Advocate—Cozens Hardy, Q.C.—Dundas—Abel. Agents — Flux, Thomson, & Flux, for Gill & Pringle, W.S.

Counsel for the Respondents—Cripps, Q.C. —Macfarlane — C. K. Mackenzie. Agents —Nicholson & Paterson, for Tait & Crichton, W.S.

Thursday, December 17.

(Before the Lord Chancellor (Halsbury) and Lords Watson, Macnaghten, Shand, and Davey.)

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

Railway—Running Powers — Jurisdiction of Railway Commissioners in regard to Regulation of Running Powers.

By article 8 of an agreement between the North Eastern and North British Railway Companies, scheduled to and incorporated with "the North Eastern and Carlisle Amalgamation Act 1862," it is provided:—"For the purpose of maintaining and working in full efficiency in every respect the East Coast route by way of Berwick for all traffic between London and other places in England, and Edinburgh, Leith, Glasgow, and other places in Scotland, the North British Company shall at all times hereafter permit the company (*i.e.* the North Eastern Company), with their engines, carriages, waggons, and trucks, to run over and use the North British Company's railway . . . between Berwick and Edinburgh and Leith, all inclusive . . . subject to the payment by the company to the North British Company for such user, of such tolls, rates, or dues, or such share or proportion of tolls, rates, or dues as have, or has been, or shall from time to time be agreed upon by and between the said companies, or in default of such agreement, as shall be fixed by arbitration in manner hereinafter provided."

The passenger trains upon the East Coast route are made up mainly of carriages which are the joint property of the three companies, and prior to 1869 the North British Company supplied those trains with engines and guards upon its own line. From 1869 to 1894 the engines and guards were provided by the North Eastern Company under an agreement between the companies, terminable on three months' notice, by which a mileage rate for the use of the North Eastern engines was payable by the North British Company.

In 1894 the North British Company raised an action against the North Eastern Company, in which they sought declarator that they were entitled to resume the haulage of the existing service of through trains upon their own line. The defenders maintained that these trains had been run by them as their trains in virtue of their running powers, and that they were not bound to hand them over to the pursuers.

The First Division of the Court of Session *assoilzied* the defenders.

On appeal the House of Lords *reversed* this judgment and *dismissed* the action, holding that neither party had an absolute right to control the through traffic, and that, failing agreement, the regulation of the exercise of the defenders' running powers was a matter for the decision of the Railway Commissioners.

Process—All Parties not Called—Railway—Joint Property.

The railway carriages used upon the East Coast route between London and Edinburgh are the joint property of the three railway companies over whose lines the route passes.

In an action by one of the companies against a second for interdict against the defenders using the carriages for a purpose which the pursuers alleged was inconsistent with the joint ownership—*held* (*affirming* the decision of the First Division) that the action must be dismissed in respect that the third company was not called for their interest.

This was an action at the instance of the North British Railway Company against the North Eastern Railway Company for the purpose of determining the legal rights of the parties under the scheduled agreement cited above in the rubric. The conclusions of the action were as follows:—"(*First*) it ought and should be found and declared, by decree of the Lords of our Council and Session, that the trains from Edinburgh to London, *via* Berwick and York, and to other places south of Berwick, by the railways of the pursuers and defenders and the Great Northern Railway Company, or of the pursuers and defenders, and the trains from London *via* York and Berwick, and from other places south of Berwick, by the said railways, to Edinburgh, have all along hitherto, or otherwise since August 1869, been and are, while on the railway of the pursuers between Edinburgh and Berwick, trains of the pursuers, and not trains run by the defenders in the exercise of the running powers conferred by the articles of agreement made between the defenders and pursuers, of date 14th May 1862, scheduled to and confirmed by the North Eastern and Carlisle Railways Amalgamation Act 1862, or by the agreement made and executed by and between the defenders and pursuers, of date 12th May 1862, or by any Act of Parliament; (*Second*) it ought and should be found and declared, by decree foresaid, that from and after 1st January 1895, or such other date as our said Lords may fix in course of the process to follow hereon, the pursuers are entitled to run between Edinburgh and Berwick, with their own engines and guards, and otherwise as their own trains, the trains shown in the schedule hereto annexed, subject always to such alterations as may from time to time be made by mutual

