these two deeds, consequently, was the undertaking by Mr Paterson of a personal obligation, in which the Victoria Feuing Company were creditors, to make a road through M'Ewan's strip of ground within twelve months from the date of the last agreement.

This action was raised in December 1879, six years after the date of the agreement. It is not at the instance of the Victoria Park Company, the creditors in the obligation, but it is brought by the trustees for behoof of the Belhaven United Presbyterian Church, who have acquired part of the Victoria Park Company's ground and built a church on it. I shall assume that if the obligation undertaken by Mr Paterson be transmissible to feuars or purchasers of parts of the property of the Victoria Feuing Company, such as the present pursuers are, the right was duly transmitted to them either by the deed of 1876, which is by no means clear in its terms, or by that of 1879, which proceeds on the footing that although it had been intended in the previous deed to include an assignation of this right, yet this had not been done in express unambiguous terms. But it must be noticed that in the deed of 1879 the position which the Victoria Park Company take up in reference to their rights in this matter is made very clear, because while they grant this conveyance to the United Presbyterian Church, they do so under a declaration that it is granted "without prejudice to any rights already granted to other parties, or to our own right to enforce by ourselves alone, or to assign said obligation to any other parties having a legal interest in the due implement thereof, and also that our granting these presents does not imply any warrandice or obligation on us to uphold these presents in favour of the said trustee." So that the footing upon which in 1879 this right was conveyed is that the Victoria Park Company reserve to themselves a similar right to enforce the obligation, and also that they reserve the power to grant like assignations to any other of the large number of persons to whom they have given off parts of the property belonging to them.

Before directly dealing with the question whether this obligation against Mr Paterson can be transmitted in this way, it is worthy of notice that the obligation was not made binding on the estate of Dowanhill, nor was it feudalised in any way so as to run with the lands. The minute of agreement was followed by a conveyance of the property, and if it had been intended that this obligation, personal in its nature, should run in favour of successors in the lands belonging to the Victoria Park Feuing Company, or against the proprietors for the time of Dowanhill, the conveyance would, it seems to me, have been the appropriate deed in which this should have been done. As it is, the sole creditors in the obligation were the Feuing Company, and the obligation as it affects Paterson binds him and his personal estate only, and has no relation to the proprietorship of the estate of Dowanhill.

Taking it in that view, and bearing in mind that the obligation in its nature is not like those obligations of common occurrence in feu-contracts where superior and vassal bind themselves and their respective successors to perform or refrain from performing acts of a continuing nature, and which are to subsist as long as the relation of superior and vassal exists, what do the pursuers maintain? They say that this obligation against Paterson is one which the Victoria Park Feuing Company were entitled to assign to any number of one or two hundred persons, purchasers of parts of their lands, giving a right to each of these persons to enforce implement of the obligation, with the result of course that in the event of the defender Mr Paterson being unable to implement it, then each of them has a claim of damages against him. Your Lordship has noticed the history of this Victoria Park Feuing Company. Since 1873, when Mr Paterson came under the obligation, the company have given off 24 acres of ground, to all of which it must be conceded that an assignation of the obligation would be an advantage, and that the 24 acres so given off were conveyed in thirty-five different conveyances, and the contention is that though an assignation has not been granted in any of these cases except the one in dispute, it nevertheless was in the power of the company to have granted it, and they may still grant it. The result of this would be that each of these thirty-five feuars might in turn still further split up and transfer this obligation. As appears from the report of Mr Armour, there have been erected on these 24 acres two churches, three villas, 115 self-contained lodgings, ten tenements of dwelling-houses, and three tenements of shops and dwelling-houses—that is to say, 133 different tenements, now probably with different proprietors—and the argument of the pursuer involves this, that it was in the power of the Victoria Park Feuing Company to give a right to each of these proprietors to compel Paterson to make this road, and failing that, to insist in a claim of damages.

It is not unimportant to observe that the obligation undertaken by Mr Paterson, somewhat rashly, was an obligation to make a road through a strip of ground belonging to another person. Mr Paterson no doubt thought that under other deeds he had the power of compelling M'Ewan, the owner of the strip of ground, to make the road, and we have had an anxious litigation on that point, in which he has been unsuccessful. Now then, supposing this obligation could not possibly be performed through the refusal of Mr M'Ewan to allow the road to be made on any terms, and the Victoria Park Company were entitled to assign and actually assigned the obligation in the way contended for. In such a case Mr Paterson would have to meet, not a claim of damages at the instance of the company only, but 133 separate claims of damages, each relating to a separate property, which was affected in its own peculiar way. It appears to me out of the question to say that that can be the effect of the obligation. It was an obligation in which the Victoria Park Company were alone to be creditors, and which they alone were entitled to enforce. I do not say that they might not have assigned the right to enforce it, if they had transferred their entire property to some one else, and at least they could have bound themselves to allow their names to be used once for all in an action against the defender. Nay, further, if the company should still have in their hands property sufficient to give them an interest to enforce the obligation, I do not say that they would not be entitled to do so. But I am very clearly of opinion that the obligation is not one which can be transferred in the way the pursuers contend for here.

