charge the expense of a certain litigation against the liferent right which the pursuer takes under his father's settlement. The way in which these expenses came to be incurred was this. The pursuer was a bankrupt, and some time after his bankruptcy his father and he appear to have come to an agreement that the pursuer should discharge his legitim. That left him of course absolutely in the hands of his father, who might then have left him either more or less, as he pleased, in his trust-settlement; but the purpose of the discharge evidently was that the share of the estate which the father destined to his son should be protected against claims by any creditor which would reduce the sum the son was to get. Accordingly in his settlement, while the father directed his whole estates to be divided into seven equal parts among his seven children, he directed that the pursuer's share was to be held by the trustees for his behoof, giving him a right to the revenue thereof as an alimentary liferent, destining the fee of that one-seventh to the pursuer's children. But on the death of the truster, the trustee in the pursuer's bankruptcy, who was vested in all the rights belonging to the pursuer, came forward and claimed what was due to the pursuer as legitim. Thereupon the defenders put forward the discharge granted by the pursuer to his father as an answer to that claim. The trustee in bankruptcy challenged the validity of that discharge, on which the defenders brought an action to have it declared that the discharge was valid and excluded all claims on the part of the trustee in bankruptcy. The trustee in bankruptcy then brought an action of reduction of the discharge, in which he was successful; the discharge was set aside by the judgment of the Court. Parties therefore stood in this position, that there was a claim by the trustee in bankruptcy against the trust estate which amounted with interest to something over £7000. Now, if that claim had been paid every one of the beneficiaries of the trust, the pursuer's children as fiars in his one-seventh, and the other children, would have each lost a sum of about £1000. But the defenders settled with the trustee in bankruptcy by paying him a sum amounting to little more than about one-half of his claim, and they thus saved one-half of the claim for the benefit of all the beneficiaries under the trust.

The question that now arises is, whether the expenses incurred in defending the trust against the claim of the trustee in bankruptcy were expenses chargeable against the trust estate, or, as is contended by the reclaimers, chargeable entirely against the liferent interest of the pursuer. I think the answer to that question depends, as the Lord Ordinary has said in a previous interlocutor, upon whether or not the litigation had been conducted solely in the interest of the pursuer or also in the interests of the trust estate generally. And it is not immaterial to notice, as Mr Gunn has pointed out, that upon the record the defenders admit that the compromise and settlement they made was beneficial not only to the pursuer but beneficial to the trust estate. In these circumstances it appears to me that the expenses now in question were, as the Lord Ordinary has held, expenses incurred in defence of the trust estate for behoof of the whole beneficiaries, and therefore in my opinion they form a good charge against the trust funds. There is no doubt that the amount paid to the trustee in bankruptcy must be repaid to the estate out of the pursuer's life interest as equitable compensation to the other beneficiaries before he can claim anything; but that he should also be required to give up his life interest to the extent necessary to pay these expenses would be defensible only on the ground that the litigation had been solely in his interest, and I think I have shown that that was not so. The argument last addressed to us by Mr Salvesen, on the effect of the assignation by the trustee in bankruptcy in favour of the defenders, is one on which I do not intend to enter, I do not think that question is raised by the interlocutor now under review, and I do not propose to offer any opinion as to the extent to which the defenders would be entitled, if entitled at all, to plead that assignation in answer to the pursuer's claim for payment of his liferent. Dealing with the one question argued before us, as to where the burden of these expenses is to be placed, I am of opinion that the Lord Ordinary is right—that they should be placed upon and deducted from the general trust estate under the management of the defenders.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuer and Respondent—Watt, K.C.—Gunn. Agents—Mackay & Young, W.S.

Counsel for the Defenders and Reclaimers—Salvesen, K.C.—J. Fleming. Agents—J. & D. Smith Clark, W.S.

Tuesday, March 3.

FIRST DIVISION.

[Exchequer Cause.

[Lord Stormonth Darling, Ordinary.

SIR JOHN MUIR *v.* FORMAN'S TRUSTEES.

Railway—Abandonment—Deposit Fund—Claims on Deposit-Fund—"Meritorious" and "Non-Meritorious" Creditors—Promoters—Solicitors and Engineer of Bill—Persons Employed by Solicitors—Process—Exchequer Petition for Warrant to Uplift Deposit-Fund—Mediate Claims Made Directly—The Muirkirk, Mauchline and Dalmellington Railways Act 1896 (59 *and* 60 *Vict. cap. xxxvii.*), *secs.* 45 *and* 67—*The Muirkirk, Mauchline, and Dal-*

mellington Railways (Abandonment) Act 1900 (63 *and* 64 *Vict. cap. ccliii.)—Parliamentary Deposits and Bonds Act* 1892 (55 *and* 56 *Vict. cap.* 27), *sec.* 1.

The Muirkirk, Mauchline, and Dalmellington Railways Act 1896 (59 and 60 Vict. cap. xxxvii.), sec. 45, enacts—"If the company do not, previously to the expiration of the period limited for the completion of the railways, complete the same, and open them for the public conveyance of passengers, or for public traffic as the case may be, then and in every such case the deposit-fund, or so much thereof as shall not have been paid to the depositors, shall be applicable, and after due notice in the Edinburgh Gazette shall be applied towards compensating any landowners . . . and if no such compensation is payable, or if a portion of the deposit-fund has been found sufficient to satisfy all just claims in respect of such compensation, then the deposit-fund or such portion thereof as may not be required as aforesaid shall, if a judicial factor has been appointed, or the company is insolvent, or the undertaking has been abandoned, be paid or transferred to such judicial factor, or be applied in the discretion of the Court as part of the assets of the company for the benefit of the creditors thereof." . . .

Section 67—"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 Muirkirk, Mauchline, and Dalmellington Railways (Abandonment) Act 1900 (63 and 64 Vict. cap. ccliii.), sec. 5 enacts—"Notwithstanding that the period for the completion of the railways and works authorised by the Act of 1896 has not expired, section 45 of that Act shall take effect immediately upon the passing of this Act."

The railway never having been formed, no share capital having been issued, and the railway having been abandoned, a petition in exchequer was presented by the depositors for warrant to uplift the deposit-fund, in answer to which claims were lodged by various persons claiming payment out of the deposit-fund for services. No claims were made by landowners. *Held* (1) that, in view of the provisions of the special Acts and of the Parliamentary Deposits and Bonds Act 1892, sec. (1), no distinction, as regards the right to be paid out of the deposit-fund, could be drawn between "meritorious" and "non-meritorious" creditors; (2) that the engineer and solicitors for the scheme, who worked on behalf and in promotion of the future company, and who were not shown to have been employed by anybody else, and whose services were necessary and effectual in obtaining the incorporation of the company, were creditors of the company, and, even if they were promoters, were entitled to claim payment out of the deposit-fund, being the only asset thereof; and (3) that other professional men who had been employed by them in this work, but who looked to the company for payment, might in this process make their claims directly upon the deposit-fund.

Railway — Abandonment — Remuneration for Services Rendered—Persons Entitled to Bind Company—Original Directors—Board not fully Constituted—Time Limit of Powers—Deposit-Fund—Company.

A company was incorporated under a private Act of Parliament, and certain persons named (together with three others to be nominated by them) were declared to be the first directors of the company, who were to act till the first ordinary meeting of shareholders, which was directed to be held six months after the passing of the Act, but no share capital was ever issued, and no ordinary meeting of shareholders was ever held. The named directors, together with one other appointed by them, continued to act as on behalf of the company. They so acted not only before but after the expiry of the six months. *Held* that although the full board of original directors had never been formed, and the directors never held the number of shares prescribed by the Act as the qualification of a director—no shares having been issued—and although the original directors had continued to act after the expiry of the six months—still, notwithstanding these facts, professional men and others who had been employed on the company's business by the directors had a good claim on the assets of the company for their services, including work instructed and done after the expiry of the six months.

The following narrative of the facts in this case is in substance taken from the opinion of the Lord President:—The Lanemark Coal Company, whose mineral field was situated in Ayrshire, was desirous to obtain a connection with the Caledonian Railway Company, in addition to the connection with the Glasgow and South-Western Railway which it already possessed, and in 1893 Mr Charles Forman, C.E., an experienced engineer, was consulted on the subject. After visiting the locality, he thought that the scheme was a promising one, and advised that Messrs Keydens, Strang, & Girvan, writers in Glasgow, who had experience in these matters, should be consulted. On 6th November 1894 a meeting of persons interested in the scheme was held, and it was decided that Mr Forman and Mr Dron, the engineer of the Lane mark Coal Company, should survey the proposed line with a view to the preparation and deposit of Parliamentary plans. This was done, and at a meeting held shortly afterwards it was decided to proceed with the scheme, Messrs Forman and Dron being appointed engineers, and Messrs Keydens, Strang, & Girvan, solicitors for it. The bill was introduced in 1895, and came before a committee of the House of Commons, who held the preamble proved, notwithstanding the opposition of

the Glasgow and South-Western Railway Company. In consequence, however, of Parliament having been dissolved, no further progress was made with the bill in that session, but in the following session (1896) it was reintroduced, passed both Houses of Parliament, and received the Royal Assent on 2nd July 1896.

By the Act thus obtained Sir John Muir, Baronet, of Deanston, Mr Howatson, of Glenbuck, Mr Somervell, of Sorn, Mr Granger, and three persons to be nominated by them, were declared to be the first directors of the company. These four gentlemen and Mr A. M. Brown, who was nominated a director by the others, made the Parliamentary deposit of £26,094, under a special arrangement with the Clydesdale Bank. Mr Andrew, one of the partners of Messrs Mitchells, Johnston, & Company, writers, Glasgow, was appointed solicitor to the company in succession to Messrs Keydens, and Mr Forman was instructed to stake out the line, but no share capital was issued to the public, and the line was never made. Efforts were, however, made to raise the necessary capital through financiers and capitalists, and negotiations were carried on with the Caledonian Railway Company for a working agreement, and in these and the general business of the company Messrs Mitchells, Johnston, & Company, writers in Glasgow, and others, were employed by the directors named in the Act, who continued to act on behalf of the company, although they were only appointed till the first ordinary meeting of the shareholders, which was directed to be held six months after the passing of the Act. There were no shareholders, and no such meeting was held. Part of the work done on the instructions of the directors by Messrs Mitchells, Johnston, & Company was instructed and done after the expiry of the six months. Mr A. M. Brown was the only person nominated as a director by the persons originally named in the Act as directors. No shares being issued, none of the directors ever acquired any shares in the company. The negotiations for making and working the line were not successful. The failure of the scheme apparently was not due to any defect in it, but to the injudicious action of some of the promoters.