consent of the pursuers and defenders and of the Great Northern Railway Company, so far as the consent of the defenders or of the last-mentioned company may be necessary, and that from and after 1st January 1895 the defenders are not entitled, in the exercise of their said running powers or otherwise, to work between Edinburgh and Berwick, with their engines, guards, or other servants, the said trains, or any of them, while and so long as the pursuers, as the owners of the railway, are able and willing and continue to run and work said trains in an efficient way; (*Third*) it ought and should be found and declared, by decree foresaid, that the defenders are not entitled to use the East Coast joint-stock carriages mentioned in the condescendence . . . in any trains they may run on the pursuers' railway in the exercise of their said running powers without the consent of the pursuers; (*Fourth*) the defenders ought and should be interdicted, prohibited, and discharged, by decree of our said Lords, from and after 1st January 1895, from attaching their engines at Edinburgh or elsewhere north of Berwick to such of the said trains shown in said schedule (subject to alteration as aforesaid) as run from Edinburgh to the south, and from entering by their guards and other servants, or in any way interfering with or molesting the pursuers in the control and management of such trains north of Berwick, and from attaching their engines at Berwick or elsewhere north of Berwick to such of said trains as run to Edinburgh from the south, and from entering by their guards and other servants, or in any way interfering with or molesting the pursuers in the control and management of such trains north of Berwick, and from attaching their engines at Berwick or elsewhere north of Berwick to such of said trains as run to Edinburgh from the south, and from entering by their guards and other servants, or in any way interfering with or molesting the pursuers in the control and management of such last-mentioned trains at or north of Berwick; and (*Fifth*) the defenders ought and should be decerned and ordained, by decree of our said Lords, from and after 1st January 1895, to hand over at Berwick to the pursuers the said last-mentioned trains, or otherwise the said East Coast joint-stock carriages upon such trains, and to detach the engine or engines of the defenders from such trains at Berwick, and to remove from such trains at Berwick their guards and other servants."

The railway carriages used upon the East Coast route were mainly joint-stock carriages owned in common by the North British, the North Eastern, and the Great Northern Railway Companies.

After the date of the scheduled agreement, and until 1869, the North British Company supplied these trains with engines and guards upon their line from Edinburgh to Berwick. In 1869 certain negotiations took place between the North British and the North Eastern Companies, and a meeting of the representatives of the companies was held on 7th August 1869, at which it was agreed that the North Eastern Company should provide the engines and guards for the through trains between Edinburgh and Berwick, and should be paid a fixed mileage rate for haulage by the North British Company. Art. 10 of the minute of meeting was as follows:—"That this arrangement be without prejudice to, and be not mentioned or referred to in connection with, any further or subsequent arrangements or arbitrations which may become necessary, and be terminable at three months' notice on either side." This arrangement continued till 30th April 1894, when the agreement of 7th August 1869 was terminated by notice in terms of art. 10.

As regards the first declaratory conclusion of the summons, there was a controversy between the parties as to the effect of the negotiations in 1869 under which the new arrangement was made. The pursuers contended that the through trains were still run as "their trains," subject to the payment for haulage, and not as running-power trains of the defenders, and that the arrangement was terminable at their option under art. 10 of the minute of meeting of 7th August 1869. They also maintained that as owning company they had a primary right to the control of the through traffic upon their own line. The defenders maintained that the through traffic trains had been run by them between 1869 and 1894 under their running powers, and that the agreement had only been entered into for the purpose of regulating the terms upon which the running powers of the defenders should be exercised.

In the Court of Session the question of fact involved in the first conclusion of the summons was decided in favour of the defenders, and it was found that the through trains had in fact been run as the defenders' trains under the running powers conferred on them by the scheduled agreement. The manner in which the other conclusions were dealt with appears from the judgment of the Lord President, *infra*.

The defenders pleaded, *inter alia* — "(1) All parties not called. (3) The East Coast trains in question between Edinburgh and Berwick having been run by the defenders in the exercise of their running powers, the defenders should be assoilzied from the first conclusion of the summons. (4) The defenders are entitled, under the powers conferred upon them by the agreements of 12th and 14th May 1862, to run such number of East Coast trains between Edinburgh and Berwick as may appear to them to be necessary or advisable. (7) Under the agreement of 12th May 1862 the defenders have an exclusive right to run the East Coast trains between Edinburgh and Berwick."

As regards the private agreement of 12th May referred to in the summons, and in the pleas for the defenders, the Lord Ordinary held it unnecessary for the decision of the case to determine the rights of the parties under it, or whether the agreement was or was not still operative, and in the Appeal Courts the case was dealt with as depending on the scheduled agreement only.

On 10th December 1895 the Lord Ordinary (Low) pronounced the following interlocutor:—"Sustains the first plea-in-law for defenders, so far as regards the third conclusion of the summons, in reference to the East Coast joint-stock carriages, and dismisses the same; and as regards the remaining conclusion of the summons, sustains the defences, assoilzies the defenders therefrom, and decerns: Finds the defenders entitled to expenses," &c.

This interlocutor was affirmed by the First Division on 6th March 1896.

The following opinion was delivered:—

LORD PRESIDENT—[*After reviewing the evidence as regards the first conclusion of the summons with the result indicated above*]—If the question tabled by the pursuers in the first conclusion of their summons must be decided against them, then in my judgment they cannot prevail under the second. On the hypothesis which I state the question stands thus—Given that the whole trains in question are North Eastern trains, can the Court ordain that in future North British trains are to be run in place of them?

