the argument of the Dean of Faculty and Mr Haldane satisfied me that there are passages in the Westminster Confession and in other standards of the Church which might require such explanation and exposition as would fairly come within the words used in the Barrier Act—"alteration in doctrine." I do not feel myself competent, at any rate upon the information at present before me, to express any final opinion upon such a point, and I do not therefore propose to base my judgment upon the second ground which was urged before us on behalf of the appellants.

It only remains to consider the position of the appellants and their rights as a minority of the ministers and elders of the Free Church representing congregations or portions of congregations who are not prepared to join the United Free Church. It is not contended that they have changed their principles; it is not urged that they have departed from any fundamental or essential principle of the Free Church; it is not alleged that they are not faithfully carrying out the objects of the Protest of the 18th May 1843. The respondents are threatening to attempt to eject them from their churches and manses, and to deprive them of any right to participate in any funds of the Church, simply on the ground that they decline to become members of the United Free Church. The decisions of the Court of Session in *Craigie* v. *Marshall*, and *Couper* v. *Burns*, unless overruled by your Lordships' House, are wholly inconsistent, in my opinion, with any such right on the part of the respondents, and I am unable to support a judgment which would deprive the persons forming a minority of their rights simply upon the grounds that they are unwilling to become members of a body which has not only abandoned a fundamental principle of the Church to which they belong, but supports a principle essentially different from that on which that Church was founded.

For these reasons I am of opinion that the appeal should be allowed.

The LORD CHANCELLOR then moved "That the Order appealed from be reversed, and that the respondents pay to the appellants the costs both here and below." In the action *General Assembly of the Free Church of Scotland and Others and Lord Overtoun and Others*—"The cause to be remitted to the Court of Session to declare in terms of the third and sixth declaratory conclusions of the summons, and for any necessary consequential proceedings." In *Macalister and Others and Young and Others*—"The cause to be remitted to the Court of Session to assoilzie the defenders from the conclusions of the action."

This motion and procedure were agreed to.

Counsel for the Appellants—H. Johnston, K.C. — Salvesen, K.C. — Christie. Agents—Simpson & Marwick, W.S., and Deacon, Gibson, Metcalf, & Marriott, Solicitors, London.

Counsel for the Respondents — Dean of Faculty (Asher, K.C.)—Haldane, K.C. — Guthrie, K.C. — Orr. Agents — Cowan & Dalmahoy, W.S., and Grahames, Currey & Spens, Solicitors, Westminster.

COURT OF SESSION.

Thursday, July 7.

SECOND DIVISION.

[Lord Pearson, Ordinary.

WEST HIGHLAND RAILWAY COMPANY AND ANOTHER *v.* COUNTY COUNCIL OF INVERNESS AND OTHERS.

Railway — Valuation — Statute — Casus omissus in Statute — West Highland Railway Guarantee Act 1896 (59 *and* 60 *Vict. c.* 58), *sec.* 2.

The West Highland Railway Guarantee Act 1896 enacted, section 2—"During the period . . . for which the whole or any part of the interest or dividend guaranteed by this Act shall be payable by the Treasury, the railway shall not be assessed to any local rate at a higher value than that at which the land occupied by the railway would have been assessed if it had remained in the condition in which it was immediately before it was acquired for the purpose of the railway." The Act conferred no power and imposed no duty on the Assessor of Railways or the county assessors to give effect to section 2 in making up the valuation roll. The railway having been valued and assessed in terms of the statutory provisions appropriate to railways in general, while payments were being made by the Treasury under the Guarantee Act—*held* (*aff.* judgment of Lord Pearson) that the West Highland Railway Company was entitled to declarator in terms of section 2 of the Act, and that the valuation which had been entered in the valuation roll was not that on which the company were liable to be assessed for rates, but further (*diss.* Lord Young, *revers.* judgment of Lord Pearson) that the Court had no jurisdiction to ascertain by proof the value at which the railway should be assessed in terms of section 2.

This was an action at the instance of the West Highland Railway Company and the North British Railway Company, the sole workers of the railways of the former company, against the County Councils of the counties of Inverness and Argyll, certain parish councils, the Assessors of Lands and Heritages in the said counties, and the Assessor of Railways in Scotland, concluding for declarator in the following

