or be leased to the lessees," showed that the distinction was present to the minds of the parties to the contract.

At advising—

LORD JUSTICE-CLERK—I have come to the conclusion that the interpretation which the Lord Ordinary has put upon the clause in question is the only interpretation which is sound, looking to the terms of the lease. Therefore I am for adhering to his interlocutor.

LORD TRAYNER—I agree. I think the construction of the Lord Ordinary is the correct construction, and it is fatal to the contention of the reclaimers.

LORD MONCREIFF — The construction adopted by the Lord Ordinary may at first sight appear somewhat strict, but after reading the whole of the lease I am satisfied that it is correct. No wayleave being charged the clause must be strictly construed against the lessees.

The word "let" will not bear the meaning of "belonging in property to." Neither in legal nor in popular language is the word so used.

Although the question must be decided on the terms of the lease, it is legitimate in illustration or explanation of its meaning to observe that while the fact that Wallsgreen belonged to the lessees not in lease but in property is noted in the lease, they were known to be about to obtain a lease of the adjoining minerals in Balgreggie. No doubt the allusion to "minerals which may hereafter be let to the lessees" referred chiefly to those minerals.

LORD YOUNG was absent.

The Court adhered.

Counsel for the Complainer—Dundas, Q.C.—Clyde. Agents—Dundas & Wilson, C.S.

Counsel for the Respondents—W. Campbell, Q.C.—Graham Stewart. Agents—Wishart & Sanderson, W.S.

Friday, June 22.

FIRST DIVISION.

[Lord Low, Ordinary.

KIRKCALDY AND DISTRICT RAILWAY COMPANY *v.* CALEDONIAN RAILWAY COMPANY.

Contract — Construction — Agreement to Contribute to Expenses of Promoting Railway Bill—Relief or Primary Obligation—Railway.

The Caledonian Railway Company being anxious to obtain direct access into the county of Fife, agreed with the Kirkcaldy and District Railway Company that the latter should promote a bill for the construction of four railways. It was agreed between the parties that in the event of the bill authorising the construction of the railway not receiving the Royal Assent from any cause other than the withdrawal therefrom of the support of the Caledonian Railway Company, that company should "contribute towards the expense of the said bill (1) two-thirds of all outlays incurred in connection with the promotion of the bill; and (2) one-third of the professional charges . . . in connection with such promotion." The House of Lords held that the preamble was not proved so far as it related to the three railways, Nos. one, two, and four included in the bill. These three were the only ones in which the Caledonian Railway Company were interested. The preamble was held to be proved as regards railway No. three.

In an action at the instance of the Kirkcaldy Railway Company against the Caledonian Railway Company for payment of the proportionate amount of expenses connected with the bill, in accordance with the agreement between the parties, the defenders maintained (1st) that the bill had in fact received the Royal assent, and that on a sound construction of the agreement they were not liable for any portion of the sum claimed; and (2nd), that their obligation was one of relief only, and that as the whole expenses had been paid by the North British Railway Company and not by the pursuers, the claim of relief must fail.

Held (1) that the bill had not received Royal assent within the meaning of the agreement, and that the terms of the agreement applied to the case; (2) that the obligation of the defenders was not one of relief only, but was an unqualified obligation to pay a share of the expenses of the bill, and that it was therefore unnecessary for the pursuers to show that they had personally paid or were liable to pay the expenses; and (3) that, as any agreement between the pursuers and the North British Company was *res inter alios acta* and *jus tertii* for the defenders, even if it were proved that the expenses had been paid by the North British Railway Company, the defenders would not thereby be released from their obligation.

The Kirkcaldy and District Railway Company were incorporated under the name of the Seafield Dock and Railway Company in 1883, for the purpose, *inter alia*, of constructing a deep-water dock at Kinghorn, and two small railway lines. By the Seafield Dock and Railway Act 1888 the name of the company was changed into "The Kirkcaldy and District Railway Company." By a further Act passed in 1890 the company obtained power to construct eight other railways, being a continuation of their system authorised in 1883. They commenced the construction of certain of the works, and being unable to carry them on as expeditiously as desired, approached the Caledonian Railway Company with the

view of obtaining financial aid. The Caledonian Railway Company agreed that they would contribute their aid if a junction was made between their line and that of the Kirkcaldy Company, thereby giving the Caledonian Company direct access into Fife. It was arranged therefore that the Kirkcaldy Railway Company should promote in the parliamentary session of 1891 a bill for the purpose, *inter alia*, of obtaining power to construct four railways, of which the first, second, and fourth, if duly constructed, would give the Caledonian Railway Company a direct access into Fife without passing over the lines of the North British Railway Company. The construction of the third railway was not of any service to the Caledonian Railway Company.