I must own that an initial, and as I think an ultimate, difficulty arises from the want of harmony between the theory of the summons and the facts and conditions of through railway communication by these East Coast railways. The summons begins by personifying a "train," and assigning to it an identity and a continuous and apparently perpetual existence. To this fanciful notion I make no demur so long as it corresponded with the facts, as was the case in the historical question submitted under the first conclusion. But when we pass into the region of the future the fallacy vitiates the argument. The summons assumes that certain "trains," so numerous as to require a schedule for their enumeration, are such well-established institutions that they will of themselves run from Edinburgh to London and back at their appointed hours, and that the only question is which company shall have their control in Scotland. All this is flagrantly contrary to—I shall not say anything wider than—the admitted conditions of the traffic in question. There is no law of nature—there is no law of railways or of railway facilities—by which the pursuers, having their will, and running what they call the 10 a.m. train from Edinburgh to Berwick, will get their passengers sent straight on in the same train from Berwick to London. The pursuers have no running powers beyond Berwick, and the practical result of our adopting the theory of the second conclusion would be that we should set up a new series of local trains from Edinburgh to Berwick, clearing the North British line of through trains for this futile purpose, which nobody desires. What the pursuers really desire is that they, as the owning company of the North British line, shall be held in law by our decree entitled to run a series of trains from Edinburgh to Berwick, which shall have the legal quality of running right on to London. No decree that we could pronounce will have this stimulating effect. In this imaginary journey from Berwick to London the pursuers would, without the consent of the two English companies, override the vested rights of both the defenders and the Great Northern Railway Company, over whose lines the pursuers have no running powers whatever. Corresponding difficulties beset the pursuers' theory, when they picture themselves as waiting at Berwick with a purely North British train for a North Eastern train which, so far as we know and so far as we have jurisdiction, need never arrive. The essential difference in strategical strength and in legal right between the pursuers and the defenders in relation to through traffic between London and Edinburgh is that the defenders have running powers for the conduct of such traffic over the pursuers' line, and the pursuers have no running powers over the defenders' line. The summons adopts the easy course of ignoring this distinction.

The Court has no material before it for determining the complicated question what would be a fair exercise of the running powers of the defenders as to the hours of their trains. That question would have to be determined according to the equitable principles which regulate the possession or use of one subject by two persons having rights of different qualities. No such question is stated. We are not asked to frame a scheme for the use of this line by the owning company and the running-power company, nor are the facts before us that we could decide it, even assuming that it is within our jurisdiction and not within that of the Railway Commissioners, a subject on which only a very meagre argument was offered by the pursuers.

On the third conclusion I believe the Lord Ordinary to be right. For my own part I think that the question raised by that conclusion legitimately enters the consideration of the first conclusion, but it is right that in the absence of the Great Northern Railway Company, as the pursuers must be held to decline to call them as defenders, we should not give any decree upon it.

The fourth and fifth conclusions follow the fate of the first and second.

On the question—at first sight not very clear—what matters the summons really meant to submit for our decision, counsel were not well agreed, and we had read to us passages from what was said to be the shorthand writers' notes of the proceedings before the Railway Commission—as to the result of which counsel did not profess a common understanding. Upon this I have only to observe that while I am sure that this Court would be desirous to facilitate the settlement of disputes originating in the Railway Commission by determining questions of legal right, it rests with the party resorting to the court of law to state the question which he desires to have decided, and upon that question, as defined in the writ by which it is submitted, and upon no other, can the Court give judgment.

I am for adhering to the Lord Ordinary's interlocutor.

LORD ADAM and LORD KINNEAR concurred.

The LORD PRESIDENT intimated that LORD M'LAREN, who was absent, concurred in the opinion.

The pursuers appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—In this case two railway companies have placed contentions before the Railway Commissioners, neither of which appear to me well founded. The North Eastern Company claim to have running powers, which they certainly possess. The North British Company are the owners of the line over which the North-Eastern claim to run. The object of each of them is by means of facilities to reach London and obtain the profit of that traffic. The North British used to start a train upon their own line which in due course went over some parts of the North Eastern line and the Great Northern line. It is admitted that up to the 1st of June 1869 the trains to London were worked by the North British on their own line. At that date a controversy arose which was settled by an agreement, which, however, was one which the parties had reserved power to put an end to upon three months' notice. It was put an end to. The controversy again arose, and the parties proceeded before the Railway Commissioners to do that which the Railway Commissioners are empowered by the statute to do, namely, to arrange upon what terms the running powers should be exercised and what facilities afforded. When there each party appears to have been impartially unreasonable. The North British Company, relying upon the practice up to the 1st of June 1869, maintained that they had a vested right in what they were pleased to call *their train*, which started at a particular hour, and that the Railway Commissioners had no right to deal with the North British right to start a through train at that hour. The North Eastern Company, on the other hand, founding their supposed rights on the agreement to which I have referred and the practice under it, claimed themselves a right to start that train as theirs. The Railway Commissioners did not feel themselves competent to deal with these claims set up as absolutely legal rights, and accordingly this action has been raised to determine what they are.