terms—"(*First*) That during the period mentioned in section 2 of the West Highland Railway Guarantee Act 1896 (hereinafter called 'The Guarantee Act'), the railway of the pursuers, the West Highland Railway Company, from Banavie in the County of Inverness to Mallaig in said county (hereinafter called 'the railway'), shall not be assessed to the rates payable to the defenders, the County Council of the County of Inverness, the County Council of the County of Argyll, the Parish Council of the Parish of Kilmallie, the Parish Council of the Parish of Arisaig and Moidart, and the Parish Council of the Parish of Glenelg, or any of them, including county assessments, district assessments, and poor and school and other parochial rates, at a higher value than that at which the land occupied by the railway would have been assessed if it had remained in the condition in which it was immediately before it was acquired for the purpose of the railway, and that during the said period the said defenders are not entitled to assess the railway or any part thereof to any rates leviable by them respectively on or at a higher value than that at which the land occupied by the railway would have been assessed if it had remained in the condition in which it was immediately before it was acquired for the purpose of the railway; (*Second*), That the valuations of the railway made up by the defender the Assessor of Railways and Canals for Scotland, for the years from Whitsunday 1901 to Whitsunday 1902, and from Whitsunday 1902 to Whitsunday 1903, and entered in the respective valuation rolls for said years, are not the valuations on which the defenders, the County Council of the County of Inverness, the County Council of the County of Argyll, the Parish Council of the Parish of Kilmallie, the Parish Council of the Parish of Arisaig and Moidart, and the Parish Council of the Parish of Glenelg, were and are entitled to assess the rates leviable by them respectively in the said years respectively on the railway or any part thereof; (*Third*), That for and during the period mentioned in section 2 of the Guarantee Act, or otherwise for the three years from Whitsunday 1901 to Whitsunday 1902, from Whitsunday 1902 to Whitsunday 1903, and from Whitsunday 1903 to Whitsunday 1904, or otherwise, for one or more of said three years, the yearly value on or at which the railway shall be assessed to the rates payable to the defenders the County Council of the County of Inverness, the County Council of the County of Argyll, the Parish Council of the Parish of Kilmallie, the Parish Council of the Parish of Arisaig and Moidart, and the Parish Council of the Parish of Glenelg, or any of them, including as aforesaid, is £147, 1s. 11d., or thereby, or is such other sum as may, after such inquiry, remits, reports, or other procedure as our said Lords shall think proper, be ascertained and determined in the course of the process to follow hereon to be the value on or at which the land occupied by the railway would have been assessed if it had remained in the condition in which it was immediately before it was acquired for the purpose of the railway; and (*Fourth*), that the total value of the railway, as determined in terms of the immediately preceding conclusion, is divisible amongst the parishes traversed by the railway, as follows—[*specifying the values effeiring to each parish*]—or is divisible amongst the parishes traversed by the railway in such other amounts as may after such inquiry remits, reports, or other procedure as our said Lords shall think proper be ascertained and determined in the course of the process to follow hereon; and the defenders the County Council of the County of Inverness, the County Council of the County of Argyll, the Parish Council of the Parish of Kilmallie, the Parish Council of the Parish of Arisaig and Moidart, and the Parish Council of the Parish of Glenelg, ought and should be decerned and ordained by decree foresaid . . . to assess and levy the rates foresaid, payable to said defenders respectively by the pursuers the West Highland Railway Company in respect of the railway, according to the yearly value or values to be declared by our said Lords in the course of the process to follow hereon, and for the period, or years or year, determined by our said Lords, to the same effect as if said yearly value or values appeared on the respective valuation rolls in force for the time under the Valuation of Lands (Scotland) Acts, and notwithstanding that such values or value are not or may not be entered in any valuation roll; or otherwise, and alternatively, it ought and should be found and declared by decree of our said Lords that the defender the Assessor of Lands and Heritages for the County of Inverness, and his successors in office, and the defender the Assessor of Lands and Heritages for the County of Argyll, and his successors in office, are, during the said period mentioned in section 2 of the Guarantee Act, or during the portion of said period remaining unexpired, bound to value the railway or the respective portions thereof, situated in the said counties, or the land occupied by the railway, or the respective portions thereof situated in the said counties, and that at the value at which the land occupied by the railway would have been valued if it had remained in the condition in which it was immediately before it was acquired for the purpose of the railway . . . or otherwise, and alternatively, it ought and should be found and declared by decree of our said Lords that the defender the Assessor of Railways and Canals in Scotland, and his successors in office, are, during the said period mentioned in section 2 of the Guarantee Act, or during the portion of said period remaining unexpired, notwithstanding the provisions of the Valuation of Lands (Scotland) Acts, bound to value the railway at the value at which the land occupied by the railway would have been valued if it had remained in the condition in which it was immediately before it was acquired for the purpose of the railway." . . .

The following narrative is quoted from the opinion of the Lord Ordinary (PEAR-

son):—"The extended railway of the pursuers the West Highland Railway Company runs through certain parishes of the counties of Inverness and Argyll, and this action is brought in consequence of the rating authorities having imposed upon the Railway Company in respect of their undertaking certain assessments which they say are in excess of those for which they are liable under their statutes. The Railway Company were incorporated in 1889, and by their Act of 1896 they were authorised to make the extension to Mallaig. This extension passes through certain parishes, and it is the assessment of the Railway Company on its valuation within these parishes, or in another view it is the valuation of the railway within these parishes, which is now in dispute.

"The Mallaig extension was aided by a Treasury guarantee of 3 per cent. for thirty years on £260,000 of the capital, and a Treasury grant of £30,000 towards the cost of constructing a pier and breakwater at Mallaig. It is obvious that that was arranged, as the schedule to the Act shows, on public grounds, because it was not at all certain that the prospects of the railway in its early years were such as to induce the investing public to support it. The aid from public funds was authorised in 1896 by the West Highland Railway Guarantee Act of that year (59 and 60 Vict. cap. 58); and the second section of that Act contains the words upon which the pursuers found as the basis of the present action. It enacts that 'During the period, not exceeding the said period of thirty years, for which the whole or any part of the interest or dividend guaranteed by this Act shall be payable by the Treasury, the railway shall not be assessed to any local rate at a higher value than that at which the land occupied by the railway would have been assessed if it had remained in the condition in which it was immediately before it was acquired for the purpose of the railway.'

"The Railway Company now complain that the rating authorities have not observed this statutory prohibition, but have assessed the railway to local rates at a higher value than that at which the land would have been assessed if it had remained in its former condition as described in the words I have read. It would appear that the public officials charged with the duty of valuation and of assessment have simply followed the normal course as if section 2 of the statute had not been passed or had no application to the case. The Assessor of Railways valued the extension line on the same basis as he values other railways in Scotland, and entered the result as usual against each parish in the valuation roll. The county councils (the assessing authorities) in pursuance of the 27th section of the Local Government Act 1889 (52 and 53 Vict. c. 50) imposed the rates on all lands and heritages within the county, as in the normal case they are bound to do, according to the annual valuation thereof as appearing in the valuation roll. Thus it is argued that section 2 of the Act of 1896, which was meant to limit the rates and thereby to benefit not merely the Railway Company but the Treasury as guarantor, has been ignored by all concerned.

