Wednesday, June 4.

SECOND DIVISION.

[Lord Trayner, Ordinary.

THE NORTH BRITISH RAILWAY COMPANY *v.* THE CALEDONIAN RAILWAY COMPANY.

Contract — Conditional Obligation — Postponed Payment — Obligation Running with lands—Mutual Wall.

The Caledonian Railway Company entered into an agreement in 1874 with the North British Railway Company, under which the latter company were allowed to build a mutual wall, which to the extent of half its breadth stood on ground not yet embanked belonging to the former company. The whole cost of the wall was in the first instance to be borne by the North British Railway Company. As soon as the wall was completed the proportion of the expense effeiring to that part of the wall situated on the Caledonian Railway Company's ground was to be ascertained and the sum so ascertained was to be repayable by the Caledonian Railway Company "when and so soon as they shall have embanked their ground up to the foresaid boundary wall." The wall was finished in 1876. By agreement in 1878 the North British Railway Company bought 5½ acres of land from the Caledonian Railway Company, being part of the ground upon which one-half of said boundary wall was built. No reference was made in that agreement to the former one, nor was any claim reserved for the cost of building the wall. The whole ground originally belonging to the Caledonian Railway Company, including the 5½ acres, was embanked up to the wall on or before 1st July 1885. The North British Railway Company brought an action against the Caledonian Railway Company for payment of the proportion of the cost of the wall effeiring to the said 5½ acres as due under the agreement of 1874.

Held that the obligation for the cost of the wall under that agreement was not absolute with a postponed period of payment, but was conditional upon the Caledonian Railway Company embanking the ground, that it ran with the ground, and that the North British Railway Company having purchased the ground in 1878 had no claim against the Caledonian Railway Company.

Question — Whether if the ground had been sold to a third party without notice, that party or the Caledonian Railway Company, would have been debtors in the obligation, and if the former, whether they would have had an action of relief against the latter?

An agreement was entered into in 1874 between the North British Railway Company of the first part and the Caledonian Railway Company of the second part, in the following terms:—"Whereas the properties of the two companies lying to the west of South Union Street, and on the south side of the second party's station ground, Dundee, adjoin each other; and it has been arranged that the retaining wall to be built by the first party under the 'North British Railway (Tay Bridge and Railways) Act 1870,' shall be erected partly on the ground of both parties as a mutual boundary wall, and paid for in the proportions and in the manner after mentioned, therefore it is agreed as follows:— . . . . *Second*, The whole cost of the wall shall, in the first instance, be borne by the first party, and so soon as the wall is completed the proportion of the expense effeiring to that part of the wall situate on the second party's property shall be fixed and ascertained by an arbiter or arbiters mutually named, or their oversman. *Third*, The sum so fixed and ascertained shall be repayable by the second party to the first party when and so soon as the second party shall have embanked their ground up to the foresaid boundary wall."

The wall was completed in 1876.

By agreement in 1878 the Caledonian Railway Company undertook to convey to the North British Railway Company 5½ acres of land, which included part of the ground upon which one-half of the said boundary wall was built. The price to be paid by the North British Railway Company for these 5½ acres was to be at a rate per acre equal to the average rate per acre paid by the Caledonian Railway Company for lands acquired by them under an Act of Parliament of the same year. The conveyance was executed and the price paid in September 1881, with entry as at Martinmas 1878. No reference was made in this agreement to the agreement of 1874, and no reservation of any claim for the cost of building the retaining wall on the said 5½ acres so conveyed to the North British Railway Company was inserted in the disposition.

The whole of the ground which originally belonged to the Caledonian Railway Company, including the 5½ acres, was filled up and embanked on or before 1st July 1885. The cost of the said wall effeiring to the 5½ acres was upon 21st January 1889 ascertained to be £4483, 19s. 6d.

In May 1889 the North British Railway Company brought an action against the Caledonian Railway Company for payment of this sum, with interest at 5 per cent. per annum from 1st July 1885.

The pursuers pleaded—"(1) The pursuers having built and paid for said wall, and the ground in question having been all embanked up, as condescended on, the pursuers are entitled to decree as concluded for."