It appears to me that neither of the claims put forward can be sustained. The possessive pronouns used by either party are inaccurate, at least they do not express what either party in truth means to claim. What each means to claim is the exclusive right to start a train which is to go through to London at a particular time. The right of the North British to start a train at some time or another on their own line I should have thought was incontestable. The right of the North Eastern to apply for and get from the Railway Commissioners some times for the exercise of their running powers, is, I should have thought, equally incontestable; but neither company can claim to exclude the other, and the questions of what facilities shall be given, or under what regulations the running powers shall be exercised, are questions which the Legislature has remitted to the Railway Commissioners.

I confess that I am unable to follow the reasoning which is supposed to establish that the through trains to London were North Eastern trains. The objection which the Lord President so forcibly urges against the second conclusion of the summons, and in which I entirely concur, seems to me equally applicable to the first:—"I must own that an initial, and as I think an ultimate difficulty, arises from the want of harmony between the theory of the summons and the facts and conditions of through railway communication by these East Coast railways. The summons begins by personifying a 'train,' and assigning to it an identity, and a continuous and apparently perpetual existence. To this fanciful notion I make no demur, so long as it corresponded with the facts, as was the case in the historical question submitted under the first conclusion. But when we pass into the region of the future the fallacy vitiates the argument. The summons assumes that certain 'trains,' so numerous as to require a schedule for their enumeration, are such well-established institutions that they will of themselves run from Edinburgh to London and back at their appointed hours, and that the only question is, which company shall have their control in Scotland. All this is flagrantly contrary to—I shall not say anything wider than—the admitted conditions of the traffic in question. There is no law of nature, there is no law of railways or of railway facilities, by which the pursuers, having their will, and running what they call the 10 A.M. train from Edinburgh to Berwick, will get their passengers sent on in the same train from Berwick to London."

I agree in every word of this except the statement that the fanciful instance corresponds with the fact in the historical question submitted under the first conclusion. The moment that it is admitted that the practice was under the agreement, even if this agreement had not been "without prejudice," it seems to me no part of that practice can be looked at to establish a right. Upon the termination of that agreement the parties were, I think, remitted to the *status quo ante*, whatever that was, but I do not think that *status quo ante* necessarily establishes the right now claimed by the North British Company. I decline to go into the question of the haulage agreement, the joint property in the carriages, or the modes of payment by the North Eastern, or what either party have said or done in the nature of admissions against themselves. Nothing that either party could have said or done would in my judgment determine the question which the Railway Commissioners have the jurisdiction to solve, and which it appears to me they are just as much able to solve now,

unfettered by anything either company has done, as if they were hearing their respective applications the day after the running powers were granted. They would probably respect any convenience which the owning company had been in the habit of enjoying, because the problem to be solved is to what extent the owning company should be ordered to permit the company having running powers to exercise those powers. But whether they would or not is a question for them and not for your Lordships. I think the only question which your Lordships can answer is whether the absolute rights claimed exist in law. I am of opinion that neither company possess the absolute rights they claim, and that therefore this action ought to be dismissed.

For these reasons I move your Lordships that both the interlocutors appealed from be reversed; that the cause be remitted to the Court of Session to dismiss the action and find neither party entitled to their costs in this House, nor to the expenses of process in either of the Courts below.

LORD WATSON—The direct East Coast route between London and Edinburgh is by the main line of the Great Northern Company from King's Cross to a point between Selby Junction and York, from that point by the main line of the North Eastern Company to Berwick, and from Berwick to Edinburgh by the main line of the North British Company.

By the 8th article of an agreement between the North Eastern and the North British Companies, which is scheduled to and incorporated with the "North Eastern and Carlisle Amalgamation Act 1862," it is provided as follows—"For the purpose of maintaining and working in full efficiency in every respect the East Coast route by way of Berwick, for all traffic between London and Scotland, and Edinburgh, Leith, Glasgow, and other places in Scotland, the North British Company shall at all times hereafter permit the Company (*i.e.*, the North Eastern Company) "with their engines, carriages, waggons, and trucks, to run over and use the North British Company's railway, sidings, stations, wharves, and stopping, loading, and unloading places, water, watering-places, and other conveniences at and between Berwick and Edinburgh all inclusive . . . Subject to the payment by the Company to the North British Company for such user, of such tolls, rates, or dues, or such share or proportion of tolls, rates, or dues, as have or has been or shall from time to time be agreed upon by and between the said companies, or in default of such agreement as shall be fixed by arbitration in manner hereinafter provided."