"A question is disclosed upon the record as to whether the guarantee has taken effect so as to bring section 2 into operation, but it is now admitted that the payments have actually been made by the Treasury, and therefore the guarantee has begun to take effect so as to call into operation section 2, whatever that section may mean."

Provision is made for the ascertainment of the annual valuation of lands and heritages by county assessors in the Valuation of Lands (Scotland) Act 1854 (17 and 18 Vict. c. 91), sec. 3. Section 20 of the same Act provides for the valuation of lands belonging to railway and canal companies by the Assessor of Railways and Canals. The Act further defines the duties of those assessors respectively, and provides for the making up of the valuation roll by them.

The West Highland Railway Guarantee Act 1896 made no provision for the valuation by county or railway assessor of the railway in question in terms of section 2 of that Act quoted *supra*.

The Light Railways Act 1896 (59 and 60 Vict. c. 48), makes provision for the case of a light railway aided by the Treasury, and enacts — section 5, sub-section (1)— "Where the Treasury agree to make any such special advance as a free grant, the order authorising the railway may make provision as regards any parish that during a period not exceeding ten years to be fixed by the Order, so much of the railway as is in that parish shall not be assessed to any local rate at a higher value than that at which the land occupied by the railway would have been assessed if it had remained in the condition in which it was immediately before it was acquired for the purpose of the railway." . . . Section 26, sub-section 9, is as follows:—"In order to carry out in Scotland the provisions contained in sub-section 1 (*c*) of section 5 of this Act it shall be the duty of the Assessor of Railways and Canals, as regards any parish to which the said sub-section (1) (*c*) applies, to enter on his valuation roll either the annual value of the light railway within such parish ascertained in terms of the Valuation of Lands (Scotland) Acts, or the annual value at which the land occupied by or for the purposes of the light railway would have been assessed if it had remained in the condition in which it was immediately before it was acquired for the purposes of the railway, whichever is less."

In anticipation of the opening of the railway now in question the Assessor of Railways and Canals in Scotland valued the same for the purposes of the valuation roll for the year 1901-2 at about £17,000.

On receiving notice of county and district assessments in November 1901 the Secretary of the West Highland Railway Company wrote to the County Collectors drawing their attention to section 2 of the Guarantee Act, and asking them to send an

amended notice. A correspondence followed which led to no result, but on which the present pursuers relied as equivalent to an appeal taken in November 1901. The valuation and subsequent assessment objected to by the Railway Company were repeated for the year 1902-3.

The present action was raised in January 1903.

The pursuers averred—"(Cond. 14) The pursuers are advised and believe and aver that the value at which the land occupied by the railway would have been assessed if it had remained in the condition in which it was immediately before it was acquired for the purposes of the railway did not for the years 1901-2 and 1902-3 exceed, and does not now exceed, the sum of £147, 1s. 11d."

The pursuers pleaded—"(1) In respect of the provisions of the West Highland Railway Guarantee Act 1896 the pursuers are entitled to decree as concluded for. (2) The pursuers being entitled in virtue of the Guarantee Act to have the railway, during the period mentioned in the second section thereof, assessed to the rates and assessments levied by the defenders the County Councils and Parish Councils, at the value of the land occupied by the railway if it had remained in the condition in which it was immediately before it was acquired for the purpose of the railway, and the said defenders having disputed said right, decree of declarator should be pronounced in terms of the first conclusion of the summons. (3) The valuations of the railway by the Assessor of Railways not being those on which the pursuers are liable to be assessed in accordance with the provisions of the Guarantee Act, the pursuers are entitled to decree of declarator in terms of the second conclusion of the summons. (4) In respect the Guarantee Act does not specify the means whereby the value at which the railway falls in virtue of the said Act to be assessed to the said rates and assessments is to be ascertained, or the principle of apportionment of said value amongst the different parishes and assessing areas traversed, and such value and apportionment are matter of dispute between the pursuers on the one hand and the defenders the County Councils and Parish Councils on the other hand, the pursuers are entitled to have such value and apportionment determined and declared by the Lords of Council and Session, and decree of declarator should be pronounced as craved in the third and fourth conclusions of the summons. (5) The defenders the County Council of the county of Inverness, the County Council of the county of Argyll, the Parish Council of the parish of Kilmallie, the Parish Council of the parish of Arisaig and Moidart, and the Parish Council of the parish of Glenelg, being bound to assess the railway to rates leviable by them in accordance with the provisions of the Guarantee Act, decree should be pronounced against them in the terms concluded for. (6) Or alternatively, the defenders the said assessors of lands and heritages for the counties of Inverness and Argyll, being bound to value the land occupied by the railway in terms of the provisions of the Guarantee Act, and to enter such valuation in their respective valuation rolls, decree should be pronounced in terms of the first alternative conclusion of the summons. (7) Or alternatively, the defender the Assessor of Railways in Scotland, being bound to value the railway or the land occupied by it in terms of the provisions of the Guarantee Act, and to enter such valuation in his valuation rolls, decree should be pronounced in terms of the second alternative conclusion of the summons. (8) In respect of the correspondence referred to, and of the pursuers' reliance thereon as an appeal, the defenders are barred from founding on any alleged absence of appeal."