There are other anomalous consequences which would follow from sustaining this action. Your Lordships have expressed an opinion that a claim of damages is the proper remedy, if any, in the present case, and I agree. But how, if that be so, are damages to be assessed? If the ground had remained in the hands of the Victoria Company, there would have been a single claim, but the ground has not remained in the hands of the company, and consequently if damages are to be assessed they must be assessed according to what this church has suffered, and not according to what the Victoria Park Company have suffered. And there would be the same question in all the other cases. Some portions of the ground are occupied by shops, and the question to go to the jury would be the damage which the shops have suffered through loss of trade from the road not having been opened up. This mode of estimating the damages is totally different from what would have been the mode had the Victoria Park Company remained the single creditor, and creates a totally different liability. For I think that it is out of the question to say that the proper way of assessing the claims of each of these 133 proprietors would be to take the damages as in a question with the Victoria Park Company, and divide that sum as a jury might estimate the share which should be given to the several claimants. I may further say that there is this other claim against the right to assign the obligation in the way contended for, that so long as the ground remained in the hands of the Victoria Park Company, release from the obligation might have been purchased from the company. Now the company would be obliged to say, "No; we have no power. We have tied our hands up. You must settle now with us, and also with our feuars." It would be unreasonable to hold that Mr Paterson could be made subject to such a change of liability as this.

There now remains only the question whether the pursuers are entitled to specific implement or to damages merely. The general rule of our law is that when a party has it in his power to fulfil an obligation which he has undertaken the Court will compel him to do so. But it must always be in the discretion of the Court to say whether this remedy of specific implement or one of damages is the proper and suitable remedy in the circumstances. In the present case there are several considerations which seem to me to show that the pursuers are not entitled to the remedy of specific implement which they ask for. In the first place, a great peculiarity of the case is that Mr Paterson undertook an obligation with reference to property which was not his own. Both parties must be assumed to have had in view the possibility that Mr Paterson might be unable to fulfil his undertaking, and that such an agreement could only be enforced on terms if the use of the strip could be got on terms not altogether unreasonable. Now, what are the facts? It appears from the printed papers in the relative case between M'Ewan and Paterson that M'Ewan, through whose ground the road was to be made, bought the whole strip of ground, which was 550 long by 4½ feet wide, and paid £142 for it. The road in question, if made, is to be made over 40 feet in length of this 550 feet, leaving M'Ewan in possession of 510, with the power to block-up another road between Dowanhill and a populous part of Glasgow on the other side. But what are the terms on which M'Ewan proposes to sell this comparatively small portion of the ground for which he paid in all £142. He offers to take £1500 in addition to the expenses of the former action, as taxed between agent and client, which I suppose may be a considerable sum. Mr M'Ewan had certainly recognised the practical value of the maxim that the buyer's necessity is the seller's opportunity. In the record the pursuers estimate the damage which the want of this road causes to their property at £1000, so that their proposal really comes to this, that the defenders should pay £1500 and the expenses alluded to in order to avoid an injury to them, which they estimate at £1000. That plainly is a case in which we cannot decree specific implement. If Mr M'Ewan had demanded £10,000 I suppose the pursuers could hardly have pressed their claim for specific implement, and his actual demand seems to me for all practical purposes to be equally objectionable. I am therefore of opinion on this second branch of the case, that even if the pursuers had a title to maintain the action, their claim must be one of damages and not for specific implement.

The Lords recalled the Lord Ordinary's interlocutor, recalled the sist of 7th July 1880, found that pursuers have no right to enforce the obligation libelled, and dismissed the action.

Counsel for Reclaimers (Pursuers) — Lord Advocate (Balfour, Q.C.) — Alison. Agent — R. Ainslie Brown, S.S.C.

Counsel for Defender (Paterson)—Solicitor-

General (Asher)—Jameson. Agents—J. & J. Ross, W.S.

Counsel for Defender (Alexander)—Lorimer. Agent—F. J. Martin, W.S.

Friday, December 16.

SECOND DIVISION.

[Sheriff of Lanarkshire.

DULLATUR FEUING AND BUILDING COMPANY *v.* RITCHIE AND STURROCK.

