a party chose at his own convenience to attend the Court in his own case he was not entitled to remuneration for doing so. And if he chose to go further, as in the case of *Whyte*, and to plead his own cause, dispensing with the aid of agent and counsel, that would make no difference. But a material change in the law was made as to the position of parties by the Evidence Act, which enabled a party to become a witness in his own case, and if a party is entitled to give evidence, why should he not get his expenses? Now in this case not only was the evidence necessary, but I should think it was not such as could properly be taken on commission, because there was a personal attack on the defender's character—a charge of fraud—and he was one of the only two witnesses who could speak on that matter. The case turned upon the credibility of the witnesses, and the Lord Ordinary and we were of opinion that Edward and David Dairon had spoken the truth. No doubt if David had not come here he would have lost his case. There is accordingly no question as to the relative expense of his coming here and of his evidence being taken on commission. Being present he was examined as a witness, and why should not the rule applying to other witnesses apply to him. The necessity for his coming here was caused by the pursuers, and there was a decree for expenses given against them. Was the expense to him caused by them any the less because he was a party to the case?

LORD M'LAREN—When a party to a case is examined as a witness, whether in his own favour or at the instance of his adversary, he gives his evidence under the same conditions as any other witness, and if his evidence is necessary he will be entitled to his travelling expenses and to money for his subsistence during the journey.

It is strange that this point is raised for the first time so many years after the date of the Evidence Act by which it was made competent for parties to appear as witnesses, and the fact that no distinction has been taken during all this time (for I presume the Auditor has followed the practice of his office) leads me to suppose that a contrary view could not be maintained. If that be so, the only question is whether the evidence given by David Dairon was necessary for the determination of the case. It was said that a party is not to be allowed expenses for conducting his own cause. I agree in the decision quoted, in which I concurred, that no party can be allowed such expenses, because he is entitled to appear by counsel, and if he does not choose to avail himself of that privilege and thinks he can conduct his case better in person his election is not to be the means of subjecting the other party to a new liability. But if a person gives evidence he must do so in person, and I cannot see how he differs from any other witness.

As to the materiality of the evidence, I think that where a person is charged with fraud there is a direct challenge to him to appear and maintain the deed or the benefit which is said to have been obtained by fraud. I cannot figure a clearer case for allowing the application of the ordinary rule.

I would add that while the Auditor's allowance has been reduced by £62, and the present reclaiming-note is only direct e to having that amount allowed, if the matter had been open I should have seen no reason for distinguishing between travelling expenses and subsistence money. If a witness is entitled to journey-money as costs in the cause, he must live on the way, and he is entitled to an allowance for subsistence in so far as it is not covered (as in the case of a steam-ship voyage) by the passenger fare.

LORD KINNEAR was absent.

The Court pronounced this interlocutor—

"Recal the said interlocutor [of 4th December 1900]: Repel the objections by the pursuers to the Auditor's report on the defenders' account of expenses: Approve of said report, taxing the same at £403, 1s. 8d., and decern for payment thereof to the defenders: Find the reclaimers entitled to the expenses of and connected with the objections to the Auditor's report in the Outer House and also to the expenses of the reclaiming-note," &c.

Counsel for the Pursuers—Jameson, Q.C. —C. D. Murray. Agent—James E. Gordon, W.S.

Counsel for the Defenders—Clyde. Agent —James Skinner, S.S.C.

Tuesday, December 4.

SECOND DIVISION.

[Court of the Railway and Canal Commission.

FORTH BRIDGE RAILWAY COMPANY *v.* GREAT NORTH OF SCOTLAND RAILWAY COMPANY.

Railway—Railway Commissioners—Jurisdiction—Through Rates—Notice—Railway and Canal Traffic Act 1888 (51 *and* 52 *Vict. c.* 25), *sec.* 25, *sub-secs.* 1 *and* 7.

On 14th January 1890 the secretary of the Railway Clearing-House issued a notice calling a meeting of the Goods Managers Conference at the Clearing-House, and intimated the following business:—"Mr M'Dougall will intimate the probable opening of the Forth Bridge Railway in March next, and give notice that the North British Company (as the working company) will claim in division of receipts on traffic conveyed *via* the Forth Bridge an allowance as for nineteen miles in addition to the actual mileage of the Bridge railway." Certain of the companies interested assented to the claim so made, but others objected, and the sums in dispute were accumulated

in the Clearing-House. On 19th October 1898 the Forth Bridge Company and the North British Company served a notice upon all the companies interested in the Forth Bridge through route, which bore to be under sec. 25 of the Railway and Canal Traffic Act 1888, setting forth that the applicants proposed and required that the through rates and fares then in operation *via* the Forth Bridge, and particularly those set forth in a schedule to each notice, should be continued in operation, and that the apportionment among the applicants and the other companies of the said rates and fares should be made on the footing that the Forth Bridge Railway was nineteen miles longer than it actually is. In the schedule were set forth a selection of the through rates then in operation *via* the Forth Bridge between certain stations of the company receiving the notice and certain other stations south of the Forth Bridge.

Thereafter the Forth Bridge Company and the North British Company presented an application to the Railway Commissioners, craving them to apportion certain scheduled rates and fares, and also all other agreed-on rates and fares, *via* the Forth Bridge, on the footing that the applicants should be credited with the said nineteen mile bonus. The Commissioners, after hearing evidence, pronounced an order by which they (1) granted and allowed the rates and fares set forth in the schedules; (2) apportioned them as craved; and (3) declared that the order should take effect as from its date.