The defenders pleaded—"(1) All parties not called. (2) The action is incompetent. (3) The pursuers' averments are irrelevant. (4) The Treasury not having paid any part of the interest or dividend guaranteed by the West Highland Railway Guarantee Act 1896, section 1, the exemption from rating therein provided has not come into force and effect, and the pursuers are not entitled to declarator in terms of any of the declaratory conclusions of the summons. (5) The value stated in the valuation roll made up by the Assessor as the annual value of the pursuers' the West Highland Railway Company's railway for the years 1901-2, 1902-3, not having been appealed against by the pursuers the West Highland Railway Company as provided by the Valuation Acts, the pursuers are now barred from impugning or challenging the same, and are not entitled to decree in terms of the second declaratory conclusion of the summons. (6) The imposition of the assessments contained in the demand notes of the defenders the County Council of the county of Inverness for the year 1901-2, having been validly made and not having been appealed against by the pursuers the West Highland Railway Company, they are now barred from impugning or challenging the same, and are not entitled to decree in terms of the third declaratory conclusion of the summons for that year. (7) The pursuers' material averments being unfounded in fact, the pursuers are not entitled to decree in terms of the third and fourth declaratory conclusions of the summons. (8) The defenders the assessors of lands and heritages for the counties of Inverness and Argyll have no right or title to value any railways in said counties, and the pursuers accordingly are not entitled to decree in terms of the first alternative conclusion of the summons. (9) The defender the Assessor of Railways in Scotland has no right or title to value the pursuers' the West Highland Railway Company's railway otherwise than is provided by the Lands Valuation (Scotland) Acts with reference to railways, and the pursuers accordingly are not entitled to decree in terms of the second alternative conclusion of the summons."

A minute of admissions was lodged for parties in the following terms—"(1) That the Mallaig Extension Railway was opened

for traffic on 1st April 1901, and that the valuation roll for the year from Whitsunday 1901 to Whitsunday 1902 was made up, and the county and district assessments by the said County Councils and the said District Committee were imposed, and the demand-notes therefor were served upon the pursuers before 1st April 1902. (2) That the first payment was made by the Treasury under the Guarantee Act on 9th April 1903, when the sum of £3789, 19s. 9d. was paid in respect of the deficiency for the year from 1st April 1901 to 31st March 1902. (3) That on 29th August 1903 the Treasury paid to the pursuers the sum of £3790, 9s. 10d. in respect of the deficiency for the year from 1st April 1902 to 31st March 1903. (4) That the valuation of the railway entered in the valuation roll is higher than that at which the land occupied by the railway would have been valued if it had remained in the condition in which it was immediately before it was occupied for the purposes of the railway."

On 23rd February 1904 the Lord Ordinary (PEARSON) pronounced the following interlocutor—"(*First*) Repels the first three pleas-in-law for the defenders the County Council of the county of Inverness and others, and in respect of articles one, two, and three of the minute of admissions, repels also the said defenders' fourth plea-in-law: (*Second*) Finds and declares that, on a sound construction of the West Highland Railway Guarantee Act 1896, and particularly of section two thereof, the defenders the County Council of the county of Inverness, the County Council of the county of Argyll, and the Parish Council of the parish of Glenelg, are not entitled, during the period mentioned in the said section, to assess the extension of the pursuers' railway from Banavie to Mallaig (in the said Act termed 'the Railway') to any local rate, including county assessments, district asseesments, and poor and school and other parochial rates, at a higher value than that at which the land occupied by the railway would have been assessed if it had remained in the condition in which it was immediately before it was acquired for the purpose of the railway: (*Third*) Finds that the pursuers are entitled to decree against the compearing defenders (other than the individual defenders after mentioned) in terms of the second declaratory conclusion of the summons: Finds and declares accordingly: (*Fourth*) As regards the conclusions of the summons directed against the defenders the Assessors for the counties of Inverness and Argyll, and the Assessor of Railways, dismisses the same, and decerns: (*Fifth*) Before further answer as to the remaining conclusions of the summons, allows the parties a proof of their respective averments relating thereto, and appoints the proof to proceed on a day to be fixed."

Opinion.—[*After the narrative quoted above his Lordship proceeded*]—"Now, the pursuers' contentions are conveniently summed up in the conclusions of the summons, and these conclusions fall into three groups. The first is a declarator of the statutory right of the Railway Company to have an assessment on the more favourable basis of section 2 of the Guarantee Act, and although it is objected by the defenders that the declarator so sought amounts to a bare declarator of the meaning of a statute, and therefore is of doubtful competency, I think that the rule, which is quite established, does not apply here for two reasons. In the first place, the conclusion goes beyond the words of the statute by including a declaration that the county and district assessments, and the poor and school and other parochial rates, are all within the interpretation of the expression 'local rates' in section 2, and that this had been matter of dispute was disclosed in the discussion. This is a declarator of the meaning of a statute, and something more, namely, a declaration that, in view of a dispute which did exist between the parties, the statute means what this conclusion says it means beyond the mere words of it. Then in the second place the conclusion seems to me to be a necessary basis for the further conclusions of the summons, and on these two grounds I do not think that the preliminary objection stated to the first conclusion, on the ground that it is a bare declarator of the meaning of the statute, can be sustained. That is the first conclusion, and forms the first of the three groups I have mentioned.

"Then the second is that the basis adopted by the valuing and assessing authorities is in fact less favourable to the Railway Company than the basis which the second section of the Act appoints. That this is so is admitted in the joint minute of admissions now lodged, and I read the admission as applying to each of the three years mentioned in this conclusion.

"The third group of conclusions is petitory, and asks the Court to set this right, either by taking up the matter of valuation itself or by ordering the County Councils of the two counties to do so, or by ordering the county assessors to do so, or by ordering the Assessor of Railways and Canals to do so. Now, it would perhaps be convenient to all concerned if I could adopt the suggestion that the matter could be worked out through the County Councils or through the assessors. It might have been possible if the clause in question had been an empowering one, to apply to it the principle that when a power is given, more particularly to a public body or a public official, all the incidental powers necessary to its exercise are implied. But here the enactment is both in form and in substance a prohibition, and I cannot order the local authorities, who are bound by strict rules under their statutes, to proceed to ascertain the proper basis either of valuation or assessment under the Act, when the Act provides no machinery for the purpose but only says that they are not to assess at a higher value than a certain standard set forth in the Act. I can declare the right of the pursuers to have the wrong assessment disregarded. But if the defenders are not able to show how the right assess-

ment, or the right valuation which is to be the basis of it, is to be ascertained, and maintain (as they do in their eighth and ninth pleas) that it is not within the duty of any of the assessors to ascertain it, then the only two alternatives seem to be (1) that the Court shall ascertain it, or (2) that it is unascertainable. If it be unascertainable, then the statutory prohibition may become absolute, and the defenders may not be entitled to lay any assessment at all upon the railway."