For a period of forty-five years prior to the institution of this action in December 1894 there had been a regular and daily service of passenger trains both ways between Edinburgh and London. The number of these trains, their times of departure and arrival, and their rates of speed, had been varied from time to time. It is not matter of dispute that until the year 1869 these trains were the joint-adventure of the three companies, who shared the receipts in proportion to their respective mileages. The rolling-stock chiefly used for them was the joint property of the three companies, but their engine-power was supplied between King's Cross and York by the Great Northern Company, between York and Berwick by the North Eastern Company, and between Berwick and Edinburgh by the North British Company. When carriages belonging to one of the companies were required to make up the train, that company received a mileage allowance for their use.

In 1869 a new arrangement was made in regard to these trains, under which the position of the Great Northern Company appears to have remained the same as it previously had been. In January 1865 the North Eastern Company intimated to the North British Company their intention to commence using the running powers conferred upon them by statutory agreement, but no change was made of any kind until August 1869, when certain heads of agreement were settled between the representatives of the two companies, which contained the proviso that the arrangement which they embodied should be without prejudice to, and should not be mentioned or referred to in connection with, any further or subsequent arrangements or arbitrations which might become necessary, and also that it should be terminable at three months' notice on either side. Apart from the terms of the arrangement of August 1869, the only apparent change which it effected in the working of the trains, and in the distribution of their earnings, consisted in the fact that thenceforth the haulage of the trains from Berwick to Edinburgh, and *vice versa*, was performed by the North Eastern Company with their own engines, and that a mileage allowance for such haulage was deducted from the proportion of receipts paid to the North British Company. That fact is not, in my opinion, conclusive of the question argued at your Lordships' bar, and largely discussed by the Lord Ordinary (Lord Low) as well as by the Lord President in delivering the opinion of the First Division, whether in working under the agreement the North Eastern Company were or were not exercising their running powers. I have no intention of entering upon that discussion, because, in the view which I take, its determination one way or another cannot affect the present position or rights of the parties to this litigation.

The North British Railway Company on the 18th January 1894 gave notice to terminate the agreement of August 1869 on the 30th day of April next in so far as it related to haulage between Edinburgh and Berwick. As that notice affected what the North Eastern Company regarded as a cardinal feature of the arrangement contained in the agreement, they accepted the notice "as a formal notice terminating that arrangement." At that time the object of the North British Company apparently was to restore in substance the arrangement which prevailed before

August 1869 by substituting their own haulage of the trains for that of the North Eastern Company between Edinburgh and Berwick, and getting rid of the payment made on that account out of the share of earnings to the latter company. Before examining the record, I think it may be advisable to consider what the respective rights of the parties were in law on the 30th April 1894, because these remained unaltered at the time when the present action was brought by the North British Company. At that date the agreement of August 1869 had come to an end, and the arrangement which had been operative before it had been superseded for five-and-twenty years. Neither the one nor the other of these arrangements could any longer affect the legal interests of the two companies, who were, in my opinion, remanded to their respective statutory rights. The North British Company were the owners of the railway between Edinburgh and Berwick, and in that capacity had an absolute right to use it as they chose, save in so far as that right might be qualified and restricted by the due exercise of the running powers competent to the North Eastern Company under the statutory agreement of 1862. They also had, or might have, the right to insist upon facilities being afforded by the North Eastern Company for the forwarding of their traffic beyond Berwick; but the existence and extent of that right are matters beyond the cognisance of the ordinary courts of the country, and can only be considered and determined by the proper tribunal—the Railway Commissioners. On the other hand, the North Eastern Company have, unquestionably, running powers over the railway between Edinburgh and Berwick; but to my mind it is clear from the terms in which these powers are conferred, that they have not the right to intrude at their own hand upon the North British system, and to use it according to their own will and pleasure. Until the extent of their legitimate use has been determined by the proper tribunal, or by mutual consent, these powers will continue to exist, but the right to exercise them will be practically suspended.

The remedy asked by the North British Company is expressed in declaratory conclusions, and two other conclusions, one for interdict and another for a peremptory order, both of which are consequential upon the declaratory conclusions being affirmed. The declaratory conclusions refer to and incorporate a schedule setting forth all the through trains which ran during the year 1894 until the date of the summons, with their monthly times of departure from and arrival at Edinburgh and London, and certain intermediate stations where they stopped. The substance of the first conclusion is to have it found and declared that these trains "have all along hitherto, or otherwise since August 1869, been and are," while on the railway of the pursuers between Edinburgh and Berwick, trains of the pursuers, and not trains run by the defenders in the exercise of the running powers conferred by the articles of agreement. The substance of the second is a declaration that the pursuers are entitled to run these trains between Edinburgh and Berwick with their own engines and guards, and as their own trains, and that the defenders are not entitled to do so, so long as the pursuers are able to work these trains in an efficient way. The third conclusion relates to a separate matter which I shall subsequently notice.