On 2nd and 4th March 1891, during the course of the bill in Parliament, an agreement was entered into between the Caledonian Railway Company *of the first part* and the Kirkcaldy and District Railway Company *of the second part*, whereby it was agreed *inter alia* (1) that the Kirkcaldy Company should construct the four railways referred to; (3) that the Caledonian Company should work, manage, and maintain them; (9) that the bill should contain powers of subscription by the Caledonian Company to the extent of £200,000 towards the share capital proposed to be authorised by the bill; and (10) that this agreement should be scheduled to and confirmed by the bill then being promoted by the Kirkcaldy Company.

Of the same dates the parties to this principal agreement (being the scheduled agreement) entered into a supplementary agreement, whereby and on the narrative that they had entered into the principal agreement (referred to as "the scheduled agreement"), and had also made certain other arrangements, the parties agreed as follows (the first party being the Caledonian Company):—"*First.* In the event of the said bill authorising the construction of the railways therein, and in the scheduled agreement described, and confirming the scheduled agreement, not receiving the Royal assent from any cause other than the withdrawal therefrom of the support of the first party, the first party shall contribute towards the expenses of the said bill (1) two-thirds of all outlays incurred in connection with the promotion of the bill; and (2) one-third of the professional charges of the solicitors, parliamentary agents, and engineers in connection with such promotion." The parties also agreed (2) that on the bill confirming the scheduled agreement receiving Royal assent the Caledonian Company should be bound to pay to the Kirkcaldy Company or their solicitors a sum equal to two-thirds of outlays and one-third of professional charges, and should be entitled to receive fully paid-up ordinary shares of the nominal amount so paid, which they might impute towards their contribution to the capital of the undertaking; and (3) that the Caledonian Company might withdraw from connection with or support of the bill and require withdrawal of the scheduled agreement on payment of their portion of the expenses incurred to date of their intimation of withdrawal in accordance with article first of this supplementary agreement, but that notwithstanding such withdrawal the Kirkcaldy Company might proceed with the bill (the scheduled agreement being withdrawn) at their own risk and expense.

The bill was passed by the House of Commons, but the House of Lords held the preamble not proved in so far as it related to railways Nos. 1, 2, and 4, though it was held to be proved as regards railway No. 3.

On 20th July 1894 an action was raised by the Kirkcaldy Railway Company against the Caledonian Railway Company for payment of the sum of £11,850, being the proportion of the expenses of promoting the bill which the pursuers averred to be due by the defenders in respect of the supplementary agreement quoted above.

The pursuers averred—"(Cond. 6) The said bill having come before a Committee of the House of Commons, the same was passed by that Committee, and also passed through the House of Commons, but when it subsequently came before a Committee of the House of Lords their Lordships were of opinion that so much of the preamble of the bill as related to the said railways, Nos. 1, 2, and 4, promoted by the said bill, was not proved. The preamble in regard to railway No. 3 only was held by their Lordships to be proved." They maintained that in consequence of the action of the House of Lords no bill authorising the construction of the railway described in the bill and the scheduled agreement, and confirming the scheduled agreement, had received the Royal assent; and that as this was from a cause other than the withdrawal of the support of the defenders, they were liable in terms of the agreement.

The defenders denied liability for any part of the sum sued for, and averred—"(Ans. 5 and 6) . . . . Explained that after certain alterations had been made in Committee the said bill passed the House of Commons. In the House of Lords the further alterations mentioned in condescendence 6 were made in the bill, and it then passed the House of Lords and received the Royal assent on 5th August 1891. The last clause in the Act provided that 'All costs, charges, and expenses of and incident to the preparing for, obtaining and passing of this Act, or otherwise in relation thereto, shall be paid by the company.' The pursuers were thereby enabled to charge these expenses against capital. The object of the first clause of the supplementary agreement was to relieve the pursuers to a certain extent of the expenses of promoting the bill in the event of the bill not becoming law, and the pursuers consequently being obliged to pay the expenses connected with the bill from sources other than from capital authorised by Parliament. The obligation thereby undertaken by the defenders was one of relief merely. While the bill was before the Committee of the House of Lords the North British Railway