The defenders pleaded—"(3) The ground included in the said 5½ acres never having been embanked up to the said boundary wall by the defenders, the sum sued for in the summons is not due by the defenders to the pursuers. (4) In respect of the

agreement of 1878, and the conveyance by the defenders to the pursuers of the said 5½ acres, the defenders are not liable in payment to the pursuers of the sum sued for, and interest thereon. (5) In any view, the defenders are not liable for the sum sued for, so far as consisting of interest, in respect the pursuer took no steps to have the amount of the principal sum ascertained by arbitration or otherwise, and that the amount was not ascertained until the month of January 1889."

The Lord Ordinary (TRAYNER) pronounced the following interlocutor:—"Decerns against the defenders for payment to the pursuers of the sum £4483, 19s. 6d. sterling, with interest thereon, as concluded for, from the 21st January 1889 until paid, &c.

"*Opinion.*—The principal sum now sued for appears to me to be a proper contract debt by the defenders to the pursuers. By the agreement of 1874 that debt became due as soon as the wall was erected, or, at all events, as soon as the proportion of the expense of building the wall 'effeiring to that part of the wall situate on' the defenders' ground was fixed and ascertained. That proportion was admittedly fixed and ascertained on 21st January 1889.

"Payment of said debt was, however, by the agreement, postponed until the defenders 'shall have embanked their ground up to the foresaid boundary wall.' That ground has now been embanked, and the period of payment has therefore arrived.

"The defenders, however, dispute their liability on the ground that by the agreement they were only to be liable in payment of their proportion of the expense of the wall when the ground had been embanked by them, whereas in point of fact it has never been embanked by them, but by the pursuers, their (the defenders') disponees. I think this is not a valid defence. In the first place, I think the fair meaning of the agreement is that payment should not be demandable from the defenders until the ground then belonging to them had been embanked, but that it was not an essential condition of liability that the embankment should be the work of the defenders themselves; secondly, that the embanking has been done by the pursuers I think immaterial to the question of the defenders' liability. The pursuers have embanked as now standing in right of the defenders, and but for the defenders' conveyance of the land the pursuers never could have embanked the ground, so that the defenders have by their own act enabled and in a sense authorised the pursuers to perform the embanking; thirdly, if the defenders were under obligation to embank the ground at any time, they have now deprived themselves of the power of fulfilling that obligation. They cannot therefore now maintain that they are only liable in payment of a debt when they perform an act, performance of which by themselves they have rendered impossible. The defenders, however, say that under the agreement of 1874 there was no obligation on them to embank which could have been enforced against them. I think this is an unreasonable reading of the agreement. It was plainly in the contemplation of the parties that the defenders should embank the ground in question at some time, although the period when that should be done was left to the decision of the defenders. But that it was to be done is plain from the fact that the time of embanking was fixed as the time for payment of a debt previously due. To read the agreement as the defenders contend for would be to read it thus—We shall pay our share of the expense of building the wall when we have embanked the ground, but we do not undertake ever to embank the ground, and therefore we do not undertake ever to pay our share of the expense of building the wall. I do not think the pursuers would have entered into such an agreement, nor do I think that is the agreement they made.

"In my opinion, the subsequent agreement of 1878, and the conveyance by the defenders to the pursuers in 1881, leave the rights and liabilities of the parties just as they stood on the agreement of 1874. The pursuers certainly did not in either of these later deeds reserve their rights under the agreement of 1874; but it is also certain that they did not discharge them. The conveyance of the land did not import an obligation on the disponees to pay the debts which the disponers had incurred in reference to these lands.

"I would only add that the argument presented by the defenders, based on the view that the wall in question is to be treated like a mutual gable, and that the rights and obligations *hinc inde* fall to be determined on that footing, is in my opinion untenable. The rights and obligations of parties in reference to a mutual gable depend on principles which have no application to proper contract obligations."

The defenders reclaimed, and argued—The Lord Ordinary had misconstrued the contract. Payment by them was not merely postponed but conditional upon their embanking. There was no obligation upon them ever to embank. If third parties in right of them had embanked probably, if nothing had been arranged, the North British Railway Company would have had a claim either against such parties or against them; it was not necessary here to determine which. The North British Railway Company were not in their right except as disponees. Their purchase in 1878 had prevented the Caledonian Railway Company ever being called upon to pay half the price of this wall, which thereafter was entirely on the North British Railway's own ground. They had not reserved the claim now made although in full knowledge of the previous transactions. The agreement of 1874 even if read alone would not bear the interpretation sought to be put upon it; but besides, the agreement of 1878 had completely altered the relations of parties. The agreement of 1874 just put the parties in circumstances which were ruled by the common law of mutual gable—see Rankine on Landownership, pp. 530-

538, and cases there cited; *Earl of Mordy* v. *Aytoun*, 30th November 1858, 21 D. 33; *Rodger* v. *Russell*, 10th June 1873, 11 Macph. 671.