Heritable Security — Bond and Disposition in Security—Transmission of the Personal Obligation in a Bond and Disposition in Security—Act 37 and 38 Vict. c. 94, sec. 47 (Conveyancing Act 1874).

A property over which certain heritable securities had been granted was disponed "under burden of the sum of £6800, being the amount of several heritable securities existing over the said subjects." *Held* that this clause did not transmit as against the disponee any personal obligation under the bonds, as being an agreement to that effect *in gremio* of the conveyance, in the sense of section 47 of the Conveyancing Act 1874.

Bond and Disposition in Security over Property on which Buildings are to be Erected—Advances to Builders Payable on Architect's Certificate.

Money having been advanced to a builder over property on which buildings were to be erected, and the erection of which was necessary to make the security of sufficient value to cover the advance, a balance of the money was paid into bank in joint names of the agents for the borrower and lender, to be uplifted by instalments as the buildings progressed, on the certificate of an architect named. The borrower having become bankrupt, *held* that any person in his right who produced the necessary certificate of the progress of the buildings was entitled to payment of the corresponding instalment.

In February 1877 Daniel Mellis, wright and builder in Glasgow, having borrowed from Peter Ritchie £1200, and from John Sturrock £800, granted in their favour bonds and dispositions in security (which were declared to rank *pari passu* on the subjects disponed in security), binding himself to repay to them at Martinmas 1877 the sums so borrowed, with interest at 5 per cent. In security he disponed two lots of ground at Dullatur, in the parish of Cumbernauld. As the sufficiency of the security depended on the completion of certain buildings then in process of erection on the property by Mellis, it was agreed that only a first balance of £450 of the sum thus lent should be then paid over, the balance being deposited in bank in the joint names of the lenders' and borrower's agents for behoof of the parties (except a sum of £100 to be retained in the meantime by the lenders till the subjects should be occupied, as a security for their interest), and paid over by instalments as the buildings progressed upon the reports of the architects named. The loan was not paid up at Martinmas 1877, and in the course of that year two additional instalments amounting to £1000 were paid over from the bank to the borrower on the architect's reports.

In September 1877 Mellis, "for sundry good and various causes," conveyed the subjects disponed in security, along with certain other subjects, to his agent Mr Lennox. This disposition was recorded on 6th October 1877. Lennox was sequestrated in March 1878. Soon afterwards the sequestration was brought to an end by a deed of arrangement, pursuant to which, in August 1878, he conveyed to the defenders the Dullatur Feuing Company, with entry as at 6th March 1878, the date of his bankruptcy, *inter alia*, the subjects acquired by him from Mellis as above mentioned, under the burdens contained in the several feu-contracts thereof, "and also under burden of the sum of £6800 sterling, being the amount of several heritable securities existing over the said subjects." That sum of £6800 included the bonds of Ritchie and Sturrock. Mellis became bankrupt shortly after the bankruptcy of Lennox. Disputes having arisen between Ritchie and Sturrock on the one hand, and the Dullatur Feuing Company on the other, as to whether or not the buildings were "finished" in the sense of the contract between the parties, and as to the obtainment by the Dullatur Feuing Company of a balance of £450 of the amount deposited in bank as above mentioned, in respect of their having "finished" the buildings, Ritchie and Sturrock, after an unsuccessful attempt on the part of all parties concerned to sell the subjects by public roup at a fair upset price, having become aware of the terms of the disposition containing the clause above quoted by Lennox to the Dullatur Feuing Company, raised an action against them in the Sheriff Court of Lanarkshire for payment with interest of the amount contained in their bonds, with penalty and interest since Whitsunday 1879.

They pleaded, *inter alia*—"(1) The defenders having accepted from Duncan Lennox a disposition to the subjects of the pursuers' securities, under burden of these securities, all as above set forth, are liable to the pursuers, both at common law and by statute (37 and 38 Vict. c. 94, sec. 47), for the amounts contained in and due by the two several bonds and dispositions in security herein before specified and partly recited."

The defenders pleaded, *inter alia*—(3) There not being *in gremio* of the disposition in favour of the defenders an agreement that the personal obligations contained in the said bonds and dispositions shall transmit against the defenders, the defenders are not personally liable for the sums contained in the said bonds. (4) There being no personal obligation upon the said Duncan Lennox to pay the principal, interest, and penalties contained in the said bonds and dispositions in security, he could not transmit any such obligation against the defenders."

The Sheriff-Substitute (GUTHRIE) being of opinion that the clause "under burden of the sum of £6800, being the amount of several heritable securities existing over the said subjects," was intended to import, and did import a substitution of the defenders in the personal obligations which attached to Mellis under the bonds, decerned against the defenders for the amount contained in bonds, with interest.