Company made an offer before that Committee that if the bill were rejected they would take over the powers and construct the authorised railway of the pursuers. It is averred that after the Act of 1891 was passed the North British Railway Company entered into an agreement with the pursuers for the purpose of giving effect to that offer, and for the relief of the pursuers of their obligations as to Parliamentary expenses, including the expenses of the bill and Act of 1891, and land claims, and also of liability for various Parliamentary deposits. The pursuers are called upon to produce that agreement, and all agreements which they have entered into with the North British Railway Company, or others on their behalf, relative thereto. Following upon that agreement a clause was introduced into the North British Railway Act 1892, section 16, by which the North British Railway Company were authorised, with the authority of three-fourths of the votes of their shareholders specially convened for the purpose, to subscribe towards the undertaking of the pursuers any sum which they might think fit, not exceeding in whole £210,000, and might take and hold shares in the capital of the pursuers' company in respect of that subscription. It is believed that the North British Railway Company have under that Act acquired the whole share capital of the pursuers' company, and that the North British Railway Company are now the only party having any interest in the pursuers' company. The effect of the said agreement between the pursuers and the North British Railway Company was to make it impossible for the pursuers now to perform their part of the agreement entered into between them and the defenders to promote the passing of an Act or Acts for the whole purpose contemplated by the said principal agreement, including the formation of railways 1, 2, and 4. (Ans. 7) . . . Explained that under article 1 of the said supplementary agreement the defenders were only liable to pay the sums claimed in the event of the bill of 1891 not receiving the Royal assent. It did receive the Royal assent, as above mentioned, and no liability was or could be incurred by the defenders under the said article. In addition, such liability was only to arise in reference to an Act confirming the scheduled agreement, and the Act which was passed contained no such confirmation. Further, it is believed and averred that the whole expenses connected with the said bill, including the expenses claimed in this action, have been paid to the pursuers by the North British Railway Company under the agreement between these parties referred to in the preceding answer."

The pursuers referred to the agreements mentioned in these answers, *quoad ultra* denied the defenders' statements, and explained, *inter alia*, that the Kirkcaldy and District Railway Company was an independent corporation entirely distinct as such from the North British Company.

The defenders pleaded—"(2) The pursuers' averments are not relevant or sufficient to support the conclusions of the summons. (3) The bill of 1891 having received the Royal assent, the defenders are not liable, on a sound construction of article 1 of the said supplementary agreement, for any portion of the sum claimed in name of expenses of the bill. (4) If defenders are liable to pay any part of the said expenses they cannot be called upon to do so unless in return for a transfer by the pursuers to them of fully paid-up ordinary shares in the pursuers' company of an equivalent nominal amount. (5) The defenders are not liable to pay any part of the said expenses, in respect that the bill which received the Royal assent did not confirm the said principal agreement. (7) The said expenses and commission having been paid by the North British Railway Company the pursuers are not entitled to sue the defenders therefor."

The Lord Ordinary (Low) on 14th May 1895 pronounced an interlocutor whereby he repelled the 2nd, 3rd, 4th, and 5th pleas-in-law for the defenders, and allowed them a proof of their 5th and 6th answers, quoted above.

Opinion.—"The question of construction is so clear that I am disposed to deal with it at once. The Court is always entitled to know the circumstances, so as to approach the contract from the same point of view as the parties took. Now, it is not disputed that the Kirkcaldy Company required the financial aid of the Caledonian Company, and that the Caledonian Company agreed that they should contribute that aid if a junction was made between their line and the Kirkcaldy Company's line, thereby giving the Caledonian direct access into Fifeshire; and the Caledonian Company were thereafter given the practical management of the whole undertaking. Now, Mr Guthrie has pointed out that a bill which is presented to Parliament may be changed very much in the passage through Parliament, and though an Act may come out at the other end and receive the Royal assent, it may be a very different thing from the bill which was originally presented. Now, of course the parties had that in view in making this agreement, so that we approach the agreement with this knowledge, that the object of the Caledonian Railway Company in entering into this agreement at all was to get a connection between their line and the system of the Kirkcaldy Company, and that both parties had in view that alterations and modifications might be made upon the bill as presented. That being so, the question comes up, what effect is to be given to the words which occur both in the first and second articles of the agreement, viz.—'And confirming the scheduled agreement.' Mr Guthrie and Mr Clyde contended that these words should be omitted altogether. I can see no reason for omitting them altogether. To do so I think would be contrary to the well-established principles of the construction of agreements, or of any other documents, and one can quite see the reason why these words descriptive of the bill were put into these two articles of the agreement, viz., it was simply to guard

