with regard to proof appended to the Sheriff Courts Act are rules for regulating procedure in the ordinary court and have no application to summary causes, in which no procedure is prescribed, and in which the Sheriff is to order such procedure as he thinks requisite. Accordingly these rules have no application to arbitrations under the Workmen's Compensation Act, which under section 17 (*b*) of the Second Schedule to that Act fall to be treated as summary causes.

There is another reason why this objection is bad. The appeal which is taken here is specifically given by section 17 (*b*) of the Second Schedule to the Workmen's Compensation Act, which allows parties to appeal by way of stated case. Under section 17 (*g*) of the Act of Sederunt of 26th June 1907 this Court has power to send back the case to the Sheriff for amendment. I am clearly of opinion that that power of remitting includes a power of remitting to the Sheriff to do anything he thinks necessary, and as a matter of fact we have again and again remitted to the Sheriff to take further proof. It is quite true that in this case we did not say in so many words that the Sheriff was to take further proof, but I think he correctly interpreted the spirit of the remit, and I think it would be quite futile to hold that his report is vitiated because he has taken such additional proof as he deemed necessary for the determination of the matter remitted to him.

Upon the merits the learned Sheriff has returned an answer which enables us to deal with the whole of the case, and our judgment will be that the second question of law should be answered in the negative and the case remitted to the learned Sheriff to find the compensation which he thinks due.

LORD KINNEAR and LORD MACKENZIE concurred.

LORD JOHNSTON did not hear the case.

The Court pronounced this interlocutor—

". . . Having resumed consideration of the Stated Case and also considered the finding by the Sheriff-Substitute as arbitrator . . ., and having heard counsel for respondents, Answer the second question stated in the negative: Recal the determination of the Sheriff-Substitute as arbitrator, and remit to him to award compensation and proceed as accords. . . ."

Counsel for the Pursuer (Appellant)—Moncrieff, K.C.—Fenton. Agents—Simpson & Marwick, W.S.

Counsel for the Defenders (Respondents)—Horn, K.C.—Strain. Agents—W. & J. Burness, W.S.

Thursday, July 17.

FIRST DIVISION.

(Along with Three Judges of the Second Division.)

[Railway and Canal Commissioners.

NEWBURGH AND NORTH FIFE RAILWAY COMPANY *v.* THE NORTH BRITISH RAILWAY COMPANY.

Railway—Contract—Share Capital—"Paid up"—Contractors' Line—Shares Issued as Paid-up to Nominees of Construction Syndicate in Payment for Construction of Railway—Railway and Canal Commissioners.

Scheduled to the Act of Parliament which authorised the construction of the Newburgh and North Fife Railway Company, and by the Act made binding on the parties, was an agreement between the promoters of the Newburgh Company and the North British Railway Company, under which the North British Railway undertook to make up, if necessary, out of certain specified funds, a sum sufficient to pay a dividend of 4 per cent. on the "paid-up share capital" of the Newburgh Company. The share capital authorised by the Act was £180,000, and the loan capital £60,000. The Newburgh Company being themselves unable to raise sufficient capital from the public, entered into an agreement with a construction syndicate whereby the syndicate bound themselves to construct the line to the satisfaction of the engineer of the North British Railway, and undertook generally the obligations and risks of the promoters in obtaining the Act and completing the line, and on the other hand the Newburgh Company agreed to "pay" for the construction to the extent of £10,600 in cash raised by the issue of shares and by issuing the balance of the share capital, viz., £169,400, and the whole loan capital to the nominees of the syndicate in blocks or instalments as the railway was constructed. The syndicate disposed of these shares at considerably less than par.

The Court (*reversing* the Railway and Canal Commissioners sitting in place of arbiters), by a majority, viz., Lord Johnston, Lord Salvesen, Lord Guthrie, and Lord Skerrington (*dissenting* the Lord President, Lord Kinnear, and Lord Dundas), *held* that the amount of the "paid-up share capital" of the Newburgh Company towards payment of dividend on which the North British Railway were bound to contribute was not the whole £180,000; and, giving effect to the opinions of Lord Salvesen, Lord Guthrie, and Lord Skerrington (*dissenting* Lord Johnston) in the majority, that they were only liable under their agreement to contribute

towards payment of dividend on so much of the issued share capital as was issued in consideration of cash or the equivalent of cash; and *remitted* to the Railway and Canal Commissioners to ascertain the amount of such capital.

Statham v. *Brighton Marine Palace and Pier Company*, [1899] 1 Ch. 199, and *Webb* v. *Shropshire Railways Company*, [1893] 3 Ch. 307, *doubted*.

Railway—Contract—"Terminals"—"Mileage Receipts."

In a contract between the promoters of a railway and a railway company which was to work the line, it was agreed that the working company should retain 50 per centum of the gross receipts as its remuneration, but in the event of the remaining 50 per centum not being sufficient to pay a 4 per centum dividend on the paid-up capital of the line, then the working company was to make up the amount required out of "the mileage proportion of receipts accruing to them on their own railway" from traffic to or from any place on the line. The gross receipts of the line were to include the mileage proportion of receipts arising from through traffic, such receipts being after deduction of the "terminals," which were to belong and be paid to the companies other than the owners of the line entitled thereto.

Held (by the Railway and Canal Commissioners) that "terminals" meant terminals on the clearing-house basis, and that "mileage proportion of receipts" meant receipts after deduction of such clearing-house terminals, calculated according to mileage.

(See *North British Railway Company* v. *Newburgh and North Fife Railway Company*, 1911 S.C. 710, 48 S.L.R. 450.)

On 21st January 1910 the Newburgh and North Fife Railway Company (*applicants*) filed an application in the Court of the Railway and Canal Commissioners for, *inter alia*, an Order determining certain differences which had arisen between them and the North British Railway Company (*defendants*) under an agreement made in the year 1897 between William Forsyth Bell and others on behalf of the promoters of the Newburgh and North Fife Railway Company of the one part and the North British Railway Company of the other part. This agreement was confirmed and made binding on the applicants and defendants by the Newburgh and North Fife Railway Act 1897, and was scheduled to the Act (for the provisions of the agreement see *infra*). The defendants on 26th October 1911 filed an answer to the application. The applicants asked the consent of the Court of the Railway and Canal Commissioners to the differences between them and the defendants being referred to that Court, and the Court consented to hear and determine the matters in difference, no arbitrator having in any general or special Act been designated by his name or by the name of his office and no standing arbitrator having been appointed under any general or special Act.

Among the *differences* between the parties for the determination of which an order was sought was the difference "as to the amount of the paid-up share capital of the applicants towards payment of the dividend on which the defendants are bound to contribute." There was also a question as to the meaning of the words "terminals" and "mileage proportion of receipts," but this question did not go beyond the Commissioners.

By the Newburgh and North Fife Railway Act 1897 (60 and 61 Vict. cap. ccxxi), the applicants were authorised to construct two railways, viz.—(1) A railway 12 miles 7 furlongs in length, commencing by a junction with the Ladybank and Perth branch of the defendants' railway near Newburgh Station, and terminating by a junction with the main line from Edinburgh to Dundee of the defendants' railway near St Fort Station; and (2) a short fork railway, 3 furlongs 143 yards in length, forming the south junction of the first-mentioned railway with the said main line at or near and south of St Fort Station. The share capital authorised by the Act was £180,000, of which the applicants were authorised to raise £60,000 by the creation and issue of preference shares. The loan capital was £60,000, which the applicants were authorised to borrow on mortgage of the undertaking, or to raise by the creation and issue of debenture stock. The applicants stated, *inter alia*, in their application—"The whole of the ordinary and preference shares have been created and issued, and the value thereof, amounting to £180,000, has been received by the applicants, and the applicants maintain and claim that the paid-up share capital towards payment of the dividend on which the defendants are bound to contribute as aforesaid amounts to £180,000."

The defendants in their answer denied that they were liable to contribute on the whole £180,000. They stated, *inter alia*—"The applicants raised no money, or very little, under the Act of 1897. None of the capital of the applicants, or very little of it, was subscribed within the meaning of the Act of 1897. None, or very few, of the shareholders whom the applicants ultimately entered in their register were subscribers within the meaning of the Act. . . . The applicants issued shares without making the only legal and competent agreement with the intending shareholder, namely, that he should pay or agree to pay 20s. per £ in cash for the shares."

The *scheduled agreement* between the North British Railway Company (*first parties*) and the promoters of the Newburgh and North Fife Railway Company (*second parties*) provided, *inter alia*—"*Article First*—In the event of an Act being obtained and the capital being subscribed the second parties shall as soon as convenient thereafter purchase at their expense the necessary land and shall make,

construct, and complete the railway as a single line with land and bridges for a double line, and all stations . . . necessary for working the traffic of the railway, in a good sufficient and substantial manner and to the satisfaction of the chief engineer of the first parties for the time being, or, in case of any difference of opinion between him and the engineer of the second parties respecting the same, to the satisfaction of the Board of Trade on application of either of the parties. *Article Second*—Upon the construction, completion, and opening by the sanction of the Board of Trade of the railway and each part thereof, the first parties shall . . . work and maintain the same and shall provide locomotive power, rolling stock, and plant of every kind (except the furnishing and conveniences to be provided by the second parties mentioned in article first hereof) necessary for the working of the traffic. . . . The first parties shall work and manage the railway under the provisions of this agreement in a proper, safe, and convenient manner, and so as fairly to develop the traffic to, from, and on the same. . . . . *Article Fourth*—The gross revenues of the second parties shall be held to consist of and include—1. All receipts in respect of local traffic, including mails, that is to say, traffic which shall both arise and terminate on the railway. 2. The mileage proportion of all receipts arising from through traffic, including mails (that is to say, traffic which passes over the railway or any part thereof and which likewise passes over the railways or any part thereof of the first parties or of any other company) corresponding to the distance for which such traffic is carried over the said several railways respectively, after deduction from such receipts of the terminals on such traffic, which shall belong and be paid to the companies other than the second parties respectively entitled thereto, and also subject to deduction of the actual expense of cartage where incurred when included in the through rate. 3. The terminals belonging to the second parties in respect of such through traffic, subject to deduction of the actual expense of cartage where incurred when included in the terminal charge. . . . 5. The first parties shall collect the gross revenues [of the second parties], and shall be entitled to retain fifty per centum thereof as their remuneration for maintaining the railway . . . and working and managing the traffic thereon and collecting the said revenues, and shall pay over the balance of fifty per centum to or for the behoof of the second parties. . . . *Article Fifth*—Out of the said balance the second parties shall pay—[Certain items, including, *inter alia*, interest upon money borrowed by them, and expenses of directorial and financial management]. . . . *Article Seventh*—If the nett revenue accruing to the second parties is not sufficient to pay a dividend of four per centum per annum on the paid-up share capital of the second parties, then the first parties shall, out of fifty per centum of the mileage proportion of receipts accruing to them on their own railway from traffic, including mails, passing over their system, or any part thereof to or from any place on the railway, contribute such sum as may be necessary to make up that dividend so far as the said fifty per centum of mileage receipts accruing in each half-year to the first parties shall suffice to pay such deficiency. *Article Eighth*—Should the sum to be contributed under the immediately preceding article, along with the said nett revenue of the second parties, not be sufficient to pay a dividend of four per centum per annum on the paid-up share capital of the second parties, then the first parties shall, out of twenty-five per centum of the mileage receipts accruing to them on their own railway from traffic including mails passing over their system or any part thereof and over the railway, contribute such further sum as may be necessary to make up the said dividend of four per centum per annum so far as the said twenty-five per centum of mileage receipts accruing in each half-year to the first parties shall suffice to pay such deficiency. . . . . *Article Fourteenth*—All questions which may arise between the parties hereto in relation to this agreement or to the import or meaning thereof or to the carrying out of the same shall be referred to arbitration under and in terms of the Railway Companies Arbitration Act 1859."