In 1900 Sir John Muir, Mr Howatson, and Mr Brown promoted a bill in Parliament for the abandonment of the undertaking, and on 6th August 1900 it received the Royal Assent.

By section 33 of the Muirkirk, Mauchline, and Dalmellington Railways Act 1896, it was enacted that the first directors should be Sir John Muir, Baronet, and James Somervell, William Granger, and Charles Howatson, Esquires, and three others to be nominated by them, and that these directors should hold office till the first ordinary meeting of shareholders, which, by section 28, was directed to be held six months after passing of the Act (2nd July 1896). The board was never filled up, and as there were no shareholders there was no ordinary meeting then or at any time thereafter. By section 31 it was provided that the qualification of a director was a holding of 50 shares of the company in his own name, and for his own benefit.

Section 44 of the said Act enacts as follows:—. . . "Be it enacted that, notwithstanding anything contained in the said Act" (*i.e.*, the Parliamentary Deposits Act 1846), "the deposit-fund shall not be paid or transferred to or on the application of the person or persons, or the majority of the persons, named in the warrant or order issued in pursuance of the said Act, or the survivors or survivor of them (which persons, survivors, or survivor are or is in this Act referred to as the depositors), unless the company shall previously to the expiration of the period limited by this Act for completion of the railways Nos. 1, 2, 3, 4, and 5, open the same for the public conveyance of passengers, and in respect of the railways Nos. 6, 7, 8, 9, 10, and 11, open the same for public traffic; and if the company shall make default in so opening the railways the deposit-fund shall be applicable and shall be applied as provided by the next following section.".

Sections 45 and 67 of the said Act are quoted in the rubric.

The preamble of the Muirkirk, Mauchline, and Dalmellington Railway Abandonment Act 1900 was, *inter alia*, as follows—. . . "And whereas no part of the capital of the company has been issued, and no notices to treat for the purchase of lands have been served, and it is expedient that the railways and other works be abandoned, the affairs of the company wound up and the company dissolved: And whereas the deposit fund in section 44 of the Act of 1896 mentioned was provided by Sir John Muir, Baronet, James Somervell, Charles Howatson, and William Granger, since deceased, and it is expedient to provide for the immediate payment of the same to the depositors: And whereas the purposes of this Act cannot be effected without the authority of Parliament."

Section 5 of the said last mentioned Act is quoted in the rubric.

Section 6 provided that the company should "forthwith proceed to wind up their affairs, and should pay, satisfy, and discharge all their debts"; and section 7 provided that only when all their debts were paid should the company be dissolved and the Act of 1896 repealed.

Section 1, sub-section 2, of the Parliamentary Deposits and Bonds Acts 1892, enacts as follows:—"The High Court may, if a receiver has been appointed, or the undertaking has been abandoned order that the deposit fund, or any part thereof, be paid or transferred to the receiver, or to the liquidator of the company, or be applied as part of the assets of the company for the benefit of the creditors thereof." In the application of the last mentioned Act to Scotland, the expression "High Court" is to mean the Court of Session in either Division thereof.

In November 1900 Sir John Muir, Mr Howatson, and Mr Brown presented a petition in exchequer for warrant to uplift the deposit-fund.

Answers and claims for payment out of the deposit-fund were lodged (1) by Mr Forman, engineer for the railway, whose trustees were sisted after his death; (2) by Philip Grierson Keyden and David Reid, the surviving partners of the firm of Keydens, Strang, & Girvan, writers, Glasgow; (3) by Messrs Martin & Leslie, Parliamentary solicitors; (4) by Messrs Blyth & Westland, engineers; (5) by Messrs Mitchells, Johnston, & Company, writers; and also by others. These claimants claimed as creditors of the company entitled to be paid out of the deposit-fund for professional services rendered by them.

There were no claims by landowners for compensation out of the deposit-fund.

In reply to the claims made by the respondents and claimants the petitioners maintained that none of the claimants were "creditors of the company" within the meaning of the special Acts: that they were either persons who had been employed by persons other than the company, or were themselves the real promoters of the undertaking; and that either they had no claim against the company or no claim against the deposit-fund; or *separatim*, no claim which the Court, in the discretion conferred upon it by the Act of 1896, should recognise; that Mr Forman and Messrs Keydens were the real promoters of the undertaking and were not entitled in a question with the petitioners to payment out of the deposit-fund; that Messrs Martin & Leslie and Messrs Blyth & Westland were employed by Messrs Keydens or Mr Forman and not by the company; and that Messrs Mitchells, Johnston, & Company were employed by persons who had no authority to bind the company.

The Lord Ordinary (STORMONTH DARLING) on 3rd June 1902 issued this interlocutor—"Finds that all the respondents are entitled to be ranked *pari passu* on the deposit-fund for the amount of their claims, as the same may be audited; continues the cause in order that the necessary remits may be made; grants leave to reclaim."

Opinion.—[*after narrating the facts*]—"The present question, therefore, depends on the true construction of sec. 45 of the Act of 1896, which, the Abandonment Act declares, shall take immediate effect although the period limited for the completion of the works had not expired when the Abandonment Act was passed. Now, we are not concerned with the first portion of sec. 45, which provides for the compensation to landowners, because no such compensation has, after due advertisement, been claimed. The only material part of the clause is that which provides that if the undertaking has been abandoned (which is the case here), the deposit-fund shall 'be applied in the discretion of the Court as part of the assets of the company for the benefit of the creditors thereof, and, subject to such application, shall be repaid or retransferred to the depositors.' These words are the same as those in the Parliamentary Deposits Act of 1892, except that the latter does not contain any express reference to the 'discretion of the Court,' although probably the same result is attained by its using the word 'may' instead of 'shall' when authorising the Court to order the deposit-fund to be applied for the benefit of creditors. Accordingly I proceed to inquire (1) whether the present claimants are creditors of the company; and (2) whether, if so, there is any special reason why they or any of them should be held disentitled to recover their debts out of this deposit-fund as part, and now the only part, of the assets of the company.

"On the first of these questions we start with the fact that the special Act contains a clause (sec. 67) providing 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.' Now, the two leading claims in this process are those of (1) Forman's trustees, amounting to £12,260, for professional services rendered by Forman as engineer for the proposed line; and (2) the surviving partners of the dissolved firm of Keydens, Strang, & Girvan amounting to £3078 for professional services rendered by the late firm as solicitors for the Bill. The petitioners' case against Forman and the Keydens is that they were themselves the real promoters of the undertaking. Accordingly as against them the petitioners can take no benefit from such cases as *Wyatt* v. *Metropolitan Board of Works*, 11 C.B. (N.S.) 744, or *In re Skegness and St Leonards Tramways Company*, 41 Ch. Div. 215, for the result of these cases is to show that the persons who are entitled to take advantage of clauses like sec. 67 of the special Act are precisely those in the position of Forman and the Keydens who have done work in the expectation of the company coming into existence, and who have no other paymaster to look to. I shall presently consider whether the petitioners have a good answer to these claimants on other grounds. All I say at present is that the mere fact of being a promoter will not bar a man from receiving remuneration for professional services rendered by him in connection with obtaining a company's special Act. In *Edinburgh Northern Tramways Company* v. *Mann*, 23 R. 1056, the persons claiming for such services were admittedly promoters, and yet the claim succeeded.

"It is rather as against other and smaller claimants that the petitioners found on the cases of *Wyatt* and *Skegness*. These claimants are (1) Messrs Blyth & Westland, C.E., whose bill amounts to £440 for engineering advice and evidence given before the Parliamentary Committees; (2) R. W. Dron, whose bill for engineering work done in conjunction with Mr Forman is £698; (3) William Robertson (£151) for evidence as a mining engineer; (4) John D. Boswell (£76) for evidence as representing local landowners; (5) John Lawson (£39) for Parliamentary land estimates; (6) Lake & Sison (£146) for printing work done in London during the passage of the Bill

through Committee; (7) Aird & Coghill (£216) for printing the book of reference and similar work in Glasgow; (8) Allan Stevenson (£140) for land estimates and giving evidence; (9) John Pringle (£100) for giving evidence as factor to Lord Home; and (10) John L. Murray (£36), also, I think, for giving evidence as a land agent. I do not include among the claimants against whom the plea of 'another paymaster' is urged, D. Cunningham's claim of £8, 10s. for providing the seal of the company, because it is perfectly clear that he received the order direct from the chairman and secretary of the company after the passing of the Act. To this small claim therefore I see no answer at all. Lastly, there is in the same category with the ten claims I have mentioned a large claim for £4094 by Martin & Leslie, Parliamentary solicitors, for carrying through the special Act, and for opposing other Bills in the interests of the promoters.

"As regards all these claims it is urged that the claimants were employed by Forman and Messrs Keydens, or one or other of them, and must look to them for payment. In one or two instances, it is said alternatively, that claimants who gave evidence were deputed to do so by public meetings held in the district. It seem to me that this plea fails on the facts. For example, in the case of Mr Blyth, of Blyth & Westland, he was undoubtedly asked to give evidence by Forman, but he entirely disclaims the idea of his ever having looked to Forman for payment of his account. The claimants Lawson and Stevenson agreed with Messrs Keydens that, as regards their land estimates, they were only to charge outlays 'in the event of the lines not being gone on with.' But that, I think, meant 'in the event of the Bill not passing.' In all these cases, as I read the evidence, the claimants, though called in by the engineer or solicitors for the promoters, looked to the company, if and when it came into existence, as their true debtor. The character in which Forman or the Keydens employed them was known to be purely representative, and I do not think that any of them, with the doubtful exception of the printers (who were not examined, and as to whose view of the matter there is therefore no direct evidence), believed that they had any claim against either the engineer or the solicitors personally. Certainly none of them acted on that view. It is true that, as Lord Bowen explains in the *Skegness* case, down to the time when a railway company's special Act passes the company is not formed, and nobody can be said in a strict sense to be employed for it or on its behalf. It may not therefore be possible to dispose of the petitioners' plea by the short and simple answer that these claimants (Martin & Leslie, for example) were acting for disclosed principals. But then Lord Bowen goes on to say that the object of a clause making costs a charge against the company is to place such persons 'in the same position after the Act comes into existence as if they had been employed by the company from the first.' Indeed, the judgment in that case seems to me to affect not liability but procedure. It rules that the proper persons to sue or claim under these clauses are those who have been acting directly for the company which is to be formed, chiefly on the ground that otherwise there might be an undue multiplication of claims. But it does not rule that indirect claims are not ultimately to fall on the assets of the company, for Lord Lindley, at the end of his opinion, says that the proper solution of the difficulty is to hold that the claimants in that case must look to their employer, and that he must look for his indemnity to the funds of the company. If this be so, and if Forman and the Keydens, as the alleged employers, are not themselves barred from claiming on this fund, the plea founded on the *Skegness* case becomes of no practical importance.