[*His Lordship then referred to a process of suspension instituted by the pursuers before the present action was raised, which was sisted to await the issue of this action. It is unnecessary for the purposes of this report to refer particularly to the suspension.*]

"Now, as I have said, I think it is beyond the province of the Court to lay upon public statutory bodies and statutory officials any duty beyond their statutory powers and duties, and it does appear to me that the ascertainment of the figure which is to be the basis of the assessment, as contended for by the Railway Company, is not (strictly speaking) within the statutory duty of any one of them. Certainly no such duty is expressly imposed upon any of them. If it had been imposed by the Legislature upon any of them I conclude it would have been imposed upon the Assessor of Railways, because in the Light Railways Act 1896, which received the royal assent on the same day as the Act now in question, we have a good instance of a clause (sec. 26, sub.-sec. 9) which, if it had been followed in the present case, would have saved all the present dispute. By that Act it is expressly provided that it shall be the duty of the Assessor of Railways to enter upon his valuation roll either the annual value of the light railways within the parish or the annual value at which the land occupied would have been assessed if it had remained in its original condition, whichever is less. Now, that is quite intelligible and fully operative. The same thing was probably intended in the section of the statute now in question, but the same thing is not done. No instruction is given nor duty assigned to the Assessor of Railways, or anybody else, to give effect to what I may call the statutory standard of valuation, either in the valuation roll or in any other return.

"There is an additional reason for holding that the Assessor of Railways could not be enjoined by this Court to do what is asked by the pursuers, and that is that there has been an appeal to the proper tribunal against his valuation on the very ground of this Guarantee Act. The Judge before whom that came to depend decided that the Assessor of Railways was not bound to take up that duty, and he did so on the express ground that the Valuation Acts contain detailed directions as to the mode of valuing railways, and that the Assessor had no power to value a railway in any other manner, and therefore section 2 could not receive effect through the valuation roll but only, if at all, by special appeal against the assessment.

"That leads one to turn to the position of the County Council and its committee, and of the County Assessor. Under the Valuation Acts and the Local Government Acts neither the one nor the other has any statutory duty in the matter. Nor is any such statutory duty expressly laid upon them by the section now in question, but only a prohibition against assessing certain particular heritages within the county at a higher standard than that which is set forth in section 2. In this view, I may say, it seems to me immaterial to consider whether, upon the words of the Act, the objection of the pursuers goes to valuation or assessment. That is a distinction towards which a good deal of the discussion before me was directed, but that is a distinction which is only material in considering upon which body or official, if any, lies the alleged duty of setting the matter right. And for the reasons I have stated I do not think that the Court can interfere in the matter by way of enjoining any of the bodies of officials mentioned to take action.

"These considerations seem to me to furnish the true answer to the defenders' fifth and sixth pleas-in-law, which are to the effect that by the pursuers' failure to appeal in certain years against the Railway Assessor's valuation and against the County Councils' assessment they are barred from now challenging the valuations and assessments for those years. It is part of the defenders' case that all these supposed remedies would have been futile, and if so, I cannot see how the pursuers can be open to a plea of bar for not adopting them. It may indeed prove to be too late on other grounds to disturb the assessments for past years, but that is a matter which may arise for decision after the proof.

"The opinion at which I have arrived is, that as there is no machinery provided by the general statutes in the way of procedure for clearing up the dispute it is within the competency of the Court in this action to ascertain the facts in order to find out to what extent the exemption, or rather the restriction introduced in favour of the Railway Company by section 2 is operative. I confess my first impression was, that owing to the attitude of the County Councils in this action it might be necessary to leave them under the statutory prohibition, and allow them to reconcile their position with it if they could. But it appears to me that the pursuers, and through them the Treasury, have the substantial interest in the matter, and that on the pursuers' motion I ought to allow the proof which they desire if parties cannot agree to a remit to an expert valuator. The question is one to be solved by an inquiry, failing agreement. And although, as I read the statute, each year must stand by itself, it is quite possible that the inquiry will result in ascertaining a figure which will be accepted as ruling the matter, unless and until there is a material change of circumstances in the locality. There is, as I have stated, a

distinct direction by the Legislature that there shall be no assessment upon these particular lands and heritages beyond an assessment calculated upon a particular basis prescribed by the statute. The statute describes in language which is quite intelligible the standard which is to be applied in assessing these particular lands and heritages, and provided that standard is capable of ascertainment, so as to admit of comparison with the entry on the valuation roll by the Assessor of Railways and Canals, I do not see any reason why it should not receive effect. Of course, if the result of the inquiry is that it is incapable of ascertainment, then the thing must fail, and resort must be had to legislation. But it does seem to me that I must take account of this being an expression of the will of the Legislature that there shall be a restriction of the liability of the Railway Company, and therefore do my best to work it out in the way I have indicated.