In an appeal against the order of the Commissioners, *held* (1) that the notice of 19th October 1898 was a valid notice within the meaning of sec. 25, sub-sec. 1, of the Railway and Canal Traffic Act 1888, and therefore that the Railway Commissioners had jurisdiction to entertain the application; (2) that in respect that the notice of 14th January 1890 was not a valid notice within the meaning of the said sub-section, the rates in operation were not agreed-on rates, but fell to be granted or disallowed in the application before the Commissioners; and accordingly, as the objections before them were to the allowance as well as to the proposed apportionment, they were right in declaring that their order should not be retrospective.

Railway—Railway Commissioners—Railway and Canal Traffic Act 1888 (51 *and* 52 *Vict. c.* 25), *sec.* 25, *sub-sec.* 9.

The Railway and Canal Traffic Act 1888, section 25, sub-section 9, provides that "it shall not be lawful for the Commissioners in any case to compel any company to accept lower mileage rates than the mileage rates which such company may for the time being legally be charging for like traffic carried by a like mode of transit on any other line of communication between the same points, being the points of departure and arrival of the through route."

Held that this provision applies only to companies which, besides having part of a through route, work another route between the termini of the through route, and are in a position to make a legal charge for which traffic may be carried from end to end of it.

The Forth Bridge Railway was constructed by the Forth Bridge Railway Company under the powers conferred by various Acts of Parliament. The railway, which is four miles two furlongs in length, is carried for more than a mile and a-half over the estuary of the Forth by a bridge constructed by the company under the powers conferred by the said Acts. The total authorised capital of the company is £3,300,000, which was all raised and expended on the construction of the railway and bridge. The railway was opened for traffic on 4th March 1890. It forms the shortest through route between the east coast of England and the east coast of Scotland south of the Forth, on the one hand, and the east coast of Scotland north of the Forth and the systems of the Great North Railway Company, the Highland Railway Company, and the Caledonian Railway Company north of the Tay, on the other hand. The North British Railway Company by statutory authority maintain and work the Forth Bridge Railway as part of their own system, and collect the whole traffic revenue therefrom.

On 14th January 1890, shortly before the opening of the Forth Bridge, a printed notice was issued by the secretary of the Clearing-House, addressed to the goods managers of the several companies interested in through rates on traffic which would pass over the Forth Bridge, requesting them to attend a meeting of the Goods Managers Conference on 23rd January. Among the business on the agenda-paper was the following—"18. Mr M'Dougall will intimate the probable opening of the Forth Bridge Railway in March next, and give notice that in terms of the Forth Bridge Railway Acts 1878 and 1882, the North British Company (as the working company) will claim in division of receipts on traffic conveyed *via* the Forth Bridge an allowance as for 19 miles in addition to the actual mileage of the Bridge railway." It appeared from the minutes of the Conference, subsequently confirmed, that the majority of the representatives of the various companies assented to the claim of the North British Company, but that the Great North, the Highland, and the Caledonian Companies dissented, and maintained that the North British Company should only receive a share of receipts corresponding to the actual mileage of the Forth Bridge railway. After the Bridge was opened certain through rates were in fact charged for traffic passing over it. A proportion of the receipts therefrom, being the amount claimed in respect of the Bridge bonus mileage, was held in suspense in the Clearing-House, and in 1898 amounted to £15,000.

On 19th October 1898 the Forth Bridge Company and the North British Company addressed the following notice to the Great North of Scotland Railway Company—"Take notice, under and in virtue of section 25 of the Railway and Canal Traffic Act 1888, that the Forth Bridge Railway Company and the North British Railway Company for their respective interests, propose and require that the through rates and fares now in operation for the conveyance of traffic *via* the Forth Bridge be continued in operation, and, without prejudice to the foresaid generality, the Forth Bridge Railway Company and the North British Railway Company, for their respective interests, propose and require the through rates and fares *via* the Forth Bridge set forth in the schedule hereto annexed, all said through rates and fares so set forth being through rates and fares now in operation. The Forth Bridge Railway Company and the North British Railway Company for their respective interests further propose that all the above-mentioned through rates and fares, including those set forth in said schedule, shall be apportioned and divided between the Forth Bridge Railway Company and the North British Railway Company in respect of the Forth Bridge on the one hand, and you, the Great North of Scotland Railway Company, and all other railway companies interested in the said rates on the other hand, on the footing that the Forth Bridge Railway Company and the North British Railway Company shall receive in every case out of the said rates such sum as they would be entitled to receive if the distance traversed by such traffic over the Forth Bridge were nineteen miles more than it actually is. This notice is given without prejudice to the whole contentions and pleas of the Forth Bridge Railway Company and the North British Railway Company before the Court of the Railway and Canal Commission and otherwise, including their contention that all through rates and fares which have been in operation *via* the Forth Bridge since the opening thereof, have been so by agreement between the Forth Bridge Railway Company and the North British Railway Company on the one hand, and all the companies interested on the other hand, and that before the opening of the Forth Bridge route due notice was given that the Forth Bridge Railway Company and the North British Railway Company claimed in the apportionment and division of such rates the statutory bonus mileage of nineteen miles." Of the same date, notice in the same terms was also sent to the Highland Railway Company, the Caledonian Railway Company, and other companies interested in the said through route.

In the schedule appended to each notice was set forth a selection of the through rates then in operation *via* the Forth Bridge, between certain stations of the company receiving the notice and certain stations on the other side of the Forth Bridge.