"The next claim to be considered is that of Messrs Mitchells, Johnston, & Company, writers, Glasgow, for £221, in respect of professional services and outlays after the formation of the company, chiefly in connection with opposing a Bill in Parliament and negotiating various agreements with contractors and others. To this the petitioners have a different kind of answer. It is an answer which affects parts of some of the other claims, and notably that of Forman's trustees, but I can most conveniently deal with it in connection with this claim by Messrs Mitchells & Company. The answer is that, inasmuch as sec. 28 of the special Act requires the first ordinary meeting of the company to be held within six months after the passing of the Act, and no such meeting was held; and as by sec. 33 the first board of directors was to continue in office until the first ordinary meeting, and a new body of directors was then to be elected, there was, after 2nd January 1897, no board legally qualified to act for or bind the company. Accordingly, it is said, work done or outlays made after that date on the instructions of the original board could not found any debt against the company. The employment of Messrs Mitchells & Company began within the six months, because Mr Andrew, one of the partners, was, at a meeting of the board on 24th November 1896, appointed interim solicitor to the company. But, as I understand the argument, the petitioners draw a line at 2nd January 1897, and say that after that date no work could be done for which the company is bound. I cannot assent to this argument. It may be that if the first board had ceased to act, and if the seal of the company had been used without any kind of warrant, there would have been no one qualified to bind the company. But the first board was duly constituted by force of the statute, and it regularly met. The statute contemplates that after six months this board shall be superseded by a new one. It does not say that if no new board be elected the first board shall cease to act, and so to hold would mean that, in any case where it had been found impossible within the six months to issue share capital, the company

must *ipso facto* die a natural death. That such was not the policy of the Legislature appears, I think, from the terms of sec. 87 of the Companies Clauses Act, even if that section be not directly applicable to a case where no ordinary meeting of shareholders and no adjournment are held. I do not say that a first board would be excused for remaining in office without reappointment after the prescribed time if a body of shareholders had come into existence competent to hold an ordinary meeting of the company. But in a case like the present, where no such body existed, and where the original board continued to act for the purpose of setting the company on its legs, I should be slow to hold that its whole proceedings were null and void.

"The very object of naming a board of directors in a special Act is to enable the company to be set agoing, if possible within six months, but above all to be set agoing, and so to fulfil the purposes for which Parliament has called it into being. I am not aware of any case which has construed the directory provisions of a statute creating a company in a manner so rigorous as that for which the petitioners contend.

"Accordingly, I come to the conclusion that all the claimants are creditors of the company, that is to say, that if the company had been a going concern with a share capital, all the claimants would have had a good right of action against the company for the true amount of their debts.

"I now pass to the question whether, owing to the only available asset of the company being this deposit-fund, the claimants, or any of them, are disentitled to recover, although they might have recovered out of the normal assets of the company. This question arises mainly in connection with the claims of Forman's trustees and the Keydens.

"The policy of Parliament with regard to deposit-funds has wavered considerably during the last half-century. The idea of requiring promoters to make a deposit of money or securities as a condition of the passing of special Acts for the construction of railways and similar undertakings undoubtedly had its origin in the Standing Orders of Parliament. Its first statutory recognition was in the Parliamentary Deposits Act of 1846, which allowed a deposit to be returned to the depositors on the termination of the Parliamentary session in which it had been made whether the Bill had passed or had been rejected or withdrawn. Then arose the practice of inserting in private Bills special clauses about the deposit-fund, in which there generally appeared a declaration of forfeiture to the Crown in the event of the undertaking proving abortive, either with or without an alternative in favour of creditors. So far as public statutes are concerned, I rather think that the Railways Construction Facilities Act of 1864 (by sec. 41) was the first to contain a provision for forfeiture to the Crown in case of non-completion. Meanwhile the Board of Trade had been authorised by the Abandonment of Railways Act of 1850 to grant warrants for abandonment, and had been in the habit of attaching conditions to their warrants. It was usually one of these conditions that the deposit-fund should be applied as part of the assets of the company. Recognising this practice, the Abandonment of Railways Act of 1869 provided (by sec. 5) that if the warrant contained this condition, the Court might, if it thought fit, direct that the fund should not be applicable for debts which, 'regard being had to what was fair and reasonable as between all the parties interested,' appeared to have been 'incurred on account of the promotion of the company.' This provision has no application to the present case, or indeed to any case which is likely now to arise, for the Act of 1869 applied only to railways authorised to be made by Acts passed before the Parliamentary session of 1867. As time went on it became more and more common to insert clauses in special Acts similar to sec. 45 of the special Act here, making the deposit-fund, in the event of insolvency or abandonment, divisible among creditors of the company, without any provision for forfeiture to the Crown. At last, in 1892, was passed the Parliamentary Deposits and Bonds Act, to which I have already referred.

"I have noticed the course of legislation in this matter because it is necessary to have regard to it in reading the decisions. The earliest case in which, so far as I know, any distinction was drawn as against creditors whose debts were connected with the promotion of a company was that of *Brampton and Longtown Railway Company* in 1870 (L.R. 10 Eq. 613). This distinction afterwards came to be known as one between 'meritorious' and 'non-meritorious' creditors. Vice-Chancellor Bacon in deciding the *Brampton* case does not use that expression, but he means the thing which it denotes. He was dealing with an undertaking under the Railways Abandonment Act of 1869, and what he had to do was to construe sec. 5 of that Act, the substance of which I have given above. He had to consider whether the Bill of the Parliamentary solicitor was 'a debt incurred on account of the promotion of the company,' and there being really no doubt about that, he had to say whether it was fair and reasonable, in the sense of the statute, that the deposit-fund should be applicable for the payment of such a debt. He held that it was not.

"The same thing happened in 1876 in the *Barry Railway Company* case (4 Ch. Div. 315). That was a case of the strongest possible kind on the facts, because a landowner who was responsible for the deposit had lost about £12,000 in attempting to float the undertaking, and the solicitor who claimed against him had already received about £6000 for his services. He now claimed £2600 more, and the Court, being directed by the Act of 1869 to inquire whether it was fair and reasonable that a promotion debt of this kind should be charged against the deposit-fund, had no difficulty in answering that question in the negative.

"Earlier in the same year a case was decided (*Bradford Tramways Company*, 4 Ch. Div. 18) which was not under the Act of 1869. But in the special Act incorporating the company it had been provided that, in the event of the undertaking proving abortive the deposit-fund should be forfeited to the Crown, or in the discretion of the Court applied wholly or in part for the benefit of the creditors. The actual point decided was that the deposit was to be resorted to only so far as necessary for paying creditors, and that no order could be made for treating it as an asset of the company until it was ascertained that there were debts that could not be paid by means of calls on the shareholders. This decision was based mainly on the view that *prima facie* the deposit was to go to the Crown, and that the Court had no discretion to apply it for creditors unless it appeared that there were debts which could not otherwise be paid. The decision, therefore, was not in favour of the depositors but of the Crown, and its only interest with reference to the present question is that in the opinion of Lord Bramwell (then L. J.) there first appeared the phrase about 'meritorious' creditors, whom he defined as those who were not responsible for the failure of the scheme.

"Next came the case, in 1877, of the *Lowestoft Tramways Company*, 6 Ch. Div. 484. The company had obtained a provisional order, and a deposit had been made in terms of Board of Trade rules, which provided that in the event of non-completion of the tramway the deposit should either be forfeited to the Crown or in the discretion of the Court applied for the benefit of creditors. Sir George Jessel exercised his discretion, as the Court of Appeal had done in the *Bradford* case, holding that neither the Parliamentary solicitors nor the persons who had become responsible for the deposit were meritorious creditors in a question with the Crown. This, therefore, like the *Bradford* case, was a decision in favour of the Crown and not of the depositors.

"Then came in 1885 the judgment of the late Lord Justice (then Mr Justice) Chitty in the case of *Birmingham and Lichfield Railway Company*, 28 Ch. Div. 652. That again was a case where under the special Act the deposit-fund was either to be forfeited to the Crown or in the discretion of the Court applied for the benefit of creditors. The solicitor for the Treasury appeared and stated that he did not offer any opposition to the exercise by the Court of its discretion in favour of *bona fide* and 'meritorious' creditors of the company. The learned Judge reviewed the former decisions, and stated their effect to be that the claims of persons engaged in the promotion of a company were not to be considered, in the exercise of discretion reposed in the Court, as 'meritorious,' notwithstanding they would rank as debts of the company in a winding-up. Accordingly, he found that no part of the deposit-fund ought to be applied in payment of the claims of the Parliamentary agent, or of three directors who had been promoters and had made certain payments for obtaining the company's special Act. He did not doubt that the Parliamentary agent was a creditor of the company, and he did not hold that the depositors were to be preferred to him. But he held that the claims of the Crown, whether it was to be regarded as a fine or as compensation to the public for the public injury done by the failure to make a railway, were preferable to that of the Parliamentary agent.

"Accordingly, it will be seen that all the cases in which a distinction was drawn between 'meritorious' and 'non-meritorious' creditors were either cases arising under section 5 of the Abandonment Act of 1869 or cases where the declaration of forfeiture to the Crown was held to imply something of the nature of punishment to all who could be regarded as having promoted an abortive undertaking, whether these were promoters in the strict sense or were engineers or solicitors or depositors. None of the cases were decisions in favour of depositors, except the two which arose under the very special terms of the Act of 1869. It therefore becomes necessary to consider whether the ratio of these judgments applies to a case like the present, which is not affected by the Act of 1869, and in which there is no clause of forfeiture to the Crown. The Parliamentary Deposits Act of 1892 seems to mark a material change in the policy of the Legislature, for it provides that 'notwithstanding any provisions for forfeiture to the Crown, the Court may order that the deposit-fund shall be applied as part of the assets of the company.