The applicants were unable for some time to raise the necessary capital for the construction of the railway and obtained several extensions of time. On May 31, 1906, an agreement was entered into between the applicants (therein called the company) and the Engineering Electric and Construction Syndicate, Limited (therein called "the contractors") by which it was, *inter alia*, agreed—"1. The contractors shall construct and complete fit for traffic as a single line of railway, but with land and bridges for a double line, to the satisfaction of the company's engineer, and so as to comply in all respects with the said acts and the said agreement between the company and the North British Company, the railway stations . . . and other the things specified in article 1 of the said agreement with the North British Company (all of which are hereinafter referred to as 'the works'). . . . [Clause 2 provided for the commencement and prosecution of the works and for completion by 31st December 1908.] . . . 3. The contractors shall pay for all land provided for the construction of the works, and all compensation payable to the landowners and others in respect of land required for temporary purposes or of property injuriously affected, and shall execute all accommodation works which the company may be called upon or may agree to execute, and shall provide the sum of £4400 for meeting the cost of administering the affairs of the company during construction. . . . Any lands which shall be acquired and shall be superfluous shall be deemed to belong to the contractors, and shall at their request be sold by the company for the contractors' benefit. . . . . 4. The con-

tractors will provide for or satisfy all legal costs and charges, including all costs payable by agreement or under the Lands Clauses Consolidation Act to landowners or others . . . and also all other legal and parliamentary costs, charges, and expenses, and all engineers' and surveyors' and valuers' fees and charges which the company may now be liable for or may incur with the approval of the contractors prior to the taking over of the works by the North British Company [for the purpose of working the line]. 5. The company shall at the request and cost of the contractors give all notices and take all steps necessary for obtaining possession of or acquiring any land required for the purposes of the works. . . . 6. In consideration of the construction of the works and of the payments and expenses to be made and borne by the contractors under this contract, the company shall pay to the contractors, in the manner hereinafter mentioned, the sum of £240,000, of which £109,400 shall be paid in ordinary shares of the company, £60,000 in preference shares, and £60,000 in 4 per cent debenture stock of the company (which shall bear interest as from the taking over of the works by the North British Company for the purpose of working the line), and the remainder, namely the sum of £10,600, in cash. 7. For the purpose of determining the payments to be made to the contractors on account during the progress of the works the said contract sum of £240,000 is considered as divided into £195,000 for the actual execution of the works including maintenance, and £45,000 for the matters mentioned in clauses 3 and 4 hereof, but such division is not to otherwise effect the payment of the contract sum whatever may be the relative proportion or value of the two parts of this contract. Of the said £45,000, £15,000 in ordinary shares fully paid shall be paid on the execution hereof in respect of the expenses incurred by the contractors under clauses 3 and 4 hereof up to and including the 31st day of May 1906. 8. Within eight days after the expiration of each calendar month the company's engineer shall estimate the value of the work executed and materials provided (exclusive of plant) during the period of such calendar month. In estimating such value such engineer shall have regard to the division of the contract sum mentioned in the preceding clause hereof, and a schedule of prices shall be made out by the contractors, subject to approval by the company's engineer, under which the execution of the work including maintenance shall work out at £195,000, and such schedule of prices shall be the basis on which the valuation for payments on account is to be made. In respect of the matters, payments, and things mentioned in clauses 3 and 4 hereof, and not included in the £15,000 above referred to, the company's engineer shall within eight days after the expiration of each calendar month estimate the proportion which the acreage of the land of which during such calendar month the company shall have obtained possession bears to the total acreage of land estimated to be required for the works, and a like proportion of the sum of £30,000 (being the balance of the said sum of £45,000) shall be added to the monthly valuation mentioned above in respect of all the payments, matters, and things mentioned in clauses 3 and 4 hereof not included in the £15,000 aforesaid, and the company's engineer shall certify the total amount of such valuation and additional sum. 9. The amount of such certificates as mentioned in clause 8 hereof shall be paid to the contractors by the company by crediting the amount of each certificate on or by the issue as fully paid to the contractors, or as they may direct, of the shares ordinary or preference and the debenture stock in such proportions as shall be within the company's legal powers. If on the taking over of the works by the North British Company for the purpose of working as aforesaid all the contract price shall not have been paid or issued to the contractors the company shall, immediately upon the North British Company so taking over the works, issue or pay to the contractors, or as they shall direct, any shares, debenture stock, securities, or cash at that time remaining to be issued or paid to the contractors: Provided that the contractors may at any time (A) require the sum represented by any certificate to be paid wholly or in part in cash until the whole of the sum payable in cash has been paid, or (B) may require the company to issue to them certificates of indebtedness to represent the proportion of the contract price comprised in any such certificate. Any such certificates of indebtedness shall be so framed as to enable the company or the contractors at any time to convert the same into the shares or debenture stock in respect of which such certificates of indebtedness may have been issued, but so that the company shall not have the power to exercise such right of conversion until after the taking over of the works by the North British Company for the purpose aforesaid. 10. The company shall, at the request and cost of the contractors, offer for public subscription, by the issue of prospectuses or other methods of advertisement, any of the shares or debenture stock hereinbefore mentioned, whether at the time the contractors shall be entitled thereto or not, and as to the said shares, notwithstanding that the same may have been allotted to the contractors, provided that the company shall not be bound to issue any debenture stock at a lower price than par. . . . [The clause then provided what was to be done with the proceeds]."

The construction of the railway was commenced in 1906, and the line was opened for traffic on 25th January 1909.

The following statement of income and expenditure of the Engineering, Electric, and Construction Syndicate, Limited, from 30th May 1906 to 17th November 1911, was produced (and is referred to by Lord Salvesen):—

"THE NEWBURGH AND NORTH FIFE RAILWAY CONTRACT.

Expenditure.

Expenses—			
Preliminary -	£7,847 5 0		
Administration -	4,400 0 0		
Parliamentary Deposit	315 9 8		
Sundries - -	45 6 8		
		£12,608 1 4	
Land Purchases, &c. - -		29,550 15 2	
Works - - - - -		132,616 13 8	
		£174,775 10 2	
Less Sums allowed for delay in completion of contracts—			
Messrs W. Beattie & Sons - -	£4,600 0 0		
M. & J. R. Watson, Ltd. - -	265 0 0		
	4,865 0 0		
		£169,910 10 2	
Loss on sale of shares and debentures - -		43,760 0 0	
Interest to block-takers - - - - -		8,205 19 8	
Management and underwriting fee - -		14,400 0 0	
Administration expenses of the Syndicate -		42 3 0	
Balance—Excess of income over expenditure carried to balance-sheet - - - -		9,706 7 2	
		£246,025 0 0	

Income.

The Newburgh and North Fife Railway—			
Cash - - -	£10,600 0 0		
		£10,600 0 0	
Shares—			
10,940 ordinary, at £10 - - -	£109,400 0 0		
6,000 preference, at £10 - -	60,000 0 0		
Debenture stock	60,000 0 0		
		229,400 0 0	
			£240,000 0 0
Lloyd's bonds for extras at par - - - -			6,025 0 0
			£246,025 0 0

On 21st March 1912 the Court of the Railway and Canal Commission pronounced, *inter alia*, this order — ". . . This Court doth declare . . . that according to the true construction of articles 7 and 8 of the said agreement the expressions 'the mileage proportion of receipts' and 'the mileage receipts' mean the receipts after the deduction of the clearing-house terminals, and that the amount of the paid-up share capital of the applicants towards payment of dividend on which the defendants are bound to contribute is £180,000, making with a debenture issue of £60,000 a total of £240,000."

The opinions of the Commissioners, which were delivered on January 27, 1912, were as follows:—

LORD MACKENZIE — The Newburgh and North Fife Railway consists of two lines,—substantially one—thirteen miles in length, which connect Newburgh and St Fort, both points on the North British system in Fife. The Bill for its construction was promoted in 1897 and was opposed, amongst others, by the North British Railway Company. An agreement was, however, entered into with them, and is scheduled to the Newburgh and North Fife Railway Act of 1897. It is confirmed by section 42 of the Act, and is thereby made binding on the Newburgh and North Fife Railway Company. The effect of the agreement was that the promoters were to construct and own the line, and the North British Company were to work and manage it. Speaking generally, the revenue was to be divided in the proportion of 50 per cent. to each, and the North British guaranteed to a certain extent a 4 per cent. dividend on the paid-up capital, which was by the Act fixed at £240,000. Owing to difficulties in the way of raising the capital the line was not proceeded with at once. Three extensions of time were obtained, the last in 1906. On 31st May 1906 the Newburgh and North Fife Railway Company entered into an agreement with a syndicate called the Engineering Electric and Construction Syndicate, Limited, under which the Syndicate became bound to construct the line to the satisfaction of the engineer of the North British Railway Company in consideration of the Newburgh Company issuing to them the whole of their capital. The line was constructed in terms of this contract, and was opened for traffic on 25th January 1909 as a single line, with land and bridges for a double line. A supplementary agreement had been entered into with the North British Railway Company in 1908 to secure the execution of certain works, and also making provision for further additional works if considered necessary by the North British Railway.

[*His Lordship here considered the questions whether the North British Railway Company had fulfilled their obligations under article* 1 *of the scheduled agreement* (*that they would work the railway so as fairly to develop traffic*) *and the obligations under article* 6 (*that they would send all traffic over the Newburgh Railway where it formed the shortest route*), *and came to the conclusion that they had failed to fulfil these obligations.*]

In order to judge of the present position it is necessary to glance for a moment at what the state of matters was when the agreement was entered into in 1897. The North British Company had the control of the railway system in Fife, but had no line running east and west close to the river Tay on the south side to connect their main line from Edinburgh to Dundee on the one hand, and their line from Ladybank to Perth on the other. The Caledonian Railway Company had a line running from Perth to Dundee on the north side of the Tay. There was no direct connection on the North British system from Perth and places north and west thereof (1) to Dundee and places north thereof on the Dundee and Arbroath joint line; (2) to Tayport and places to the east; and (3) to St Andrews and places south thereof as far as Crail. The North British and Caledonian Railway Companies were in 1897 and down to 1908 running in competition with

each other. In 1908 they entered into a pooling agreement for the purpose of discouraging and discontinuing unnecessary competition in the working of the passenger and goods traffic of the respective companies, and for the pooling and division of the receipts from competitive traffic. It is obvious that one effect of the pooling agreement was to deprive the Newburgh and North Fife line of its importance to the North British Company. Those who were responsible for the management of the North British Railway in 1897 must have had weighty reasons for entering into what is to them a very onerous agreement, and it is impossible to doubt that the Newburgh and North Fife line was intended to play a not unimportant part in their competition with the Caledonian Railway Company. That competition has ceased. It is therefore not surprising to find that the view of those now responsible for the management of the North British Railway Company with regard to the policy of the agreement is entirely different from that held by their predecessors in 1897. The stimulus provided by competition to attract traffic to the Newburgh and North Fife line has been withdrawn. Indeed it was conceded that the effect of the dividend guarantee clauses in the scheduled agreement (which will afterwards be referred to) is such as to make the North British Railway Company not only indifferent to traffic being sent over the Newburgh and North Fife line, but even in certain cases to make it pay them better that traffic should not pass over that line but go by the Caledonian route north of the Tay. Mr Jackson is of the opinion, which he expressed in the witness-box, that the agreement must have been made without any consideration whatever, and that it was a most unfortunate thing that it ever was made. . . . . .

Terminals.—The dispute as to these arises under article fourth of the scheduled agreement, more particularly (2) and (3) thereof. These clauses are very inartistically framed, but I understand that parties were in the end so far agreed as to the construction to be put upon them. The traffic as defined by (2) includes traffic passing over the railway or any part thereof. In the receipts from certain of this traffic are included terminals which belong to companies other than the applicants. These are to be paid to those companies. In the receipts from certain traffic are included terminals which belong to the applicants. These form part of their gross revenues. So far parties are practically agreed. The difference is whether by terminals are meant clearing house terminals or not.

The purpose of article fourth is to fix what is included in the gross revenues of the Newburgh Company. These under (5) are to be divided in the proportion of 50 per cent. to the North British as their remuneration for maintaining, working, and managing the railway, and 50 per cent. to the Newburgh Company, out of which they are to pay certain charges. Under (2) the terminals paid to other companies are to form a deduction from the gross revenues; under (3) those belonging to the Newburgh Company are not, being included in their gross revenues as above stated. The Newburgh Company say clearing house terminals could not have been intended, because they are not parties to the clearing house; and because, if clearing house terminals are deducted from the mileage proportion of receipts, the result will be, in the case of a short line like this, that the terminals will eat up the rate. It appears to me in construing an agreement such as this that the parties must be supposed to have intended to deal with actual figures when contracting in regard to terminals to be paid to companies other than the Newburgh and North Fife Company. If not, the matter is left quite indeterminate. In dealing with expense of cartage under (2) and (3) it is the actual expense that is dealt with. The only actual figure is the clearing house terminal. I am therefore of opinion that it is clearing house terminals that should be deducted from the mileage proportion of receipts under (2). The same principle will be applied in crediting the Newburgh Company with terminals under (3).

Dividend Guarantee Clauses.—Articles seven and eight of the scheduled agreement provide for the guarantee by the North British Company of a dividend of 4 per cent. on the paid-up share capital of the Newburgh Company if the net revenue accruing to the latter is not sufficient. In that event the North British Company "shall out of the fifty per centum of the mileage proportion of receipts accruing to them on their own railway from traffic, including mails, passing over their system or any part thereof, to or from any place on the railway, contribute such sum as may be necessary to make up that dividend so far as the said fifty per centum of mileage receipts accruing in each half year to the first parties shall suffice to pay such deficiency." Does this mean total receipts, or does it mean receipts after deduction of terminals? The same point arises in regard to the additional rebate of 25 per cent. under article eight, in the event of the sum contributed under article seven not being sufficient to pay the dividend of 4 per cent. In my opinion the words "mileage proportion of receipts" mean the receipts which result from a charge of so much per mile, and do not include terminals, which are not calculated upon mileage. The terminals ought therefore to be deducted in fixing what are receipts for the purpose of articles seven and eight. These are clearing house terminals. The language of article four, which was founded on by Mr Macmillan by way of contrast, does not seem to me to compel one to put anything but the natural construction on articles seven and eight.

