

very clearly and succinctly the true argument in regard to this question, and I adopt entirely the propositions so stated by him as part of my judgment.

The Court reversed the decision of the commissioners and remitted to them to sustain the assessment.

Counsel for Inland Revenue—Solicitor-General (Balfour, Q.C.)—Rutherford. Agent—Solicitor of Inland Revenue.

Counsel for Commissioners of Supply—Kinnear—Johnstone. Agents—J. C. & A. Steuart, W.S.

Friday, July 16.

### FIRST DIVISION.

[Lord Rutherford Clark, Ordinary.

CALEDONIAN RAILWAY COMPANY v. NORTH BRITISH RAILWAY COMPANY.

*Statute—Construction—Local and Personal—Railway—Amalgamation—First Payment of Dividend.*

A certain line of railway was transferred from the company with which it had been amalgamated to that company and another company jointly, the preamble of the Act of Parliament which effected this change declaring that it was expedient that the two companies "should have equal rights and powers and be subject to equal liabilities" in respect of the line transferred. It was further enacted that "from and after the vesting period the [new] company shall pay to the [old] company half-yearly on the 1st March and 1st September in each year a sum equal to one-half of" the dividends payable to the shareholders of the line transferred, which had hitherto been paid by the old company alone, it having received the entire revenue of the line; and under the new arrangement the old company was to continue to make the actual payments to the shareholders. The vesting period was 1st February 1880, and the dividends were for the half-years ending 31st January and 31st July of each year, and were payable respectively in the months of March and September following. In an action by the old company against the new company concluding for payment of one-half of the dividends due on March 1st 1880, *held (diss Lord Mure)* (1) that the words "1st of March and 1st September" above quoted were intended to define the terms of payment generally, and not to lay down that the 1st March immediately following the vesting period was the first term of payment; and (2) that the equitable construction, looking to the purpose of the Act, was that the first term of payment should be that for the first half-year during which the line was in the joint possession of both companies—Defenders therefore *assolvitur*.

The Scottish North-Eastern Railway was amalgamated with the Caledonian Railway by "The Caledonian and Scottish North-Eastern Railways Amalgamation Act 1866" (29 and 30 Vict. c. 301).

Section 1 of that Act declared the commencement of the Act to be 1st August 1866, after which, by section 5, the Scottish North-Eastern Railway was dissolved and amalgamated with the Caledonian Company; but section 12 enacted that "The revenue of the *Scottish North-Eastern Railway Company* available for dividend in respect of the half-year ending on the 31st July 1866 shall, notwithstanding anything herein contained, be divided among and paid to the holders of shares and stock in that company as if this Act had not passed."

Section 16 created the guaranteed and preference shareholders of the Scottish North-Eastern Company guaranteed or preference shareholders of the Caledonian Company; and by section 19 ordinary shareholders in the former company became guaranteed shareholders in the latter, with a contingent right to a higher than the guaranteed dividend in the event of the dividend on the Caledonian ordinary stock being above seven per cent.

Section 22 enacted that "All the guaranteed and preference and contingent dividends hereinbefore mentioned shall be payable on the same days in the month of *March or April or September or October* as the other preference and ordinary dividends of the company [*i.e.*, the Caledonian] shall be payable, the first payment thereof being on the same day in the month of *March or April* 1867 as such other preference and ordinary dividends for the six months ending on the 31st January 1867 shall be payable."

The Scottish North-Eastern Railway was itself an amalgamation of other companies, of which the Dundee and Arbroath Railway was one. By "The North British Railway Dundee and Arbroath Joint Line Act 1879 (38 and 39 Vict. c. 147) the Dundee and Arbroath line was transferred from the Caledonian Company to that company and the North British Company jointly. The preamble of this Act, after reciting the previous Acts, was in these terms:—"And whereas it is expedient that all interest which the Caledonian Railway Company possess in the Dundee and Arbroath and Arbroath and Forfar Railways respectively between . . . should be transferred to and vested in the Caledonian Railway Company and the North British Railway Company—in this Act called 'The Company'—jointly and equally, and that those companies should have equal rights and powers and be subject to equal liabilities over and with respect to the said railways between the points aforesaid as hereinafter provided."