"The question whether the Act of 1892 marks such a change has been considered by two English Judges in cases which are not binding on this Court, but which are entitled to considerable weight. One of them was *in re Hull and Barnsley and West Riding Junction Railway Co.*, shortly reported in W.N. (1893), 83, in which Mr Justice Chitty, who had decided the case of the *Birmingham and Lichfield Railway Co.* in 1885, expressed the opinion that since the passing of the Act of 1892 all distinction between 'meritorious' and 'non-meritorious' creditors had ceased to exist. The other case was *ex parte Bradford and District Tramways Co.* (1893), 3 Ch. Div. 463, in which Mr (now Lord) Justice Stirling expressed the same opinion. The contest was between persons who would have been considered 'meritorious' creditors under the old law, viz., debenture-holders, on the one hand, and those who would have been considered 'non-meritorious' creditors on the other hand, viz., persons who had lent the money for the deposit-fund, and the solicitors of the company, whose claim was chiefly for unpaid costs incurred in obtaining an abortive extension order. Lord Justice Stirling held that all the three classes of creditors were entitled to have the deposit-fund divided among them *pari passu*. The dissent from this view recently expressed by Cozens-Hardy, L.-J., seems to have been

confined to a subsidiary point, and not to have touched the main ruling as to the abolition of all distinction between 'meritorious' and non-meritorious' creditors.

"I agree with the view of these learned Judges. I am not insensible to the equitable considerations which led the Court in the two cases of *Brampton* and *Barry* under the Act of 1869 to treat the depositors and the Parliamentary solicitors as (to use the words of Lord Justice James) 'substantially in the same boat.' But then the Judges in these cases were exercising a discretion by which Parliament had expressly permitted—and in effect directed—them to disallow promotion expenses. The discretion which I have to exercise contains no such express permission, and I must exercise it in the light of the fact that the permission has been (I must assume intentionally) omitted. Anyone who consented to become liable for the deposit-fund under this special Act must be taken to have known that in the event of the undertaking being abandoned the fund must be applied as part of the assets of the company for the benefit of its creditors, and could only be repaid to the depositors subject to such application. The reference to judicial discretion in section 45 of the special Act means really no more, I think, than the use of the word 'may' in the Public Act of 1892, and the use of that word did not apparently affect the minds of Lord Justices Chitty and Stirling in the opinions which they expressed of the meaning of the public Act. I cannot therefore disallow the claims of Forman's trustees and Messrs Keydens on the ground that they are 'non-meritorious' creditors.

"That being so, I do not find it necessary to say much on the question of fact, which was keenly contested, whether the late Mr Forman, Mr Reid, and the late Mr Strang Watkins were the active promoters of the undertaking. That they were promoters, not in the strict Parliamentary sense in which the petitioners were, but in a very real and true sense, I do not doubt. Their professional position was high enough to save them from the imputation of being mere speculators, or of promoting a certain scheme without believing in the probability of its practical success. They were not even the persons who conceived the idea of the scheme. It was suggested to them by others, but they took it up and prosecuted it with great zeal and vigour, and they were certainly much more the moving spirits of the enterprise than any of the petitioners. For the purposes of my judgment, therefore, I regard them as promoters, who gave their professional services in the expectation of being remunerated out of the assets of the company.

"I must shortly notice yet another ground on which their claim is resisted. It is of the nature of personal bar, and is founded mainly on a letter addressed by the secretary of the company to Mr Howatson, dated 22nd April 1896, and on a minute of meeting of the promoters held at the Westminster Palace Hotel on the same day. The letter was in these terms:—'With reference to your responsibility in connection with the promotion of this bill, and your responsibility in connection with the security for the parliamentary deposit with the Clydesdale Bank, it is understood and agreed that you are not to have any further responsibility for the expenses of promoting the bill beyond what you have already agreed to guarantee.' The minute bore 'Mr Granger and Mr Howatson signed the bank cheque for the deposit in addition to Sir John Muir and Mr Somervell, on the understanding that they should not be held liable for further expenses.' In the case of the petitioner Mr A. M. Brown, there is also a receipt by the secretary, dated 25th March 1896, acknowledging his share of the commission due to the bank for the deposit with the addition of the words 'which payment relieves him from further liability in connection with the promotion of the Muirkirk, Mauchline, and Dalmellington Railway Bill.' There is, further, some rather loose evidence about oral representations made by the secretary and Mr Strang Watkins to Mr Howatson and Mr Brown when they signed the cheque for the deposit, to the effect that the deposit was a mere formality, and would involve them in no pecuniary liability. I am not sure that Mr Howatson does not also found on a letter from Messrs Keydens, dated 9th January 1895, saying 'it is quite understood by the promoters and others interested in this railway that the liability of Mr Howatson of Glenbuck for the expenses of promoting this bill is limited to the subscription of £100 which he has agreed to give towards the expense incurred in connection with this matter.' This letter, of course, referred merely to his liability as a subscriber towards the fund which had been raised to meet the case of the bill not passing; it did not and could not refer to his liability as a depositor. The secretary's letter of 22nd April 1896 did profess to refer to that; but no letter from the secretary of a company could possibly relieve a depositor from the statutory consequences of his act in making the deposit, and I see nothing in the evidence to connect either Mr Forman or Messrs Keydens with such an extraordinary representation. I do not doubt that there were vague assurances made by Mr Strang Watkins and others that the deposit was a mere matter of form, because everybody at that time hoped that the share capital would be raised, and that the scheme would prove a success. Nor do I doubt the belief of Mr Howatson and Mr Brown that the depositors would never be called upon to pay. The pity is that they acted upon this belief without making any inquiry as to the legal liability which they incurred by becoming depositors. If they had done so they must have been told that no random assurances could possibly bind the general creditors of the company; and that, even as regards individuals who had probable claims on the funds, the proper plan was to get from these persons definite undertakings that they would not in any case hold the deposit

fund liable for their own debts. Nothing under the hands of Messrs Keyden, and certainly nothing under the hand of Mr Forman, amounted in my opinion to that.

"There remains, I think, only the plea that this was a 'paper company.' I venture to deprecate the use of metaphors of this kind in legal language, for I am not quite sure that I know what is said to be the effect in law of calling a company a 'paper company.' It can hardly mean that no company which fails to carry out its undertaking can ever have any legal debts; because in that case all the provisions for making a deposit fund available when an undertaking has been abandoned would be entirely nugatory. If it be founded on the opinion of Mr Justice Kekewich (*In re Manchester, Middleton, and District Tramways Company*, 1893, 2 Ch. Div. 638), then I suppose it means that parliamentary agents and others who have been instrumental in obtaining an Act which never results in any practical good to the public are to be disabled from getting payment of their accounts out of the deposit fund. I observe in passing that the learned judge's opinion (at p. 646) is entirely in favour of the view which I have expressed as to the Act of 1892 having abolished all distinction between 'meritorious' and 'non-meritorious' creditors. But then, if I understand him aright, he goes on to hold that where certain persons are all equally responsible for bringing into existence a bogus company, they must all — solicitors, parliamentary agents, and depositors—be debarred from recovering anything out of the deposit fund. I am not sure that I quite follow the reasoning, but so far as I do I cannot regard it as applicable to the present case. This may have been a 'paper company' in the sense that it never succeeded in making its line, but not, I think, in any other sense. It was started with substantial and independent local support. It went very near to securing contracts with responsible people for the construction of the line and an agreement with the Caledonian Railway for working it. Indeed, so far as one can judge, it was only through an injudicious haggling over terms on the part of the board that these agreements were wrecked. It seems to me that it would be a little hard on the engineer and solicitors who did their part of the work efficiently, and carried it to a successful issue by the passing of the Act, to punish them for having called into existence a 'paper company,' when its failure to carry out its undertaking was really due to the action of a board over which they had no control, and which, indeed, in the case of the solicitors, had at a very early period dispensed with their services. I am ready to believe that the present petitioners (who were also directors) had personally very little to do with the collapse of the company. I feel that the conclusion to which I have come is a hard one for them, and I am sorry for it. But I am afraid that it is the inexorable result of statutory provisions which they failed to examine before undertaking the liability of depositors.

"I shall find that all the respondents are entitled to be ranked *pari passu* on the deposit fund for the amount of their claims as duly audited, and I shall continue the case in order that the appropriate remits may be made."

The petitioners reclaimed, and argued—(1) The claimants who had acted prior to the incorporation of the company were not entitled to rank on this fund. It had been created by statute, and was to be disposed of without relation to common law rules save as invoked by the statute. But the only direction in the statute was that it should be distributed in the discretion of the Court, and that meant equitably — *Gardner* v. *Jay*, 29 Ch. Div. 50, at p. 58; *Knowles* v. *Roberts*, 38 Ch. Div. 263, at p. 271; *Barry Railway Company*, 4 Ch. Div. 315. The Lord Ordinary had erred in not giving effect to equitable considerations, but had dealt with the matter as if the statute had given a definite right. It was inequitable that these claimants should get payment out of this fund, because they were themselves the real promoters who should not be paid at the expense of co-promoters, or they had been employed by such promoters and had no right to be ranked save through them—*Skegness and St Leonards Tramways Company*, 41 Ch. Div. 215; *Kent Tramways Company*, 12 Ch. Div. 312; *Wyatt* v. *Metropolitan Board of Works*, 1862, 11 C.B. (N.S.), 744. There was a long series of cases going to show that the Court in its discretion would not rank upon the deposit-fund claimants of this character—*Brampton and Longtown Railway Company*, L.R., 10 Eq. 613; *Brampton and Longtown Railway Company* (*Shaw's Claim*), L.R., 10 Ch. App. 177; *Kensington Station Act*, L.R., 20 Eq. 197; *Bradford Tramways Company*, 4 Ch. Div. 18; *Barry Railway Company*, 4 Ch. Div. 315; *Lowestoft Tramway Company*, 6 Ch. Div. 484; *Birmingham and Lichfield Junction Railway Company*, 28 Ch. Div. 652; *Colchester Tramways Company*, 1893, 1 Ch. 309; *Manchester, Middleton, and District Tramways Company*, L.R. 1893, 2 Ch. 638. While it might not be possible to establish two definite classes of "meritorious" and "non-meritorious" creditors, the true character of a claimant fell to be considered—*Bradford and District Tramways Company*, 1893, 3 Ch. 466, Turpin, Weekly Notes, 1900, p. 94. It was also inequitable that these claimants should be ranked, looking to their general actings, and that it would enable them to obtain indirectly what they could not have obtained directly, as they could not have sued the petitioners. (2) The claimants who had acted after the incorporation of the company were not entitled to rank upon this fund. The board of directors had never been filled up according to the Act of Parliament, and consequently there was no one entitled to bind the company—*Skegness and St Leonards Tramways Company*, 41 Ch. Div. 215; *Kirk* v. *Bell*, 16 Q.B. 290; *Alma Spinning Company*, 16 Ch. Div. 681. The

expenses here sought were not expenses of obtaining the Act, and consequently were not made a charge upon its assets.