Paid-up Capital—Under the dividend guarantee clauses the obligation of the North British Company is to make up to the extent specified in articles seven and eight, if necessary, a sum sufficient to pay a dividend of 4 per cent. on the paid-up

share capital of the Newburgh and North Fife Railway Company. The capital of the Newburgh Company is £240,000, divided into 120,000 ordinary £1 shares, 60,000 preference £1 shares, and £60,000 of debentures. The North British Company say the share capital, which has all been issued to the Engineering Electric and Construction Syndicate, Limited, is not paid up within the meaning of articles seventh and eighth of the scheduled agreement. They argue that 'paid up' means paid up in cash, and that their obligations only apply to such amount of capital as the Newburgh Company can show was paid for at the rate of 20s. in the £1. A considerable amount of time was needlessly spent by the defendants upon points stated in the pleadings as to the necessary certificate not having been obtained from the Sheriff, and as to meetings having been held at which there was no sufficient quorum. These have all disappeared from the case. The argument for the North British Company was that the agreement of 31st May 1906 between the Newburgh Company and the Syndicate, under which the latter agreed to construct the line, and the former agreed in consideration thereof to issue their capital to the Syndicate, was *ultra vires*. It is not suggested that there was any fraud or misrepresentation. It is said to be *ultra vires*, because (1) under it there was a delegation of the duties of the directors and of the company; (2) it provided for the issue of share capital otherwise than for payment in cash; (3) it provided for the issue of shares at a discount; and (4) the capital was not applied to the purposes which the Act authorises. In my opinion all these grounds of attack fail. The position of the company in 1906 has to be considered. Their Act had been obtained in 1897, and they had on three different occasions obtained an extension of time for the exercise of their powers. They had failed to raise their capital, and accordingly entered into the agreement with the Syndicate by which they got the line made. It is said that the Syndicate agreement is not a construction contract. The opening words are—'The contractors (*i.e.* the Syndicate) shall construct and complete, fit for traffic as a single line of railway, but with land and bridges for a double line, to the satisfaction of the company's (*i.e.* the North British Company's) engineer, and so as to comply in all respects with the Acts and the agreement between the company (*i.e.* the Newburgh and North Fife Railway Company) and the North British Company the railway stations, houses, sidings, junctions, approaches, signals, telegraphic apparatus, works and conveniences, and other the things specified in article 1 of the said agreement with the North British Company,' that is to say the scheduled agreement. The contract price is provided for under article 6, which is as follows:—'In consideration of the construction of the works and of the payments and expenses to be made and borne by the contractors under this contract, the company shall pay to the contractors, in the manner hereinafter mentioned, the sum of £240,000, of which £109,400 shall be paid in ordinary shares of the company, £60,000 in preference shares, and £60,000 in 4 per cent. debenture stock of the company, and the remainder, namely the sum of £10,600, in cash.' I agree with the passage in Mr Dempster's evidence where he says 'The contract which we entered into then was a wise contract and fully justified from a business point of view.' The Newburgh Company made the agreement in *bona fide*. Before entering into it estimates had been obtained, and the calculations made are fully detailed in the evidence of Mr Dempster and Mr Beer, into which I do not propose to go in detail. It is sufficient to say that in my opinion they amount to this, that the Syndicate underwrote the construction of the line on the basis approximately of a 10 per cent. profit, with a possibility of about the same amount more if none of the sum estimated for contingencies was required. In consideration of the issue of the whole capital to them the Syndicate took upon themselves the obligations and risk of the construction of the line. The profit was not in these circumstances excessive. It was argued that the Syndicate, before they made the agreement with the Newburgh Company, had an offer for the construction of the line at a figure considerably under that which appears in the estimates obtained by the Newburgh Company. There is no sufficient evidence to connect the Newburgh Company with this. With regard to the point that the total capital was fixed on the basis of a double line being constructed, whereas only a single line with land and bridges for a double line was made, the evidence shows that there was a rise in the cost of construction between the date of the Act and 1906. So far as the facts are concerned, therefore, my opinion is against the contention of the North British Company as set out in their pleadings and maintained at the bar, that the agreement of 31st May 1906 was not a genuine or *bona fide* construction contract.

It is, however, said that the agreement is contrary to law. The basis of the argument was that the Newburgh Company had done what was equivalent to issuing their shares at a discount. This argument is based on the view that it would have been illegal for them to do so. It is to be observed, however, that the Newburgh and North Fife Railway is a company formed under the Companies Clauses Act, and is not a company under the Companies Act of 1862. So far as the decisions have gone, they are adverse to the defendants' contention that it is illegal for a company formed under the Companies Clauses Act to issue their shares at a discount. I may refer to the opinion of Lord Shand in the case of *Klenck* v. *The East India Company for Exploring and Mining, Limited*, 16 R. 271, at p. 280; the judgment of Romer, J., in the case of *Statham* v. *Brighton Marine Palace and Pier Company*, [1899] 1 Ch., p. 199 (this is a decision directly on the question); and the case of *Webb* v. *Shropshire Railways Company*, [1893] 3 Ch. 307

(the decision in this case, however, turned upon the terms of the Special Act). It is not necessary to determine whether it was illegal for the Newburgh Company to issue their shares at a discount or not. They did not in fact issue their shares at a discount. They received full value for the share capital which they issued. It has long been recognised as regards companies under the Companies Acts that shares can be issued against money's worth. As Lord Watson points out in the *Ooregum* case, [1892] A.C. 125, at p. 137, it has been ruled that so long as the company honestly regards the consideration given as fairly representing the nominal value of the share in cash, its estimate ought not to be critically examined. The effect of the judgment in *Wragg, Limited*, [1897] 1 Ch. 796, is that the Court will not inquire into the value of the consideration unless the agreement under which the shares were issued is impeached for fraud or misrepresentation, the question of value being one to be decided between the parties themselves. This law is no less applicable in the case of a company under the Companies Clauses Act than it is in the case of a company under the Companies Acts. When it is applied to the present dispute, in which there is no suggestion of fraud or misrepresentation, a decision against the defendants upon the facts really concludes the case against them. The argument against the validity of the Syndicate agreement which was founded upon an examination of its terms in my opinion fails. If sound against the Syndicate, it would be equally sound against a contract made with any firm of contractors for the construction of a line.

It was further contended that, even assuming the Syndicate contract to be *ex facie* valid, yet the money had been misapplied by being spent on purposes which were not authorised by the statute. I understood that the case to which the greatest weight was attached on this point was the *Great North-West Central Railway Company* v. *Charlebois*, 1899, A.C. 114. In that case a contract was held *ultra vires* on the ground that certain benefits which were really of a gratuitous nature were given. There is nothing of a similar character under the Syndicate agreement in question here. Great stress was laid upon the document No. 168, which is a statement of the income and expenditure of the Engineering and Electric Construction Syndicate, Limited, from 30th May 1906 to 17th November 1911, under the heading of the Newburgh and North Fife Railway contract. This, however, is a document with which the Newburgh Company had no concern. It relates to the affairs of the Syndicate. What the Syndicate did with the shares after they got them, whether they dealt with them in blocks, as was the case here, or disposed of them in any other manner they considered most advantageous to themselves, either at a profit, or, as was to be anticipated here, at a loss, does not affect the validity of the bargain made by the Newburgh Company.

My conclusion therefore is that the whole capital of the Newburgh Company is fully paid up within the meaning of the scheduled agreement. This answers in terms what, according to the opinions expressed by the First Division on 22nd February 1911, is within the reference.

We were asked to make a finding that in respect of breach of contract the defendants are liable in damages. It would not be within the jurisdiction of arbiters dealing with a common law reference in Scotland to deal with the question of damages unless this was specially referred to them. The case of the *North-Eastern Railway* v. *North British Railway Company*, 25 R. 333, 35 S.L.R. 282, shows that in these proceedings the Commissioners sit not as arbitrators but as a Commission coming in lieu of arbitrators. Under section 12 of the Railway and Canal Traffic Act 1888 the Commissioners have the power to award damages. I am accordingly of opinion that the applicants are entitled to a declaration under this head. It must, however, be clearly understood that no opinion is expressed on the question whether the applicants have sustained any damage. The matter of amount was of consent held over, and no argument was submitted on this point. The dividend guarantee clauses and the compensation in money or goods for loss of traffic will have a material bearing on the matter. I am of opinion that the applicants are entitled to costs.

In the circumstances of this case it is desirable that findings should be pronounced. These, in my opinion, should be as follows:—[*His Lordship then narrated the findings which he thought should be pronounced. These were embodied in the order of the Court dated 21st March* 1912.]

MR GATHORNE HARDY—Having had the opportunity of carefully considering the judgment, I entirely concur with it in all respects.

SIR JAMES WOODHOUSE—The Newburgh and North Fife Railway Company, as the owning company, complain that the North British Railway Company, as the working company, have failed to implement the obligations which are contained in an agreement between the parties, dated the 6th April 1897, for working the Newburgh Company's line.

This agreement was entered into whilst the applicants' Bill was before Parliament. It was scheduled to and given statutory effect by section 42 of the Special Act authorising the construction of the line. There are three principal obligations which have been in controversy before us.

In consideration of retaining 50 per cent. of the gross revenue as therein defined the defendants undertook, first, to work and manage the railway so as to fairly develop the traffic to and from and on the same; secondly, to work over the railway all traffic under their control, from whatever source arising, whenever it should form the shortest route for such traffic; and thirdly, to make good to the shareholders of the owning company out of the defendants' proportion of the receipts any deficiency

in realising a dividend of 4 per cent. on the paid-up capital of the owning company. [*The Commissioner then dealt with the first and second obligations, with which this report is not concerned.*]

With regard to the third obligation, whereby the North British Company guarantees the dividend on the paid-up capital, I am quite unable to follow Mr Cooper in the long argument which he addressed to us with a view to establish that the defendants were under no legal liability to make up the deficiency in the revenue under articles 7 and 8 of the agreement. I see no ground for his contention that the applicants exceeded their statutory powers in entering into the agreement of the 31st May 1906 with the Construction Syndicate, neither do I think there is any rational basis in fact for his allegation that the applicants acted throughout in an illegal or irregular manner so as to relieve the defendants from their liability.

It is important to note that the defendants not only carefully abstained from making, but wholly disclaimed any imputation of fraud, misrepresentation, or bad faith against the applicants. I have most carefully considered the proofs and documents in process, and I fail to find in the facts and circumstances in evidence before us the shadow of a case to support the contentions put forward by Mr Cooper. I think the transactions between the Newburgh Company and the Syndicate are characterised by the utmost good faith and fair dealing and are within the powers of their Act. His Lordship has in his opinion dealt fully with the cases that were discussed before us, and I desire respectfully to express my entire concurrence in the conclusions at which he has arrived.

We have also to determine a difference between the parties, arising under subclause 2 of article 4, as to what are the terminals which are to be deducted in order to arrive at the mileage proportion of receipts. I am clearly of opinion that the terminals here contemplated were clearing-house terminals. From the business point of view, I think any other interpretation would lead to much difficulty and confusion. The sub-clause deals with through traffic. Part of the gross revenue accruing to the applicants therefrom is their mileage proportion of receipts. Before such proportion can be ascertained the terminal companies are entitled to a deduction of their station and service terminals. These are regulated between the companies by the clearing-house on a fixed scale, and I cannot doubt that this is what the parties had in mind when the agreement was made. I think in determining what are "mileage receipts" under articles 7 and 8 the same construction should be applied. The receipts will be ascertained by first deducting the terminals on the clearing-house basis and apportioning the balance according to mileage.

I agree in the findings proposed by the learned Judge, and I am of opinion that the applicants should have their costs of these proceedings.

The defendants appealed. The appeal was heard before the Lord President, Lord Johnston, and Lord Skerrington (Lord Kinnear and Lord Mackenzie being absent) on 5th, 6th, 7th, and 8th November 1912. It was sent to be heard by Seven Judges, and was reheard on 3rd, 4th, 5th, and 6th March 1913.

Argued for the defendants—They were liable to contribute to make up a four per cent. dividend only on "the paid-up share capital" of the Newburgh Company. Art. 7 of the scheduled agreement, and similarly art. 1 of that agreement, depended on the capital being "subscribed." None of the capital of that company was "paid-up" capital. "Paid up" meant paid up in cash, just as subscription meant payment in cash—*Great Western Railway Company* v. *Swindon and Cheltenham Extension Railway Company*, 1882, L.R., 22 Ch.D. 677, Chitty (J.), at 687 (the decision was reversed on appeal but not on this point); *Arnison* v. *Smith*, 1889, L.R., 41 Ch.D. 348; *Bloomenthal* v. *Ford*, [1897] A.C. 156, Lord Herschell at 168; *Burke* v. *Lechmere and Others*, L.R., 1871, 6 Q.B. 297. The agreement between the Newburgh Company and the Construction Syndicate was *ultra vires*, in that under secs. 1 to 4 the Newburgh Company surrendered their whole powers and duties to the Construction Syndicate, who were to do and did everything except issue scrip (and that was done by the Newburgh Company at the bidding of the Syndicate), and give the statutory notice; again, under sections 7 and 8 the Syndicate were credited with £195,000 for the execution of work and acquiring of land whatever the actual cost of these might be; and again, under section 10 the Syndicate could have asked the company to issue shares at a discount, and all the shares although only one-third of the line had been made. The contract was in fact a capital contract and not a construction contract. The capital having been paid under an *ultra vires* agreement was not properly subscribed in the sense of the Companies Clauses Acts (8 and 9 Vict. cap. 17, and 26 and 27 Vict. cap. 118), and the appellants were not bound to guarantee 4 per cent. on illegally raised capital. Such a company as this could not delegate its powers to another company; thus it could not get rid of its obligation to construct or work the railway—*Beman* v. *Rufford*, 1851, 1 Simon (N.S.), 550; *Winch* v. *Birkenhead, Lancashire, and Cheshire Junction Railway*, 1852, 5 De G. & Sen. 562, Parker (V.-Ch.), at p. 579; *Johnson* v. *Shrewsbury and Birmingham Railway Company*, 1853, 22 L.J. Ch. 921. Where a railway company was created for public purposes, the Legislature must be held to have prohibited every act of the company not authorised by the incorporating statutes expressly or by fair implication—*Attorney-General* v. *Great Eastern Railway Company*, 1879, L.R., 11 Ch.D. 449, James (L.J.), at 467, 1880, L.R., 5 App. Cas. 473, Selborne (L.Ch.), at 478, Lord Blackburn at 481, Lord Watson at 486; *Ashbury Railway Carriage and Iron Company* v. *Riche*, 1875, 7 E. & Ir. Ap. 653; *Howard's Case*, 1866, L.R. 1 Ch. 561; *Gardner* v. *London, Chat-*