By section 3 it was provided that "On the 1st day of February 1880 (in this Act called 'the vesting period') all interest of what nature or kind soever which the Caledonian Railway Company possess or enjoy, or to which they are entitled, whether as owners, lessees, or otherwise, in the line of railway between . . . shall by force and virtue of this Act be transferred to and vested in the Caledonian Railway Company, and the Company jointly, and in equal proportions, in manner provided by this Act."

By section 6 it was provided that "The consideration for the transfer of the joint line shall be as follows (that is to say)—1. From and after the vesting period the company shall pay to the Caledonian Railway Company half-yearly, on the first day of March and first day of September in each year, a sum equal to one-half of the aggre-

gate of the following half-yearly payments for which the Caledonian Railway Company are now liable in respect of their acquisition of the Dundee and Arbroath Railway (that is to say)—(1) £1667, 10s., being the half-yearly dividend upon £83,375 of Caledonian Railway Company four per cent. consolidated guaranteed stock, into which the Dundee and Arbroath Railway five per cent. preference stock, amounting to £66,700 has been converted under the powers of the Caledonian Railway (Additional Powers) Act 1875; (2) £10,140, being the half-yearly dividend upon £507,000 of Caledonian Railway Company four per cent. consolidated guaranteed stock, into which the Dundee and Arbroath ordinary stock, amounting to £200,000, has been converted under the powers of the same Act." [Then follow three other payments, one of which had not down to the amalgamation been paid by the Caledonian Company, and the amount of the two others had at the date of the action still to be fixed by arbitration.] 2. On the vesting period, or as soon thereafter as the amount shall be fixed or determined as hereinafter provided, the company shall pay to the Caledonian Railway Company a capital sum, equal to one-half of the value of the joint line by this Act transferred to the two companies, subject to the half-yearly payments hereinbefore stipulated, provided that such sum shall in no case be less than one-half of the principal sums expended on capital account on the joint line by the Aberdeen Railway Company, the Scottish North-Eastern Railway Company, and the Caledonian Railway Company respectively, or any of them, previously to such payment, as the amount of such value shall be fixed by agreement between the two companies, or determined by arbitration, and the company shall also pay interest to the Caledonian Railway Company on the said capital sum at the rate of five per cent. per annum from the vesting period till paid."

The pursuers of this action were the Caledonian Company, who concluded against the North British Company for payment of £5903, 15s., being a half-yearly payment under section 6, subsection 1, and sub-heads 1 and 2 of the Act of 1879, quoted above, which sum the Caledonian Company alleged to be due on the 1st March 1880. This demand was resisted by the North British Company, who pleaded that—"Upon a sound construction of the statute libelled, the sums sued for, being the amounts of dividends not yet payable by the pursuers, are not due by the defenders until 1st September 1880, and the defenders should be assolvied."

The Lord Ordinary (RUTHERFURD CLARK) assolvied the defenders. The following opinion was delivered by his Lordship in deciding the case:—"The vesting clause enacts that the two companies shall have equal rights in the railway; that those equal rights shall begin from the 1st of February 1880, and shall continue to subsist thereafter. It would naturally follow, from a clause which converted a line held by one company into a line held by two companies on an equal footing, that the liabilities of the acquiring company should only commence from and after the date on which the vesting took place. Therefore, unless there are words which absolutely compel me to adopt another view, I would hold that the liabilities to make the payments sought to be enforced did not arise until the 1st of Sep-

tember, which is the term of payment applicable to the first six months following the 31st of January. The pursuers maintain that the clause of payment is so express as to require the defenders to pay the sums in question on the 1st day of March, notwithstanding that the defenders were not in possession of the line previous to the 1st of February, and thereby to relieve the pursuers of a payment which they were bound to make, not in respect of what they earned between the 31st of January and 1st of March, but in respect of what they earned prior to the 31st of January, or, in other words, when they were the sole owners of the line. I confess that I am not able to adopt so harsh a construction of the Act. I read the clause not as applicable so much to the first term of payment as prescribing the course of payment which was to be made throughout an indefinite number of years, or rather in perpetuity, leaving it to the parties or to the Court to settle when the first payment was to commence. I think the purpose of the Act was to require the North British Company, in respect of its joint ownership, to relieve the Caledonian Company of one-half of those payments for which the latter would have been liable *in toto*. The operation of the obligation for relief commenced only when the rights commenced, and therefore on the 1st of September. Any other construction would be so manifestly unjust, and so manifestly contrary to the equality which the statute seems intended to secure, that I could not adopt it unless I was absolutely shut up to that construction by the words of the clause. I do not see the slightest indication of any premium being payable by the defenders for the privileges obtained by the agreement. I shall decide this case in favour of the defenders, and assolvie them with expenses."