against an Act of Parliament being ultimately passed which did not contain that which was essential to the Caledonian Railway Company having any interest in the matter, viz., the confirmation of the scheduled agreement. Now, if these words are to be taken into consideration, and if they are to be read according to their ordinary and plain meaning, then only one answer can be given to the question which has been raised in this debate. The Royal Assent has not been given to a bill confirming the scheduled agreement, and therefore the Caledonian Railway Company are not entitled to take advantage of the second article of the agreement; and, upon the other hand, it seems to me to be perfectly clear that, unless some other ground of defence is made out, they are bound by the obligations in the first article of the agreement. I therefore propose to repel, which I fancy I may do without touching the questions which are still undisposed of, the second, third, fourth, and fifth pleas for the defenders; and then I shall allow the pursuers a proof of their averments in article 8 of the condescendence, and to the defenders their answer thereto; and the defenders a proof of their averments in answers 5 and 6 of the condescendence, and to the pursuers their answers thereto."

[Article 8 referred to a dispute between the parties regarding a certain small sum which is not again referred to in the judgments.]

The defenders reclaimed to the First Division, who on 11th June 1895 pronounced the following interlocutor:—"Adhere to the said interlocutor in so far as it repels the 2nd, 3rd, 4th, and 5th pleas-in-law for the defenders; *quoad ultra*, recal the said interlocutor; before answer allow the defenders a proof of their averments in their answers 5, 6, and 7, and to the pursuers a proof of their answers thereto. . . ."

LORD PRESIDENT—I am of opinion with the Lord Ordinary that the first head of the supplementary agreement applies to the events which have happened.

The bill which the defenders were interested to promote was a bill which should open Fife to their traffic, by authorising the construction of certain railways, and confirming the agreement scheduled to the bill. The supplementary agreement, which we have now to construe, determines how the costs of this bill, in which they were jointly interested, are to be borne by the two companies, the pursuers and defenders, in the several events which might befall it. The bill might pass; and in that event the second article comes into effect. The defenders might think fit of their own choice to withdraw from supporting the bill while it was in progress, and to require the withdrawal of the scheduled agreement, and in that case they bear two-thirds of the costs already incurred, the pursuers being at liberty to go on, at their own risk and expense, with such parts of the bill as they still were interested to pass for their own benefit. The other case is that of the allies remaining together in support of the bill, but the bill being lost. That is the case contemplated in the first article. I say "the bill being lost," because, according to modern experience no bill which passes both Houses fails to receive the Royal assent; and accordingly, when the agreement speaks of the bill not receiving Royal assent, from any cause other than the withdrawal therefrom of the support of the defenders, the event contemplated is the bill being lost in one or other of the two Houses.

Now, as the facts stand, the bill was lost in the House of Lords. When I say that, I mean the bill which the first article carefully describes by the essential features which constituted the common interest of the two parties. When the Lords found the preamble not proved as regards the part of the bill to which the scheduled agreement related, that bill, in the sense of the supplementary agreement, came to an end. The common objects of the allies failed and the alliance was terminated. It is quite true that the pursuers clung to that fragment of the bill which affected themselves alone; and under the original title of the bill those clauses received the Royal assent. But the identity of the bill described in the supplementary agreement was lost. The course which the pursuers took was substantially the same as that contemplated in the third article, as open to them on the voluntary defection of the defenders; and the structure of the first article seems to me to apply exactly to the case now before us, which is that of the bill, in which both allies were interested, being lost through other causes than voluntary defection.

It is of course clear that the logical view of the pursuers' rights is that they are entitled, under the supplementary agreement, only to those expenses which were incurred prior to the loss of the bill in the Lords, and are not entitled to the expenses incurred in the separate enterprise of the pursuers which ensued that event, and resulted in the Royal assent being given to a bill which did not sanction the scheduled agreement. The pursuers cannot at one and the same time say that the bill, of which the supplementary agreement speaks, did not receive the Royal assent and did receive it. Their proper argument is (and this was made clear by Mr Asher) that the bill which the supplementary agreement describes, and to which alone it relates, did not receive the Royal assent, but came to an end in the House of Lords. With it, of course, came to an end the expenses thereof.

I am therefore of opinion that the Lord Ordinary has rightly repelled the second, third, fourth, and fifth pleas of the defenders.