Argued for the respondents—(1) Claims for services rendered in the promotion of the company were good against this fund. The Act said such expenses were to be paid out of the assets of the company, and declared this fund to be an asset. Having been a promoter did not invalidate a claim for professional services rendered—*Edinburgh Northern Tramways Company* v. *Mann*, July 15, 1896, 23 R. 1056, 33 S.L.R. 752, and no distinction could be drawn between different classes of creditors. All were alike. The cases cited in support of that contention turned upon the Act of Parliament in question at the time, and only showed that the policy of the Legislature in dealing with a deposit-fund had varied. Where any disqualification had been upheld that had always been in favour of the Crown and not of the depositors, but here there was no question of forfeit to the Crown. The cases cited also showed that such claims had been admitted where there was no specialty to exclude. In the winding-up of a company the claim of the solicitor who had acted in the formation of the company was a recognised equitable debt against it—*Terrell* v. *Hutton*, 4 H.L. Cases, 1091. (2) The claims for services rendered after the passing of the Act were also good. These individuals were appointed by the Act directors until the first meeting of shareholders, and as the company was never in a position to hold such a meeting they continued to form the Board and effectually bound the company—Deas on Railways, p. 69; *Scottish Petroleum Company*, 23 Ch. Div. 413; *Thames-Haven Dock and Railway Company*, 4 Man. & G. 552; *Colonial Bank of Australasia* v. *Willan*, L.R., 5 Privy App. 417; *Bonnelli's Telegraph Company*, L.R., 12 Eq. 246; *Livingston* v. *Proudfoot*, 6 Bell's App. 469; *M'Gregor* v. *Cox*, July 20, 1898, 25 R. 1216, 35 S.L.R. 273; *County of Gloucester Banking Company*, 1895, 1 Ch. 629; *Mahony* v. *E. Holyford Mining Company*, L.R. 1875, 7 H.L. 869, at p. 893; *Owen and Ashworth's Claim*, 1901, 1 Ch. 115; *Duck* v. *Tower Galvanizing Company*, 1901, 2 K.B. 341. But even if the contract was bad owing to the irregular constitution of the board of directors, still the claims would be good as being for recompense for work actually done for the benefit of the company — *Pinkerton* v. *Addie*, June 22, 1864, 2 Macph. 1270.

At advising

LORD PRESIDENT—The question in this case is whether the petitioners, who made a Parliamentary deposit under a bill for the construction of a railway, are entitled after the abandonment of the undertaking to have the whole amount of the deposit repaid to them, or whether certain other persons who rendered professional services in connection with its promotion have right to payment for these services out of the deposit, so that only the balance remaining after such payment would be handed over to the persons who made it.

[*His Lordship then narrated the facts ut supra.*]

The first question is whether the claimants or any of them are creditors of the company, and the second question is, whether, if they are creditors of the company, there is any valid reason why they should not receive payment of the debts due to them out of the deposit-fund, which is the only asset of the company. The leading claims are by Mr Forman's trustees and the surviving partners of the firm of Keydens, Strang, & Girvan, for professional services rendered by Mr Forman as engineer, and by that firm as solicitors for the bill, but there are other claims of a similar character. In answer to these claims the petitioners submit that Messrs Forman and Keydens, Strang, & Girvan, or their representatives, are not entitled to claim on the fund because they were themselves the promoters of the undertaking. I concur, however, with the Lord Ordinary in thinking that this ground of objection is not well founded. The fact of a man being a promoter does not, *per se*, form a ground for holding that he is not entitled to remuneration for professional services rendered in obtaining an Act of Parliament for the company (*Edinburgh Northern Tramways Company* v. *Mann*, *ut supra*).

There are eleven other claims for professional services, and I agree with the Lord Ordinary in thinking, for the reasons which he assigns, that in the proper exercise of the discretion confided to us by the Act of 1896 we should not reject these claims. It seems plain that the employment of the persons who rendered the services was by the promoters as such, not as individuals, and that the persons relied, and were entitled to rely, upon their claims being valid as against the company, if and when it should come into existence.

The petitioners dispute the claim of Messrs Mitchells, Johnston, & Co., in respect of professional services and outlays after the formation of the company, on the ground that sec. 28 of the special Act (of 1896) required that the first ordinary meeting of the company should be held within six months after the passing of the Act, and that no such meeting was held; as also that, by sec. 33 of the Act, it was provided that the first board of directors should remain in office till the first ordinary meeting, and that a new board of directors should then be elected; and that as this was not done there was, subsequent to 2nd January 1897, no board having a legal right to act for or bind the company. I think, however, that this contention is not well founded. The first board of directors was regularly constituted under the Act, and it duly met. It is true that the Act contemplated that after the expiry of six months this board should be succeeded by a new one, but it is not declared that if a new board should not be elected the original board should cease to exist, or at all events should not continue to carry on the

necessary business of the company until a new board should be elected. The contention maintained by the petitioners upon this question does not appear to me to be in accordance with the intention of the Legislature, or with the provisions of the statutes regulating such companies. There was a body of directors capable of holding an ordinary meeting of the company, and so long as no new board was elected and no objection was taken by anyone having interest to the original board of directors continuing to act, I do not think it would be reasonable to hold that their acts were null and void, or even that if they had been this would have afforded an answer to the claim of persons who held the position of creditors of the company to rank upon its assets for payment of their debts.

The next and most important question is, whether, seeing that the company has no assets other than the fund deposited by the petitioners, the claimants are or are not entitled to recover out of that fund the payment which they would (*ex hypothesi* of this part of the argument) have been entitled to receive out of the ordinary assets of the company if there had been any such assets.

This involves an important general question of policy, as to which different views have been taken by Parliament from time to time. The first statutory provision relative to such deposits is contained in the Parliamentary Deposits Act 1846, which sanctions the return of the deposit to the depositors at the end of the Parliamentary session in which it was made, whether the bill in connection with which it was made had or had not been passed into law. Afterwards a different view appears to have been taken by Parliament as to the proper mode of dealing with such deposits, and it became customary to provide for a forfeiture of them to the Crown if the bill did not receive Parliamentary sanction, there being sometimes an alternative provision in favour of creditors who had rendered services in the promotion. Reference may be made to the Railways Construction Facilities Act 1864, section 41 of which contains, so far as I am aware, the first provision for the forfeiture of such deposits to the Crown in the event of the undertaking not being completed within the time therein mentioned. The Abandonment of Railways Act 1850 empowered the Board of Trade to grant warrants for abandonment, and I understand that conditions were usually attached to its warrants, one sometimes being that the deposited fund should be applied as part of the assets of the company. It was by the Abandonment of Railways Act 1869, section 5, declared that if the warrant contained this condition the Court might, if it thought fit, direct that the funds should not be applied towards payment of debts which appeared to have been incurred on account of the promotion of the company. This provision, however, as the Lord Ordinary points out, has no application to the present case, or indeed to any case which is likely now to occur, seeing that the Act of 1869 related only to railways sanctioned by Acts passed prior to the Parliamentary Session of 1867. Afterwards it appears to have become usual to insert in special Acts clauses similar to section 45 of the Act authorising the construction of the railway now in question, by which a large discretion is conferred upon the Court as to the proper mode of dealing with deposited funds.

This being so, the next questions are—(1) Whether the claimants, or any of them, are creditors of the company; and (2) if they are, is there any valid reason why so much of the deposit-fund as may be requisite for payment of the debts due to them should not be applied in such payment.

The Lord Ordinary has stated the origin and history of the distinction which for some time obtained in the decisions between "meritorious" and "non-meritorious" creditors, and I agree with him in what he says on that subject. His Lordship has also carefully and accurately traced the course of decision as well as of legislation in regard to this matter, and I need only advert to it very briefly. In the cases of the *Brampton and Longtown Railway Co.*, 1870, L.R., 10 Eq. 613, and the *Barry Railway Co.*, 1876, 4 Ch. Div. 315, both of which arose under section 5 of the Railways Abandonment Act of 1869, it was held that it would not be fair and reasonable in the sense of that Act to permit the deposited fund to be applied in payment of accounts due to solicitors for professional services rendered by them in connection with the promotion of the company. These decisions were in effect in favour of the depositors. In another case, that of the *Bradford Tramways Co.*, 4 Ch. Div. 18, which arose under a special Act, it was held that recourse could be had to the deposit only in so far as requisite for paying creditors, and that it could not be treated as an asset of the company unless and until it was ascertained that there were debts which could not be met by calls on the shareholders. This decision, as the Lord Ordinary points out, was not in favour of the depositors but of the Crown, and the same may be said of the decision in the case of the *Lowestoft Tramways Company*, 6 Ch. Div. 484, in which it was held that neither Parliamentary solicitors nor the persons who had made the deposit were meritorious creditors in a question with the Crown. Again, in the case of the *Birmingham and Lichfield Railway Company*, 28 Ch. Div. 652, where the special Act provided that the deposit fund should either be forfeited to the Crown or, in the discretion of the Court, applied for the benefit of creditors, it was held that no part of the fund should be applied in payment of the claims of the Parliamentary solicitor or of certain directors who had been promoters, and had made payments in promoting the special Act.