ham and Dover Railway Company, 1867, L.R., 2 Ch. 201, Lord Cairns at 212. And such *ultra vires* acts were null and void and could not be subsequently homologated; *Ashbury* case (*cit. sup.*), Lord Cairns at 673, Lord Chelmsford at 679, Lord Selborne at 695. The agreement was null and invalid because under it slump payments were to be made irrespective of the actual cost of construction and of acquiring the land, and this mode of employing the company's funds was not authorised in its Act—*Earl of Shrewsbury* v. *North Staffordshire Railway Company*, 1865, L.R., 1 Eq. 593, Kindersley (L.Ch), at 615 and 617; *Edinburgh Northern Tramways Company* v. *Mann*, June 26, 1891, 18 R. 1140, Lord Trayner at 1146, 28 S.L.R. 828, Nov. 29, 1892, 20 R. (H.L.) 7, Lord Herschell at p. 10, 30 S.L.R. 140; *Mason's Trustees* v. *Poole & Robinson*, May 22, 1903, 5 F. 789, 40 S.L.R. 614; *Great North West Central Railway Company* v. *Charlebois*, [1899] A.C. 114. The result of the slump payments was that a large sum was paid not for construction but for getting the capital, and that it was impossible to check expenditure. The Newburgh and North Fife Railway Act 1897 (60 and 61 Vict. cap. ccxxi), sections 6, 8, 9, 11, 13, 14, showed that it was not contemplated that the company should issue its shares except for money, and no power to issue shares except for money was given by the Companies Clauses Act 1845 (8 and 9 Vict. cap. 17). They referred to sections 6, 8, 14, 17, 19, 20, 22, 37, and 39. In section 8 the words "or shall otherwise have become entitled to a share in the company" did not imply or confer a right to give shares for other than money; they referred to specified modes of transmission of shares by marriage, bankruptcy, and transfer. Unlike the companies under the Companies Acts, companies under the Companies Clauses Acts could not issue shares even for money's worth, for Parliament prescribed the amount of capital to be expended in certain specific ways. Even if money's worth was allowable there must be full present value—*Pellatt's* case, 1867, 2 Ch. 527, followed in *National House Property Investment Company, Limited* v. *Watson*, 1908 S.C. 888, 45 S.L.R. 712. Here the shares were not issued for money or full money's worth but at a discount. It was illegal for a company limited by shares to issue shares at a discount—*Ooregum Gold Mining Company of India* v. *Roper*, [1892] A.C. 125; *Klenck* v. *East India Company for Exploration and Mining, Limited*, December 21, 1888, 16 R. 271, 26 S.L.R. 261; *Trevor* v. *Whitworth*, 1887, L.R., 12 App. Cas. 409; *Mosely* v. *Koffyfontein Mines, Limited*, [1904] 2 Ch. 108; *Hoole* v. *Great Western Railway Company*, 1867, L.R., 3 Ch. 262; *Dominion of Canada General Trading and Investment Syndicate* v. *Brigstocke*, [1911] 2 K.B. 648. The same reasons for holding that companies under the Companies Acts were not able to issue shares at a discount applied equally to companies under the Companies Clauses Acts. Section 21 of the Companies Clauses Act 1863 (26 and 27 Vict. cap. 118) gave a company formed under the Clauses Act power to dispose of new shares (or stock) on such terms and conditions as the directors might think advantageous to the company, but so that not less than the full nominal amount of any share should be payable in respect thereof. Section 27 of the Railway Companies (Scotland) Act 1867 (30 and 31 Vict. cap. 126) removed the prohibition against issuing new shares at a discount and thus authorised new shares to be issued at a discount. The implication from this was that original shares on the other hand could not be issued at a discount. Accordingly they submitted that *Statham* v. *Brighton Marine Palace and Pier Company*, [1899] 1 Ch. 199, was wrongly decided. Reference was also made to sections 93 and 94 of the Companies Clauses Act 1845 (8 and 9 Vict. cap. 17), and to section 17 (4) of the Railway and Canal Traffic Act 1888 (51 and 52 Vict. cap. 25).

Argued for the applicants and respondents—The agreement with the Syndicate was an honest agreement and within the powers conferred on the Newburgh Company by their Act. Moreover, the North British Railway were informed of the agreement with the Syndicate, and had thereafter withdrawn their opposition to an application for extension of time. Further, they were sub-contractors to the extent of £5000. Article 1 of the scheduled agreement was the counterpart of article 2, and the qualification of the capital being subscribed was a qualification of the obligations of the Newburgh Company and not of the obligations of the North British Railway Company. Of the agreement with the Syndicate, sections 6, 7, 8 merely provided a method of arriving at payments to be made to account. The appellants could not use section 10 in support of their argument of *ultra vires*, because in fact the capital had not been raised in that way. Sections 3, 4, and 13 were probably wider than ordinary construction contracts but were not *ultra vires*. It was difficult to see how there could be delegation in construction. No railway company built its own line. They had not delegated their powers in the sense of the cases cited against them, which were all cases of a company selling or leasing their powers to another company, with the exception of *Howard's* case, which was a case of directors delegating their powers of accepting a conditional offer for shares. The remark of James, L.J., in *Attorney-General* v. *Great-Eastern Railway* (*cit. sup.*) at p. 467, was made in the course of argument and was of no authority. There was no reason why they should not get the land, &c., by slump contract. They were allowed by the Lands Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 19), to get them by "agreement," and it might well be that the Construction Syndicate could get the land cheaper for the company than the directors could. The cases cited on this matter were not against the legality of slump payments; they were all cases of giving money for nothing, or for purposes not authorised; thus in *Earl of Shrewsbury* (*cit. sup.*) there

was devotion of capital to purposes outside those of the Act—in fact really a "tip" to Lord Shrewsbury; in *Edinburgh Northern Tramways Company* v. *Mann* (*cit. sup.*) there was an abuse of promoters' fiduciary position—the taking of money for undisclosed services; *Mason's Trustees* v. *Poole & Robinson*, was also a case of taking money for nothing. They did not dispute the law of *Great North-West Central Railway Company* v. *Charlebois* (*cit. sup.*), that promoters could not give bonuses. Here the Commissioners, who were final on fact, were with them that the bargain was an honest one and the best they could make. Further, in practice a "contractor's" line was a well-known thing, and had been taken judicial notice of in *Ystalyfera Iron Company* v. *Neath and Brecon Railway Company*, 1873, L.R., 17 Eq. 142, Jessel, M.R., at p. 148. Just as any *bona fide* transaction between a company and a shareholder which would be a good defence in an action for payment of calls, was "payment in cash" within the meaning of section 25 of the Companies Act 1867 (30 and 31 Vict. cap. 131)—*Spargo's* case, 1873, L.R., 8 Ch. 407—so it was also settled that companies under the Companies Clauses Acts could issue shares for other consideration than actual cash—*Webb* v. *Shropshire Railways Company*, [1893] 3 Ch. 307, Lindley, L.J., at 329, and shares so issued were "subscribed" and "paid up" within the meaning of the Companies Clauses Acts and of the scheduled agreement. The words "or shall otherwise have become entitled to a share" in section 8 of the Companies Clauses Consolidation (Scotland) Act 1845 (8 Vict. cap. 17) covered the case of shares being issued for other consideration than actual cash, and this was treated by that section as "subscription." *Arnison* (*cit. sup.*) did not supply a dictionary meaning for "subscribe," but merely decided that where A, B, and C were invited to take shares on the faith that X and Y had "subscribed," they were entitled to believe that X and Y had subscribed in the same way as they were asked to do. Moreover, while maintaining that the shares in the Newburgh Company had not been issued at a discount, they submitted that it was permissible for companies under the Clauses Acts to issue shares, both original shares and new shares, at a discount provided no better price could have been got—*Statham* (*cit. sup.*)—and the same had been held of original stock—*Webb* v. *Shropshire Railways Company* (*cit. sup.*), Lindley on Companies, 6th ed. vol. i, p. 549. The Companies Clauses Act of 1845 made no distinction between lawful modes of issuing original and new shares, and the removal of the prohibition in section 21 of the Companies Clauses Act 1863 against issuing new shares at a discount by section 26 of the Railway Companies (Scotland) Act 1867 would have achieved nothing unless under the Clauses Act of 1845 it were permissible to issue shares at a discount. The shares, however, had not been issued at a discount, and in judging of this the Court should not critically examine the consideration given, for, as held by the Commissioners, the company had honestly regarded the consideration as equivalent to the nominal value of the shares—*Ooregum Gold Mining Company of India, Limited* (*cit. sup.*), Lord Herschell at p. 140; *in re Wragg, Limited*, [1897] 1 Ch. 796, Vaughan-Williams, J., at 815, Lindley, L.J., at 829—and it was also to be remembered that payment of reasonable brokerage and commission in placing the shares was a justifiable charge—*Metropolitan Coal Consumers' Association* v. *Scrymgeour*, [1895] 2 Q.B. 604.

At advising—

LORD JOHNSTON—Under the reference contained in article 14 of the agreement between the North British Railway Company and the promoters of the Newburgh and North Fife Railway Company, which was scheduled to the Act of the latter company passed in 1897, and by its 42nd section confirmed and made binding on the company, two main questions were submitted by the parties to the Railway Commissioners. The first, which embraced a large number of matters of detail, was, speaking generally, whether the North British Company, in fulfilling the obligations undertaken by them to work the North Fife Company's line, were developing the traffic of the line in the spirit of the agreement. The second related to a "difference as to the amount of the paid-up share capital" of the North Fife Company towards the payment of the dividend on which the North British Company were bound to contribute.

The Newburgh Company maintained that the amount was £180,000, being the whole authorised share capital of the company, which they contended was issued and paid up.

The North British Company, admitting that the question of their liability or non-liability to do so was matter of arbitration under the scheduled agreement, and therefore within the jurisdiction of the Commissioners to decide, maintained that in the circumstances and for the reasons advanced by them they were under no liability to contribute towards payment of dividend on the whole share capital of the Newburgh Company.

But they further maintained that if they were not so liable it was not within the jurisdiction of the Commissioners to determine whether they were liable to contribute any sum to make up any dividend on a smaller amount of the share capital of the Newburgh Company, or to fix and determine any capital of the Newburgh Company towards payment of the dividend on which they were bound to contribute.

The second question therefore involved the determination of the meaning and effect of the undertaking of the North British Company to supplement, if necessary, the sources of revenue for payment of a stated dividend on the "paid-up share capital" of the North Fife Company.

The first question is not within the appeal

to us. That appeal is entirely limited to the second question. In order to understand it it is only necessary to say that the North British Company, by the agreement above referred to, undertook to work the North Fife line for 50 per cent. of the gross revenue of the North Fife Company, as "gross revenue" is defined in article 4 of the agreement, and to hand over the balance of 50 per cent. to or for behoof of the North Fife Company. Out of their 50 per cent. the North Fife Company were to pay (art. 5) sundry items, including interest on debenture stock and other borrowed money. The balance of their 50 per cent. is the "nett revenue" of the company; and (art. 7) "if the nett revenue" accruing to "the North Fife Company is not sufficient to pay a dividend of 4 per centum per annum on the paid-up share capital" of the company, the North British Company are to contribute *pro tanto* what is necessary to make up the deficiency out of two sources of revenue. These are defined (arts. 7 and 8), and without going into details I may say that they are both derived directly or indirectly from traffic originating in or passing over the North Fife line.

This is not a guarantee of a 4 per cent. dividend pure and simple. Its value is contingent, depending on actual traffic. But it was regarded by those concerned, on the advice of experts, as practically amounting to a 4 per cent. guarantee, and was, I think, so intrinsically of the nature of a guarantee that it must be judged of on the same footing as if it was an absolute guarantee, that is, with strictness. It was an obligation to contribute towards dividend on the North Fife stock out of funds which if not called upon would remain in the coffers of the North British Company and be available for its purposes; and I cannot distinguish in its essence between such obligation and a proper guarantee. I desire to emphasise this, because the consideration appears to me to have been overlooked by the Commissioners.

Such being the obligation of the North British Company, the real question at issue is, What is "paid-up capital," not merely *per se*, but in the sense of the agreement?

Is it, as maintained by the North British Company, capital subscribed and paid up in the ordinary sense of these terms. Is it in fact capital raised on a cash basis? or is it, as maintained by the North Fife Company, capital not subscribed for, not paid up, but raised by being issued in block to an intermediary in consideration of his undertaking the risks and obligations of the promoters and of the company in obtaining the Act and in getting the line completed, with right to the intermediary to place the capital on the market on such terms as he pleased—in other words, capital raised on a basis other than cash?

When the case was first before the Judges of the First Division, I came without difficulty to the conclusion that on a consideration merely of the terms of the contract the contention of the North British Company was sound and that the Commissioners had come to a wrong conclusion. A further discussion of the case, and a more close examination of the history and nature of the transaction by which the capital of the North Fife Company came to be issued or raised, has not only confirmed my first view, but it has also impressed me with the importance of the question at issue, and the dangerous consequences which may ensue if the contentions by which the North Fife Company have supported their case are to receive the *imprimatur* of the Railway Commissioners and of this Court.

It is necessary, therefore, before considering the documents on which I think the question depends, first to state as clearly as possible how the nominal capital of the North Fife Company was raised.

The project of the North Fife promoters was a line from St Fort to Newburgh to link the North British Tay Bridge route with their original line from Ladybank to Perth *via* Newburgh. The promoters were no doubt locally interested, but they were counting on the competition between the North British and the Caledonian. They regarded their line as of importance to the North British in this competition. It was at the time to a certain extent so regarded by the North British Company. Hence the agreement which we have to construe. It was made and the North Fife Act passed in 1897. But even with the *quasi* guarantee of the North British, the promoters failed to get anyone with capital to look at their shares. I do not think the North British Company were particularly anxious on the subject, for though they looked benevolently on the promoters and gave their concurrence to two extensions of time being obtained, they made no objection that the line was still not commenced in 1900. In that year the solicitor of the promoters, who really, one can see, was the soul of the promotion, came into touch with a firm of Arbuthnot, Latham, & Company, a financial house in London—they are described as "an accepting house"—and thereout sprang a further agreement under which the North Fife line was ultimately made.