The Lord Ordinary has allowed to the defenders a proof of their averments in answers 5 and 6; and the defenders pointed out that, evidently by inadvertence, the averments in answer 7 are not included in the allowance—a criticism which the pursuers admitted to be just, assuming the case of the defenders to have any relevancy

at all. This, however, they deny; and they asked that the allowance of proof should be recalled. I am not prepared to accede to this contention, and do not think that we should interfere with the Lord Ordinary's discretion. At the same time, as we must vary the interlocutor by inserting answer 7 in the allowance of proof, it may be as well to order that allowance to be before answer.

LORD ADAM concurred.

LORD M'LAREN—I entirely agree with your Lordships' observations. I think the agreement shows, not only by implication, but by its express terms, that the purpose of the measure to which it relates was one which was supposed to be for the advantage of the Caledonian Railway Company. The company sought by this bill to obtain an access to the Kirkcaldy district for their system, and as the Kirkcaldy District Company was promoting the interests of the Caledonian Company it was agreed between them that the Caledonian Company should bear the cost of the necessary application to Parliament. The two cases contemplated are not really alternatives, because in every event the costs of the bill were to be paid by the Caledonian Company. The only difference was this, that as it was contemplated that the Caledonian Company should subscribe to the funds of the proposed extension, then in the event of the bill being carried the Caledonian Company were to receive shares in the new project, which were to include their subscription towards the expenses; in other words, instead of making a gift of the expenses they were to pay the money and to receive shares which would be of more or less speculative value in exchange. But in any view, the Kirkcaldy District Company was to undertake no liability for the costs, or at least were to be relieved of their costs. Now, the Kirkcaldy District Company included in the measure some local provisions of no great importance, and which only affected themselves. The main provisions of the measure were rejected by the House of Lords, but the clauses of a local character, in which the Kirkcaldy Company alone were interested, were passed; and it appears to me that it could make no difference in the intention of the parties with regard to the costs of the measure, and no difference in the agreement, that clauses in which the Caledonian Company were not interested should have been saved out of the wreck of the bill. If the provisions had been strictly alternative, a different principle of construction might come into view; but I think, on a fair reading of the agreement, it amounted to this, that in any event the Caledonian Company should bear the costs of the bill pending before Parliament, and that the alternatives specified were only as to the mode of payment and not as to the liability. It was stated that in consequence of the defeat of this bill the Kirkcaldy Company had been taken over by the North British Company, who had paid the costs. Of course we do not decide anything as to any question between these two companies; but in the meantime the Caledonian Company are liable to the Kirkcaldy Company in terms of their agreement.

LORD KINNEAR concurred.

A proof was led, the result of which sufficiently appears from the judgments of the Court, *infra*.

On 20th December 1895 the Lord Ordinary (LOW) delivered the following judgment:—"By agreement between the pursuers and the defenders, dated 2nd and 4th March 1891, the latter agreed, in the event of a certain bill then before Parliament 'not receiving Royal assent,' they would contribute towards the expense of the said bill—(1) two-thirds of all outlays incurred in connection with the promotion of the bill; and (2) one-third of the professional charges of the solicitors, Parliamentary agents, and engineers in connection with such promotion.'

"The bill did not receive Royal assent, and the present action is brought to enforce payment of the proportion of the expenses of promoting the bill which the defenders undertook to contribute.

"The defence is that the expenses have been paid by the North British Railway Company, and that therefore the pursuers have no title or interest to sue.

"It appears that the pursuers were unable to construct the railways and works for which they had obtained Parliamentary powers, and the North British Railway Company came to their assistance. The terms upon which they did so is an agreement dated 9th October 1891.

"By the first article of the agreement the North British Company agreed to purchase at par the whole share capital of the Kirkcaldy Company, and by the second article to construct the railways authorised by the various Acts of the Kirkcaldy Company.

"By the third article the North British Company undertook to 'fulfil, and so free and relieve the Kirkcaldy Company of, the whole obligations and liabilities incumbent on that company, or for which it is in any way liable, and, in particular, without prejudice to the general terms of this undertaking; . . . (3) the whole expenses of or connected with the promotion of the Kirkcaldy and District Railway Bills of 1890 and 1891, whether in relation to the portions thereof passed or the portions thrown out, the professional charges of the solicitors and Parliamentary agents in connection therewith to be certified by the Taxing Officers of the House of Commons. It is understood that the Kirkcaldy Company shall be entitled to recover payment of any part of such expenses from any person or company liable for the same, or any part thereof . . . the amounts referred to in number three; (4) . . . so far as consisting of professional charges to be paid when certified as aforesaid.'