"It is quite true that it is not an enactment which would operate as a restriction in favour of the Railway Company in every conceivable case. The Railway Assessor may find that a railway undertaking is not to be entered on a particular year's roll as of any value for assessment. That depends upon various considerations which he has to take into account. Or this railway might conceivably be entered in the roll but at a less value within these parishes than what has been called in the course of the discussion the prairie value of the strip of land on which the railway runs. In either of these cases there would be no restriction under section 2, for it would be in the interest of the Railway Company to adopt the more favourable basis found in the valuation roll. But undoubtedly the clause was intended to operate, and will operate in the normal case, as a restriction of the liability of the Railway Company, and it is not to be forgotten that that restriction is imposed, not merely in the interest of the Railway Company or its shareholders, but in the public interest. It is pretty clear that the Treasury guarantee was given on the condition that it would not be called upon to pay any additional local rates, and of course it would indirectly pay such additional rates if the contention of the defenders was sound.

"I may add that I see no reason to doubt that just as the County Councils are entitled, upon the allowance of proof, to adduce evidence on the subject, so they are quite entitled, if so advised, to make it a matter of agreement with the pursuers what figure shall be taken to represent the difference between the assessment as made and the assessment as it would have been made if the statutory rule furnished by the Guarantee Act had been followed."

The defenders reclaimed, and argued—The lands in question could not be valued by the county assessors, who had no powers with regard to land taken by railways, and they could only be valued by the Assessor of Railways in the manner prescribed by statute, and statute gave him no powers to give effect to the mode of valuation contended for by the pursuers. The words "shall not be assessed" in section 2 of the Guarantee Act meant that the railway should not be entered in the valuation roll at a higher value than that at which the lands would have been valued had the railway never been there; that reading was in accordance with the correct use of the word "assess"—*Scottish Union & National Insurance Company* v. *Inland Revenue*, February 8, 1889, 16 R. 461, at p. 474, 26 S.L.R. 330. In the absence of any machinery for the ascertainment of the value referred to in section 2, it was necessary to proceed with the valuation of the railway in terms of statutory provisions regulating the matter in dispute; the value at which it should be entered in the valuation roll could not be ascertained by proof.

Argued for the respondents—The action was wrongly dismissed so far as directed against the individual assessors. Section 2 of the Guarantee Act referred not to the valuation of the railway but to the rate to be levied therefrom. The intention was that it was not to be subjected to any rate on "a higher value than" that indicated in section 2; that section should be given effect to by those whose duty it was to impose rates in terms of the Local Government Act 1889. It was for the Court to correct what had been done in violation of statutory provisions—*Lord Advocate* v. *Police Commissioners of Perth*, December 7, 1869, 8 Macph. 244, 7 S.L.R. 147; *Stirling, &c.* v. *Hutcheon, &c.*, May 25, 1874, 1 R. 935, 11 S.L.R. 542. The value of the land occupied by the railway should be ascertained by remit to a man of skill, or by proof—*Pumpherston Oil Company* v. *Wilson*, July 19, 1901, 3 F. 1099, 38 S.L.R. 830; *Broxburn Oil Company* v. *Morrison*, March 18, 1903, 5 F. 694, 40 S.L.R. 468.

At advising—

LORD JUSTICE-CLERK—This case arises under the Act authorising the extension of the Highland Railway to Mallaig, Parliament having authorised the Treasury to give financial aid if necessary in view of the district being a poor one, and it being a matter of public policy to aid the fishing industry by providing a rapid means of transit for fish to more populous parts of the country. It is accordingly enacted by section 2—"During the period, not exceeding the said period of thirty years, for which the whole or any part of the interest or dividend guaranteed by this Act shall be payable by the Treasury, the railway shall not be assessed to any local rate at a higher value than that at which the land occupied by the railway would have been assessed if it had remained in the condition in which it was immediately before it was acquired for the purpose of the railway."

The fact is that the Treasury has been required to give subsidies, and accordingly this clause has come into operation. And it is here that the difficulty has arisen, for while by the clause the rating of the rail-

way is to be upon a different basis from that of the railways of the country, and is not to exceed the value of the lands as they were before they were appropriated to railway purposes, the Act provides no machinery by which the valuation is to be made. In the Light Railways Act a clause is provided, section 26, sub-section 9, by which it is enacted—[*His Lordship quoted the sub-section ut supra*]; but there is no such clause in the Act in question. Difficulty therefore has arisen in obtaining a valuation on which the local authorities can assess the railways and lands. Being a railway, they fall to be assessed by the Assessor of Railways; but that official, on the ground that he is not authorised to make a valuation roll in any exceptional manner, has made up his roll in the ordinary way, thus entering values for the line, railway works, and stations, &c., just as he would if it was an ordinary railway he was dealing with. And accordingly as the basis of value for assessment is that of the values in the valuation roll, the question has arisen sharply whether such assessment is legal. I am of opinion with the Lord Ordinary that it is not, and that the pursuers are entitled to declarator to that effect.

The Lord Ordinary is of opinion further that the Court cannot ordain the Assessor of Railways to value the pursuers' railway on any other basis than that of the value as a railway, and I think he is right. He also holds that the county assessor has no power to value the subjects, and in that I think he is right also.

But with a view to overcome the difficulty which has thus arisen he has allowed a proof, with a view to ascertaining value in this process as a basis for fixing assessment. My opinion is that there is only one way in which assessment can be laid on, and that is by ascertaining the value in the manner required by statute, and embodying it in the valuation roll.

I am unable to see what power this Court has to declare values for purposes of assessment. And I therefore am of opinion that that part of the interlocutor by which a proof is allowed should be recalled.

The question remains whether the difficulty could be got over by the Assessor of Railways inserting an alternative valuation in addition to his valuation of the railway *qua* railway, and therefore supplying the local assessing body with a basis for assessment consistent with the special Act, such as is given by the direction to assessors under the Light Railways Act. But it is not a question which we are called upon to decide judicially, or to give any order upon. That I think we cannot do. But it may be possible by reasonable agreement to such an arrangement to overcome the present deadlock. If this cannot be accomplished, there seems to be no remedy except that resort should be had to Parliament.