Argued for respondents—The agreement did not create a burden effeiring to the land but an absolute obligation for a personal debt with a delayed period of payment. It was a builder's bill that was due by the Caledonian Railway Company. The amount of the debt was by the agreement to be ascertained at once, and to be paid when the ground was embanked. The Caledonian Railway Company could not have got rid of their liability by selling the ground to a third party, and that they sold the ground to the North British Railway Company made no difference. The agreement of 1878, under which the North British Railway Company got the ground, did not touch that of 1874, by which the relation of parties was fixed. It would have been wiser in 1878 to have reserved their rights, but it would be most inequitable to hold that by not doing so they had discharged them. This case did not fall to be decided upon the common law of mutual gable—which did not apply—but upon the express terms of a contract—*cf. Sinclair* v. *Brown Brothers*, 17th October 1882, 10 R. 45. The Lord Ordinary's construction of the agreement was the correct one.

At advising—

LORD YOUNG—This is an action at the instance of the North British Railway Company against the Caledonian Railway Company, founded upon an agreement between them entered into in August 1874, and it concludes for payment of sums between £4000 and £5000 as due under that agreement, and the Lord Ordinary, upon the ground that by the agreement the money debt was constituted and created, and that it was due—that is, that the term of payment had come before the action was raised—gave decree for the amount. The question is whether under that agreement, having regard to the facts, the Lord Ordinary is right in holding that there is a contract debt, and that the period of payment is past and gone? It is necessary in determining that question to look carefully to the nature of it, and to the terms of that agreement, and to the terms which show the nature of it.

It appears that the Caledonian Railway Company and the North British Railway Company were proprietors of adjoining shore ground in the vicinity of Dundee. It also appears that the North British Railway Company acquired other ground from the town of Dundee under statutory authority, and apparently upon the statutory condition that they would bank it up and build a retaining-wall for the purposes of that embankment. The pursuers upon record averred this state of matters as an explanation of their entering into the agreement. In article 5 of the condescendence they say—"The pursuers," that is, the North British Railway Company, "proceeded with the construction of the railways and works authorised by the Act of 1870;" that is the statute which sanctioned the agreement between them and the town under which they got the ground. "Among the works requiring to be executed was a retaining-wall on the west side of South Union Street, and on the south side of the Caledonian Railway Company's property, and an agreement, hereinafter called the agreement of 1874, was entered into between the two companies." That is the agreement now sued upon.

It thus appears that the North British Railway Company, being in this position, that they were not merely authorised but were required by the statute to build this retaining-wall, and to embank their own ground beyond it, made an arrangement with the Caledonian Company with a view to their own convenience. Even without that statement the fact would to my mind have been manifest enough. It was a very rational interest and altogether intelligible. They required to build a retaining-wall in order to bank up their ground. The time might come, was no doubt in contemplation, and the prospect was within measureable distance, when the Caledonian Company's necessities would require them to bank up their ground, and then one retaining-wall would do for both. Therefore it was an obviously reasonable proposal to make to the Caledonian Company—"The wall we have to build up may be confined to our own property, in which case the use of it will be confined to ourselves, but if you will agree to allow us to build to the extent of one-half of its thickness upon your ground, that will be advantageous to us, for it will give us increased accommodation on our side to the extent of one-half of the thickness of the wall, and it would be a convenience to you in the event, the probability of which you will judge, of your coming to bank up your ground, or of putting buildings upon your ground, for which this wall may be used. The agreement which we propose to you therefore is, that you shall allow us that convenience of building the wall which we must build to the extent of one-half of the thickness upon your ground, we paying the whole expense of it, and you, on the other hand, agreeing, if you come to require the use of it, that you will reimburse us to the extent of one-half." Nothing could be more reasonable than that. We are quite familiar with it in what appears to be quite an analogous case of adjoining feu stances, in which there is no peculiar law, no statute, nothing but the rules of common law founded upon such considerations of utility, expediency, justice, and good sense which are the foundations of the rules of our common law or are meant to be so.