The Great North, the Highland, and the Caledonian Companies replied, stating various objections to the validity of the notice, and also to the proposed rates and apportionment, which they subsequently maintained before the Railway and Canal Commissioners.

On 1st November 1898 the Forth Bridge Company and the North British Company presented the present application to the Railway Commissioners, in which they craved the Commissioners to determine that all the through rates and fares set forth in the schedule to the application, and all other agreed-on rates and fares chargeable on traffic passing *via* the Forth Bridge, should be apportioned between the applicants on the one hand and the other companies interested in the said rates and fares on the other, on the footing that the applicants should receive such a sum as they would be entitled to if the distance traversed by such traffic over the Forth Bridge were nineteen miles more than it actually is.

The Great North Company, the Highland Company, and the Caledonian Company lodged answers, in which they opposed the granting of the application upon various grounds, which for the purposes of the present report sufficiently appear from the argument and opinions, *infra*.

The Railway and Canal Traffic Act 1888, sec. 25, enacts that the facilities to be afforded by railway and canal companies, as provided by the Railway and Canal Traffic Act 1854, "shall include the due and reasonable receiving, forwarding, and delivering by every railway company . . . at the request of any other such company, of through traffic to and from the railway or canal of any other such company at through rates, tolls, or fares (in this Act referred to as through rates), and also the due and reasonable receiving, forwarding, and delivering by every railway company . . . at the request of any person interested in through traffic, of such traffic at through rates: . . . Provided as follows—(1) The company or person requiring the traffic to be forwarded shall give written notice of the proposed through rate to each forwarding company, stating both its amount and the route by which the traffic is proposed to be forwarded, and when a company gives such notice it shall also state the apportionment of the through rate. The proposed through rate may be per truck or per ton. (2) Each forwarding company shall within ten days, or such longer period as the Commissioners may from time to time by general order prescribe, after the receipt of such notice, by written notice inform the company or persons requiring the traffic to be forwarded, whether they agree to the rate and route, and if they object to either, the grounds of the objection. (3) If at the expiration of the prescribed period no such objection has been sent by any forwarding company, the rate shall come into operation at such expiration. (4) If any objection to the rate or route has been sent within the prescribed period, the matter shall be referred to the Commissioners for their decision. (5) If an objection be made to the granting of the rate or to the route, the

Commissioners shall consider whether the granting of a rate is a due and reasonable facility in the interest of the public, and whether, having regard to the circumstances, the route proposed is a reasonable route, and shall allow or refuse the rate accordingly, or fix such other rate as may seem to the Commissioners just and reasonable. (6) Where, upon the application of a person requiring traffic to be forwarded, a through rate is agreed to by the forwarding companies, or is made by order of the Commissioners, the apportionment of such through rate, if not agreed upon between the forwarding companies, shall be determined by the Commissioners. (7) If the objection be only to the apportionment of the rate, the rate shall come into operation at the expiration of the prescribed period, but the decision of the Commissioners as to its apportionment shall be retrospective; in any other case the operation of the rate shall be suspended until the decision is given. (8) The Commissioners in apportioning the through rate shall take into consideration all the circumstances of the case, including any special expense incurred in respect of the construction, maintenance, or working of the route or any part of the route, as well as any special charges which any company may have been entitled to make in respect thereof. (9) It shall not be lawful for the Commissioners in any case to compel any company to accept lower mileage rates than the mileage rates which such company may for the time being legally be charging for like traffic carried by a like mode of transit on any other line of communication between the same points, being the points of departure and arrival of the through route."

Proof was allowed and led.

In the course of the proceedings the applicants lodged a minute by which they agreed "that any apportionment of the through rates and fares to be made by the Commission on traffic passing *via* the Forth Bridge should only apply in so far as such through rates and fares are divisible by mileage *via* the said Bridge, and without prejudice to all or any statutory enactments, statutory or private, or other agreements or arrangements, and the regulations of the Railway Clearing-House affecting the apportionment or division of such through rates and fares."

The Railway Commissioners on 10th March 1899 pronounced an order finding that the granting of the through rates and fares set forth in the schedules annexed to the notice of 19th October 1898 was a due and reasonable facility in the interest of the public, and that the route proposed was a reasonable route, and allowed the said rates, fares, and route, and (subject to the minute lodged by the applicants) apportioned the said rates and fares in the manner proposed in the said notice, such apportionment to commence from 10th March 1899 (the date on which judgment was pronounced).

LORD STORMONTH DARLING—"A former application to this Court by the Forth Bridge and the North British Railway Companies directed solely against the Great North of Scotland and Caledonian Companies, and having for its object the apportionment of 'agreed-on rates for traffic passing *via* the Forth Bridge between stations on the Great North of Scotland Railway and on the Caledonian Railway between Aberdeen and Kinnaber Junction on the one hand, and stations south of the Forth Bridge on the other,' was on the 26th January 1898 dismissed, on the ground that the applicants had not sufficiently specified the rates to be apportioned. Various matters were discussed in the opinions then delivered, but want of specification was the ground of judgment. A similar application with regard to the Tay Bridge was dealt with in the same way.