The pursuers reclaimed, and argued—The Caledonian Company were entitled to have the statute construed strictly in their favour, as they were the parties whose rights were invaded. There was no difference in this matter between a private person and a railway company who were deprived of property by an Act of Parliament. But it did not require any strict reading of the Act in order to favour the Caledonian; on the contrary, it was difficult to see what other possible construction there was than that which they contended for. The North British would argue that this construction was inequitable, inasmuch as the Caledonian would by it get money which they never earned. But that was true only if you took the clause by itself. The whole Act, like all these Acts, was a matter of give and take, and must consequently be interpreted literally; otherwise under the guise of equity you would really be doing injustice. Besides, equity will be let in only when there is an ambiguity. Here there was no ambiguity, for the first period of payment was set forth in perfectly clear terms in the Act.

Replied for the defenders—Equity will be let in wherever there is an ambiguity. Here there was a plain ambiguity, for the words "first day of March and first day of September" might either be put in for the purpose of settling the periods of payment generally and nothing else, or they might also be intended to fix when the first payment was to take place. But the last was not in express words said to be the object, and as it was plainly the inequitable construction

it ought not to prevail. The defenders consequently ought to be assoziized.

At advising—

**LOED PRESIDENT**—The claim which is made by the Caledonian Railway Company in this action depends upon the construction and effect of an Act of Parliament passed in the year 1879 to give to the North British Railway Company a joint interest with the Caledonian Railway Company in the Dundee and Arbroath Railway, and part of the Arbroath and Forfar Railway, as the title of the statute bears. This Act, like most Acts of the same kind, really embodies a contract between the two railway companies. I do not mean to say that it merely gives Parliamentary sanction to a contract already made between the two companies, and about the whole terms and conditions of which they were agreed. It is rather a statute that makes a contract for the two companies, the object being to secure the greatest advantage to the public by enabling one railway company to obtain a joint right with another to the use of a particular part of a line. But not the less on that account does the statute embody an agreement, because whether the particular terms of that agreement were all voluntarily acceded to on either side or no, or whether some of them were forced on one or other of the companies by the Legislature, it still comes to be of the nature of a contract by which a certain interest belonging to the one party is transferred to the other upon terms and conditions.

Now, viewing it in that light, we find in the first place that the object of the statute is very plainly announced in the preamble, in words which I think have a great bearing upon the construction of the clauses more immediately under consideration. It recites the previous Acts of Parliament, and then it bears that it would be expedient that all interest which the Caledonian Railway Company have in the lines in question should be transferred to and vested in the Caledonian Railway Company and the North British Railway Company jointly and equally; and that those companies should have equal rights and powers and be subject to equal liabilities over and with respect to the said railways between the points aforesaid as hereinafter provided. The principle, then, of the bargain, or of the statute, whichever it may be called, is this, that the North British is to be taken into partnership with the Caledonian Railway Company in respect of the line in question upon equal terms—that is to say, they are to have precisely equal rights in the subject, and they are to be liable to precisely equal liabilities. That is the announced purpose of the Legislature in this preamble. Then we find in the 3d section the way in which the North British Company are vested with equal rights with the Caledonian Railway Company. It is enacted that on the 1st day of February 1880—in this Act called the “vesting period”—all interest of whatever nature which the Caledonian Railway Company have in these lines “shall by force and virtue of this Act be transferred to and vested in the Caledonian Railway Company and the company (that is, the North British) jointly, and in equal proportions, in manner provided by this Act.” The right of the North British Company commences upon the 1st day of February 1880. From that time they have joint and equal rights

with the Caledonian Company in the line in question.