This, therefore, was another decision in favour of the Crown in a question with promoters. In none of these cases were the decisions in favour of the depositors, except the two which arose under section 5 of the Railways Abandonment Act of 1869,

and I think that these decisions have no application to a question arising under the Parliamentary Deposits Act 1892, which in effect declares that, notwithstanding any of the provisions for forfeiture to the Crown, the Court may direct that the deposited fund shall be applied as part of the assets of the company, or to a case like the present, which arises under special Acts containing provisions such as those which occur in the Acts of 1896 and 1900, already referred to. In the cases which have arisen in England under the Act of 1892, the judges have expressed the view that the distinction between meritorious and non-meritorious creditors has ceased to exist, and I concur in this view. For these reasons I am of opinion that claims by the engineers and solicitors who were engaged in the promotion of the company should not now be rejected merely upon the ground that they are "non-meritorious" in the sense of the earlier decisions. These gentlemen gave their professional services in the promotion in reliance upon receiving payment out of any assets which the company might come to possess; and I think, especially keeping in view the provision of section 45 of the Act of 1896 already referred to, that in the events which have occurred the fund "shall be applied, in the discretion of the Court, as part of the assets of the company for the benefit of the creditors thereof," and only "subject to such application, shall be repaid or re-transferred to the depositors," that the claimants are entitled to be remunerated out of the only asset of the company, viz., the deposit-fund.

Reliance was placed by the petitioners upon certain representations and statements alleged to have been made by the secretary of the company, Mr Strang Watkins, and others, who rendered professional services in connection with the promotion of it, to the effect that their (the petitioners) signing the cheque for the Parliamentary deposit would not involve them in any pecuniary liability. The Lord Ordinary examines the evidence bearing upon this question in detail, and I agree with him in thinking that any such general statements as are alleged to have been made cannot affect the legal right of persons who can prove that they are creditors of the company to payment of their debts out of its only asset, viz., the deposited fund.

A number of objections were stated by the petitioners to particular claims, but I do not think that these require separate notice if the views which I have just expressed are correct. The discretion conferred upon the Court by section 45 of the Act of 1896 is a large one, and I am of opinion that in a due exercise of it the claims in question should be sustained as valid against the deposited fund.

For these reasons I am of opinion that the judgment of the Lord Ordinary is right and that it should be adhered to.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR—I have come to the same conclusions as your Lordship, and for the same reasons, which are also, I think, the reasons so very fully explained by the Lord Ordinary.

There are two questions to be considered. In the first place, whether all or any of the claims which the Lord Ordinary has sustained are good against the assets of the company; and secondly, whether, assuming the claimants to be creditors of the company, they are entitled to be paid out of the deposited fund. For the purpose of considering these questions, Mr Johnston, I think, very conveniently divided the claims into three classes—first, the solicitors and engineers who were professionally engaged in promoting the company and passing the bill through Parliament; secondly, professional men who were employed during the same period, but who are said to have acted on the instructions of the Glasgow agents Messrs Keyden, Strang, & Girvan, or of Mr Forman, the engineer, and to have looked to them alone for payment; and thirdly, professional men or tradesmen who were employed on behalf of the company after the passing of the Act, but by persons who are said to have had no authority to bind the company, and at a time when no one had any authority to bind it. It is unnecessary at this stage to consider the specific claims which are said to fall within each of these classes, and we have nothing to do at present with the amount of these claims. But Messrs Keyden and Reid and Mr Forman's representatives may be taken as the best example of the first class; Messrs Martin & Leslie and Messrs Blyth & Westland as examples of the second; and Messrs Mitchells, Johnston, & Company as an example of the third. The most important claims in amount, and those which have, I think, been most seriously disputed, are the claims of Messrs Keyden & Reid and of Forman's representatives, but I think that in regard to these claims we are relieved by a concession made by Mr Johnston from the necessity for considering with much anxiety the first of the two questions I have mentioned.

It is common ground between the parties that Messrs Keyden and Forman gave their professional services in preparing for, obtaining, and passing the Muirkirk, Mauchline, and Dalmellington Railway Act, and it is enacted by the 67th section of that statute—"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." Now, I understand Mr Johnston to concede—what was not I think admitted at the beginning of the discussion—that the claimants in question were persons who worked on behalf of the future company before it came into existence, and whose services were necessary and effectual in obtaining its incorporation, and also that they are not shewn to have been employed by anybody else to whom they were entitled to look for payment. And therefore at the beginning of his argument he put

the argument on the footing that they were in the position of creditors of the future company if it had come into existence. If that be so, I take it that the enactment I have quoted places them in the same posision as if they had been employed by the company from the first. Accordingly, Mr Johnston conceded they must be considered as persons who, if the company had been still going on, and was in the possession of assets, could have obtained decree against it for payment of their accounts. But then he said that although they were creditors of the company and might make good their claim against the assets if there were any, they are not entitled to claim on the deposited fund. That seems to me to depend on the meaning and effect of the Acts of Parliament which direct the disposal of that fund, and if it depends on these Acts alone I am unable to find any ground for the petitioners' contention. The special Act provides by section 44 that the sum deposited pursuant to the standing orders shall not be paid or transferred to the depositors unless the company shall, previously to the expiration of the period limited by the Act for the completion of certain railways, open the same for the public conveyance of passengers, and, in the case of certain other railways, open them for public traffic. "And if the company shall make default in so opening the railways the deposit-fund shall be applicable and shall be applied as provided by the next following section." Now, that section provides that "if the company do not previously to the expiration of the period limited for the completion of the railways complete the same and open them for the public conveyance of passengers or for public traffic," then the deposited fund shall be applicable towards (first) "compensating any landowners or other persons whose property has been interfered with or otherwise rendered less valuable by the commencement, construction, or abandonment of the railways or any portion thereof, or who have been subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company by this Act, and for which injury or loss no compensation or inadequate compensation has been paid, and shall be distributed in satisfaction of such compensation as aforesaid in such manner and in such proportions as to the Court of Exchequer in Scotland may seem fit; and if no such compensation is payable, or if a portion of the deposit-fund has been found sufficient to satisfy all just claims in respect of such compensation, then the deposit-fund or such portion thereof as may not be required as aforesaid shall, if a judicial factor has been appointed or the company is insolvent, or the undertaking has been abandoned, be paid or transferred to such judicial factor, or be applied in the discretion of the Court as part of the assets of the company for the benefit of the creditors thereof."

Now the company was incorporated, but it was abandoned. The works were never completed, it was never considered as a going company, and the railway was never opened for the conveyance of passengers or goods. It became necessary, accordingly, that parliamentary authority should be obtained for abandoning the undertakings; and in the abandoning Act it is provided "that notwithstanding that the period limited for completion of the railway works authorised by the Act of 1896 has not expired, section 45 of that Act shall take effect immediately on the passing of this Act." Now this abandonment Act was obtained upon an application to Parliament of the persons interested in the undertaking, including promoters, and it proceeds on the narrative "that whereas the deposit fund in section 44 of the Act of 1896 mentioned was provided by Sir John Muir" and certain other persons, "and it is expedient to provide for the immediate release and repayment of the same to the depositors; and whereas the purposes of this Act cannot be effected without the authority of Parliament," therefore the undertaking is to be abandoned, and among other things section 45 is to come into immediate effect. That is to say, the statute says that it is now desirable that the deposit fund should be relieved and repaid to the depositors, but it is only to be relieved and repaid to them subject to the provisions of section 45 of the Act of 1896, by which it is in the first place to be applied to compensation of landowners for services required, and in the second place, to be applied in the discretion of the Court as part of the assets of the company; and therefore it is to be repaid to the depositors only subject to those claims which on the true construction of the Act are made good charges against the deposit fund. Now it is conceded, as I have said, that of the present claimants those who are included in the first of the three classes mentioned by Mr Johnston are creditors who have a good claim against the assets of the company; and the deposit fund which forms part of these assets is only to be repaid subject to the claims of such creditors. It seems to me to follow that these claims, at all events, have been rightly sustained by the Lord Ordinary.

But then it is said the claims of creditors are not absolute—they are to be allowed subject to the discretion of the Court, and the Court in its discretion ought not to allow the claims in question, because it would be inequitable and unjust to give any part of the deposited fund to persons who were the promoters of the abandoned company. That is the main argument maintained to us.

Now, I assume, for the purpose of the argument, that the Act gives the Court a discretion to allow or disallow the claims of creditors, although I am by no means satisfied that that is the true construction of the reference to discretion in the 45th section. But when the Court is by an Act of Parliament invested with discretion, we must try to discover whether there is any indication of the ground on which such discretion is to be exercised in the Act of Parliament itself, or in such a case as the present in

any general Act which may be in force at the time for carrying out in all ordinary cases the same provisions as the special Act prescribes in the particular case; and if we cannot find such indications in the Act or Acts themselves I presume we must exercise our discretion, which is a judicial discretion, on the settled principles of law and equity in so far as they may bear on the particular circumstances of the case. Now I cannot myself find, after careful consideration of these two statutes, and after listening with attention to the arguments which have been maintained before us, that there is any indication in them that persons in the position of "promoters," in the only sense in which that term can be applied to the claimants in question, are to be excluded from any part of the assets or from a share in the deposited fund which is to be treated as part of the assets. The claimants may, no doubt be called promoters in this sense, that they exerted themselves in their respective professions to obtain the incorporation of a railway company by an Act of Parliament, looking for their reward exclusively to the liability which would be created against the assets of the company after it was brought into existence. But that cannot be a reason so far as I see for rejecting a claim upon these assets. There is nothing blameworthy in the conduct of professional men who act in this way, provided they are acting honestly for the creation of a substantial and beneficial enterprise, and it can hardly be disputed by the petitioners, who are themselves promoters in a more strict sense, that this was the character of the Muirkirk, Mauchline, and Dalmellington railway. The bill for the constitution of that company was promoted in Parliament as a perfectly honest measure by proprietors and traders in the district which it was expected to benefit, and both Houses were satisfied, after evidence and discussion, that it was likely to be a measure of public utility; and I think we must take it that there was no undue or improper speculation on the part of the persons engaged in carrying the bill through Parliament. It is quite true that after the bill had been passed and the railway company had been incorporated nothing was done to construct the works which were necessary for carrying out the undertaking; it is also true that the scheme fell to the ground and that it was thought necessary to obtain Parliamentary authority for abandoning it. But that was no fault of the claimants in question. It was due entirely to the management of the undertaking after the company was incorporated, by the persons then in charge, or some of them; and certainly it cannot be imputed to the claimants that they are to blame for it, either by misleading Parliament as to the reasonable expectations of public utility with which the bill was passed, or by failing to do any work which they had undertaken to do after the Act was obtained. I do not see, therefore, that they have done anything to displace them from making good their claim against the assets of the company.