"The North British Company carried out the agreement by acquiring at par the

whole of the issued share capital of the pursuers' company, and the price was credited to the latter company in their books. Two hundred of those shares were allotted to five gentlemen who are directors of the North British Company, and who subsequently became directors of the pursuers' company. The North British Company further advanced or guaranteed large sums for behoof of the pursuers' company, in respect of which the latter issued fresh shares in their favour.

"All the debts of the pursuers, including the expenses, to the payment of which the defenders had bound themselves to contribute, were paid either out of the price of the shares purchased by the North British Company, or out of the moneys subsequently advanced by that company.

"Although the North British Company acquired the sole interest in the pursuers' company, the two companies remained separate and distinct. There were accordingly separate books and accounts kept for the two companies, and the management and undertakings were kept entirely separate. Until the two companies were amalgamated by an Act of Parliament passed subsequent to the raising of this action, the relationship between them was either that of debtor and creditor or of company and shareholder.

"In these circumstances I am unable to see that the claim of the pursuers is in any way affected by the fact that the expenses in question were paid out of moneys which came from the North British Company. If the latter company had paid the expenses gratuitously it would have been a different matter. But they did not do so. On the contrary, what they did was to put the pursuers' company in funds to meet their obligations by purchasing the existing shares, and advancing money in consideration of the issue of additional shares, and any payments which were made out of these funds were truly made by the pursuers' company.

"The amalgamation which has taken place between the pursuers and the North British Company has in no way affected the title of the former to proceed with this action, because although the pursuers' company has been dissolved by the Amalgamating Act, it continues to exist for the purposes of winding-up; and the 43rd section of the Railways Clauses Act 1863 provides that actions commenced by the dissolved company prior to the amalgamation may be continued by that company after the amalgamation.

"I am therefore of opinion that the pursuers are entitled to decree."

After sundry other procedure, to which it is unnecessary to refer, the Lord Ordinary on 15th July 1899 pronounced the following interlocutor:—"The Lord Ordinary having resumed consideration of the cause, with the statement of pursuers' claim as adjusted by Mr Francis More, C.A., and the objections thereto, and heard counsel thereon, and on the question of interest and expenses, Decerns against the defenders for payment to the pursuers of the sum of £9055, 15s. 8d. sterling, being the amount of the sums due under the conclusions of the summons, with interest thereon at the rate of 5 per centum per annum from the date of citation till payment: Finds the defenders liable in expenses, including the expenses reserved by interlocutor dated 11th June 1895, reserving for after consideration the question of modification thereof, if any, and to what extent," &c.

The defenders reclaimed, and argued—The obligation undertaken by the defenders in the supplementary minute of agreement was an obligation of relief only. Accordingly they could only be called upon to discharge it when the pursuers had paid the whole expenses. They had not paid any of these expenses, the whole having been paid by the North British Railway Company. As therefore the pursuers had not paid this debt, some-one else having paid it on their behalf, the defenders could not be called upon to relieve them of any portion of it.

Argued for the pursuers and respondents—The pursuers had in fact paid the debt for which they were suing. But the true nature of the obligation was not one of relief, but an unqualified undertaking by the defenders to contribute, their *quid pro quo* being the chance of getting a connection with Fife. But whether the obligation was one of relief or of contribution, the defenders were not entitled to be freed from their obligation because the money to pay the expenses had been obtained from the North British Railway Company.

At advising—

LORD PRESIDENT—The Lord Ordinary has by his interlocutor of 15th July 1899, now submitted to review, found the defenders liable to the pursuers in the sum of £9055, 15s. 8d. as being due under a supplementary agreement entered into between the defenders of the first part and the pursuers of the second part on 2nd and 4th March 1891. The defenders intimated at the hearing that they did not raise any question as to the amount found due if liability was held to be established, and consequently the question of liability is the only one which we have to decide.

The defenders being anxious to obtain direct access into the county of Fife arranged that the pursuers should, in the Parliamentary Session of 1891, promote a bill for the construction of certain railways and other works, and during the course of the bill in Parliament, an agreement, dated 2nd and 4th March 1891, was entered into between the defenders of the first part, and the pursuers of the second part, which was scheduled to the bill while in Parliament. A supplementary minute of agreement was also entered into between the defenders and the pursuers bearing the same dates (2nd and 4th March 1891) by article 1 of which it was stipulated that in the event of the bill authorising the construction of the railway therein, and in the scheduled agreement described, and confirming the scheduled agreement, not receiving Royal assent from any cause other

than the withdrawal therefrom of the support of the first party (the present defenders), "the first party shall contribute towards the expense of the said bill (1) two-thirds of all outlays incurred in connection with the promotion of the bill, and (2) one-third of the professional charges of the solicitors, parliamentary agents, and engineers in connection with such promotion."