Then on the other side we have the consideration which is to be paid by the North British Company to the Caledonian Company for obtaining this joint and equal partnership, and it consists of two portions. In the first place, the North British Company are to reimburse the Caledonian Company of one-half of the capital expended in the acquisition of this line. That is the second branch of the consideration as stated in the 6th section, but I mention it first for the sake of clearness. Now, that is quite consistent of course with the preamble, which says that the rights are to be equal and the liabilities are to be equal, and if the one company obtains half the interest in the line it is quite right that they should pay one-half the price which the Caledonian Company paid for the line; for it was not a line originally constructed by the Caledonian Company as we all know. But then it is necessary to go further than that in order to carry out the principle of equality, because the Caledonian Company paid a great deal more for this line than merely capital sums. It undertook obligations—obligations bearing a tract of future time, and a tract of future time which seems never to come to an end. It undertook to incorporate into the Caledonian Company the shareholders of these lines, among other things, and to give them preference stock of the Caledonian Company in place of the stock which they previously held in these small lines. And the consequence of that of course is that the Caledonian Company have got to pay dividends to the original shareholders of these small lines in respect of the amount of stock which they had in these lines, and which have been converted into Caledonian stock. Now, it is very obvious that the equality which is announced as the fundamental principle of this bargain would not be completely carried out unless the Caledonian Company were relieved of one-half of these obligations. And it is quite right also that that relief should commence and be operative from the vesting period, the 1st of February. Now, observe what the nature of the obligation and liability of the Caledonian Company is in respect of these preference shares. They have got to pay dividends upon them half-yearly, and from the time that this bargain comes into operation on the 1st of February they are entitled to be relieved of these half-yearly payments to the extent of one-half. That carries out the principle of equality precisely. Now, then, let us see what these half-yearly payments are.

We gather that from another statute, which is called the Caledonian and Scottish North-Eastern Railways Amalgamation Act 1866, and by the 22d section of that statute there is this regulation for the payments of these dividends—“All the guaranteed and preference and contingent dividends hereinbefore mentioned shall be payable on the same day in the month of March or April and September or October as the other preference and ordinary dividends of the company (that is, the Caledonian Company) shall be payable, the first payment thereof being on the same day in the months of March or April 1867 as such other preference and ordinary dividends for the six months ending on the 31st day of January 1867 shall be payable.” The obligation therefore which

the Caledonian Railway Company thus undertook was, that in the year 1867, which was the year of the commencement of this Amalgamation Act, they were to pay the preference dividends, commencing with the half-year's dividend which is payable for the six months ending on the 31st day of January. Now, that dividend is payable in March, and so we commence with that dividend. The dividends therefore fall to be paid in this way according to this regulation—one dividend is paid in March, and that is for the half-year ending the 31st of January previously; the second dividend is payable in September or October, and that is for the half-year ending the 31st of July in that year. So that the dividend earned in the half-year ending on the 31st of January is payable in March, and the dividend earned in the half-year ending on the 31st of July is payable in September. Now, it is of these dividends that the Caledonian Company are to be relieved to the extent of one-half under the operation of the clause to which I now call attention—"From and after the vesting period the company shall pay to the Caledonian Railway Company half-yearly, on the 1st day of March and 1st day of September in each year, a sum equal to one-half of the aggregate of the following half-yearly payments for which the Caledonian Railway Company are now liable in respect of their acquisition of the Dundee and Arbroath Railway."

Now, suppose for a moment that we take out of the statute the words "on the first day of March and first day of September in each year," it would then read, "From and after the vesting period"—that is, from and after the 1st of February 1880—"the company shall pay to the Caledonian Railway Company half-yearly a sum equal to one-half of the aggregate of the following half-yearly payments." I should think in that case the construction of the clause would not be doubtful. The Caledonian Company remained in sole possession of the lines in question down to and including the 31st of January 1880. They remained their exclusive property and possession down to that time, and they have down to that time made the whole profit of the traffic for the period down to the 31st of January 1880; and it is out of the produce of that traffic of course that they pay the half-yearly dividend which becomes due on the 31st of January and is payable on the 1st of March. The whole traffic belonged to them for that period, and the dividend therefore must of course be paid by them, and assuming the words that I have excepted from the statute not to be there, the first half-yearly dividend which they would be entitled to be relieved of to the extent of one-half would be that for the first half-year after the vesting period—that is, the half-year from 31st January to 31st July. And unless that be the rule upon which these payments are to be regulated, there is the most flagrant violation of the principle of equality which is set out in the preamble as the foundation of the bargain. It is obviously not only inequitable but absurd to suppose that the Caledonian Company are to be relieved of payments which they make for a period when they were in the full possession and enjoying the full profits of the traffic of the line.