I have only further to add that I concur with the Lord Ordinary in his dismissal of the action as directed against the individual defenders, Morin, Maxtone, and Jackson—indeed I did not understand that these findings were contested. I am therefore in favour of adhering to the findings of the Lord Ordinary, but recalling the allowance of proof.

LORD YOUNG—The only difficulty here is to ascertain in point of fact the value at which the land occupied by the railway would have been assessed if it had remained in the condition in which it was immediately before it was acquired for the purpose of the railway. That is the only question in dispute; and it is a pure question of fact. In cond. 14 the Railway Company—one of the only two parties who are interested in this question of fact—set forth their averments in point of fact. I do not read these averments. They are minute and distinct, with the result that the value of the land before the railway was formed does not exceed the sum of £147, 1s. 11d.; and then that is divided among the parishes. What is the answer to that of the only other party interested in that question of fact? The answer for the County Council for the County of Inverness and others is "denied." Now, I think that if one of the two parties interested sets forth his averments in detail as to a matter of fact which is in dispute, it is not enough for the other to answer simply "denied." He ought to state in what respect the averments are erroneous and what he maintains to be the truth regarding matter of fact. Your Lordship is of opinion I understand, but upon some ground that I do not understand, that this is not a question of fact which this Court can determine. But if the parties interested are at issue about it, it must be determined by some tribunal, and what tribunal is there other than this Court to determine it? I understand your Lordships' answer to that question to be "None. There is no tribunal. Parliament may make one and appoint a public officer, whether the county assessor or the Railway Assessor, to make the valuation and enter it in the valuation roll." Your Lordships, as well as the Lord Ordinary, have determined that this Court cannot order these officers to do this. But are there not in existence intelligent men who can discover which of the two parties are in the right? I quite agree in the observation that it is a course inconvenient on the face of it, and to be avoided if possible—allowing a proof at large on such a question as this; but how, under any circumstances whatever, would this Court proceed to determine a question between two parties, and the only two parties interested in such a matter as this? It would be a remit to somebody selected by the Court to ascertain it, and this person could easily and safely and with due regard to the interests of all parties interested ascertain it as easily as the Assessor of Railways. Suppose instead of denying the Railway Company's statements as to what was the value of the land before the railway was formed, that statement had been "admitted," should we not have proceeded on that admission. The parties being agreed that that was the value according to which the rate was to be assessed and laid on, are

we not to act upon that agreement and pronounce judgment accordingly? If the parties are not agreed—as they are not—why should we not proceed in the usual way to determine the truth as to such a simple matter of fact as that regarding which the parties here are at issue? I have no doubt whatever—there is nothing in any Act of Parliament to the contrary—that we ought to ascertain in this process between the disputants who are before us what is the truth of the matter. Reference was made, and I assume properly, to the Light Railways Act, which is a very different Act from the Act with which we are now concerned, and applicable to very different circumstances. The Legislature in the Light Railways Act thought it desirable to put in the clause which your Lordship read, but in this Act, with which alone we are here concerned, we must assume that the Legislature thought that such a clause was not necessary, for they did not put it in. Therefore I concur so far as your Lordship proposes to affirm the judgment of the Lord Ordinary, but I cannot concur in the view that we have no jurisdiction to determine the value which alone is in dispute.

LORD TRAYNER—I agree with the Lord Ordinary that the pursuers are entitled to decree of declarator in terms of the first and second conclusions of the summons. I also agree with the Lord Ordinary in thinking the action should be dismissed against the three individual assessors for the reason which I shall state in a single sentence. The County Assessors cannot perform any duty in reference to the valuation here in question. They are required to value the lands in their different counties and parishes and to put these on their valuation rolls, but they have no right and no competency to value a railway, and in this case it is a railway that is to be valued. The Guarantee Act enacts that "during the period, not exceeding thirty years, for which the whole or any part of the interest or dividend guaranteed by this Act shall be payable by the Treasury, the railway shall not be assessed to any local rate at a higher value than that at which the land occupied by the railway would have been assessed if it had remained in the condition in which it was immediately before it was acquired for the purpose of the railway." It is a railway that is to be assessed on a certain basis, and no one can assess the value of that railway but the Railway Assessor. Therefore I think the action should be dismissed against the two county assessors, for they can do nothing towards the valuation of a railway. We cannot order the Railway Assessor to put any particular value on the railway, because the Railway Assessor's duty is prescribed by statute. He is by the Valuation Act taken bound to value the railway in a certain way, upon certain *data*, and in certain proportions. This railway, if it had stood in the ordinary circumstances of other railways, would have been assessed by the Railway Assessor in the manner prescibed by the statute. If we ordered him to do anything other than what the statute has ordered him to do or authorised him to do, his answer would be that he can proceed with his valuation no otherwise than as directed by statute.