The preamble of the bill, in so far as it proposed to authorise the construction of railways Nos. 1, 2, and 4, was opposed in both Houses of Parliament by various parties, but ultimately the opposition was limited to an objection by the North British Railway Company to the construction of railways Nos. 1, 2, and 4 above mentioned, the bill not being opposed in so far as it related to railway No. 3. The bill was passed by the House of Commons, but the House of Lords held the preamble not proved in so far as it related to railways Nos. 1, 2, and 4, though it was held to be proved as regards railway No. 3. Accordingly no bill authorising the construction of the railway in the said bill and in the scheduled agreement described, and confirming the scheduled agreement, ever received the Royal assent. It was in effect decided by this Division of the Court on 11th June 1895 (affirming a judgment of the Lord Ordinary) that the first article of the supplementary agreement applied to the case, and that the second, third, fourth, and fifth pleas of the defenders had been rightly repelled by the Lord Ordinary. A proof was, however, allowed to the defenders of their averments in answers 5, 6, and 7, and this proof was led before the Lord Ordinary.

The main if not the sole defence now relied upon by the defenders is that the obligation undertaken by them in the supplementary minute of agreement to pay a share of the expenses therein mentioned was an obligation of relief only; that the pursuers were primarily liable to pay the whole expenses, the defenders being only liable to relieve them of a share if and when they did pay, and that as they (according to the defenders' allegation) have not paid, and are not now liable to pay any part of these expenses, the whole having been (as the defenders allege) paid by the North British Railway Company, the claim of relief must fail.

With reference to the first part of this contention, it appears to me that the obligation contained in article 1 of the supplementary agreement is not an obligation of relief only, but an unequivocal obligation to "contribute towards," or, in other words, to pay originally, and not merely by way of relief, the proportion of the expenses therein mentioned, so that the considerations which might apply to a case of a proper obligation of relief, and the liability resting upon the person claiming relief to show that he had paid or was liable to pay, is not present in this case. The pursuers and the defenders were both interested in the promotion of the bill—the main interest of the defenders being to obtain an independent access into Fife, and they agreed to contribute to the expenses of the bill in this their own interest—getting as the consideration for the promised contribution the chance of convincing Parliament that they should be allowed an independent access into Fife. I therefore think that the defenders must pay the stipulated shares of the expenses unless they can establish that they have been in some way discharged from the liability to do so, and this they have not, in my judgment, succeeded in doing. Further, it appears to me that the allegation of the defenders that the expenses in question have been paid by the North British Railway Company has not been proved.

It is true that a memorandum of proposals by the North British Railway Company for the purchase of the pursuers' railway was submitted on 7th October 1891, by which the North British Railway Company undertook, *inter alia*, to construct the railways authorised by the various Acts of the pursuers, and also to fulfil, and so free and relieve the pursuers of, the whole obligations and liabilities incumbent on them, or in which they were in any way liable, including the whole expenses of and connected with the promotion of the pursuers' bills of 1891, whether in relation to the portions thereof passed or to the portions thrown out, it being, however, "understood that the Kirkcaldy Company (the pursuers) shall be entitled to recover payment of any part of such expenses from any person or company liable for the same or any part thereof." The defenders were not parties to this agreement—it does not contain any stipulation on their behalf or in their favour—it was *res inter alios acta* in so far as they were concerned, and it appears to me that it would be *jus tertii* of them to found upon it But even if the carrying out of the agreement would (contrary to my opinion) have otherwise released the defenders from their obligation to contribute towards the expenses in question, I consider that the stipulation just quoted would have effectually reserved the claim against them.

It was also stipulated by the memorandum of proposals by the North British Railway Company that these proposals should "take effect in the event of the North British Company obtaining transfers from three-fourths in value of the Kirkcaldy Company's shareholders on or before 1st November next," and on 30th October 1891 the proposals for the purchase by the North British Railway Company of the pursuers' railway were, "in respect that more than three-fourths in value of the shares of the Kirkcaldy and District Railway Company have been transferred to Mr Wieland at par," unconditionally confirmed. The pursuers and the North British Railway Company, however, remained separate and distinct undertakings until 6th July 1895, nearly a year after the present action had been raised—when they were amalgamated by Act of Parliament.