Now, if that be so, just let us see what effect is to be given to these words "on the 1st day of March and 1st day of Sep-

tember in each year." Is it anything more than merely prescribing that the relief which is then to be given is relief at such a time as to enable the Caledonian Railway Company to pay the dividends for which they are liable to the old shareholders of the Arbroath line, one-half with their own money and one-half with the money which they had got from the North British Railway Company. That is plainly what is intended to be secured, and the mention of these days therefore as days of payment is only to ensure that the payment in relief by the North British Railway Company shall be made at such a time as not to require the Caledonian Company to disburse the whole half-yearly payment out of their own funds and then only receive reimbursement afterwards. Nothing is said about the 1st day of March and the 1st day of September in the year 1880. It is in each year. It is the general rule and nothing more that is here expressed, and if anything so inconsistent with the fundamental principle of the statute was intended to be introduced, one would expect very clear words to express it—such words as that the first payment should be made on the 1st of March 1880. But there is nothing in this clause, I think, that is fairly susceptible of that construction. At the very best, the argument could go no further, I think, than this—that the words which I have cited are ambiguous—that it may be intended that there should be such an anomalous thing as this, but it may not. It may be merely intended to express that these are to be the days of payment in each year, but not that it is to commence on the 1st day of March 1880; and if there be ambiguity at all—if there be room for two constructions—then I apprehend we must appeal to the whole scope and purpose of the Act in order to determine which of these constructions shall prevail, and then I apprehend there can be no doubt whatever. The only way in which you can secure that equitable equality which is announced in the statute as being the principle upon which the bargain is regulated—equal rights and equal liabilities—is by holding that the first payment to be made by the North British Company under that first sub-section of section 6 is on the 1st of September 1880.

LORD DEAS—I am of opinion with your Lordship that the preamble of the statute, which provides for equal rights and equal liabilities on the part of these two companies, is of great importance in this question of construction. The question then comes to be, Whether, notwithstanding that that equality certainly would have been in favour of the construction put upon the statute by the North British Railway Company, a different construction has to be put upon it in respect of its being said that these rights and liabilities are to commence from the 1st of February, which is called the vesting period? The substance of the question is, whether by the half-yearly payments which are to be made on the 1st of March and the 1st of September are meant the permanent half-yearly payments, or if it is the same thing as if it had been said that the first half-yearly payment shall commence and be payable on the 1st of March next? I am clearly of opinion that the words "the half-yearly payments which are to be made on the 1st of March and the 1st of September" are used to

denote the general terms of payment, and that is not at all the same as if it had gone on to say "commencing such payments upon the 1st day of March next." There is a provision made for the half-yearly payments over the future period of this agreement, but it is not said that the first of these payments is to be made on the 1st of March next. It is very much the same as if provision had been made for the permanent half-yearly payments and nothing said at all as to when these payments are to commence. Suppose in place of reimbursing the Caledonian Company for one-half of the price which they had paid for this railway, the consideration had been that the North British Company should lend the Caledonian Company a sum equal to one-half the price which they had paid, and nothing was said about when that was to commence would it have been possible to construe that into an agreement that the first half-yearly payment was to be made upon the 1st of March? The observation that would have been made is clear—it was not said when the first half-yearly payment was to be made, and therefore the Caledonian Company might have an equitable claim for the portion of interest intervening before the 1st of March, when they were under advance for the money; they might have an equitable claim for that portion of the interest although it was not so said. That would have been the position they would have taken up. If this had been a case of loan in place of an advance of money, the Caledonian Company would have said, We advanced the money at the vesting period—the 1st of February; it would not be equitable that for the intervening period till you come to the general annual term we are to get no interest. And that might have prevailed. It could only have prevailed upon the ground of an equitable claim. It would not have been the same thing as if it had been stipulated expressly as to the payment for that month. Now, I consider this to be substantially the same case. There is nothing against the words, and less against the meaning, of the contract or the Act of Parliament in holding that the intervening month is not to be paid for at all, and is left to depend on equitable considerations; and the equity would have been entirely limited on the part of the Caledonian Company to the period of one month.