But then it is said that this would be inequitable, because the fund consists of money supplied by the promoters, against whom the claimants have no claim, and that they cannot make their co-promoters pay indirectly a debt for which they would not have been directly liable. I do not see anything in the relation between the petitioners and the claimants which can deprive the latter of any right they could otherwise make good against the deposited fund. It is true that the solicitors and the engineer had no direct claim against the Parliamentary promoters, and it is just because they had no such direct claim that they are entitled to found on the conditions of the Act of Parliament, which charges the assets of the company with the liability to meet their accounts.

The question, therefore, is—What is the true meaning and effect of the Act of Parliament? The only inference as to the policy of the Act which I can infer from its provisions is that when a bill is passing through Parliament, Parliament, considering that the company about to be incorporated may never be in a position to perform the obligations which its incorporation will impose upon it, requires that in the meantime a certain sum of money shall be deposited to satisfy those obligations of the company if it fails to bring itself into a position to satisfy them out of its own assets. The first class of claimants are creditors having a good claim against such assets which it is admitted the company would be bound to satisfy if it was still in existence as a going company; and I see no reason for holding that, because they may be quite properly called promoters in one sense, they are to be deprived of the recourse which the statute gives them against funds deposited on these conditions. I can quite understand its being said, in a case where persons are shown to have combined in order to promote a purely fictitious company for the purpose of speculating in shares or any other indirect motive, as it was by a learned judge in England in one of the cases cited to us, that such persons are all in the same boat, and one of them is not entitled to benefit at the expense of the others. But where a perfectly honest scheme is proposed for the creation of a railway undertaking which is believed and intended to be of public utility, I can see no relation between professional men who give their services to carry such a scheme through Parliament in the expectation of being paid for them when a company is formed, and Parliamentary promoters who are required by the standing orders of Parliament to deposit a fund to meet future or possible obligations, that should prevent the former from obtaining the benefit of that fund merely because the money for it is supplied by landowners or traders in the district who are interested in the success of the railway scheme and are expecting to benefit by the passing of it. I do not suppose that the argument would have been put forward but for the series of decisions which has established what is called the distinction between meritorious and

non-meritorious creditors, and decides that the debts due to the promoters can never be allowed as a good claim against the deposited fund. It is said that this is the policy of the Legislature, and that therefore the Court, in the exercise of the discretion conferred on it, should give effect to that policy; but I think the conclusive answer is that given by Lord-Justice Stirling and Lord-Justice Chitty in the two cases *Bradford and District Tramways Co.* (L.R. [1893] 3 Ch. 463), and *Hull, Barnsley, and West Riding Junction Railway Co.* (W.N. [1893] 83), to which the Lord President referred. It was the policy of the Legislature before the passing of the Parliamentary Deposits Act of 1892, but that policy has been entirely altered; and it certainly is not the policy of the statutes we are required to construe. The Lord Ordinary says that the phrase about meritorious creditors was first used by Lord Justice Bramwell in the case of the *Bradford Tramways Company*, and if so, that eminent judge made it perfectly clear what he meant by it. He was discussing a private Act which prescribed that if within a certain time the undertaking should not be completed the deposit made in pursuance of the standing orders should be forfeited to the Crown, or in the discretion of the Court, if the company was insolvent and had been ordered to wind up, should be wholly or partly held as assets of the company for the benefit of the creditors; and his Lordship says—"The scheme of the 17th and 18th sections" (which were the sections dealing with this matter) "is that the promoters who deposit this money, and who are the originators of an abortive scheme, shall, if the scheme proves abortive, forfeit the deposit money, shall never get it back, nor get the benefit of it in any way. Now, it is not forfeited strictly for the benefit of the Crown; the Crown has not any meritorious claim, and takes it as a sort of vacant property that must go to somebody just as it takes a fine; but then if there are unhappily creditors who cannot get paid out of the assets of the company, the Crown's right to the fund (the Crown having, as I have said, no particular meritorious claim to it) may be put on one side for the benefit of those creditors who otherwise would remain unpaid and who are not guilty or responsible; but the proprietors, as I have said, are not to get it, nor are the shareholders, who have done nothing to deserve it." These are *obiter dicta*, but the line of reasoning is perfectly clear. The depositors are never to get back the money because they are responsible for originating an abortive scheme. Creditors who are equally guilty with them, as Lord Justice Bramwell puts it, are not to get it either, and if the Crown's right to the forfeited fund is to be set aside at all, it must be in favour of these creditors only who have good claims against the company and are not responsible for either getting Parliament to pass a fictitious scheme or for failing to do the work they undertook to do when their scheme was approved. The view taken by Sir George Jessel in the case of the *Lowestoft Tramways Company* (L.R. [1877], 6 Chan. Div. 484) is exactly the same. He was dealing with Board of Trade Regulations, but they were to the same effect as the clause in the private Act in the case just mentioned; and taking Lord Justice Bramwell's dicta as a guide, he says:—"The intention of these regulations is that the promoters are not by any subterfuge or device to get the deposit money back again, either directly or indirectly, if the work is not done; secondly, that the creditors only are to be considered and not the shareholders; and thirdly, that the only creditors who are to be considered are meritorious creditors, *i.e.*, persons who, as Sir George Bramwell says, are not guilty or responsible for what has happened in any shape or way." And he adds, with reference to creditors claiming before him:—"In addition to that there is a very serious consideration always to be attended to, and that is, that those who come here for what is in fact a gift to be made to them, not according to caprice but in the exercise of a judicial discretion, must come here with clean hands and a *bona fide* case."

I observe in passing that the claimants now in question are not responsible for the work not being done or the failure of the scheme in any manner of way, and that they come here, as it seems to me, with a *bona fide* case. But the ground on which the whole reasoning proceeds is that the deposited money is to be forfeited, that the depositors are never to get it back, and that the creditors who may be admitted to participate in what is really a vacant property are persons who are seeking for a gratuitous benefit—a gift out of money to which they have no direct right. The policy of the Legislature in this respect is, I think, brought out as clearly in the case of the *Brampton and Longtown Railway Company* (L.R. 10 Eq. 613), because there the Court was engaged in applying the provisions of a statute which contained this condition—that the Court might, if it thought fit, direct that the funds should not be applicable for the payment of any debt or part of a debt which, regard being had to what is fair and reasonable as between all parties interested under all the circumstances of the case, appears to the Court to have been incurred on account of the promotion of the company.

Now the whole of that policy as expounded by Lord-Justice Bramwell and by Sir George Jessel and by the Vice-Chancellor Bacon has been entirely altered. There is no forfeiture whatever. The depositors are not considered as persons who are to be fined as a penalty for having done wrong to the public, nor are the creditors to be considered as mere donees of the Crown, acting through the discretion of the Court of Exchequer, who are allowed *ex gratia* to participate in a fine or forfeited sum of money. For the policy of the Legislature in passing the Act we are to construe we must, in my opinion, look to the Acts themselves, and not to earlier statutes containing totally different provisions. Now, what the Act in question

requires is that a sum of money deposited to provide for claims which may arise against the company, if it is incorporated, but which, though it has been incorporated, it may never be in a position to meet, shall be held as a part of the assets of the company. So that claims which might otherwise have been satisfied out of the assets of the company as a going concern are to be now paid out of the deposited fund, and that, subject to those preferable charges, the money deposited is to be paid back to the promoters by whom the money is deposited. The money is to be deposited, not in order to be forfeited by way of penalty, but to meet the claims of creditors; and if there are no such claims, or after they are satisfied, it is to be paid back to the depositors. I think it follows that the claimants are not in the position of persons applying to the Court for a gratuitous benefit which is to be granted or withheld as a mere matter of discretion, but that they are in the position of creditors whose debts are made payable by statute out of a particular fund, and who are entitled to be paid out of that fund unless it can be shown against them that they are excluded either by agreement or by personal bar.

Now, it is said in this case that the claimants are excluded; and that in the course of the argument was put on two distinct grounds. In the first place, it was said that they had given an undertaking that no claims of theirs should be made against the parliamentary promoters; and, in the second place, that they had given what was practically, I think, represented as an undertaking that the promoters should be held scatheless except to the extent to which they had made certain subscriptions for parliamentary expenses. As to the first of these grounds, what I think the argument came finally to rest on was an undertaking which is contained in a letter from Keydens, Strang, & Girvan to Mr Murray, the agent of one of the promoters, Mr Howatson, in which they said —"It is quite understood by the promoters and others interested in this railway that the liability of Mr Howatson of Glenbuck for the expenses of promoting this bill is limited to the subscription of £100, which he has agreed to give towards the expense incurred in connection with this matter." Some correspondence follows upon this, and it ends in a request made on behalf of Mr Howatson by his agent for a further undertaking. His agents write on 17th April 1895, "that he is not quite satisfied with your undertaking of 9th January last regarding costs. The promoters might be found liable in costs which, although no doubt very unlikely, is a possibility. He would like your letter to cover this contingency." No answer is made to this letter, but the result of it seems to me to be perfectly clear. It could never mean anything more than an undertaking by the particular claimants Messrs Keydens, Strang, & Girvan to one particular promoter, Mr Howatson, but the meaning of it is quite clear—they undertake that he shall not be asked to pay more money out of pocket for the parliamentary expenses—for the expenses of promoting the bill. And I think the true meaning of the correspondence shows quite plainly that what is intended is that, except to the extent provided for by subscriptions the promoters will come on the company for payment. But then that has no application to the liability of the deposited funds. This correspondence takes place before the deposit is made, and it appears to me that the liability to charges which may ultimately come to be charged against this deposit never entered into the minds of the parties to this correspondence. It had nothing to do with the matter.

There is a second point, that representations were made by claimants or some of them. I think with the Lord Ordinary that the evidence on that point is a great deal too vague and too indefinite to found any conclusion of fact.