I fail to see what possible interest the North British Railway Company has to insist in either of these conclusions. The object of a declaratory decree in a case like the present is to establish the right of the pursuers as it existed at, and will continue to exist, after the date of the action. But the judicial ascertainment of what the North British Company's rights in relation to these trains were, either under the agreement of 1869 or under the arrangement which preceded it, cannot, in my opinion, afford any aid towards determining what their rights were at the commencement of this action and are now, which is the only real subject of controversy between the parties. In order to arrive at an intelligible construction of these conclusions, in so far as they relate to the through trains which continued to run after the determination of the agreement of 1869, I have found it necessary to assume—what I understand to be admitted as matter of fact by both sides of the Bar—that both parties who were then at issue as to their respective rights, in their own interest very properly consented to the continuance of the trains until their rights were settled. An arrangement of that kind cannot give rise to any right in either of them, or detract from any right which they possess. It is also clear to my mind that the North British Company are not in a position to ask a court of law to determine what their rights were or are to be in relation to through trains after the date of the summons, and that is a matter which, as I have already pointed out, must depend upon the arangement which the parties may make for themselves or have settled for them by the Railway Commissioners.

The leading pleas stated in defence to the action by the North Eastern Company were—that under their running powers they are entitled "to run such number of East Coast trains between Edinburgh and Berwick as may appear to them to be necessary or advisable"—that they may have exclusive right to run the East Coast trains between Edinburgh and Berwick. As already indicated, it appears to me that these pleas are in excess of their legal rights. To this extent, that they have no power at their own hand, and with no authority beyond their own, I do not hesitate to express my opinion. But I purposely abstain from pursuing the question further, because that course would necessarily involve considerations which are beyond my jurisdiction. If the parties chose to resort to the proper authority, that authority will be able to determine the cognate questions whether and how far the North British

Company are in a position to insist for forwarding facilities at Berwick, and also to what extent and in what manner the North Eastern Company ought to use its running powers.

The third conclusion is for a declaration to the effect that the North Eastern Company are not entitled to use the East Coast joint-stock carriages in any trains which they may run on the railway of the pursuers without their consent. It is admitted that these carriages are the joint property of the three companies; but it is pleaded in defence that the conditions regulating the use of these carriages excluded the objection taken by the North British Company; and also that it could not be disposed of in this suit, inasmuch as the Great Northern Company had not been made a party to it.

The Lord Ordinary (Lord Low) sustained the plea of all parties not called as regards the third conclusion, and dismissed the same; and as regarded the whole other conclusions of the summons, he sustained the defences stated to the action, and assoilzied the respondents therefrom with expenses. Upon a reclaiming-note to the First Division of the Court, his Lordship's inerlocutor was affirmed with additional expenses.

I think that the third conclusion of the summons was rightly disposed of by the courts below. The use which has been or was being made of the carriages in question by the North Eastern Company was in reality one in which the Great Northern Company participated, and from which it derived pecuniary benefit, and a decree in terms craved against the North Eastern Company would have the effect of compelling that company to eliminate their carriages from the train when or before it reached Berwick, and would so deprive the Great Northern Company of the right to use the carriages for the conveyance of passengers from King's Cross to Edinburgh. It appears to me that they ought not to be deprived of that right without an opportunity of being heard for their interest.

For the reasons which I have endeavoured to explain, I am of opinion that the North British Company have shown no interest entitling them to insist in the other declaratory conclusions of the action, the affirmance of which would not ascertain or assist in the ascertainment of their legal rights as in a question which the North Eastern Company either at the present time or at and after the date of the summons. The logical result of that opinion is, that these conclusions also ought to be dismissed together with the remaining conclusions of the summons, which are dependent upon them. The interlocutors of the Courts below go a great deal further—they sustain the defences and assoilzie, the effect of which is to make the affirmance of each and every plea-in-law put on record by the respondents *res judicata* as between the litigants. There are several of these pleas, including the most important of them, which I should be prepared to repel if it were necessary.

I have in these circumstances come to the conclusion that the proper course for your Lordships to take is to reverse both interlocutors appealed from, and to remit the cause to the Court of Session in order that the action may be dismissed. Having regard to the nature of the litigation, and to the purposeless or extravagant claims advanced by both these litigants, I think the justice of the case will be met as your Lordship has proposed, by allowing costs to neither of them, either here or in the Court of Session.

LORD MACNAGHTEN—I entirely agree in the motion which has been proposed, and in the reasons which have been assigned for it.

LORD SHAND—Apart from the arrangements or agreements which have been made between the parties for the regulation of the traffic on the North British Railway from Berwick to Edinburgh during the last twenty-five years, the relative position of the pursuers and defenders is that on the one hand the pursuers are vested with the right to their own line and to the use of their own line with all the powers which their statutes confer on them; and on the other hand it is not disputed that the defenders, the North Eastern Railway Company, under the Statute of 1862 have the right to running powers over the pursuers' line.