**LORD MUEE**—I regret that I am obliged to differ from your Lordships in the construction which you have put upon this clause of the Act of Parliament; because with every anxiety to concur where I can with the majority of your Lordships, I cannot get over the express provision—the very express provision as I read it—of the 6th section of the statute. The words are (sub-section 1)—"From and after the vesting period the company (that is, the defenders' company) shall pay to the Caledonian Railway Company half-yearly, on the 1st day of March and the 1st day of September in each year, a sum equal to one-half of the aggregate of the following half-yearly payments," &c.—shall pay to the Caledonian Company on the 1st day of March and the 1st day of September of each year. That, I think, is an express and positive enactment sanctioned by Parliament. It is a contract between these two companies with a view to the disposal of one-half of the line of railway in question,

the whole of which at that time belonged to the Caledonian Company. Now, by the 3d section one-half of the interest in that line vested on a particular day, viz., on the 1st of February 1880, and then we have the provision as to what are the conditions in respect of which the Caledonian Company agreed to part with their property; for that is really the contract. It is the consideration of the purchase-price of this portion of the railway that we are here dealing with. Now, if we take these words in their ordinary acceptation, I can put no other interpretation on them than that the defenders are bound by Act of Parliament to do on the 1st of March what the clause says they are to do—that is to say, they are to pay one-half of the dividend.

The Lord Ordinary has rejected this construction of the enacting words because of what he considers the harshness of their operation. Now, I assume and at once agree with your Lordships in thinking that is *ex facie* of it a hard enactment as regards the defenders—that they are to pay at that time a sum of money to meet a dividend which is alleged to be in the hands of the Caledonian Company as at the end of the preceding year. But in the view I take of it, it is this very harshness of the provision that leads me to think that Parliament did it intentionally, and with their eyes open when they did it. If I am right in my construction, the plain meaning of the words is that the money is to be paid on the 1st of March; and I assume that Parliament knew what they were doing and what they were sanctioning at the time they put the words in the way in which they stand in the Act. Your Lordship suggests that by reading the clause without these words in the first instance it is clear that the equitable rule laid down in the preamble of the Act would favour the construction which your Lordship puts upon it, and which the Lord Ordinary has given to it. But in the view which I take of these words I cannot leave them out. I am asked to construe an Act of Parliament which contains these words. If they were out I should then be left to take into consideration what would be the fair and equitable arrangement as to the payment of the interest. But in the view I take of it I cannot leave them out, and finding them there I must give effect to them in the plain meaning which they have.

I agree with your Lordship that on the admitted facts of the case, although it does not appear to be very distinctly set forth in the record, the money with which this dividend was to be paid was in point of fact earned by the operation of the Caledonian Company, and is payable out of the profits which I hope they acquired before the end of the preceding year to an amount sufficient to pay it. The equitable view, therefore, may appear to be that the Caledonian Company should pay this 1st of March payment themselves, and should not get a payment till September—that is, six months after the North British Company have been joint-proprietors of the line. But here the question of consideration comes in. We are dealing with the matter of the purchase-price of this railway, and it is in respect of that consideration alone I must assume that the Caledonian Company agreed to make over to the North British Company one-half of the line here in question. Now, the equitable view which your Lordship has very strongly put I would

concur fully in if the matter were open to me to consider; but I do not know that there may not have been considerations laid before Parliament of a different description by the Caledonian Company, to show that looking to the nature of the whole transaction they were entitled to have this payment made on the 1st of March, within a month of the vesting period, as the statute provides. I do not know the pecuniary condition of the railway company who were called on to part with one-half of this line, but I think the company was entitled to make the best stipulation they could with a view to the payment of the purchase-price. There may have been considerations laid before Parliament to show that from the peculiar state of the funds of the Arbroath line that year the Caledonian Company said—"We shall not part with this portion of our property unless we get so-and-so, and we stand out for these terms." I can quite conceive that. They may have been harsh terms, but as I read this clause I can put no other interpretation on the plain meaning of the words than this, that on 1st March 1880 the North British Company were to be bound to pay to the Caledonian Company one-half of the half-yearly dividends. I think that is the plain meaning of the language, and giving all due weight to your Lordship's observations as to the apparently inequitable result of this construction of the statute I am constrained to come to the conclusion that the pursuers are entitled to prevail.