What it really comes to is that somebody —it does not appear who, but perhaps various people—said that the signing of the cheque for £25,000 for the purpose of satisfying the standing orders in making the deposit was a mere matter of form, and that the promoters who gave their signature acted in that belief. Now I think it is extremely difficult to accept the statement of experienced men of business that they sign cheques for considerable sums of money as a mere matter of form, if that means that they supposed that no liability could ever arise against them in consequence of signing the cheque. But I do not think that is the meaning of it. I agree with the Lord Ordinary that the true effect of all the evidence on this point is that everybody was very sanguine about the success of this undertaking, and that all looked forward not only to the bill passing and becoming an Act, but that the company would start, and that the scheme would be carried out successfully, and that for that reason they were all of opinion that no real liability whatever would arise against the deposited fund, and that it would be repaid without claims being made against it. I do not see that it is shown that they made inquiry or ever considered with any care what charges might be made against the fund which they were required to deposit, or on what conditions it might be recovered by them. I think they took for granted that no claims would be made against it, and they did so for the reason which the Lord Ordinary has given. Now, I agree with the Lord Ordinary that the case is a hard one for them, but still the result of that evidence is simply this, that they deposited large sums of money, taking the risk of claims that might arise against them and without considering what these might be, and I am afraid the legal consequence is that, however hard the case, they are responsible for providing the sum which the Act of Parliament required, and must submit to the claims with which it is chargeable.

The question raised by the second class of creditors is a different one. That ques-

tion is whether those professional gentlemen and others who gave their services in promotion of this bill, not directly as promoters of the company, but upon instructions given to them by Messrs Keyden, Strang, & Girvan, have a claim upon the deposited fund; and the difficulty which arises in their case is created by decisions of great weight and authority in England. The decisions in the cases of *Wyatt* v. *The Metropolitan Board of Works* (11 C.B., N.S. 744), and *Skegness and St Leonards Tramways Company* (L.R. [1888] 41 Ch. Div. 215), by which it has been held that the provisions of Railway Acts making the costs incident to the obtaining and passing of the bill charges against the assets of the company are not available to create claims for the benefit of anyone except promoters, except persons who gave their services as promoters and looking for payment to the future company alone, and that if anybody is employed by such promoters for hire and reward they can have no claim on the fund in question. Now I think, as I have said, these are decisions of very great authority, and I should not be disposed to disregard them. But then I think the question does not arise in this proceeding exactly in the same way as it did in either of these cases. It rather seems to me that the result of the reasoning of the learned judges would be that if we suppose that Blyth & Westland, or Martin & Leslie, were not acting as promoters looking only to the company for payment, but were acting on the employment of Keyden, Strang, & Girvan, then their claim would be against Keyden, Strang, & Girvan, and Messrs Keyden, Strang, & Girvan would look for indemnity to the company's assets. That is the result of the decisions, and I think that is the view that was presented to us in argument, because the way in which it was put by Mr Johnston was that these creditors might have a riding claim on the claim of Keyden, Strang, & Girvan, but they could have no direct claim on the assets. Now, if that be the true position of the case, it does not appear to me that any difficulty arises in this process of the kind that arose in the cases of *Skegness* and *Wyatt*, for this is a process of distribution of assets in the discretion of the Court, and if it be assumed or admitted that a claim would be good as a riding claim on another which is before the Court, I see no rule of process which, in a somewhat novel procedure, should prevent us from doing justice and giving direct effect to such claims in the distribution of these assets. It seems to be a mere matter of procedure, and I do not see any ground for insisting on a more circuitous procedure if the merits of the claim can be determined as conveniently in the form which has actually been adopted. The question is whether these claimants have good claims against the assets; and I do not think it is a substantial objection to these claims that they are put in the form of direct claims on assets, and not in the form of claims against persons who would themselves be entitled to be indemnified out of these assets.

The remaining question is, whether persons who were employed by the company after its incorporation have a good claim or not; and the ground on which this claim is disputed is this, that although the company was incorporated it never came into practical existence, and that at the time when these claimants were employed there was no one having any authority to bind the company. The case is stated quite distinctly in the replies for the petitioners to the claims which have been lodged, in which it is said in article 3 that the company "never had any existence for practical working, or did anything towards carrying into execution its statutory powers. No capital was ever subscribed, and no shares were ever issued." Then it is said by section 33 of the Act of 1896 it was enacted that the first directors should be Sir John Muir, Baronet, and James Somervell, William Granger, and Charles Howatson, Esquires, "and three others to be nominated by them, and that these directors should hold office till the first ordinary meeting of shareholders, which by section 28 was directed to be held six months after the passing of the Act (2nd July 1896). The board was never filled up, and as there were no shareholders there was no ordinary meeting then or at any time thereafter. By section 31 it was provided that the qualification of a director was a holding of fifty shares of the company in his own name and for his own benefit. None of the directors named ever acquired the necessary qualification." Upon that state of facts, therefore, it is said that the persons who were in the actual control and management of the company at the time when the persons now claiming were employed were not legal directors and not in a position to bind the company. I think the answer is to be found in the section quoted by the petitioners—that the company is incorporated by the Act of 1896, and that it is provided in sec. 33 that certain persons shall be the first directors, and that these, along with three others to be nominated by them, shall hold office till the first ordinary meeting of shareholders, which by sec. 28 was directed to be held six months after passing of the Act. That imposes on them an obligation that they shall continue in office until the first meeting of the company; and as no such meeting ever took place nothing has ever happened which can put them out of office and relieve them from the obligation imposed upon them. It appears to me, therefore, that so long as they were carrying on business and professing to represent the company by employing persons to serve the company, they were in a position to bind the company; and that if there were any irregularity in the constitution of the board, that cannot affect outsiders with whom the persons who were *de facto* the directors chose to contract.

For these reasons I think the Lord Ordinary's interlocutor should be adhered to, all questions as to the amount of claims or objections to specific claims being of

course left open by his Lordship's interlocutor.

The Court adhered.

Counsel for the Reclaimers—H. Johnston, K.C.—J. A. Fleming—Tait. Agents—Forrester & Davidson, W.S.

Counsel for the Respondents and Claimants—Jameson, K.C.—Dundas, K.C.—M'Clure—Younger—Blackburn—Graham Stewart—Maxwell Fleming—H. A. Young. Agents—Clark & Macdonald, S.S.C.—Dundas & Wilson, C.S.—Macandrew, Wright, & Murray, W.S.—Millar, Robson, & M'Lean, W.S.—F. H. Lockhart Thomson, W.S.

Wednesday, March 4.

SECOND DIVISION.

[Sheriff Court at Aberdeen.

RENNET *v.* MATHIESON.

Right in Security—Transaction in Form of Sale, but Intended to Operate by Way of Security — Security over Moveables —Sale—Sale of Goods Act 1893 (56 *and* 57 *Vict. c.* 71), *sec.* 61, *sub-sec.* 4.

A firm of wood-turners, the tenants in certain premises, entered into an agreement with their landlord under which they received £79 from him, and acknowledged themselves to have taken on hire from him for payment of a specified sum per annum certain plant "purchased by him from them" (being the plant which they had in the premises for use in their business), and bound themselves to take over the plant when called upon to do so by the landlord, paying him therefor £79 in addition to whatever hire might be due at the date of taking over, the hirers to be entitled to take over the plant on the same terms at their own option. Four half-yearly payments were made by the tenants under the agreement, for which the landlord granted receipts "for half-year's interest on loan at 4½ per cent." The tenants thereafter having become insolvent and granted a trust-deed for creditors, the trustee raised an action against the landlord to have it declared that the plant in the premises was his property as trustee, and for interdict against the landlord interfering with him in the possession thereof. A proof was allowed as to the nature of the transaction between the tenants and the landlord, in which the latter deponed that he would never have thought of buying the machinery. *Held* (*diss.* Lord Young) that the transaction between the parties was truly of the nature of a loan on security of the plant, and as no delivery had been made to the landlord, it remained the property of the tenants, and passed to the pursuer under the trust-deed granted by them.

On 13th October 1898 Bisset & Wyllie, wood-turners, Saint Peter Street, Aberdeen, entered into an agreement with John Mathieson, Lochwood Park, Drumoak, the landlord of the premises occupied by them in Saint Peter Street. The agreement was in the following terms:—"*First*, The second parties (Bisset & Wyllie) hereby acknowledge to have taken on hire from the first party (Mathieson) the gas-engine to be purchased by the first party from Crossley Brothers, engineers, Openshaw, Manchester, and the seven turning-lathes, band-saw, three circular-saws, moulding-machine, boring vertical, shafting, pulleys, and belting, hereinafter called 'the plant' purchased by him from them as at the date hereof, the said second parties being bound to pay said first party for the hire and use of said gas-engine and 'plant' the sum of £9 per annum in equal parts at the half-yearly terms of Martinmas and Whitsunday, beginning the first term's payment at Martinmas next for the portion due in respect of said hire from the date hereof to said term of Martinmas next. *Second*, The said second parties shall be bound to take over from the first party the said gas-engine and 'plant' at any time when called upon by said first party, paying him therefor the price of £200 sterling, and paying in addition thereto whatever hire may be due at the date of taking over, which hire shall be estimated at the above-mentioned rate of £9 per annum. But, without prejudice always to the said first party's right to exact payment of said purchase price and hire, it shall be in the power of the said second parties to acquire from the said first party at any time the said gas-engine and 'plant' on paying the first party the said price of £200 and whatever hire may be due at the time of taking over; Declaring that, whether the said gas-engine and 'plant' be taken over by the second parties under the first party's requisition or at their own option, the property of said gas-engine and 'plant' shall not pass to the second parties until the whole price of £200 and hire then due shall have been paid to the first party."

On the same day Bisset & Wyllie granted a receipt in the following terms:—"Received from John Mathieson, Esquire, Lochwood Park, Drumoak, the sum of £79 sterling, being price of seven turning-lathes, band-saw, three circular-saws, moulding-machine, boring vertical, shafting, pulleys, and belting purchased by him from us as at this date, and let on hire by him to us, as per minute of agreement between him and us as at this date."

The plant referred to in this receipt was the plant which Bisset & Wyllie had been previously using in their business at the premises in St Peter Street, leased by them from Mathieson, and it continued to be used by them in their business there, and it never left the premises.

Mathieson purchased the gas-engine referred to from Crossley Brothers, who delivered it on Mathieson's order at the premises in St Peter Street. Crossley Brothers rendered their account to Mathieson for the price, which was £121, and this sum was paid by him to them.