The true purpose of this action, as it appears to me in the circumstances in which it has been raised, is not that the Court should define the respective rights of the parties as binding upon them in all future time, but rather that it should determine the question of possession with reference to the working of the numerous through trains which have been in existence since 1869, as such possession might affect the relative positions of the parties before the Railway Commissioners, by whom the regulation of the mode of exercising the running powers has to be determined. The pursuers on the one hand maintain that these numerous trains have been what they described as their trains, and not the trains of the defenders, the North Eastern Railway Company. The defenders on the other hand maintain that the trains, on the contrary, were their trains, and that they are entitled to the entire control of them. I observe that the learned Lord Ordinary in his judgment, in sustaining the defences, as has been pointed out by my noble and learned friend Lord Watson, has expressly said—"I am of opinion that the agreement of the 7th of August 1869 was entered into because the defenders were exercising their running powers, and for the sole purpose of regulating the working of the running-power trains, and if that view is sound, then the trains to which that agreement is applicable have continued to be running-power trains of the defenders ever since." Substantially, therefore, his Lordship finds that these trains were North Eastern Railway trains, and under the control of that company. And the learned Lord President, in delivering the opinion of the First Division of the Court, in a similar way observed—"I have come to think that the better opinion is that the trains were run by the defenders

in exercise of their running powers, and that the agreement was not a compromise by which those running powers were waived, but was merely the necessary adjustment of the terms on which the running powers were exercised."

I am unable to agree in these opinions. The effect of the judgments, which proceed on the ground now stated, undoubtedly would be that no fewer than ten important trains have been daily running on the pursuers' line for so many years as North-Eastern Company trains, and the North-Eastern Railway Company would seem to have the practical possession of the North British line during a very great part of every day. When we look at the language of the statute which refers to these working powers as to be used by permission of the North British Company, it would seem to follow that that company have really themselves permitted the North Eastern Railway Company practically to absorb their line and to oust them, though the owners of it, during a very great and important part of every twenty-four hours. I agree in thinking that the North British Railway Company cannot be said to have made any such large concessions, and I think that neither of the parties can say that these numerous trains were the trains either of the one company or of the other.

It appears to me in the circumstances to be unnecessary to consider the details of the arrangements that were actually made and carried out, because I agree with your Lordships in thinking that these arrangements must be regarded as having been temporary arrangements made by agreement for the very purpose of avoiding the determination or the admission on either side of the alleged legal rights of the parties, and that they were made without prejudice to these rights. It is true, on the one hand, that the North-Eastern Railway Company by their own engines, engine-drivers, and guards ran the through trains to and from Edinburgh, but, on the other hand, it is clear that while running those trains they were paid for the haulage of them by the North-Eastern Company. It is further clear that the whole of the pecuniary arrangements as between the parties were quite such as one would naturally expect if each company were working the traffic on its own line, and, as has been pointed out by my noble and learned friend Lord Watson, not only were the pecuniary arrangements of that nature, but they certainly did not proceed upon the footing that either party was giving up his rights. It is in these circumstances difficult to draw the inference that these trains were the trains of either the one party or the other, even if the agreements did not exclude that idea, but in truth I am satisfied that the whole of the arrangements were of a temporary character, and made for the convenience of the time and under reservation of all rights.

The agreements of 1869 expressly bear on their face that they were intended to be temporary. It is true that they have lasted for a very long time—for no less than twenty-five years—but the minutes of 1869, in which the agreements were expressed, make it clear that they were not intended to be in any sense permanent. I refer especially to what is said in the minute of the meeting of the 27th of July 1869, in which it was said, "after some conversation" (which took place between the representatives of the different companies), "it was agreed as an interim arrangement, and without prejudice to the rights of either company, which are reserved entire, that the North British Company shall pay to the North Eastern Company one shilling per mile for the use of their engines, the North British Company finding the carriages, and using the trains in every respect as though they were their own, but so as not to prejudice the through traffic, and receiving the whole receipts accruing between Edinburgh and Berwick." Again, referring to the minutes of a subsequent meeting of the 7th of August 1869, not only was it intended, as their language plainly shows, to be a temporary arrangement, but there is this provision—"That this arrangement be without prejudice to, and be not mentioned or referred to in connection with any further or subsequent arrangements or arbitrations which may become necessary, and be terminable at three months' notice on either side." I can scarcely conceive language which parties could use more clearly intended to indicate that the arrangements were not arrived at as an admission of legal rights, but were under reservation of each party's rights, and that in any future question, whether arising for judicial determination or otherwise, the parties had carefully provided that this particular agreement and the working of the trains under it should not even be referred to as the basis of an argument for the determination of any dispute or difference.

There is no doubt that these arrangements were made in consequence of the right to the running powers having been given to the defenders, and in order to avoid settling precisely what the rights of these parties were as to the exercise of their running powers either as regards the times at which trains should be run or the terms on which the powers should be evercised. It appears to me that although they are arrangements made in consequence of the power which the North-Eastern Railway Company possessed, they cannot be represented as being arrangements which were in the actual exercise of these powers.