But it appears that in the meantime the North British Railway Company lent large sums of money to the pursuers, or became security for large loans by the Clydesdale

Bank to them. The pursuers' books contain accounts headed "North British Railway Co. — Temporary Loan Account," "Clydesdale Bank — Current Account," "Clydesdale Bank—Loan Account," and "Interest Account," and in the books of the North British Railway Company there is an account styled "Kirkcaldy and District Railway Co.—Temporary Advance Account." Under these accounts large advances of money were made to or on behalf of the pursuers, and the advances so made to the pursuers by the North British Railway Company, or upon their credit, were in effect repaid to them by fully paid shares of the pursuers' company being allotted or issued to the North British Company, who ultimately became the sole shareholders of the pursuers' company. Still the relation between the pursuers and the North British Railway Company appears to me to have remained debtor and creditor as regards the advances made by the latter; guaranteed and guarantor as regards the advances made by the Clydesdale Bank; and latterly, company and shareholder during the period down to the amalgamation on 6th July 1895.

As to the actual payment of the expenses towards which the pursuers seek by this action to compel the defenders to contribute, it appears from Mr More's evidence that about £1000 was paid out of a credit which the pursuers had with the Royal Bank before they had any relations with the North British Railway Company, that another part was paid by the pursuers out of a loan which they received from the North British Railway Company, and that the remainder was paid out of advances made by the Clydesdale Bank to the pursuers, but it does not appear that any part was paid by the North British Railway Company to the persons to whom the expenses were due. I am therefore unable to see sufficient ground for holding that the effect of any of the dealings between the pursuers and the North British Railway Company was to release or discharge the defenders' obligation to contribute to the expenses under the supplementary agreement of 2nd and 4th March 1891.

I may add that I concur in the view expressed by the Lord Ordinary in his judgment of 20th December 1895, that although the pursuers' company was dissolved by the Amalgamating Act of 1895, it continues to exist for the purpose of winding-up, and that its title to insist in this action is saved by section 43 of the Railways Clauses Act 1863.

LORD M'LAREN—I agree with your Lordship in the chair, and only desire to add an observation upon what appears to me to be the determining point in the case. The Caledonian Railway Company are bound by contract to pay a proportion of the expenses incurred in promoting in Parliament the Kirkcaldy and District Railway Bill, and it is not disputed that the share of these expenses for which the Caledonian became liable has not been paid by that company, and that the Kirkcaldy Company has not disharged the Caledonian from this obligation. The defence put forward by the Caledonian is that the Kirkcaldy Company are entitled to be indemnified from other sources against all liability for these expenses. Now, there is no better settled principle of commercial law than that a contract of indemnity with one party is no answer to a demand against another who has undertaken an independent obligation. For instance, if I sue my neighbour for negligently setting fire to my haystack, he cannot successfully plead in defence that I am insured against loss by fire, or even that I have actually been paid the insurance money. It is *jus tertii* for him to inquire into my arrangements with my insurers, or whether I am suing him in my own interest, or have lent my name to enable my insurers to recover.

This is perhaps a rare case, but the same principle is more frequently applied in marine insurance, where it has long been settled that the party liable in damages has no concern with the fact that the party who has suffered is protected by insurance.

In this case it appears to me that as the Kirkcaldy Company might have discharged the North British, or might have made any financial settlement they pleased with that company without consulting the Caledonian, the money arrangement between the Kirkcaldy Railway Company and the North British can have no effect in releasing the Caledonian Railway Company from its contractual liability for these expenses.

LORD ADAM and LORD KINNEAR concurred.

The Court adhered.

Counsel for Pursuers—Ure, Q.C.—C. K. Mackenzie. Agents — Dundas & Wilson, C.S.

Counsel for Defenders—Guthrie, Q.C.—Clyde. Agents—Hope, Todd, & Kirk, W.S.

Tuesday, June 26.

SECOND DIVISION.

PATERSON *v.* BEST.

Judicial Factor—Judicial Factor on Undertaking of Railway Company—"Undertaking"—Works Authorised not Begun—Railway Companies (Scotland) Act 1867 (30 *and* 31 *Vict. c.* 126), *secs.* 3 *and* 4—*Nobile Officium—Directors not Known or Ascertainable—Railway.*

In 1900 a creditor of a railway company, who had obtained decree for the amount of his debt in an action against them, presented a petition for the appointment of a judicial factor on the company's estates, invoking the *nobile officium* of the Court, and founding on section 4 of the Railway Companies (Scotland) Act 1867.

The railway company had been in-