"Accordingly, the applicants have presented the present applications against all the companies interested, setting forth particular through rates and fares which are now in operation, and which they say are representative in their character, and asking us to apportion these as well as all other agreed-on rates and fares on traffic passing over the bridges in such a way as to give the applicants the benefit of a bonus mileage system of nineteen miles as regards the Forth Bridge, and ten miles as regards the Tay Bridge. The applications were preceded by formal written notices addressed to each of the respondent companies proposing and requiring that the through rates and fares then in operation, and (without prejudice to that generality) the through rates and fares set forth in the schedules annexed to the notices, should be continued in operation, and should be apportioned and divided on the footing of the bonus mileage. Counter-notices were sent by the three objecting companies—the Caledonian, the Great North, and the Highland—and in case it should be thought necessary, in consequence of these counter-notices, that rates and routes should be fixed by this Court as well as apportioned, the applicants ask us to allow the proposed rates and routes. The applicants' notices were sent, and the present applications are presented under express reservation of their plea that all through rates and fares which have been in operation since the opening of the Bridges have been so by agreement among all the companies interested, and that, before the opening of the bridges due notice was given that the applicants claimed in apportionment the benefit of the bonus mileage.

"The through rates and fares with which we are asked to deal are thus in three distinct categories—(1) Those which are scheduled and specifically described; (2) those which are not scheduled but are now in operation; and (3) those which have been in operation since the opening of the bridges, and with respect to which the sums in question between the applicants and the objecting companies have been carried to a suspense account in the Clearing-House, representing in the aggregate a sum of about £15,000.

"I am of opinion that we ought to deal only with the first of these categories. To deal with the second would be to go in the face of the decision of this Court in the former application. I readily accept the statement of Mr Conacher, which indeed was hardly controverted, that to set out in a schedule every through rate applicable to traffic passing over these bridges, from the extreme north of Scotland to the extreme south of England, would be an operation so laborious as to be out of all proportion to the end in view. But we are relieved from all anxiety as to the practical effect of confining ourselves to the scheduled rates by the perfectly frank and proper concession of the Lord Advocate, that the settling of particular rates would be accepted as 'embodying a principle' (that, I think, was the Lord Advocate's phrase), and that other through rates raising no difference in principle would be treated by the companies themselves as ruled by our decision.

"With regard to the third category, viz., the sums in dispute which have been accumulated in a suspense account, it is conceded by the applicants that our right to deal with these depends entirely on the sufficiency of the notice, or equivalent of a notice, which was given by the applicants before the bridges were opened. And here it may be convenient to test the question by reference to what took place in 1890, shortly before the opening of the Forth Bridge. The facts upon this matter have been more fully expiscated in the present than they were in the former proceedings. In particular, one of the agenda-papers for a Clearing-House meeting has been recovered. It is a printed notice addressed by the Secretary of the Clearing-House on 14th January 1890 to the Goods Manager of the Great North Company. It requests him to attend a meeting of the Goods Managers Conference to be held at the Clearing-House on 23rd January of that year; and it appends a list of subjects for discussion. One of these is in the following terms—'Mr M'Dougall will intimate the probable opening of the Forth Bridge Railway in March next, and give notice that, in terms of the Forth Bridge Railway Acts 1878 and 1882, the North British Company (as the working company) will claim in division of receipts on traffic conveyed *via* the Forth Bridge an allowance as for 19 miles in addition to the actual mileage of the Bridge Railway.' I think we may assume that similar agenda-papers were sent out to the other goods managers. Next, it appears from the minutes that at the Goods Managers Conference on 23rd January Mr M'Dougall did make his intimation, and that it was agreed to by the Conference under dissent from the representatives of the Caledonian and Highland Companies. It further appears that the same notice was given at the Superintendents Conference on 23rd January, with the same result; that the General Managers Conference on 6th February approved and adopted the minutes of the other two conferences; and that at a subsequent stage the Great North Company joined in the dissent of the Caledonian and Highland Companies.

"Now, all this is quite consistent with the undoubted fact that the North British Company has from the first claimed the benefit of the bonus mileage in the division of receipts on traffic passing over the Forth Bridge, that the claim has been allowed by the majority of the companies interested, and that it has been disputed by the three companies who are here objecting. But that affords no ground for holding that anything done in connection with these meetings constituted a written notice in terms of section 25 of the Traffic Act of 1888, with the peremptory and stringent results arising therefrom. The applicants say that the agenda-paper constituted such a notice. I cannot assent to that view, which received no countenance from any member of this Court on the last occasion. The agenda-paper did not fulfil the statutory requirements; it was not addressed to the company; it did not state the amount of any through rate; it did not even specify the route; it spoke merely in the most general terms of 'receipts on traffic conveyed *via* the Forth Bridge.' How could any company know, merely because their officials had been summoned in the usual way to an ordinary meeting at which a question of bonus mileage was, *inter alia*, to be discussed, that this was a challenge to them to say whether they were to agree to a whole series of through rates, under the penalty that if they did not object within ten days, or obtain an extension of time from this Court, every one of these rates would come into operation at the expiration of that period? But even if these agenda-papers were to be held as fulfilling the statutory requirements in other respects, it would be a fatal objection to them that they did not specify a single through rate. On that ground alone we must hold them insufficient, because to do anything else would be inconsistent with our former judgment. If we are not to deal with unspecified rates as regards the future, it is plainly impossible that we can do so as regards the past.