The result in my view is as has been stated by your Lordships. It is admitted that up to the 1st of June 1869 the North British Railway Company worked their own trains and carried their own traffic. From that date downwards, during the intervening five and twenty years, there have been only temporary arrangements which cannot be founded upon by either party as conferring a right against the other. The Commissioners, in taking up any question which may arise for their determination will therefore be in the same position as if the question had arisen in June 1869, or, in other words, if I may use the expression,

the parties in going before the Commissioners will present "a clean sheet" as regards the period after 1869. The Commissioners will have the consideration on the one hand that the North British Company are the owners entitled in the first instance to the possession and use and working of their own line and the trains upon it, but, upon the other hand, that the North Eastern Railway Company have obtained running powers which they will be entitled to exercise. There is this difference, of course, between the year 1869 and the present, that there is a much larger traffic to be dealt with now than would have to be taken into consideration then, and this circumstance and the public necessities and convenience may require some arrangements of a kind different from what they would have been if the question had arisen for determination then. Perhaps with the light which the parties have, I hope, received from what has fallen from your Lordships to-day, they may find that their wiser course is still to continue some mutual arrangement between themselves, but failing that the Commissioners will take up the question with reference to the legal position of the pursuers and defenders which your Lordships have now defined.

On the other question—I mean with regard to the use of the railway carriages—I agree entirely in thinking that the Court was right in dismissing that conclusion of the summons because all parties were not called.

Each party in this case has made demands so much in excess of their legal rights, that I agree that in dismissing the action on the grounds which have been already so fully stated, it should be dismissed, awarding costs to neither party.

LORD DAVEY—I agree entirely in the order which has been proposed by my noble and learned friend on the Woolsack, and in the reasons which have already been given by your Lordships in support of that order. It is quite unnecessary to repeat them. I will only say that I think both parties in this litigation have put their claims far too high, and in fact that the claims put forward in some of the pleas-of-law both of the pursuers and the defenders are, in my opinion, extravagant.

Ordered that the interlocutors appealed from be reversed, and that the cause be remitted to the Court of Session to dismiss the action, and to find neither party entitled to the costs in this House nor to the expenses of process in the Courts below.

Counsel for the Appellants—The Dean of Faculty (Asher, Q.C.)—Solicitor-General for Scotland (Dickson, Q.C.)—Grierson. Agents—Loch & Company, for John Watson, S.S.C.

Counsel for the Respondents—The Lord Advocate (Graham Murray, Q.C.)—Cripps, Q.C.—C. J. Guthrie—A. O. M. Mackenzie. Agents—Williamson, Hill, & Company, for Cowan & Dalmahoy, W.S.

COURT OF SESSION.

Wednesday, December 2.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

THIN & SINCLAIR *v.* ARROL & SONS AND OTHERS.

Reparation—Measure of Damages—Fraud—Concealment and Misrepresentation.

A, induced by representations made by B, a creditor of C for a large amount, advanced £6000 without security to C, a grower of esparto grass in Algeria. He subsequently made further advances to C, amounting in all to £4500, against C's bills of lading. C having failed to repay these advances, A raised an action of damages against B, concluding for payment of £10,500, on the ground of B's fraudulent concealment and misrepresentation with regard to C's indebtedness to himself.

After a proof, *held* (*aff.* judgment of Lord Kyllachy) that B was entitled to absolvitor—*per* Lord President, Lord Adam, and Lord Kinnear, on the ground that the evidence failed to establish the alleged misrepresentations; and *per* Lord M'Laren—on the ground that the pursuer had improperly included in his demand restitution of the £4500 advanced subsequently to the alleged misrepresentations, for which the defenders could in no case be liable.

On 22nd March 1894 Thin & Sinclair, merchants, Liverpool, raised an action against Archibald Arrol & Sons, brewers, and Thomas Kennedy & Son, Algerian merchants and esparto brokers, Glasgow, concluding for payment of £10,500.

The pursuers averred—"(Cond. 1) For some years prior to November 1889 the defenders—at least the defenders Arrol & Sons—had been in the habit of making large advances to Mr T. A. Barber, Oran. Mr Barber's principal business was in esparto grass, which he shipped to the United Kingdom. His agents in Glasgow were Messrs T. Kennedy & Son, one of the partners of which firm was married to a daughter of the late Mr Archibald Arrol, the senior partner of the firm of Messrs Arrol, and the business was in fact financed by Arrol & Sons. (Cond. 2) Mr Arrol died some time prior to November 1889, and the defenders became anxious to cease financing Barber, and to secure payment of the debt due to them. The debt due by Barber to the defenders amounted at Mr Arrol's death to not less than £10,000, and the defenders were unable to obtain payment of this sum from Barber. It was therefore in the autumn of 1889 arranged between the defenders and Barber that the latter should approach the pursuers with the view of inducing them to make cash advances to him with reference to his esparto business, and so enabling the business to be carried on, and the defenders to get their debt satisfactorily paid off. Accordingly Barber, in