Well, the wall was built, and the exact date of it we do not know, but they were proceeding to build it in 1874, and I suppose it was completed shortly after that. Then the views of the North British Railway Company enlarged, and it seems that they were enlarged quite consistently with the convenience of the Caledonian Company, at least with the permission of parties. These enlarged views of the North British Company involved the necessity of

their acquiring five and a-half acres of the Caledonian Railway Company's ground adjoining this wall or adjoining a portion of it, and Parliament accordingly sanctioned their acquisition of these 5½ acres, and the agreement was formally entered into between the two Companies that 5½ acres of the Caledonian Company's ground on the north side of the wall in question should be conveyed by them to the North British Railway Company at a certain price and that price should be a rate per acre which should be ascertained, and the Caledonian Company were required to pay for some similar ground which they required. The conveyance under this agreement was made in 1878, and the conveyance by the Caledonian Company to the North British Company of the 5½ acres was made in September 1881, and the price agreed upon was then paid in September 1881. The disposition acknowledges the receipt, and we have the print showing how the amount was ascertained, showing that the Caledonian Railway Company had paid at a certain rate per acre for the ground referred to in the agreement. I think it was something like £5000 per acre; that was a sale of 5½ acres; and the price was estimated to come to £31,000. The ground was conveyed and the price paid upon that footing in 1881. Now, I merely stop to point out here that the price was ascertained without the slightest reference to the cost of erecting this retaining wall referred to in the agreement of 1874. The price per acre which the Caledonian Railway Company paid for the land referred to, and which was to be taken as a standard of the price of this land, had no concern whatever or no relation to any obligation upon the part of the seller to pay the price of the wall, or anything else connected with the land, to the buyer when he proceeded to use it. Therefore I think it is clear that the price of £31,000 was not upon the footing that to the extent of between £4000 and £5000 now claimed that price was to be diminished or returned by the seller who got it, to the buyer who paid so soon as the buyer was prepared to use the subjects purchased.

The North British Railway Company proceeded to embank on the north side of the wall upon the Caledonian Railway Company's ground as they had previously done upon their own after they acquired the ground, and then they say—"this puts us in the position of your creditors in a contracted debt, for if you had retained your ground and so made use for your own purposes of the wall which was ended entirely at our expense, you would have had to pay us who paid the expense, one-half of it under the agreement of 1874, on the rational ground that to the extent of one-half you had agreed to that expenditure, and it does not signify that we had the benefit of the whole of it ourselves, because to the extent of one-half we have had it as representing you, therefore you must pay us one-half of the expense of erecting this wall of which we have the use."

Now, that is a startling proposition on the face of it, but the Lord Ordinary says that in his judgment it was made an essential condition of liability that the embankment should be the ground of the defenders themselves. I think that is clear enough—that is to say, if the defenders had communicated their project to a third party, and that third party had taken the use of the retaining wall built entirely at the cost of the North British Company, the North British Company would have been entitled to receive payment of one-half of the cost—whether from the Caledonian Railway Company or the Caledonian Railway Company's disponee I think not so clear. But fortunately that is a question upon which, in my judgment at least, we do not require to enter. I may, however, indicate that in my opinion there would have been strong grounds for maintaining that the claim would have been against the disponee, although in certain circumstances the disponee would have had a claim of relief against the seller to him. My reason for thinking so—and I state this again with reference to what I have said, that in my opinion it is not necessary to decide the question—is that the right to use this retaining wall, that is to say, to bank it up and lean against it, made it a right that ran with the land and could not be separated from the land. I think we have received that expression "running with the land" into our law now, or at least into our legal argument. We have the language that the right to use this wall runs with the land, and I think the obligation to make a payment may upon very strong grounds run also to a *bona fide* third party upon notice. This would apply equally to the case of adjoining building stances, for they are indistinguishable. Without knowledge or notice, which is knowledge, that this retaining wall had not been paid for, and that the payment was to be made on the use being taken, a disponee might have been subject to a claim by the party who was creditor in that obligation, but he would certainly have had a claim of relief against his seller. But if the sale was in the knowledge of the debtor, and there was due notice, as in the case of an ordinary retaining wall, that payment was to be made on the use being taken, there would have been no such obligation for relief, and the payment would have been clear on the use being made. But I do not need to pursue that, because we are not dealing with a third party. I think it clear that if the Caledonian Railway Company, or any proprietor in a similar position, had sold to a third party with the obligation upon them to pay £5000 to an adjoining proprietor upon use being made of the retaining wall, he would have made this bargain; that is, he would say—"You must pay this money when you take use, because it is in respect of that use that the payment has to be made." Conveying to the North British Railway Company no notice was necessary, because they were parties to the agreement under which alone the payment was to be made, and they knew the claim was to be made on

the use being taken, and to say that payment was made on the assumption that so much of the price was to be paid back is to my mind extravagant.