"The applicants maintained an alternative argument, that if these were not statutory notices, the necessity for such notice was dispensed with. I am willing to assume that the companies interested might have dispensed with written notice by distinct agreement to that effect. But, in my judgment, the first condition of any such waiver would be that they had the provisions of the statute in view, and knew that the North British Company was laying the foundation for an application under section 25. If in that knowledge they had said, 'We know exactly what you propose; don't go through the form of sending us a statutory notice; we shall act as if you had done so,' it might perhaps have been pedantic to insist on literal compliance with the statutory procedure. But in the fuller light of the evidence now before us I think it impossible to say that any of the companies concerned, including the North

British itself, ever bestowed a thought on the statute, or intended that what passed at those Clearing-House meetings should be held either as a compliance with or a substitute for its provisions. Probably they all regarded through rates as inevitable, and recognised that their amount was practically determined by the existence of competitive routes; but that is quite a different thing from a consent on the part of the respondent companies that statutory provisions in their favour should be waived in the event of its being necessary to resort to this Commission for the determination of disputes. I hold, therefore, that we cannot competently deal with any through rates or fares except those which were specified in the written notices of 19th October 1898.

"An objection was stated even to these notices, to the effect that they did not sufficiently inform the respondents what their own share of the proposed apportionment would be. But this, I think, is a captious objection, and ought not to be sustained.

[*His Lordship then discussed the merits of the application, and proceeded*]—"With regard to the argument which was addressed to us on sub-section 9 of section 25 of the Traffic Act as limiting our powers of apportionment, I have had the advantage of reading Sir Frederick Peel's opinion, and I concur in the view of that sub-section which he there expresses.

"I propose therefore, with regard to each of the bridges, that we should allow the through rates and fares set out in the schedules appended to the respective applications, and that we should apportion these in the manner proposed by the applicants, but subject to the qualifications stated in each of the minutes which were lodged by them in the course of the proceedings. Where rates are allowed as well as apportioned, the apportionment cannot be retrospective, but under section 25 (7) it will date from the giving of the decision—that is, from to-day."

Sir Frederick Peel.—. . . "The Forth Bridge application has reference first to all through rates and fares *via* the Bridge from the time of its opening in 1890, every such rate and fare being included in the notice given in January 1890 by the North British as the working company to the Clearing-House, and by the Clearing-House to other companies by sending them an agenda-paper, and also in the more formal notice sent in October 1898 to each forwarding company by the North British and Forth Bridge Companies; and secondly, in case it should be considered that some sort of specification of rates and fares proposed for apportionment is necessary, then to such rates and fares as are specifically named in schedules annexed to the notices of last October. The length claimed for the railway across the Forth is nineteen miles addition to actual distance, and the applicants say that as regards all rates and fares which are divided in the Clearing-House on the equal mileage principle, a division in which that bonus mileage is taken into account is made with the consent of all the companies interested except the three who are respondents in these cases, and whose shares therefore of such part of each through rate or fare as corresponds to the proportion of the bonus mileage to the whole distance of the through route is for the present held in suspense in the Clearing-House instead of like the shares of other companies being paid to the applicants.

"Now, it is a condition-precedent to any application for a through rate and its apportionment that each forwarding company should receive a written notice of the proposed rate, route, and apportionment, and the first ground on which the respondents oppose the granting of the Forth Bridge application in either of its branches is, that the notices on which the applicants rely as satisfying the Act do not fulfil its requirements. As respects the notice given in 1890, the objection made to it is the same as was made to it in the case between the same applicants and the Caledonian and Great North of Scotland Companies which we heard in 1897. The North British and Forth Bridge Companies there stated that a large number of agreed-on rates were by agreement in operation for traffic passing *via* the Forth Bridge between stations on the Great North, or on the Aberdeen to Kinnaber section of the Caledonian Railway on the one hand and stations south of the Forth on the other, and that the Caledonian and Great North of Scotland Companies would not agree to a division of through receipts giving the North British and Forth Bridge Companies any larger share on account of the bridge railway than was due to its actual mileage, and they asked us to determine that receipts from traffic conveyed *via* the Forth Bridge ought in the circumstances to be divided on the footing of including the extra nineteen miles in calculating the mileage of that railway. It was contended in answer that the notice through the Clearing-House, on which the applicants rested their demand, was invalid as a notice under the Act, on the two-fold ground that it was not issued in the prescribed form, and that it did not give any particulars of the proposed rates or routes. In the result the Court, though not thinking the applicants in the wrong on the first of these grounds, on which the validity of the notice of 1890 was impugned, were, on the second of them, of opinion that a demand for a general rule of division to apply to rates in gross, as distinguished from an apportionment of specific rates, could not be granted. In the present case the same applicants again ask that all through rates and fares which have been in operation *via* the Forth Bridge since it was opened may be apportioned as rates of which due notice was given in 1890, and they further ask that, failing their application to have these rates apportioned under the notice of 1890, we will allow and apportion them under the notice of 1898. It is urged in opposition that the notice of 1890 is inadmissible as a

notice under sec. 25, sub-sec. (1) of the Traffic Act, and that in addition the proposed through rates are both in the 1890 notice and in that of 1898 no further indicated than as being all rates from 1890 for traffic passing *via* the Bridge, and that conformably to what was decided in the former case, this first branch of the application ought to be dismissed, on the ground that the proposed rates are not specified in either notice with the degree of detail to which forwarding companies are entitled by the Act. I am of opinion that, on the reasoning of the judgment on this point in the former case, this part of the present application should be refused.