I am of opinion, contrary, I think, to some of the Commissioners, that we are bound to look behind the contract which came to be made between the North Fife Company and Messrs Arbuthnot, Latham, & Company. It may be that having entered into a pooling arrangement with the Caledonian in the end of 1907, the North British have ceased to have any interest in the North Fife line, and that since it was opened in 1908-9 the North British Company have acted very far short of the spirit of their undertaking of 1897, and have starved instead of developed the traffic of the North Fife line. But as they are bound to develop the traffic within the spirit of the agreement, so the North Fife Company were bound to issue their capital within the terms of the agreement if they are to exact the contribution in guarantee of their dividend.

What, then, was the position created in

1906 by the agreement between the North Fife Company and Messrs Arbuthnot, Latham, & Co.? By that time the promoters had become hopeless of raising capital themselves. They had failed to interest any other capitalists. Accordingly they then entered into an agreement with Arbuthnot, Latham, & Company (under the guise of the Engineering Electric and Construction Syndicate, Limited), the true meaning and effect of which was, We hand you over our whole share capital and all our powers under our Act, and you undertake to construct and complete our line.

It was well known, and was the basis of the agreement, that Arbuthnot, Latham, & Company were a financial firm. But they were of good standing, and the promoters of the North Fife line took steps to satisfy themselves that they were financially able to carry out what they undertook. In fact what the North Fife promoters bought or acquired under the contract of 1906 was Arbuthnot, Latham, & Company's credit, and of course they paid for it. I do not like to say that they sold their Act to Arbuthnot, Latham, & Company, because in the expression there is an invidious imputation of personal interest. And I should wish to say, with Sir J. Woodhouse, that "the transactions between the Newburgh Company and the Syndicate are characterised by the utmost good faith and fair dealing," though I must add *inter se*, and cannot follow his lead when he says "and are within the powers of their Act." Were it necessary for my judgment I would be prepared to hold that they were not within their power under their Acts. But it is not, in my opinion, so much a question of their powers under their Act, as of what was in the contemplation of their agreement with the North British Company. It is here that I find myself obliged to part company with the Commissioners. They have, I think, mistaken the issue. What the North Fife Company did was not, in my opinion, within the contemplation of that agreement. In point of fact, what the promoters did, though I do not use the expression invidiously, was in effect to sell or assign their Act, for they put Messrs Arbuthnot, Latham, & Company precisely in their position under the Act, though they coupled this with an obligation on their vendees or assignees to complete the line. But Arbuthnot, Latham, & Company, though nominally the contractors, never intended to construct the line themselves. They were to employ proper constructional contractors, and in point of fact had in their pockets an offer to execute the work from the contractors who ultimately undertook it. And they were placed in command of the whole share and debenture capital of the company, subject to its being doled out to them proportionally to the progress of the work. It was on their ability, first, to contract on cash terms for the construction of the line, and second, to place, at least on terms, the share capital of the company with their clientele, that they relied for their profit. They had the credit and the connection which gave them that ability. The promoters had neither. Hence I think it absolutely true that what the promoters acquired was the credit of Arbuthnot, Latham, & Company, and with it, if it proved as good as they were advised, the completion of their line, and that what Arbuthnot, Latham, & Company acquired in return was the whole capital of the company under the Act, to make the best they could of—and their profit depended on the terms of the cash contract they were able to make for the construction of the line, and the terms on which they were able to place the company's capital on the market. As to both they had a perfectly free hand.

The promoters thought they had done a good stroke of business in enlisting Arbuthnot, Latham, & Company to do what they were quite unable to do themselves, viz., make their Act march. They seemed to have thought that they had obtained an Act to enable them to make a line of railway; that their business was to make it; that they were taking the only way which, in their circumstances of credit and with the line's prospects, was open to them to attain that end; that in the result the railway was made, completed, and opened; and that there the matter ends. I cannot help thinking that this was very much the view of the Commissioners. But the question between the North Fife Company and the guarantors of dividends on their capital is not quite so simple as this mode of presenting it would suggest. There are, as I have already noticed, two other considerations—first, Was this method of proceeding warranted under the North Fife Company's Act? second, Was it such as to bring into operation the guarantee obligation of the North British Company under the scheduled agreement of 1897?

I have given the general result of this agreement between the promoters and Messrs Arbuthnot, Latham, & Company, and I only intend to refer to it in detail so far as necessary for this judgment. For there is an immense amount of material even in this branch of the case which must be avoided if any pretence of brevity is to be attained. I have purposely spoken of the promoters and not of the company, for I think that there is a grave question whether the company, though created by statute, had in 1906 yet come into existence, and as to the validity of a good many of the earlier actings of those who assumed to represent the company. But I do not desire to cumber this judgment with any question not necessary for the decision of the case, and I shall assume that the agreement was made by a properly constituted board of directors of an existing company. Also I have spoken of Messrs Arbuthnot, Latham, & Company as the real contracting parties; but they created as an intermediary *ad hoc* the Engineering Electric and Construction Syndicate, Limited, for good reasons, fully explained. This Syndicate was just their *alter ego*, and the ostensible transaction in 1906 was between the North Fife Company and the Syndicate?

On its face the contract was a contract to construct a single line of railway, with land and bridges for a double line, intended to comply with the company's Acts and their agreement with the North British. The contractors undertook not only (1) to construct the line, but also to pay or provide (2) the legal and parliamentary costs of the Act; (3) the legal costs incurred by the company during construction of the line; (4) a sum of £4400 for the administrative expenses of the company; and in addition (5) to pay for all land required, subject to a right to any surplus land. I should have mentioned that the capital of the company was £180,000 in 18,000 £10 shares, with a borrowing power of £60,000, in all £240,000, and that it was open to them to issue £60,000 of their share capital in preference shares. In consideration, then, of these undertakings, article 6 of the agreement provided that the company should pay to the contractors £240,000, exactly the amount of their share and debenture capital, "of which £109,400 shall be paid in ordinary shares of the company, £60,000 in preference shares, and £60,000 in 4 per cent. debenture stock of the company, and the remainder, namely, the sum of £10,600 in cash."

The history of this £10,600 is worth pursuing. It had a double origin. In the first place, the Act, sec. 16, required as a quorum for general meetings five shareholders holding not less than £10,000 of the company's capital. In the second place, there was required in cash for the expenses of the Act and for the costs of administration during construction a sum of about £10,600. Accordingly, with the idea of legalising their proceedings and to produce this sum, 1063 shares were subscribed and paid for in cash, producing £10,630, and these were the only shares which were ever subscribed in the ordinary way, and this was the only cash which ever came into the coffers of the company; and it was immediately turned over to the Syndicate under the agreement in order that they might implement their cash obligations to the company. The amount was provided to the extent of £1500 by the subscription for qualification shares by five directors, to the extent of £9100 by members of the firm of Arbuthnot, Latham, & Company, and of the balance of £30, for some unexplained reason, by three officials each taking a share; and it is not a little remarkable that in the end, when the rest of the capital was disposed of by the Syndicate at much below par, it was thought not only just but competent to place the partners of Arbuthnot, Latham, & Company *in pari casu* with those who acquired the remaining shares by giving them, *ex post facto*, an equivalent rebate.

But the provision of the contract to which I wish to draw particular attention is contained in the seventh and following sections. The contract price of £240,000 was arbitrarily divided into £195,000 for works and maintenance, and £45,000 for land and parliamentary and other costs. Then a schedule of prices was to be made out by the Syndicate or contractors, subject to the approval of the company's engineer, under which, irrespective of real values, the costs of the works and maintenance should work out at £195,000, and such schedule of prices was to be the basis on which the valuation for payments to account as the work proceeded should be made.

In the same way the remaining £45,000 was to be divided into £15,000 to be attributed to the element of costs and to be met at once by payment in ordinary shares, and £30,000 to be attributed to land and to be doled out along with the monthly payments for works in proportion to the acreage, not the value, of land taken, as compared with the total land required.

But an astute attempt was made to legalise the transaction, or make it square with the assumption that share capital can, under an Act embodying the Companies and Railways Clauses Acts, be issued in return for work done.

I have shown how the "contract sum of £240,000" was (art. 7) to be artificially divided and attributed proportionally to the value of work from time to time completed and the acreage of land taken. At the expiry of each calendar month the engineer was to estimate the value of work executed, &c., during the month; and in estimating that value he was to "have regard to the division of the contract sum mentioned in the preceding clause hereof," and a schedule of prices was, as already stated, to be made out irrespective of real value under which the execution of the work, including maintenance, "shall work out at £195,000, and such schedule of prices shall be the basis on which the valuation of payments on account is to be made." For the value of work so estimated, &c., the engineer's certificate was to be issued to the Syndicate as contractors. Then, section 9, the amount of the engineer's certificates was to be paid by crediting the amount of each certificate on or by the issue as fully paid to the contractors or as they might direct of the shares, ordinary or preference, and the debenture stock in such proportions as should be within the company's legal powers. To which intent certificates of indebtedness were to be issued by the North Fife Company for the amount of the engineer's certificates in order that the amount of these certificates of indebtedness might be converted into the shares or debenture stock to cross which they had been issued.

To complete the statement of facts I have only to add that at the time this agreement was made between the North Fife Company and the Syndicate, the Syndicate had provided themselves with constructional contractors, ready to make the line on a cash basis of something like £160,000—it is unnecessary in my view to go into more accurate calculations—and that the Syndicate had in view the marketing of the shares in blocks of £12,000, as they actually did, on terms that the takers must accept £6000 ordinary along with £3000 preference and £3000 debenture stock at an overhead

price of 80 per cent., though their scheme was generally expressed as if preference and debenture stock were taken at par and ordinary at 60 per cent., which works out to the same thing. The result was a realisation of the company's capital at a rebate—for I cannot call it a discount—of something like £50,000.

In these circumstances the Railway Commissioners have determined that the amount of the paid-up share capital of the North Fife Company towards payment of the dividend on which the North British Railway Company are bound to contribute is £180,000, being the whole authorised share capital of the company.

In this determination I think that the Commissioners' judgment is not well founded.

We have had a very able and learned argument on this part of the case and a very exhaustive citation of authority, but much of it has been, I think, beside the point. There was a long discussion, for instance, on the question whether a company created by special Act, incorporating the Companies Clauses Acts, could issue its stock at a discount. I do not think that the North Fife Company has established that general contention. I do not propose to enter on its discussion at length. I content myself by saying that the contention is in the teeth of the terms of the company's Special Act and of the Companies Clauses Acts of 1845, 1863, and 1869, and is supported only by the general rubric of the much canvassed case of *Webb* v. *Shropshire Railway Company* ([1893] 3 Ch. 307), whereas a perusal of the case itself shows that its circumstances do not support the general rubric, for they were special, almost unique, while the terms of the Act in question were adapted solely to suit those special circumstances. Even Romer, J., who appears to have held personal views on the general question hitherto unsupported, which he adumbrates in *Webb's* case, and to which as Judge of first instance he gave effect in the *Brighton Marine Palace* case ([1899] 1 Ch. 199), in *Webb's* case admits that the general considerations "do not apply to this case at all." The opinion of Lord Shand in *Klenck's* case (16 R., at p. 280) is also prayed in aid by the North Fife Company. That opinion, if it be sound, does not touch the general case which we have here. It is only that "apparently in certain limited cases the shares of railway and other companies which have adopted the Companies Clauses Acts may be issued at a discount." This is not one of these limited cases (*cf.* Lord Macnaghten in *Ooregun Gold Mining Company*, L.R. [1892] A.C. at 146). But I do not think that the North British Company are concerned with this question. For, first, it is impossible to describe the transactions regarding the capital of the company, when analysed, as the issue of stock or shares at a discount. And in the second place, I do not think that the North British Company are entitled directly to raise it. It is one for the shareholders *inter se*, or for the creditors, should the equivalent of a winding-up prove necessary and possible.

What the North British Company are concerned with, but what has in the argument been rather lost sight of, is the interpretation and enforcement of an agreement.

I have already dealt with the essential provisions of that agreement, but it must be noted that it was a provisional agreement—provisional on the Act passing and the line being made under the Act. Thus article 1 says that "in the event of an Act being obtained and the capital being subscribed" the North Fife Company, shall, as soon as convenient, purchase the land, and make, construct, and complete the line; article 2, that "upon the construction and completion and opening" of the entire line, the North British Company shall work it; article 4, that the North British Company shall collect the "gross revenues" of the line, and "shall be entitled to retain 50 per cent. thereof as their remuneration, and shall pay over the balance of 50 per cent. to the North Fife Company; article 5, that out of this balance the North Fife Company shall pay certain recurring claims, which commonly fall upon a company such as it; articles 7 and 8, that "if the net revenue accruing to the second parties (the North Fife Company) is not sufficient to pay a dividend of 4 per cent. per annum on the paid-up share capital" of the company, the North British Company shall contribute to make up the deficiency out of certain specified sources.

To the expression in article 1, "In the event of . . . the capital being subscribed," and to the expression in article 7, "On the paid-up share capital," I am only able to give that meaning which the ordinary use of language demands. When a man is said to "subscribe" for capital in a company, and there is nothing in the document to qualify the expression, the expression imports that he undertakes to pay his subscription in cash, and so when the share capital is spoken of as "paid-up share capital," the expression imports that it has been paid up in cash.