My own reading of the 1874 agreement is that there was no debt constituted by it. I think it was a conditional obligation, the condition being that the second party should have embanked the ground up to the wall. The Lord Ordinary is of opinion—it is not mine—but for reasons I shall express I think the point is immaterial; the Lord Ordinary is of opinion that there was an obligation on the Caledonian Company by this agreement to bank up the wall. I think there was not. I think it was not contemplated that they should, and that the likelihood is they would have undertaken no such obligation. It might have been a case of contemplation that daughters would get married and have children, and in that contemplation provisions are often made and contracts even are made, but that is not an obligation to get married, and there was no obligation on the part of the Caledonian Company here to implement this agreement by banking up their ground; but suppose there was, then the performance of that obligation is a condition of this payment. The Lord Ordinary says very forcibly, as a general observation, although I think it is altogether inapplicable to this case, that if an obligation to pay money is conditioned upon anything which you place it in the power of the obligant to perform, and he from his own fault omits to perform it, and if this renders the performance of that obligation impossible, it would be inequitable to allow him to plead his own fault as rendering the performance of his obligation impossible to the detriment of the other party to the contract. There are principles of the common law which would not allow any party to it to render the performance of a condition of his obligation impossible by any fault of his to the detriment or prejudice of the other party to the contract. But I think that remark is wholly inapplicable here, for the performance of the condition or the implement of the obligation by the Caledonian Company is not attributable to any fault or misconduct of theirs. It is a matter of contract between them and the other party to the contract upon which the condition is satisfied. By the contract of 1878, implemented by the conveyance of 1881, this condition, upon which the obligation of 1874 is made dependent, is rendered impossible. It is rendered impossible that anybody should take the use of the wall for which the payment stipulated by that agreement was to be made, and upon which alone it was to be made, except the North British Company themselves, and that being so, it appears to me that the view of the Lord Ordinary is inapplicable to the case. He says—"If the defenders were under obligation to embank the ground at any time, they have now deprived themselves of the power of fulfilling that obligation. They cannot, therefore, now maintain that they are only liable in payment of a debt when they perform an act, performance of which by themselves they have rendered impossible. The defenders say, however, that under the agreement of 1874 there was no obligation on them to embank which could have been enforced against them. I think that is an unreasonable reading of the agreement." In my opinion it is the true reading of it, for if you could have read into it an obligation upon them to embank that wall, say within six months or six years, and when they did so, or at the expiry of that term, then to make payment, I think the case would have been on the principles I have already stated, and not at all within the rule and principle of law which must have been in the mind of the Lord Ordinary.

The Lord Ordinary says—I was startled I must say—"To read the agreement the defenders contend for would be to read it thus—We shall pay our share of the expense of building the wall when we have embanked the ground; but we do not undertake ever to embank the ground; and therefore we do not undertake ever to pay our share of the expense of building the wall. I do not think the pursuers would have entered into such an agreement, nor do I think that that is the agreement they made." I think that is the very agreement entered into by them, and a more rational agreement of its kind it is impossible to conceive. It requires the wall to be built immediately. It is enough that it suited their convenience to build it immediately, and besides, they were in the position of getting nothing but benefit by the agreement with the Caledonian Company, reading it as the Lord Ordinary says it is unreasonable to read it. They got the use of the Caledonian ground to the extent of one-half of the thickness of the wall, thereby increasing the accommodation of their place to that extent. The cost of the wall was not one penny more. There was nothing but benefit to them, and only after the Caledonian Company came to share the use of it were the latter to pay. Nothing was more rational in such a matter, and therefore I think the reading of the defenders is the true reading, and that according to it we should dispose of this case.