"As to the other branch, that relating to rates and fares specified in the notice of 1898, this notice also is said to be defective for uncertainty, as it only asks for a proportion for the Forth Bridge Railway as for nineteen miles in addition to actual mileage, and fails to shew what amount of each through rate or fare each forwarding company is to have allotted to it. But I think, if the different companies' shares can be inferred from what a notice states under the head of apportionment, the statement is in manner and substance sufficient for the words of the sub-section. Now, what was proposed in these notices was expressly said to be the continuance of rates and fares already in operation. The companies therefore knowing the proportions which they had respectively been receiving out of these rates through the Clearing-House, would, as to such of them as by the Clearing-House rules were divisible by the mileage of the Bridge route, know what difference the lengthening of that route by reckoning the Forth Bridge portion of it as nineteen miles longer than before would make in what they would get in future. The notices, therefore, as to this class of rates do in effect furnish the information intended by the Act, and if they left it uncertain as to what was proposed when rates and fares *via* the Forth Bridge route were being divided by the mileage of some shorter route within the North British system, or were not divisible by equal mileage owing to some agreement or usage, as, for example, where the division was made *pro rata* to local charges, or in proportions fixed by agreement, we have not now to go into the question of the notice as it is concerned with them, because the applicants in the course of the hearing agreed not to ask us to apportion rates and fares not divisible by the mileage of the Forth Bridge route, nor to apportion in such a way as would override or set aside any enactments, agreements, or Clearing-House rules at variance with our apportionment. We deal, therefore, only with rates and fares *via* the Forth Bridge route, and divisible by that route, and named in the schedules to the notices, and also not otherwise than subject to the limitations or exceptions desired by the applicants. . . . . Sub-section 9 of section 25 of the Act of 1888, it was argued, prevents our giving a railway company a less rate per mile than it is charging for like traffic carried between the same points by another line of communication, whether it has the whole or part only of that line in its own hands. In my opinion, this contention is not well founded. Sub-section 9 is, I think, confined to companies which, besides having part of a through route, work another route between the termini of the through route, and are in a position to make a legal charge for which traffic may be carried from end to end of it. Such companies became liable under the Traffic Act of 1873 to be forced to compete with themselves, and to be made partners in a rate by the through route lower than they charged by their own route; and as a check upon the amount of a proposed through rate, where it might operate unfairly, it was provided that in the division of it they should be entitled to such a sum as would yield them a rate per mile equal at least to what they were getting over the whole distance of the route which was in their own hands. That was done to mitigate the hardship of their having to compete with themselves. This is not the case of companies which have only a link in each of two routes between the same points, and the principle of a through rate, that it is the charge for the long distance of a route which, though it may be made up of various companies' lines, is to be considered as one railway, could have no effect given to it, if not only what is due and reasonable, but the local charges also applying to different parts, large or small, of an alternative route are to be borne in mind in fixing the amount of a through rate."

[*On the merits Sir Frederick Peel concurred with Lord Stormonth-Darling.*]

VISCOUNT COBHAM — The respondent companies in their answers to the applications in this case have confined themselves mainly to legal or technical objections. These have been fully dealt with by my colleagues, and I am in entire agreement with them in their conclusions, viz., that we have jurisdiction to allow the through rates, fares, and routes asked for and specified in the schedule to the applications, and to apportion the rates and fares at our discretion under section 25 of the Traffic Act 1888."

[*On the merits Lord Cobham concurred with the other Commissioners.*]

The applicants appealed to the Court of Session against the order of the Commissioners in so far as it determined that the apportionment of the said rates and fares should take effect only from the date of the order, and not from the opening of the Forth Bridge.

The respondents appealed and argued that the Commissioners had no jurisdiction.

Argued for the applicants—The Commissioners had erred in law in refusing to make their order retrospective. The applicants' notice of January 1890 was a sufficient compliance with the requirements of section 25 (1), and the objection of the respondent companies being only to the proposed apportionment, the rates must be

held to have had effect since the opening of the Bridge, as agreed on rates under sub-section 7. The notice intimated to all the companies interested, through the Clearing-House, which was the agent of them all, that the applicants claimed the nineteen miles bonus in respect of all existing through rates, *i.e.*, it specified rate, route, and apportionment as required by sub-section 1. To give written notice of every individual rate was practically impossible—the number was too great. A reference to them as the rates then in existence was quite specific and sufficient for the purpose of the Act, which was to inform possible objectors of what was claimed. But whether strictly sufficient or not, the notice was perfectly understood by all the other companies, and was accepted as equivalent to notice under the Act. That was clear upon the evidence, and also because the majority admitted the applicants' claim, while the respondents protested against it. The objection was purely technical, because the Commissioners had admitted the principle of the claim, and that principle applied equally to the money held in suspense in the Clearing-House. The judgment of the Commissioners in the previous application was not *res judicata*. The Railway Commission was not a court of law, and their dismissal of that application was merely *in hoc statu*. In any view, the notice relied on in that application was not that now before the Court. If the notice of 14th January 1890 was valid, then the order of the Commissioners ought to have been made to take effect from the date of the opening of the Forth Bridge. 2. Assuming that the notice of 14th January 1890 was invalid, that of 19th October 1898 was a good notice, upon which the Commissioners could proceed. But they had erred in limiting their order to the rates scheduled in the application. It was within their power to determine as a general principle that the applicants were entitled to the nineteen mile bonus on all rates then existing, and upon that basis the pecuniary rights of parties could have been adjusted. The answer to the argument submitted by the Great North and Highland Companies was that sub-section 9 applied only to companies which were forced to compete with themselves, being the owners of the whole length of the competing line. That was not the position of these respondents, who each only possessed a link in the competing route.