There is nothing in the agreement in question to qualify these expressions, but there is something which leads directly to support the ordinary construction. The agreement is dependent on an Act being obtained, and it is entered into with reference to that Act and in reliance on its terms. When one turns to that Act it is found that the preamble narrates the obligation of the North British Company under the scheduled agreement to contribute, if necessary, to make up a dividend of 4 per cent. on the "paid-up share capital" of the North Fife Company. And when the sections of the Act are examined, I do not think that there can be the slightest doubt that "paid-up share capital" means capital divided into shares, and, so far as paid up, paid up in cash. Section 6 says that the capital shall be £180,000 in 18,000 shares of £10 each, and that the company may raise any sum not exceeding £60,000 of the said

capital by the creation and issue of preference shares, provided that no such preference shares shall be created or issued until the Sheriff certifies that a like sum of £60,000 of the said capital has been issued as ordinary share capital and accepted, and *one-half therefore has been paid up.*

Again, section 8 says that the company shall not issue any share under authority of the Act, nor shall any such share vest in the person accepting the same until a sum not less than one-fifth of the amount of said share is paid in respect thereof.

Again, section 9 says that a fifth of the amount of a share shall be the greatest amount of a call, that two months at least shall intervene between successive calls, and that three-fourths shall be the utmost aggregate of calls made in any year.

Again, with regard to the exercise of the borrowing powers conferred, section 11 says that "no such sums shall be borrowed until £60,000 (being one-third share of the capital of £180,000) is issued and accepted, and one-half thereof is paid-up in respect of each" sum of £20,000, which goes to make up the £60,000, to which the borrowing powers are limited.

Lastly, section 14 says that "all moneys raised under this Act, whether by shares, debenture stock, or borrowing, shall be applied only to the purposes of this Act, to which capital is properly applicable."

I do not propose to enter on an examination of the Companies and Railways Clauses Acts of 1845 *et seq.* It is, I think, sufficient to say that in their every provision they consist with and would lead to the same conclusion as the company's Special Act of 1897 does.

When these provisions of the Special Act of 1897 and of the general Acts incorporated therewith are referred to, there cannot, I think, be the slightest doubt that when the parties contracted by the scheduled agreement that in the event of an Act being obtained and the capital being subscribed the North Fife Company should purchase the land and build the line, and that the North British Company should contribute to make up the deficiency of net revenue to pay a dividend of 4 per cent. on the paid-up share capital of the North Fife Company, parties were dealing, as regards the North British Company's guarantee, on a cash basis, and nothing but a cash basis. It is not conceivable that any company or individual would have undertaken such a guarantee on any other condition, for to read the agreement as the North Fife Company now seek to read it would be to assume the North British Company to undertake an indefinite guarantee, the onerosity of which would depend, not merely on the costs of the construction, which they could estimate, but on the credit of the North Fife Company, which they could not, because it would become a guarantee of dividend upon a capital liable to be watered according to the necessities and at the discretion of the North Fife Company. The probabilities of the situation are, of course, no conclusive indication, of the intention of the agreement, but when they consist with its terms, they cannot, I think, be left out of sight.

The argument for the North Fife Company must then come to rest on their contention that a great deal of water has flowed through Westminster Bridge since the company and railway legislation of 1845; that we have become accustomed to the practice of what are styled contractors' lines; that innumerable small lines have been in use to be made on contracts based not on cash but on shares; and that everyone, including the Legislature sitting at Westminster, knows this, and legislates and contracts accordingly. I have always understood that what ninety-nine people do without legal warrant does not become legally warrantable to the hundredth, and I should be very much surprised to learn that Parliament in 1897 had any idea, when they were passing an Act authorising the making of a railway, containing the usual anxious and stringent clauses relating to the creation and issue of capital, such as the one in question, that they were authorising the exercise of compulsory powers and the dealing with share capital in the way which has been here adopted, and that anyone dealing with the promoters or with the company must be held to have dealt with that knowledge and in view of such a possibility. The bare suggestion is to impute to the Legislature the folly of continuing a practice which had ceased to have any meaning, and the dishonesty of sending forth statutes containing specious clauses which they know to be empty words.

But the North Fife Company have, I think, entirely failed, though they made every endeavour to prove such a practice.

I think that what I have just indicated was the real case attempted to be made by the North Fife Company when driven to their last line of defence. There is, so far as I know, no case which directly raises this question, and only one which can be said indirectly to raise it, viz.—that of *Rixon* v. *Edinburgh Tramways Company* (18 R. 264, and L.R. [1893] A.C. 636). Undoubtedly in the last end of a series of most complicated transactions there was evolved a contract for construction of the balance of a line of tramways for payment in shares, based not on the face value but on the speculative and depreciated market value of the shares. I do not disguise the fact that the Court assumed the competency of such a contract. But the point now at issue was not raised, and though it might and should have been raised, I cannot, particularly having in view the judgment of the House of Lords, regard it as a considered judgment on the point in question. No reference was made either to the company's Special Act or to the Companies Clauses Acts of 1845 *et seq.*

It may be asked, how comes it that so-called "contractors' lines" have come to be made without challenge. I think the answer is plain. The conception of the transaction indicated by the phrase involves a fraud on the Legislature indeed, but in circumstances in which no one has both title and interest to challenge. It is only

where abnormal circumstances occur, as here, that challenge is possible.

The North Fife Company endeavoured to present their agreement with the Syndicate under the guise of payment in shares for work done, and to pray in aid the authority of cases decided under the Registered Companies Acts of 1862 *et seq.* The attempt is specious. But even if the analogy holds, which I doubt, the substratum of fact fails, as I trust the analysis which I have made of the real terms of the transaction between the North Fife Company and the Syndicate has shown. There was no true payment in shares for work done, even in the sense of the authorities founded on. For there can be no doubt that in registered companies shares can only be issued on a cash basis, and to be paid in money or else in money's worth. It is true that the Court will not if there is a valid contract by the company for the acceptance of something of substantial value, as money's worth, inquire strictly into the adequacy of the consideration (*in re Wragg*, L.R. [1897] 1 Ch. 796). Yet "the cases decide that a man must really pay for the shares. And further, that if the contract makes it manifest on its face that the taker of the shares is paying less than their nominal cash value, he may be liable for the balance" (Vaughan Williams, L.J., in *Mosely's* case, L.R. [1904] at p. 114).

It is of the essence of such a transaction that as the claim of the company is on a cash basis, so the value of the consideration given by the shareholder is a cash value. No case has occurred, and on the principle of the cases founded on no case could, I think, occur, in which the depreciated value of the share as a marketable article is set against the actual value, as estimated by the parties, of the work done, services rendered, or material supplied, or in which the value of the latter is on the face of the contract artificially inflated in order to exhaust the nominal value of the shares. Take it either way, that is precisely what has been done here.

For these reasons I have come to the conclusion that the method of proceeding adopted in 1906 by the North Fife Company, in the first place, was not warranted under that company's Act of 1897, and, in the second place—and this is sufficient for the decision of the case—was not such as to bring into operation the guarantee obligation of the North British Company under the agreement between them and the North Fife Company scheduled to that Act.

On this branch of the inquiry, therefore, I think that the order of the Railway Commissioners was wrong, and that their declaration that according to the true construction of articles 7 and 8 of the scheduled agreement "the amount of the paid-up share capital of the applicants towards payment of dividend on which the defendants are bound to contribute, is £180,000, making with a debenture issue of £60,000 a total of £240,000," should be recalled, and that a consequent modification should be made in their finding of expenses.

Having thus determined, so far as I am concerned, that the order of the Railway Commissioners was wrong, it remains for consideration whether it is competent for the Commissioners, if the case be remitted to them, to do anything further under the reference, and if so, what? I refer to what I have said at the outset of this judgment as regards the attitude of the North British Railway Company in the event of the Commissioners being found to be wrong, upon which no judgment has or could have been yet given.

I would remind your Lordships that the scheduled contract contains a provision (section 14) to the effect that "all questions which may arise between the parties hereto in relation to this agreement or to the carrying out of the same shall be referred to arbitration under and in terms of the Railway Companies Arbitration Act 1859."

Under the Regulation of Railways Act 1873, section 8, and the Railway and Canal Traffic Act 1888, section 17 (2), it is competent to bring in the Railway Commissioners as arbiters in place of special arbiters, with appeal to this Court (see *North-Eastern Railway Company* v. *North British Railway Company*, 25 R. 333). According to the practice of the Commission no deed of submission is required defining the question to be submitted, and exactly limiting *a priori* the functions of the Commissioners as arbiters. The practice apparently is to commence such proceedings by an application and answers, and from these papers for the parties the questions at issue appear. In their paper in this case the Newburgh Company, having stated that their authorised capital was £180,000, that the whole of it was created and issued, and that the value thereof amounted to £180,000, maintained and claimed that the paid-up share capital towards payment of the dividend on which the defendants the North British Railway Company were bound to contribute, amounted to £180,000. At the same time they conceded that the defenders countered their contentions, and they therefore applied to the Court for an order determining, *inter alia*, the difference which had arisen between the applicants and the defendants "as to the amount of the paid-up share capital of the applicants towards payment of the dividend on which the defendants are bound to contribute." But there arise on this statement and on the counter-statement of the defendants, to which I formerly adverted, these questions:—

First. Is the paid-up capital of the Newburgh Company, on which the North British Company are bound to contribute to pay dividend in the sense of the scheduled agreement £180,000? That question I am prepared to decide in the negative.

Second. Is the paid-up capital in the sense of the agreement any less sum than £180,000?

Third. Though the share capital of the Newburgh Company may not in the sense of the agreement be either £180,000, or any less sum, ought not the North British Company, on equitable principles, to con-

tribute towards payment of a dividend on something which may be termed, for shortness, a *quantum meruit*?

Fourth. Are either the second or the third questions, or both, within the jurisdiction of the Commissioners to decide?

I take the fourth question first. I remain of the opinion which I stated in the former case between these parties, reported 1911 S.C. 710, that the third question is outside the contract, and therefore could not be disposed of by the Commissioners as arbiters. It assumes no liability under the contract, but a liability outside the contract.

I think, further, that the second question is not really within the reference either, because it is truly not a question under the contract, but just in another guise a reference to equitable considerations. The conclusions which I have already reached involve this proposition, that the capital of the company has neither been issued nor paid up in the sense of the contract. In a sense it has been issued. Personally I do not think that it has been legally issued. But I accept that the parties to this case have neither the title nor the interest to try that question. How, then, has it been issued? It has, except as to £10,000 or thereby, been dealt out to the Electric Syndicate on a fictitious, not on a cash basis, proportionally to the work done by a subsidiary contractor. The Syndicate have marketed it to purchasers, who are now the shareholders, for what they could get, which works out at something about, say, 80 per cent. of its face value, throwing in the debenture stock issue. It will not stand in the sense of the contract as issued and paid up in the hands of the shareholders at its face value. It never was properly subscribed even in fact. But, passing over that difficulty, how are you to ascertain any other value than its nominal value, at which it is to be taken for the purpose of the contract? It is said it has been issued in respect of work done, and can be held as paid up, in the sense of the contract, to the extent of the real value of the work done. How is that to be ascertained? It can only be so in one of two ways. Either you must take the price at which the Syndicate, who got the stock, actually sold it to finance the venture on which they had entered, or you must ascertain, independently of that Stock Exchange transaction, what the Syndicate can show to have been the real cost of the work when reduced, as it can from the books of the Syndicate be reduced, to a cash basis. Now it appears to me that neither of these operations are operations under the contract. The contract has been broken, or perhaps, more properly stated, the conditions of the contract on which the guarantee of dividend becomes enforceable have not been complied with. We should, if we sent the case back to the Commissioners, be remitting to them to do something which is not within their jurisdiction, viz., to find on equitable considerations a figure which is to be substituted for the figure which should have been ascertainable under the contract but cannot be so. Though I regret it, I am obliged to say that except of consent of parties the Commissioners have no jurisdiction to entertain the question which remains between the parties, the second and third which I have indicated above, or either of them, and that we have no jurisdiction to remit to them to do so.

But should your Lordships on this branch of the case be of a different opinion, I should gladly acquiesce. Though the matter is not strictly before me for decision, I must say that, as at present advised, I think that there is room in equity for fixing a *quantum meruit* based on the actual or cash costs under the sub-contract, plus a reasonable brokerage for the issue of stock, such as was recognised in the case of *Metropolitan Coal Consumers' Association* (L.R. 1895, 2 Q.B. 94), and cases there referred to and distinguished, and plus proper administrative charges during construction, but not including any allowance for the remuneration of the Syndicate for their intervention. I am of this opinion, because the scheduled contract is a many-sided one. It must be assumed to have been entered into, so far as their guarantee obligation is concerned, by the North British Company for valuable consideration. Through the making of the line, they have received and have accepted that consideration, and in equity a surrogatum must be found for the obligation which they undertook, but which cannot now be enforced in terms under the contract. It would be a pity that, when a more appropriate tribunal is not only constituted but is already in possession of the facts, the parties should require to have recourse to this Court. For myself I think this desirable result can only be reached by consent of parties. But, as I have already said, I should gladly acquiesce in a different course being taken should that in the opinion of your Lordships be possible.

LORD SALVESEN—In this case I have had the advantage of reading Lord Johnston's opinion, and as I agree in his narrative of the facts and much of his reasoning, it is unnecessary that I should go as fully as he has gone into the details of the case. Many of the points on which he has touched are not directly involved in the decision of the case, although they have a bearing on what is the true issue between the parties, namely, the sound legal construction of article 7 of the agreement of March and April 1897. The words upon which the whole controversy turns are as follows—"If the nett revenue accruing to the second parties is not sufficient to pay a dividend of four per centum per annum on the paid-up share capital of the second parties, then the first parties shall . . . . contribute such sum as may be necessary" to pay off such deficiency. I purposely omit for the sake of simplicity the sources from which the deficiency is to be made up, for the guarantee is not an absolute one in form; although for practical purposes it may be treated as absolute in substance. It was so dealt with when the memorandum to blocktakers

was issued; for it is there stated—"It will be seen from the attached reports that the undertakings given by the North British Company are stated by the experts to practically amount to a 4 per cent. guarantee." The one question in the case is, What is the meaning of "paid-up share capital of the second parties"? Does it mean such capital as the North Fife Company actually issued as paid up; or does it mean, as the North British Company contend, capital which is paid up in cash or its equivalent? The Railway Commissioners have found that the former is the sound construction, on the footing, which they hold to be established in fact, that the agreement which the North Fife Company made with the Syndicate for the construction of the line was *bona fide*, and that the terms to which they consented were justified looking to their pecuniary exigencies and the state of the money market of the time. I am unable to assent to this view. I think the contractual obligation undertaken by the North British Company was based upon the assumption that the capital of the North Fife Company would all be subscribed by the public in the ordinary way; and I cannot understand how it should be enlarged by the circumstance that the promotors of the North Fife Company found it necessary in order to get their line constructed to issue their ordinary shares as fully paid when they received in money or money's worth only 60 per cent. of the nominal capital.