Now, with regard to the question of proof, what practical value would it have? Supposing the Lord Ordinary took a proof as to the value of the railway, or rather the land occupied by it, as if it had remained in the condition in which it was immediately before it was acquired for the purpose of the railway—and formed an opinion on that value, whether upon evidence adduced before him or by a remit to a man of skill—of what practical value would that be? The Lord Ordinary cannot order his valuation to be put on the valuation roll, for nothing is to go on the valuation rolls except what the assessors of the counties or the assessors of railways put upon them, and unless the valuation appears on the valuation roll it cannot be taken as the basis for any assessment. Besides, if the Lord Ordinary was to determine that the lands were of a certain value prior to being acquired for the purposes of the railway, and ordered that to be put on the valuation roll, how long is that valuation to continue there? The valuation roll must be made up year by year, and although the value of this land when taken for the purposes of the railway is an unchanging figure, yet if at any time the Treasury ceased to pay the Guarantee Fund, the railway would require to be assessed, not upon the value of the land taken when the railway was formed, but on the value of the railway as assessed according to the directions given to the Railway Assessor by the Valuation Act. It does not appear to me therefore that the finding of the Lord Ordinary or of this Court would be of the least value, because we cannot ordain the assessor to put the finding of the Court of Session on the valuation roll, and if it is not on the valuation roll it is of no use as a basis of assessment. The basis of assessment is to be found in the valuation roll alone. I thought your Lordship's reference to the Light Railways Act not at all inapposite. It is not attributing any want of intelligence to the Legislature to say that the present difficulty would have been obviated if there had been put the same clause into this Guarantee Act as is to be found in the Light Railways Act. I think there has been simply an omission on the part of the draughtsman. But if such a clause had been found in the Guarantee Act it would have met exactly the difficulty which has given rise to this litigation. I can see no practical value to be derived from any proof before the Lord Ordinary, and am therefore for recalling that part of his interlocutor. But I think the difficulty—for there is a difficulty here—might be overcome in one or other of two modes. In the first place, the parties might apply to Parliament to have the Guarantee Act amended to the effect of adding a provision with reference to valuation similar to that which is to be found in the Light Railways Act. Or

the Railway Assesssor might do for this railway—though not specially authorised—what he does under the Light Railways Act. I cannot say he is bound to do it; but, on the other hand, I do not think he would exceed his power if he valued this railway according to the mode of valuation prescribed in the Valuation Act, and put that on the roll, with an alternative entry that the land when taken for the purpose of the railway was of a certain value in the different parishes through which it extends. I am therefore of opinion that we should adhere to the interlocutor of the Lord Ordinary, except in so far as he allowed a proof, which I think can be of no practical value.

LORD MONCREIFF was absent.

The Court adhered to the interlocutor reclaimed against, with the exception of allowance therein of a proof, and *quoad ultra* dismissed the action.

Counsel for the Pursuers and Respondents—Ure, K.C.—Cooper. Agent—James Watson, S.S.C.

Counsel for the Defenders and Reclaimers—Clyde, K.C.—Lyon Mackenzie. Agents—Fletcher & Baillie, W.S.

Friday, July 8.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

DUKE OF BEDFORD *v.* EARL OF GALLOWAY'S EXECUTOR.

Entail—Lease by Heir of Entail in Possession—Fishings—Claim of Warrandice in Lease—Reduction of Lease by Succeeding Heir of Entail—Terms of Clause of Warrandice Held Ineffectual to Bind the Executor of Granter of Lease.

An heir of entail in possession granted to certain persons a lease of the salmon-fishings on the estate for twenty-one years. The lease bore that its object was to improve the fishings on the estate, and its provisions were conceived in the interest of the granter and the succeeding heirs of entail in the estate. The lease contained a clause of warrandice by which the granter bound and obliged himself "and his foresaids" (*i.e.*, his successors in the entailed estate) to warrant the lease to the lessees at all hands. The granter of the lease died within a year after granting the lease, and subsequently in an action of reduction brought by the succeeding heir of entail the lease was found to be null and void.

The lessees brought an action against the trustee and executor of the deceased granter of the lease, as trustee and executor and as an individual, averring the reduction of the lease at the instance of the succeeding heir of enta and founding on the clause of warrandice in the lease, concluding for payment of certain sums in respect of outlays and expenses incurred by them and for declarator that the defender was bound to relieve them of their liability for future rents.

Held that the clause of warrandice was ineffectual to bind the executor of the granter of the lease, and the defender assoilzied.

The Duke of Bedford and others brought this action against Colonel the Hon. Walter John Stewart, Mire House, Keswick, Cumberland, as trustee and executor of the deceased Right Hon. Alan Plantagenet, Earl of Galloway, and also as an individual, concluding for payment of £646, 16s. 5d., and for declarator that the defender, as trustee and executor foresaid, or otherwise as an individual, was bound to free and relieve the pursuers of all claims made or which might be made against them for the rents of the fishings of Machermore and Carsewilloch amounting to £1485, or any part thereof, and for interdict against the defender, as trustee and executor foresaid, from paying away any portion of the said trust estate in his hands without retaining an amount sufficient to meet the said claims.

By lease last dated 12th April 1900, entered into between the deceased Earl of Galloway, then heir of entail in possession of the entailed lands and estate of Galloway, Baldoon, and Newton-Stewart, in the county of Wigtown and stewartry of Kirkcudbright, on the one part, and the pursuers on the other part, the said deceased Earl of Galloway let to the pursuers the salmon and other fishings, both net and rod, in the rivers Cree and Minnick, and in the burns of Trool and Penkiln, in so far as forming part of the said entailed estates, subject to certain exceptions and reservations. The endurance of the lease was to be for twenty-one years or fishing seasons, beginning with the fishing season for 1900. The rent was £350. The lease narrated that its purpose was to improve the fishings in the river Cree and other rivers, and that in furtherance thereof the said Earl had negotiated leases from various other riparian proprietors on the said river Cree possessing rights of salmon and other fishing therein, and had arranged that the said leases should be granted to and in favour of the pursuers, subject to the terms and conditions as to the manner in which the said rights of fishing therein were to be exercised, which were contained in the said several leases. By the lease the said Earl let to the pursuers and their heirs, expressly excluding assignees, whether legal or voluntary, unless with the express consent in writing of the said Earl or his successors in the said entailed lands and estates of Galloway, Baldoon, and others, all and whole the salmon and other fishings (both net and rod fishings) before referred to. Among the conditions of the lease was the following—*Third*, "The rights of fishing hereby granted to the said second parties shall