Argued for the respondents—The foundation of the jurisdiction of the Commissioners in such an application was a notice in terms of section 25. Neither the so-called notice of 14th January 1890, nor that of 19th October 1898, fulfilled the conditions of the statute, and therefore the Commissioners had no jurisdiction. The notice of 14th January 1890 contained none of the essential requisites; it did not bear to be under the Act; it set forth neither rates nor route nor apportionment. It was not issued by an official of the applicants' company, but by the Secretary of the Clearing-House, nor was it addressed to the respondent companies, but was merely an intimation to their goods managers that this matter would be discussed. The Clearing-House was not the agent of all the companies, some of whom, including the Forth Bridge Company, were not members of it. The inequity of holding this intimation to be a notice was apparent from the provision of sub-section 3, declaring that if not objected to within ten days the rates and route should come into operation—thus the time might have expired before the date of the meeting, and the respondents would have lost the opportunity to object. The intimation was no more than an intimation of a proposed rule of the Clearing-House by which only those companies were bound who agreed to it, and this the respondents never did. 2. Nor did the notice of 19th October 1898 fulfil the requirements of the Act. It did not ask for apportionment, but only that the apportionment should be made on a certain basis, viz., that of a nineteen mile bonus, and it did not set forth what amount of each through rate fell to each company. If neither notice was valid, then the Commissioners had no jurisdiction to entertain the application. 3. The objections of the appellants to the Commissioners' order were not well founded. The Commissioners had no power to make their order retrospective unless the only question before them was that of apportionment, *i.e.*, unless the rates and route were agreed upon. But if the respondents were right in their contention that the notice of January 1890 was invalid, it followed that the rates and route were not agreed to, and it fell to the Commissioners to allow them, which they had done in the order under appeal.

The Highland Company and the Great North Company stated an additional argument to the effect that the Commissioners in allowing the bonus mileage had disregarded the provision of sub-section 9, whereby they (who were owners of certain lines forming part of another route) were compelled to accept a less rate than they were entitled to charge for like traffic carried by them thereon.

The respondents referred to *Highland Railway Company* v. *Great North of Scotland Railway Company*, July 16, 1896, 23 R. (H.L.) 80; *North Eastern Railway Company* v. *North British Railway Company*, December 17, 1897, 25 R. 333; and *Severn and Wye Railway Company* v. *Great Western Railway Company* [1886], 5 Br. and Mack. 156.

At advising—

LORD TRAYNER—The present appeals are brought against a judgment and order pronounced by the Railway and Canal Commissioners on an application presented to them by the North British Railway Company and Forth Bridge Company in November 1898. That application is based upon the Railway and Canal Traffic Acts, and more particularly on sections 25 and 26 of the Act of 1888, and craves the Commissioners to apportion certain through rates and fares over certain through routes,

among the applicants on the one hand, and the companies called as respondents and all other companies interested in the said rates and fares on the other hand. The rates and fares sought thus to be apportioned are set forth by the applicants in schedules appended to their application. The Railway Commissioners have granted the application, but have determined, contrary to the contention of the applicants, that the apportionment which they have sanctioned should have effect only as from the date of their judgment, and not as from the date when the Forth Bridge was opened. Against this limitation the applicants have appealed. The respondents who appeared to oppose the application have appealed against the judgment of the Commissioners on several grounds, but they may be summarised as being (1) that the Commissioners have no jurisdiction to determine the question submitted to them, and (2) that in the judgment they have pronounced they have disregarded the provisions of the Act under which the application was made.

In dealing with the first of these objections it is necessary to have regard to the provisions of the 25th section of the Act of 1888, which provides for the establishment of through traffic and through rates where one company desires to have such traffic over the system or part of the system of another company. The portions of that section which are of most importance at present are sub-sections 1, 2, 5, and 7. [*His Lordship read the sub-sections.*]

The respondents say that unless and until the requirements of the first sub-section are complied with the Commissioners have no power to approve of the proposed route, or to fix or apportion any rates in connection with it, and further, that the notice given by the applicants was not a sufficient notice, or such as the statute requires to be given. Now, I agree with the view that the Commissioners could not exercise the powers conferred on them by the 25th section of the Act, unless what the statute prescribes as preliminary to such exercise has been observed. The question therefore is, whether the notice given by the applicants on 19th October 1898 complied with and fulfilled the statutory requirements. I am of opinion, agreeing with the Commissioners, that it did. It sets forth (1) the proposed route *via* the Forth Bridge; (2) the proposed rates and fares—the rates and fares set forth in the annexed schedule, being the rates and fares then in operation; and (3) the apportionment of the rates—by in every case allowing to the North British Company such sum as they would be entitled to if the route by the Forth Bridge was 19 miles longer than it actually is. The respondents maintained that the notice was defective in respect it did not indicate whether the proposed apportionment was to proceed on the principle of division of rates according to mileage, and therefore did not indicate what proportion of the rates and fares would fall to them. I think there is nothing in that objection, but if on this subject the notice left any room for doubt (I do not think it did), that doubt was cleared away by the minute lodged by the applicants to which the Commissioners in their order and judgment have given effect. The objection therefore to the jurisdiction of the Commissioners cannot be sustained.

The second ground on which the judgment of the Commissioners is objected to is, that they have disregarded (to the prejudice of the respondents) the 9th sub-section of the 25th section of the Act of 1888. On this subject I do not think it necessary to do more than say that I do not accept the respondents' reading of that sub-section, and that I entirely agree with the views expressed in regard to it by Sir Frederick Peel.