Lord Johnston has referred in detail to the various sections of the private Act of 1897, which make it plain to my mind that the Legislature in authorising the construction of the new railway had only in view the issuing of capital for money or money's worth. In particular, I think that the provisions as to the issue of debentures demonstrate this; for it is declared that no sum shall be borrowed "until £60,000 (being a third of the share capital of £180,000) is issued and accepted, and one-half thereof is paid up in respect of each of the said sums of £20,000." This provision is made for the security of debenture-holders, and is, I think, unambiguous. We are not here concerned with any claim by the debenture-holders; for the debentures were issued in blocks along with the preference and ordinary shares. But I think any independent debenture-holder whose money had been taken on the footing that the Act was to apply would have had serious reason to complain if he had found that his security was to consist of one-half in cash of the value of the ordinary shares, and that the obligation of the shareholders to pay the remainder was to be discharged by an additional payment of 10 per cent.

The position of the North British Railway Company with regard to their guarantee appears to me to be *in pari casu*. The promotors of the North Fife Railway Company Act, in terms of the Standing Orders of Parliament, deposited an estimate of expense amounting to £176,296, 7s. 6d. for the construction of the line as a double line. The total authorised capital, £240,000, was fixed on this basis. As matters have turned out, the whole capital has been issued as fully paid up; although only a single line, with the necessary passing places and also with the land and bridges for a double line, has been constructed. The Railway Commissioners seem to think that this may be accounted for by the fact that the cost of construction had increased between the date that the Act was obtained and the date at which the line was actually constructed. I assume that there was a general rise in prices, but, if so, the capital authorised to be issued made ample provision for such a contingency. The whole sum paid to the contractors for the construction of the single line with the necessary buildings and equipments was under £128,000; and the total sum expended, including preliminary expenses, administration, and purchase of lands, amounted to under £170,000, leaving £70,000 for the construction of the remaining line. As the £128,000 included bridges, stations, and land for a double line, it may safely be assumed that the additional £70,000 would have sufficed to construct the double line to which the agreement referred.

The construction to be put upon similar words was the subject of decision in the case of *Arnison* v. *Smith* (41 Ch. D. 348). In that case a prospectus had been circulated inviting application for debentures which were to rank "in priority to £300,000 share capital (£200,000 of which had been subscribed)." In point of fact the amount of capital subscribed was much less, unless there were taken into account £100,000 of shares which had been issued as fully paid to a firm of contractors who had agreed to construct the water-works for £400,000, of which £300,000 was to be paid in cash and £100,000 in fully paid-up shares. The Court held in these circumstances that it was untrue to say that £200,000 had been subscribed, and that persons who were induced to take debentures on the faith of the prospectus were entitled to damages against those who issued it. In my opinion the words "paid up" which are used in this contract are clear and unambiguous, and mean what the Court decided that the word "subscribed" meant — that the shares had been issued for cash. If therefore this guarantee had been obtained from the Railway Company on a statement that £180,000 of capital had been paid up, when in fact it had been allotted to the contractors for the construction of the line, I think it is obvious that the guarantee would not have been binding. It appears to me to be equally plain that it cannot be enforced against the North British Company to an extent beyond the amount that was actually paid up. To that extent the guarantors are responsible under their guarantee, but no further. Had the company been in a position to get the public to subscribe for its shares, there is no reason to suppose that it could not have made as favourable a contract as the financiers, who received substantially the whole capital. It would not have required to give any

bonus in the shape of shares, although it may be that it would have incurred a certain amount of expense in advertising, printing, and the like, the reasonable amount of which it is quite possible to ascertain. It has been suggested that the North British Company must have had in view at the time when the contract was entered into that the North Fife Company might have to resort to a method similar to that which it actually adopted of raising capital. I see no ground from which this can be inferred. In 1897 an investment on which a return of 4 per cent. was guaranteed by a great corporation like the North British Railway was by no means unattractive; but, whether or not, this surely cannot affect the construction of the contract. If the directors of the North Fife Company had been prepared to deal fairly with the North British Company, they might have given them the option of providing the necessary capital for the construction of the line; but the parties were no doubt so much at arm's-length at this time that such a proposal could scarcely have been made. The effect, however, of what the company has done was, as the Syndicate stated in the memorandum to blocktakers, to fix the price which the ordinary stock was disposed of so as to yield a return of 5½ per cent. to 6 per cent. per annum instead of the 4 per cent. which the North British Company had contracted to pay. In other words, on the construction which has commended itself to the Court below, the guarantee for 4 per cent. was increased by the action of the North Fife Company to a guarantee of 6 per cent on the actually paid-up capital without the guarantors being consulted in the matter. It is easy to understand why the directors of the North Fife Company came to make what would undoubtedly have appeared to be in the earlier history of the company so improvident a bargain. After nearly ten years of futile attempts to float the concern, they found themselves in the unpleasant position of having personally to meet the preliminary expenses of obtaining their Act unless in some way they could get the line constructed. To extricate themselves from this predicament they were not unnaturally prepared to assign the whole authorised capital of the company in return for an obligation by a prominent financial house to undertake the construction of the line and relieve them of the heavy bill they had incurred. Neither party to the transaction seems to have thought that the North British Company, on whose credit they traded, had also a claim to be considered.

In the view I have taken it is unnecessary that we should consider many of the questions which were so anxiously debated. The sole question, to my mind, is one of the construction of a simple contract of guarantee, and does not involve the much controverted point as to whether a company incorporated by Act of Parliament can issue its original shares at a discount. I reserve my opinion on this matter, but would desire to say that as at present advised I do not agree with Lord Mackenzie, nor with the decision of Romer, J., on which he bases his opinion. To say that because such a company has been specially authorised by statute to issue further shares at a discount it must therefore be entitled to issue its original shares at a discount, does not appear to me to be a convincing argument, and there are strong considerations of public policy which are adverse to such a power. It is unnecessary, however, to pursue the matter. It is still more beside the point that undertakings authorised by Parliament for which it has been found impossible to obtain from the public the necessary capital have often been constructed by contractors in the hope that they would ultimately be able, when the undertaking was completed, to induce the public to buy the shares. It may well be that the transferees of shares from such contractors, or even the liquidator of the company, after it has become insolvent, cannot challenge the original issue of the shares on the ground that they were not issued for cash or its equivalent, but that is a department of law with which we are not here concerned. I only refer to it because an argument was presented to us on behalf of the North British Company to the effect that on analogous considerations that company had been relieved from the contract of guarantee which it undertook. Such a contention appears to me hopeless in view of the fact that that company have worked the line since its inception, and have acted upon the footing that the agreement they made in 1897 was binding upon them, as indeed I think that it was, and still is, in its entirety.

The practical result which I reach accordingly is that I think we must reverse the decision of the Court below, "that the amount of the paid-up share capital of the applicants towards payment of dividend on which the defenders are bound to contribute is £180,000." So far I agree with Lord Johnston. We have not had a full argument as to what figure should be substituted, but for the guidance of the Commissioners I think we should express our views as to the method by which they may reach the true amount of paid-up capital, more especially as on this matter I do not appear to be in full accord with Lord Johnston. That is easily done by reference to the statement of income and expenditure. As regards the three heads—expenses, land purchases, etc., and works—assuming these to be properly vouched, I think that they represent the equivalent of cash. The next item, "Loss on sale of shares and debentures," so far as it consists of the discount of 40 per cent. on the ordinary shares, must be struck out. So also, I imagine, must management and under writing fee, although instead the company will be entitled to take credit for such expenses as would reasonably have been incurred in making a successful public issue. The administration expenses of the Syndicate are equally inadmissible, and also, *prima facie*, the excess of income over expenditure. In short, the account of paid-

up capital must be stated on the same footing as if a public issue of shares had been made and taken up, and the company had been put in funds to pay in cash for the construction of the works and the parliamentary expenses. On this principle the Commissioners will no doubt easily be able to arrive at an estimate of what was the amount of capital that was paid up within the meaning of the guarantee, upon which alone, as I think, the North British Company are bound to contribute.

LORD GUTHRIE—I concur in the opinion of Lord Salvesen, which I have had the advantage of reading.

LORD SKERRINGTON—[*Read by the Lord President*]—The agreement of 31st March and 5th and 6th April 1897 between the appellants the North British Railway Company and the promoters of the Newburgh and North Fife Railway Company (now represented by the respondents the Newburgh and North Fife Railway Company) is silent as to the amount of the capital which the parties regarded as necessary for carrying out the undertaking, and no doubt they left the amount to be fixed by Parliament. According to my reading of the agreement it was a condition-precedent of the respondents' obligation to construct the railway, and of their right to do so in a question with the appellants, that the whole of the share capital authorised by the Special Act should be subscribed. Of course the appellants had it in their power to waive their rights under this clause if they chose to do so. If they thought that it was safe to begin to construct the railway although a part only of the authorised share capital had been subscribed, they could allow the respondents to proceed with the work. Or again, they could if they pleased dispense with the subscription either in whole or in part and allow the respondents to pay their contractors with shares issued as fully paid up. Such an issue would not be equivalent to subscription in the ordinary sense of the word—*Arnison* v. *Smith*, 1889, 41 Ch.D. 348—and the appellants, in my opinion, could have refused to go on with the execution of the agreement if the respondents insisted on following this course. A price payable in shares is generally higher than when payable in money, and the appellants were not bound to submit to any such inflation of their liability under the guarantee. The appellants on 8th June 1906 received written notice that the respondents were about to commence the construction of the railway and that the contracts had been let. They asked for and were told the name of the Syndicate who were the contractors for the construction of the railway, but they did not inquire whether the whole, or if not, what part, of the capital had been subscribed. If they had been vigilant as to their rights, and had insisted upon the production of legal evidence to the effect that the capital had been subscribed, they could on ascertaining the facts have refused to do anything further towards carrying out the agreement. Their right to take up this position must, if disputed, have been determined by the Railway and Canal Commissioners as arbiters under article 14 of the scheduled agreement. But it is now too late for the appellants to maintain that the respondents had no right to build the railway, and it is also too late for them to offer to cease to work the railway, as they did in their letter of 4th November 1909. The appellants waived any inquiry as to whether the whole or any part of the capital had been subscribed, and they co-operated with the respondents in carrying out the first article of the scheduled agreement. In their answer dated 5th February 1910 the appellants admit that from time to time during the construction of the railway they approved of the plans; also that they proposed certain additional works, some of which the respondents agreed to construct and did construct. It follows that the appellants are liable under their guarantee to make up a 4 per cent. dividend upon so much of the share capital of £180,000 as the respondents can prove to have been paid up. I can find nothing in the actings of the appellants which precludes them from insisting upon legal evidence to the effect that the whole, or alternatively some definite part, of the respondents' authorised share capital has been in fact paid for in some way which the law recognises as valid. The appellants maintain that the £109,400 of ordinary shares and £60,000 of preference shares which were issued in pursuance of the agreement between the respondents and the Syndicate were not paid up either in fact or in law, because shares in a statutory company must be paid for in money and not in money's worth. If this contention is well founded, it follows that the appellants' guarantee is limited to the £10,600 of ordinary shares which were admittedly paid for in cash. Neither party maintained that the guarantee could be held to apply to shares which, though not in fact paid up, must by the operation of personal bar be deemed to be paid up in any question between the respondents and their shareholders, according to the principle applied in the case of *Bloomenthal* ([1897] A.C. 156). All the shares issued in pursuance of the agreement with the Syndicate were issued direct to nominees of the Syndicate, with the exception of £15,000 in ordinary shares which were issued to the Syndicate.

It may be conceded to the appellants that the respondents' Act of 1897 and the Companies Clauses Consolidation (Scotland) Act 1845 (8 Vict. cap. 17) require that in return for every £10 share issued by the company it shall be entitled to be paid £10 in cash by or on behalf of the person accepting the share. But there is nothing in the statutes which can reasonably be construed as preventing the company from accepting payment for its shares, if it chooses to do so, in goods previously delivered or in services previously rendered. The word "payment" is ambiguous and must be interpreted according to the context. In questions of bankruptcy it is generally used as in contrast to satisfac-

tion, but ordinarily a debt may with perfect accuracy be said to have been paid if the creditor agrees to accept payment in money's worth. I find nothing in the Acts of 1897 and 1845 which requires that the word must be construed in the narrower sense. On the other hand, a statutory company cannot any more than a registered company accept payment for its shares in a mere promise to render future services or to deliver future goods—*National House Property Investment Company, Limited* v. *Watson* (1908 S.C. 888).