The Lord Ordinary again says at the end of his note—"I would only add that the argument presented by the defenders, based on the view that the wall in question is to be treated like a mutual gable, and that the rights and obligations *hinc inde* fall to be determined on that footing, is in my opinion untenable. The rights and obligations of parties in reference to a mutual gable depend on principles which have no application to proper contract obligations." But they are proper contract obligations. All obligations with reference to mutual gables are proper contract obligations. There is nothing there but contract relations between the parties, there is nothing but a contract construed according to the principles which regulate their rights and obligations in the building.

This might have been a mutual gable and nothing else. I am not sure that the word

mutual is not quite applicable to it. I think it is according to the generally understood meaning of the word. But let us remove all doubt from our minds by making it what might be called a mutual wall in the most accurate and at the same time popular language. Suppose the North British Railway Company required to build a station on that place, that their necessities required it and their obligations imposed it upon them, and that they approached the Caledonian Railway Company and said, "We are going to build a station, and we will have to build it on our own ground, but you might consider if it would not suit you, not now but sometime hereafter, to build also—Allow us to build back the wall to the extent of one-half its thickness upon your ground, and upon the terms as in all other cases with which we are so familiar as to mutual contracts, that we who require it now, and who alone require it now, shall be at the expense, and you shall be required to do nothing unless and until you come to take one-half of the use." Would that not be precisely a mutual gable and a mutual gable contract expressed at length, according to the rules which the law would imply in the case of stances, showing what was the intention of the parties, and none the less according to the principles that are expressed. I know nothing in the rule of mutual gables that is not expressed here. To be sure, there is this, that the purchaser of a building stance, where you have the usual appearances to suggest it, would be presumed to know that he is entitled to take the use of the gable wall on the one hand—it has all the appearance of a mutual wall, and that when that use is taken he will have to pay one-half of the price. He is presumed to know that, and therefore he has it put upon him. Is there any presumption as to the Caledonian Company paying for it? They might contract that the use was to be taken when it suited parties' convenience, and that then they should pay the price. That was known most thoroughly here. Well, what would have been the difference between that case and the present, and supposing some extended views came into operation, and before the railway company have taken anything under the agreement of 1874 the North British Railway want to make a double station, and the Caledonian Company have given, at all events, the building stance, and that this wall which the North British Company built becomes useful to none but themselves, and none but themselves can take any use of it, is it conceivable upon any rules of law and justice that payment should nevertheless be made upon one-half of the cost of the wall which they alone use? Let me illustrate it further. The Lord Ordinary seems to be of opinion that there is no distinction between the two adjoining proprietors or two co-proprietors dealing with one another and one dealing with a third party. In the ordinary case of a mutual gable, if a man has built a house upon one stance, and built his gable, of which his neighbour is to find one-half of the cost, if his feu is enlarged and he wishes to double the size of his house, and instead of the gable wall which he intended to be a wall between his and the adjoining house, there is to be a wall in the centre of his own house, he accordingly deals with the adjoining proprietor to sell him the stance just for what stances are selling for. Then he builds his double house with a centre division wall in his own house, and then he says, "You must pay me one-half of the cost of erecting the wall in my own house, and you must pay that, because if you had sold your stance to another and he had taken use of the wall he would have had to pay me. He would have had one-half of the use, and I would have had one-half of the use."

Supposing two merchants dealing in the same goods agreed that a cargo could be got cheaper by agreeing together, and that one of them to his own interest should pay the whole price, and that the other should pay the price of one-half of the whole when he took his half, if he gave up his purchase to a stranger for consideration, the stranger would have to pay, or he would have to pay upon one-half on receiving from the person who had the whole. If he gave up his purchase to the other, without consideration, was it for the other to say, "Oh, I am just the same as the stranger, and if you gave without consideration one-half of the goods to a third party, I should have to get payment of the price. If you give it to me it will be all the same." But this appears to me to be a total misconception of the case.

I could have understood the case if there had been anything in it to the effect that the North British Company said, "Oh, I paid you the price upon the footing that this £5000 was to be paid back to me as soon as I got the property;" and upon that footing they say this, that it was not for them to say that in estimating the price the agreement of 1874 was lost sight of altogether, and so they were not even at the point until 1889, ten years after the ascertainment of what the cost of the wall of 1874 was. I have already pointed out that the agreement for the price was on the footing that so much of it was to be paid back as soon as use was taken. The price was not to be £31,000, but £31,000 minus £5000, for which the Caledonian Railway Company was the North British Company's debtor so soon as the conveyance was made, and that this ceased to be prestable because it was out of the Caledonian Company's power to make use of this wall. I have myself no doubt about the equity of the case and just as little about the law as about the equity and honesty of this case from the first time I heard it, and I have dwelt at such length upon it, really in deference to the Lord Ordinary's opinion. I have tried to follow it, and find reasons for it, and I have been unable, and I have all the more felt it incumbent upon me to explain my views as clearly as I could. I am sure that the clearness has not been added to by the length of my observations, but still my opinion, whether right or