The objections I have hitherto dealt with were maintained on behalf of the whole respondents. But a special objection to the Commissioners' jurisdiction was stated on behalf of the Caledonian Company, to the effect that under their Amalgamation (with the Scottish North Eastern Railway) Act of 1866 questions as to rates between that company and the applicants were referred to arbitration, and that therefore the present application, so far as these two companies are concerned, is incompetent, or at all events superfluous.

In a former application by the North British Company, similar in purpose to the one now before us, I (being then *ex officio* Railway Commissioner for Scotland) repelled that objection for reasons which I then gave, and to which it is enough now to say that I adhere. The Commissioners in the present application have given no effect to the objection, and I think they were right. The objection seems to me untenable, and the scant reference to it in the opinions delivered when the judgment under review was pronounced does not surprise me.

I come now to consider the appeal maintained by the applicants, who complain that the judgment of the Commissioners is wrong in so far as it limits the application of their order to the apportionment of rates and fares from the date of their judgment, instead of allowing the same apportionment since the year 1890.

The applicants say that they gave what was, or was equivalent to, the statutory notice in writing on 14th January 1890, by an intimation then made to all the respondents (and other companies interested) through the Clearing-House. That notice is printed in the proceedings before us. Now, I entirely agree with Lord Stormonth Darling in holding that that notice was quite insufficient, and that it cannot be taken as fulfilling the requirements of the 25th section of the Act. I need scarcely repeat what his Lordship has said about that notice, but will merely add that as it announced only the probable opening of the Forth Bridge, it could not in the nature of things be regarded as a notice asking for the facility of through traffic and through rates on a route that was not then completed or opened, and which consequently might never be opened. Nor was the

intimation of what the North British Company intended to claim, if and when through traffic was established, anything to the purpose. In saying this I am not saying anything which is inconsistent with the opinion I delivered in the former application. In that opinion I stated my view of what was required by the provisions of the Act, and also said that I thought the notice before me then sufficiently complied with its requirements. But the notice I was dealing with was not the notice of 14th January 1890. It was a notice sent to the companies interested through the Clearing-House, dated in July 1890, in which it was stated that the Forth Bridge had been opened, that the route by that bridge had been substituted for the former route to the north, and that the rates and fares by the old route were discontinued and applied to the Forth Bridge route. At the same meeting at which this announcement was made reference was made to the claim of the North British Railway Company to a bonus or mileage allowance for nineteen miles beyond the actual mileage of the route. Whether I was right or wrong in the view which I expressed is of no moment here, because the notice with which I was then dealing is not now before us, and was not produced in this application. We must take the present case as it was presented in argument and evidence to the Commissioners, and the only notices produced to them and founded on by the applicants were the notices of January 1890 and October 1898. The former of these notices was, in my opinion, as I have said, insufficient as wanting in the statutory requirements—the latter I think was sufficient.

In these circumstances, and having regard to the question raised under this application, and the attitude of the several parties to those questions, it remains to be considered whether, as the applicants contend, the Commissioners were entitled to make their apportionment retrospective. I think the statute is clear upon this matter. By sub-section 7 of the 25th section it is provided that the apportionment shall be retrospective only in those cases where no other question than apportionment is raised. That is the apportionment of rates agreed on or not objected to. But in the present case the rates were not agreed-on rates. They had no doubt been acted on for some years, but they might have been objected to at any time; there had been no agreement as to their being fixed at what they were or as to their continuance. The Commissioners had accordingly to fix and allow the rates, and apportion what they had so allowed. That being so, the Commissioners could not make their apportionment retrospective, but could make it applicable as they have done only from the date of their decision.

It is scarcely necessary to say anything upon the questions raised by the applicants as to their right to the bonus mileage claimed by them as a right conferred on them by the Forth Bridge Acts of 1873 and 1878. Whatever may be the sound construction and the effect of these Acts in regard to the bonus mileage (on which I reserve my opinion) it has no bearing on the present application. This application is not for the enforcement of a right conferred by these Acts; it is an appeal to the discretion of the Commissioners founded on the 25th section of the Act of 1888, and as such it has been regarded and determined by the Commissioners. I have hitherto dealt only with the application of the North British Railway and Forth Bridge Railway. But my observations apply equally to the application which concerns the Tay Bridge.

On the whole matter I think the judgment and order of the Commissioners is right, and that the several appeals presented against it should be dismissed.

LORD MONCREIFF—I am of the same opinion. The only competent notice before the Commissioners was that of 19th October 1898. The notice of 14th January 1890, which was given through the Clearing-House, is in no view sufficient notice to satisfy the terms of section 25 of the Railway and Canal Traffic Act of 1888. It specifies no rates or routes, and this alone is enough for our decision. But I reserve my opinion as to whether such an agenda-paper could in any circumstances fulfil the requirements of the statute as to notice. On that point it is not necessary that I should express any opinion at present.

With these remarks I entirely concur in the opinion of Lord Trayner which I have had an opportunity of considering.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

The Court refused the appeal, and affirmed the judgment of the Railway Commissioners.

Counsel for the Appellants—D.-F. Asher, Q.C. — Cooper. Agent — James Watson, S.S.C.

Counsel for the Great North of Scotland Railway Company — Sol.-Gen. (Dickson, Q.C.) — Ferguson. Agents — Gordon, Falconer, & Fairweather, W.S.

Counsel for the Highland Railway Company—Johnston, Q.C.—Macphail. Agents—J. K. & W. P. Lindsay, W.S.

Counsel for the Caledonian Railway Company — Guthrie, Q.C. — Nicolson. Agents—Hope, Todd, & Kirk, W.S.