LORD SHAND—I cannot say that I think this can be represented to be a question that is not attended with difficulty, and indeed considerable difficulty; but I have come to the conclusion at which the majority of your Lordships have arrived, and to which the Lord Ordinary has given effect. Of course, if I were of opinion with my brother Lord Mure that the language of section 6 admitted of one construction only, and that of the limited nature which the Caledonian Railway Company put upon that section—that the words expressly and directly enact that whatever considerations of equity might prevail to affect the question, or whatever may be the language otherwise in this statute, it is there directly enacted that on the first day of March 1880 this half-yearly payment is to be made—then I should concur with my brother Lord Mure in his judgment. But my view goes along with your Lordships in thinking that this is not the only construction of which this language is admissible, and that the language used in section 6 is open to construction arising out of the subject-matter of the section and the other language which the statute contains.

There are two parts of the statute that I think important in the construction of the words which are founded upon by the pursuers. The first of these your Lordship and Lord Deas have already referred to—I mean the narrative of the statute. It is there distinctly avowed as the purpose of this enactment that, as your Lordship has put it substantially, the North British Railway Company and the Caledonian Railway Company are to be in partnership in reference to this line—they are to be joint-owners of this line at and from the 1st of February 1880. But they are to be so on equal terms I think the statute says. In its narrative it bears that the company shall have

equal rights and powers and be subject to equal liabilities over and with respect to the said railway—be subject, that is, from the date of their becoming joint-owners to equal liabilities with respect to the said railway. Now, it appears to me that the contention of the Caledonian Company would make these liabilities substantially unequal. One of the liabilities in respect of the said railway from the time of its possession is the payment of these different dividends upon guaranteed stocks with the security which the lines afford; and the statute provides that in regard to that, as well as to all other liabilities arising in the course of the maintenance of the line, the parties are to be in an equal position.

Then, in the next place, when you turn to section 6, the statute declares what these payments really are to be. According to the second part of section 6, one-half of the sums which have been expended on capital account on the general line is to be paid to the Caledonian Company. And when we come to the particular payments which we are now dealing with, they are each described as payments that the Caledonian Company are obliged to make; and in order to ascertain what these are we are entitled to refer, and indeed we must refer, to the previous statute which your Lordship has mentioned. We find on looking at that statute that the Caledonian Company have half-yearly to make certain payments on account of that preference stock. These payments have to be made in March or April and in September or October of each year, and the purpose for which this money is to be put into the hands of the Caledonian Company is, I think, in substance to be found within this clause. It is that they shall be impressed with the half of the funds which are necessary to meet these payments. Accordingly, we have the 1st of March as the date when a half-yearly payment is to be made, obviously to enable the Caledonian Company to make their payment in that month of March or April. And, again, on the 1st of September payment is to be made to enable the Caledonian Company to make its corresponding payment of the full amount in September or October. Now, taking the preamble as indicating that the parties are to be entirely on equal terms, and containing no suggestion of any premium to be paid or bonus to be given the Caledonian Company in connection with this matter—for from beginning to end of this statute there is not an indication of any advantage or premium of that kind to be given—taking it so, and taking along with that the fact that this money is to be impressed with reference to certain payments that the Caledonian Company have themselves to make, then we come to the construction of the words "from and after the vesting period," and so on.

Now, looking at the statute as a whole, as I think we are bound to do, it appears to me, as it does to the majority of your Lordships, that the true purpose for which this clause was inserted was to define in the first place that half-yearly payments were to be made—that they were to be made half-yearly and not at the will of the parties from time to time—and in the next place the dates at which these half-yearly payments were to be made are also specified. I think it would be carrying the effect of this clause further than its language, fairly and reasonably construed, will

hold that you must begin with a half-yearly payment on the 1st of March. The result would unquestionably be that if such a payment were enforced the North British Railway Company would be giving a half-yearly sum of upwards of £5000 for a period of possession when the Caledonian Company had this line entirely in its own hands and obtained the entire profit from it, and necessarily at a time when the North British Company were getting no advantage from it whatever. I might have been induced to adopt that construction if there were anything in the statute otherwise which indicated that there was a bonus or advantage of that kind to be given by the one company to the other; but as it appears to me that the preamble negatives that view, and section 6 indicates substantially the purposes for which the money is to be impressed by the North British Company into the hands of the Caledonian Company, I think that is not the sound view of the statute. I am accordingly of opinion that the language of the statute is open to construction, and that the reasonable and sound construction of its language is that to which the Lord Ordinary has given effect.

The Court adhered.