Seeing that the nominees of the Syndicate paid nothing to the respondents for the shares allotted to them, it behoves the respondents to prove that the Syndicate gave value for these, and also for the £15,000 in shares allotted to themselves. The respondents' counsel argued that it was immaterial whether the value received for the 10,940 ordinary shares and the 6000 preference shares issued in pursuance of the agreement did or did not amount to £169,400, because the respondents had power to issue their shares at a discount —in other words, in return for payment not of their face value but of their market value at the date of issue. He did not refer to any statute which enacted that a payment to a statutory company of the market value of a share should for all purposes be deemed to be a payment of its full nominal value. In the absence of such an enactment the expression "paid-up share capital" as used in the scheduled agreement must be taken in its natural sense. Though the question does not really arise in the present case, I may say that as at present advised I can see no ground for the suggestion that original shares in a statutory company which is regulated by the Companies Clauses Consolidation (Scotland) Act 1845 may be issued at a discount except under special statutory authority to that effect.

A statutory company may issue debentures at a discount, and I do not need to consider whether share capital issued in lieu of loan capital may by section 63 of the Act of 1845 be issued at a discount. Nor do I need to narrate the later legislation, which in certain specified cases authorised the issue at a discount of new shares or new stock or even of the residue of the original share capital—26 and 27 Vict. cap. 118, sections 16-21; 30 and 31 Vict. cap. 126, sections 27-29; 32 and 33 Vict. cap. 48, sections 5, 6, and 7. The implication from the Acts of 1867 and 1869 is that capital, whether original or additional, cannot be issued at a discount except in the particular cases there mentioned, or unless authorised by the Special Act. The case of *Webb* v. *Shropshire Railways Company* ([1893] 3 Ch. 307) is an example where an Act of Parliament was construed as authorising the issue of fully paid-up original stock at a discount, but the circumstances and language of the Act were special. Lord Lindley (then L.J.), who delivered the opinion of the Court of Appeal, distinguished between stock issued as fully paid up under statutory powers and shares liable to calls. The case of *Statham* v. *Brighton Marine Palace and Pier Company* ([1899] 1 Ch. 199) is a judgment by Romer, J., to the effect that a company governed by the English Companies Clauses Act 1845 may issue fully paid original shares at a discount in the same manner as new shares. The English Act does not contain any clause corresponding to section 37 of the Scottish Act, but the judgment does not proceed upon the absence of any such clause. The learned Judge expressed the opinion that shares subscribed for must be paid for in full, but he rested his judgment upon the view that the Act of 1845 contemplated that shares may be acquired otherwise than by subscription, and that shares allotted without subscription may be issued at a discount. He referred, I presume, to section 8 of the English Act (which is the same as the corresponding section of the Scottish Act). I respectfully dissent from the view that so momentous a result can be implied from a clause which is on the face of it bungled. In my view the words founded on by Romer, J., were intended to meet the case of a person who had acquired a right to scrip before any issue of shares, and who might, if the company were willing to accept him, be treated as if he himself had subscribed and paid the deposit, and so become entitled to a share in the company.

The agreement of 31st May 1906 between the respondents and the Construction Syndicate does not in my judgment afford even *prima facie* evidence to the effect that the respondents received either full value or indeed any ascertainable value in return for the £169,400 of shares which were issued to the Syndicate or its nominees. The price of £240,000 payable to the Syndicate was a lump price, which was carefully fixed in such a manner as makes it impossible to discover how much the respondents were to pay (1) for the construction of the railway, (2) in lieu of brokerage for placing their shares and debentures, (3) for the land required for the railway, and in order to satisfy all claims under the Lands Clauses Acts for injurious affection, accommodation works, &c., and (4) for the expenses incident to the obtaining of the Special Act and for all other expenses, past and future, for which the respondents might be or become liable. If in the agreement the total price of £240,000 had been separable into lump sums representing the consideration agreed to be paid in respect of each of these four heads, it might have been possible for the Commissioners to decide whether the price payable to the Syndicate, so far as payable in shares, was or was not fixed upon the footing that each share was worth less than its face value. I do not think that the Commissioners had materials before them which in law entitled them to find as they did that the respondents "did not in fact issue their shares at a discount." As regards brokerage, a company may pay a reasonable reward in respect of the trouble and expense of placing its shares—*Metropolitan Coal Consumers' Association* v. *Scrimgeour*, [1895]

2 Q.B. 604—but it cannot make itself or its capital liable for a sum in lieu of brokerage which can neither be ascertained nor taxed. If the total price had been apportionable it would have been possible to ascertain whether the lump sum agreed to be paid on this head was or was not excessive and to restrict it if necessary. Again, under the Special Act (sections 2 and 4) the respondents had power to acquire land under the Lands Clauses Act either by agreement with the sellers or compulsorily, but they had no power to apply their capital in paying an unascertainable lump sum in return for an indemnity by the Syndicate against all claims in respect of land taken or injured. Here again, if the total price could have been apportioned it would have been possible to ascertain whether the price agreed to be paid on this head did or did not exceed the sums for which the respondents were legally liable and to restrict it if necessary. Lastly, there is a decision of the House of Lords to the effect that it is *ultra vires* of a statutory company to pay a lump sum in respect of the expenses authorised to be paid by the usual clause in the Special Act irrespective of the actual amount of such expenses as taxed—*Edinburgh Northern Tramways Company* v. *Mann* (18 R. 1140, *affd.* 20 R. (H.L.) 7). In the Court of Session some importance was attached to the fact that the persons who received the lump sum of £17,000 stood in a fiduciary relation to the company, but the House of Lords proceeded upon the simple ground that it was *ultra vires* of the company to pay more than the actual expenses as taxed. As regards this matter also, if the total price of £240,000 had been severable, it would have been possible to ascertain whether the portion of it representing expenses did or did not exceed the actual expenses, both past and future, as taxed. In so far as it exceeded the actual expenses the lump sum could have been restricted, as was done in *Mann's* case. That case was followed in *Mason's Trustees* v. *Poole & Robinson* (1903, 5 F. 789). Within certain limits I do not doubt that a statutory company when agreeing upon a price to be paid for property or services may include in the price an additional and undefined amount in respect that the other party to the contract accepts certain risks and agrees to indemnify the company against all liability beyond the sum agreed upon. For example, an ordinary contract to build a house or railway includes either expressly or tacitly an allowance for "contingencies." So if a railway company employs a solicitor at a salary, the solicitor accepts a lump sum and in return agrees to make no further claim against the company, however much his ordinary professional charges may exceed his salary. Again, no one doubts the power of a railway company to protect itself against certain risks by insurance. But there is no real analogy between such cases and the present one. In considering whether this particular agreement was within the power impliedly conferred upon the respondents by their statute, one must keep in view that the question is to be decided, not upon abstract or logical grounds, but by reference to the ordinary way in which a particular kind of business is conducted in this country. I accept the view of the Commissioners that in this particular case it would have been beneficial for the respondents to have possessed the power to enter into the construction agreement, but in the majority of cases the possession of such a power would be a doubtful benefit. It is, however, enough to say that a contract of this kind is so unusual in practice that a power to make it cannot be implied from a power to make a railway, to buy land, and to pay expenses. In England the Court has been very liberal in supporting honest agreements by which the price of property or services was to be paid for in fully-paid shares (*in re Wragg Limited* [1897] 1 Ch. 796), and possibly we might have followed that decision if some definite lump price had been fixed for the construction of the railway. But it was admitted by Mr Dempster, the secretary of the respondents' company, and is indeed obvious, that the total price of £240,000 included some unknown amount "for expenses for raising the capital," in addition to round sums of £30,000 and £15,000, which it was estimated would cover the cost of the land and the expenses.

The practical result, in my judgment, is that the respondents have failed to adduce evidence which entitled the Commissioners to find that the paid-up share capital of the Newburgh and North Fife Railway Company amounts to any sum exceeding £10,600. The case must be remitted to the Commissioners in order that they may, if necessary, determine the actual amount of the legal consideration which the Syndicate gave to the respondents in return for the 16,940 shares allotted to them or their nominees. It is for the respondents to prove the amount, but it is to be hoped that the parties will be able to agree on a figure without further litigation. What I propose to add is in no way binding either upon the Commissioners or upon the parties, but it may be useful to indicate the way in which, as at present advised, I think that the account should be stated. The Syndicate are entitled to credit for the sum which it would have cost to construct the railway if a contractor had been employed by the respondents in the ordinary way and if the respondents had themselves supervised the construction. Credit must also be given for a reasonable allowance in lieu of the brokerage which the respondents would have required to pay in order to place the shares and debentures. The Syndicate must further be credited with the £4400 of cash paid by them to the respondents, the interest so far as legally paid to shareholders and debenture stock holders during construction, and with the amount paid in respect of land claims and expenses for which the respondents were legally liable. On the other hand the Syndicate must be debited with the market value of the debenture stock when issued, and with cash received by them from the respondents.

I may have omitted items from both sides of the account, and of course there must be an adjustment of interest. The balance of this account will represent the consideration paid by the Syndicate for the 16,940 shares.

LORD PRESIDENT—Although I must now consider that as the majority of your Lordships are against me my opinion is wrong, I think that the judgment of the Commissioners here ought to have been affirmed, and I can express my opinion in a very simple form.

I first ask myself this question, which was argued before us—Is it possible for a railway company which is formed under the Companies Clauses Act to pay for its railway, not in cash, but by issuing shares? I confess that I think it is; and seeing that these operations have been going on in numberless cases ever since the year 1845, and that what are called contractors' lines have often been before the Court and had the consideration of the most eminent persons, including amongst others the late Master of the Rolls and many members of the House of Lords, I must say that I should look with the gravest suspicion upon the discovery by the learned counsel for the North British Railway Company, for the first time in the history of this matter, that such transactions were entirely illegal. It has often been for the interests of parties to maintain that they were illegal, and yet no one seems to have thought of this contention till now.

The particular case of which I would remind your Lordships is that much contested litigation, *Rixon* v. *Edinburgh Northern Tramways Company*, 18 R. 264, 20 R. (H.L.) 53. There every effort was made to destroy the contract made with Messrs Dick, Kerr, & Company, and yet this expedient was never thought of.

The question having been answered in this way, I next ask myself—Must that not have been one of the methods of construction of the line which the North British Railway Company had in view when they made their contract? And here, without insisting on the matter, I would remind your Lordships of what is very clearly stated by the Commissioners, namely, the great interest which in the past the North British Railway had in the making of this line. This line was a necessary link in what at that time was a keen competition with the Caledonian Railway Company. It was in potentiality one of the pawns—if indeed it was not a piece of higher denomination—in the struggle between the two great Scottish companies which happily resulted in the peace agreement. It is equally clear that the peace agreement having once been concluded the line became of very little use to the North British Railway Company, and therefore it is not at all wonderful that if they are entitled upon any legal ground to get out of their guarantee they should seek to do so. I am far from expressing any moral blame in this matter. Public companies are entitled to stand upon their legal rights—nay more, probably they are bound to stand upon their legal rights. But as to the question of the North British Railway Company at the time of the inception of the agreement having been willing to table a high price for what they were getting, I do not think that the judgment of the Commissioners leaves any shadow of doubt.

If that is so, I think that this is one of the methods in which they must have contemplated that the capital should be issued. And the capital was so issued.

The only remaining argument is one which was strenuously urged by the learned counsel, and is also touched on in the opinion of Lord Skerrington which I have just read, namely, whether this was not a void agreement as being *ultra vires* of the directors of the company. I need scarcely say that I entirely adopt the authority of the House of Lords in *Mann's* case. I have no doubt that you cannot, as there, pay a slump sum and say "I will give you that in order to relieve me of the expense of the company, and what has been actually paid shall not be looked into." But although that is so, the question, I imagine, can only arise between the company and the person with whom they have so contracted. It is quite true that a void agreement is as a rule void not only as between the two parties who made it but also to all the world. But I see no reason to suppose that the personal bar—or, as it is called in the sister country, estoppel—may not operate with regard to an agreement which is void just as much as an agreement which is voidable. I think it is impossible for the North British Railway Company here to say that as a matter of fact this agreement is void and that the line has never been constructed at all. They themselves are founding upon the agreement under which the line has been constructed in order to insist upon their right to work the line upon certain terms, and that being so this argument also fails.

The result, therefore, in my opinion, would be that the view of the Commissioners should have been sustained. I only add that, necessarily, my opinion is based upon the finding in fact which the Commissioners have given, namely, that this construction contract was perfectly fair and above-board and did not represent any donation from the one party to the other.

LORD KINNEAR—I agree with the Lord President.

LORD DUNDAS—I also agree with the Lord President.

LORD PRESIDENT—The majority of the Court being against the determination of the Commissioners, it must be reversed. On the other hand, Lord Johnston's view was that nothing more would be done by the Commissioners, but the other three Judges composing the majority are of the view that it should be remitted to the Commissioners to find out how much capital has been legally issued in the sense of the contract, so we shall give effect to this view.

The Court pronounced this interlocutor—

"The Lords having, along with Three Judges of the Second Division, considered the note of appeal and whole process, and having heard counsel for the parties, Recal the order of the Court of the Railway and Canal Commission, of date 21st March 1912, in so far as the said Court declares 'that the amount of the paid-up share capital of the applicants towards payment of dividend on which the defendants are bound to contribute is £180,000,' and in place thereof find and declare that the said defendants are only liable under their agreement with the applicants to contribute towards payment of dividend on so much of the issued share capital of the applicants as was issued in consideration of cash or the equivalent of cash, and remit to the Court of the Railway and Canal Commission, after such further inquiry, if any, as may be necessary, to ascertain the amount of such capital in conformity with this finding: *Quoad ultra* affirm the said order so far as submitted to review by either party: Find the appellants and defendants entitled to the expenses incurred since 21st March 1912. . . ."

Counsel for the Applicants and Respondents — Clyde, K.C. — Macmillan, K.C. — Gentles. Agents — Guild & Shepherd, W.S.

Counsel for the Defendants and Appellants — Dean of Faculty (Dickson, K.C.)— Cooper, K.C.—E. O. Inglis. Agent—James Watson, S.S.C.