wrong, is diametrically opposed to that of the Lord Ordinary. I differ from his judgment and I differ from his reasons. I think this was a useful obligation, and that by subsequent arrangement between the same parties, it was terminable, and the obligation rendered it impossible. I therefore think the defenders should be assoilzied with expenses.

LORD RUTHERFURD CLARK concurred.

LORD LEE—I concur. There is only one point on which I wish to guard myself, and that is this, that I do not differ from the Lord Ordinary in the opinion he expresses as to the application of the law of mutual gable.

LORD JUSTICE-CLERK—I am of the same opinion as Lord Young. On one matter which has not been noticed I should like to say a few words. I quite agree with your Lordships that no obligation was on the Caledonian Company at any time to bank up to the wall. The only thing which could have suggested that possibility has not been noticed, and I shall notice it for the purpose of getting it out of the way. The price to be paid in the event of the Caledonian Company banking up was to be at once ascertained. I think that was for a very obvious reason. I do not think this was a case of one-half of the price of the wall being paid by the Caledonian Company even when they did bank up, because the wall was of a different quality on either side, and the very fact that the payment of the Caledonian Company was dependent on an event that might not take place for a long time made it highly desirable that the price should be made known at once in order that there should be no dispute later in the event of the Caledonian Company using it.

I have tried to take the case on the only possibilities that could be, and they are three as regards the position of the Caledonian Company at the time the wall was built, viz., either that the North British Company owned the whole wall, or they owned their own half on their own ground, or they were owners mutually with the Caledonian Company. If they owned the whole wall then the payment they could demand from the Caledonian Company when the Caledonian Company banked up their ground would have been for the use of the wall built by and belonging to them the North British Company. They could not, in my opinion, when they became owners of the ground, by operations done by themselves, set up a claim against the Caledonian Company, from whom they bought it for a sum of money which they (Caledonian Company) only undertook to pay so soon as for their own use they should have banked up the ground on the opposite side of the wall, which now belongs to the North British Company alone. Then take the second case. If the North British Company owned only half of the wall on their own side, then on their purchasing ground from the Caledonian Company on which the other half of the wall stood, they became proprietors of the half of the wall which stood on the Caledonian ground, and it is to be understood that the previous position of the Caledonian Company is to be taken into consideration in the adjustment of the price. When lands are disponed, undoubtedly walls such as this pass with the ground in the disposition, and if the North British Company were purchasers of land upon which was part of a wall belonging to the Caledonian Company, they entered into a contract by which it was impossible for the Caledonian Company by itself, or by its cedents, to make that use of the wall upon the occurrence of which alone any sum was to be paid to the North British Company. Then take the third case, that the North British Company owned the wall mutually with the Caledonian Company, a case that does not seem to be different from the case last supposed, and I concur with Lord Young about the mutual gable. Such proprietary right in the wall as the Caledonian Company possessed the North British Company by contract took from the Caledonian Company, and so the Caledonian became the sellers. Use by the Caledonian Company of a mutual wall will not cease until it becomes the property solely of the other party, in this case the North British Company. Constructive use by the Caledonian Company seems to be out of the question.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defenders.

Counsel for Pursuers and Respondents—D.-F. Balfour, Q.C.—Dickson. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for Defenders and Reclaimers—R. Johnstone—Dundas. Agents—Hope, Mann, & Kirk, W.S.

Thursday, June 5.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

KELLY *v.* STATE LINE STEAMSHIP COMPANY, LIMITED.

Reparation—Quay — Thoroughfare — Obvious Risk—Primary Purpose of Quay for Loading and Unloading.

A man while unnecessarily passing among materials lying upon a quay where loading operations were going on, fell and sustained certain injuries. It was not clear how the accident occurred, but he averred that those engaged in loading were in fault in leaving the materials there, and he sued them for damages accordingly.

Held that the quay was properly occupied by the materials at the time, that the pursuer had run an obvious risk in going where he did, and that he