Counsel for Reclaimers (Pursuers)—Kinnear—R. Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Counsel for Respondents (Defenders)—Solicitor-General (Balfour, Q.C.)—Asher—J. P. B. Robertson. Agent—Adam Johnstone, Solicitor.

Tuesday, July 20.

## SECOND DIVISION.

### SPECIAL CASE—SMYTH'S TRUSTEES v. KINLOCH AND OTHERS.

*Trust—39 and 40 Geo. III. c. 98 (Thellusson Act)—11 and 12 Vict. c. 36, sec. 41—Accumulations beyond Twenty-one Years—Truster's Debts—Effect of Authority to Trustees to Incur Debt and Accumulate Funds to Pay it off—Person to whom Illegal Accumulations belong.*

A direction to testamentary trustees to accumulate savings from the rents and profits of a trust-estate, and therewith to buy land or to discharge debt incurred by them to pay for land bought under the directions of the testator, is a direction to accumulate within the prohibition of the Thellusson Act, in so far as beyond the term of twenty-one years from the death of the testator.

A truster who had made up his title to certain lands as heir of provision under a deed granted by his brother in favour of a certain series of heirs, directed his trustees on the occurrence of a certain event to make an entail of these lands in favour of certain substitutes named, whom all failing in favour of his "own nearest heirs and assignees whomsoever." In his trust-deed he directed an accumulation of the rents of these lands which was struck at by the Thellusson Act. *Held*, in a question arising before the period contemplated for making the entails, that the

rents illegally directed to be accumulated fell to the heir under the old investiture, that investiture remaining unaltered *quoad* the illegal direction to accumulate.

John Smyth, Esq. of Balhary, died in the year 1819 without issue. He left a disposition whereby he conveyed his whole estate to the heirs of his own body, whom failing to his brother Robert Smyth and the heirs of his body, whom failing to his sisters and the heirs of their bodies successively. Robert expedite a general service as heir of provision in general to him, and also a general service as his heir in general.

Robert Smyth died without issue on 6th October 1855. At that date his only surviving relatives were Sir George Kinloch of Kinloch, son of his sister Helen, who had married Mr Kinloch of Kinloch; Mrs Lingard Guthrie, daughter of a sister of Sir George Kinloch; Mrs Whitson, a sister of his own; Miss Cecilia Kinloch, a sister of Sir George Kinloch; and Miss Anne Oliphant Kinloch, another sister of Sir George. Of these there were alive at the date of this Special Case only the two first named and their children. Mrs Whitson died without issue in 1866, and her estate, which was destined to various charities, was managed by Mr C. W. W. Thomson, C.A., as judicial factor.

Robert Smyth left (1) a deed of settlement of his heritable estate, (2) a settlement of his moveables, and (3) a trust-disposition and settlement dated 16th October 1854, registered in the books of Council and Session 16th October 1855. By this last mentioned deed, under which alone the questions proposed to the Court in this Special Case arose, the truster, on the narrative of his succession to his brother John Smyth of Balhary, and of the title which he had made up to him, conveyed to trustees, whom the first parties to the Special Case represented, the estate of Balhary and others to which he succeeded as heir of his brother John Smyth. The settlement contained a detailed description of the Balhary estate, lying in the counties of Perth and Forfar, and also a special assignation of three heritable bonds for the cumulo sum of £13,250, and a general conveyance "of all and sundry other lands and heritages to which I have succeeded as heir of my said deceased brother." The deed by its second and third purposes provided for payment of certain annuities to the children of the truster's nephew Sir George Kinloch till they should be of full age, when the trustees were directed to pay to each of them the sum of £2000, being the sums of principal that the truster had become bound to pay them on their coming of age. The truster directed that his trustees should "apply £8000 of the sums contained in and due by the bonds and dispositions in security before conveyed for that purpose in the first instance, or if the sums due by the said bonds and dispositions in security shall have been paid up or otherwise disposed of before that time, in terms of the powers hereinafter contained, then my said trustees are hereby directed to sell lands in Glenisla belonging to me, or as much thereof as may be sufficient to produce the said sum of £8000, or what part of it may be required, for the purpose of paying the said provisions of capital sums to the children of said George Kinloch, or such part as may be required for that purpose; but if the sum required to pay off all the children of the said George Kinloch shall exceed £8000, then the remainder of the sums required