not entitled to withhold the case from a jury, and accordingly I agree with your Lordship that the reclaiming note should be refused.

The Court adhered.

Counsel for the Pursuer and Respondent —Wark, K.C. — Berry. Agent — Dugald Maclean, Solicitor.

Counsel for the Defenders and Reclaimers —Dean of Faculty (Constable, K.C.)—Keith. Agents — J. Miller Thomson & Company, W.S.

Friday, January 27.

FIRST DIVISION.

NORTH BRITISH RAILWAY COMPANY *v.* FORTH BRIDGE RAILWAY COMPANY.

Railway — Statute — Construction — Maintenance — Compensation for Minerals— Forth Bridge Railway Act 1882 (45 *and* 46 *Vict. cap. cxiv*), *sec.* 38 — *Railways Clauses Consolidation (Scotland) Act* 1845 (8 *and* 9 *Vict. cap.* 33,) *sec.* 71.

The Forth Bridge Railway Act 1882, by which the Forth Bridge Railway Company was authorised to make and maintain a railway crossing the Firth of Forth, provided by section 38—"When and so soon as the railway shall have been constructed and shall have been approved by the Board of Trade, the North British Company shall take possession thereof and shall for ever thereafter maintain in good working order and condition and work the railway in the same manner and with the same powers and obligations as if the railway formed part of the North British system. . . ."

The Forth Bridge Railway Company acquired land for the railway, but did not acquire the minerals in the land. The railway having been constructed and taken over by the North British Railway Company, a dispute arose as to which of the companies was bound to bear the cost of compensation for leaving unworked the minerals required for the support of the railway. *Held* that payment of the compensation was not maintenance in the meaning of the section, and that the cost fell to be borne by the Forth Bridge Railway Company as owners of the land.

The North British Railway Company, *first parties*, and the Forth Bridge Railway Company, *second parties*, brought a Special Case for the opinion and judgment of the Court as to which of the companies was to bear the cost of compensating a lessee of minerals for leaving unworked the minerals required for the support of the railway which had been constructed by the second parties and handed over to the first parties under the provisions of the Forth Bridge Railway Act 1882.

The first parties owned and worked extensive systems of railways on the south and north sides of the Firth of Forth. The second parties were incorporated by the Forth Bridge Railway Act 1873 (36 and 37 Vict. cap. ccxxxvii), which authorised them, *inter alia*, to make and maintain a railway crossing the Firth of Forth by a bridge and connecting the systems of the first parties, and subsequently obtained further Acts of Parliament for this purpose.

The Case stated—". . . 4. By the Forth Bridge Railway Act 1882 (45 and 46 Vict. cap. cxiv) the second parties were authorised to make and maintain a railway 4 miles 2 furlongs in length (in substitution of the railway (No. 1) authorised by the Act of 1873), commencing in the parish of Dalmeny in the county of Linlithgow by a junction with the Queensferry branch of the first parties, crossing by a bridge the Firth of Forth and terminating in the parish of Inverkeithing in the county of Fife by a junction with the Dunfermline and Queensferry branch of the first parties' railways. Under the Act of 1882 the second parties' undertaking is limited to the said railway 4 miles 2 furlongs in length including the Forth Bridge. The Lands Clauses Consolidation (Scotland) Act 1845, and the Railways Clauses Consolidation (Scotland) Act 1845, were incorporated with and form part of the said Act of 1882. 5. By section 38 of the Act of 1882, section 5 of the Act of 1878 was repealed, and it was provided, with regard to the railway authorised by the Act of 1882, as follows:—'When and so soon as the railway shall have been constructed and shall have been approved by the Board of Trade the North British Company shall take possession thereof and shall for ever thereafter maintain in good working order and condition and work the railway in the same manner and with the same powers and obligations as if the railway formed part of the North British system, and the company shall maintain and keep in repair the structure of the bridge for carrying the railway over the Firth of Forth and all parts thereof except the permanent way thereon, and the North British Company shall maintain and keep in repair all other parts of the railway including the permanent way upon the said bridge and all signals and signal appliances necessary for the working of the railway.' In this section 'the company' means the Forth Bridge Railway Company, the second parties to this case. 6. The second parties took and acquired the lands necessary for the construction of the railway, including the Forth Bridge, authorised by the Act of 1882, but in the case of the lands lying to the south of the Forth Bridge did not take or acquire the minerals in these lands, which accordingly were not included in the conveyances to the second parties, but remained the property of the landowners and subject to the provisions of the Railways Clauses Consolidation (Scotland) Act 1845. The second parties' railway and bridge were completed, approved by the Board of Trade, and taken possession of by the first parties in March 1890, and since that date the first parties have been in possession thereof in terms of the said section 38 of the Act of 1882. 7. In certain of

the lands acquired by the second parties for the purposes of their railway south of the Forth and in the adjoining lands there are minerals, including shale. None of said minerals belong to the second parties. In March 1920 the Dalmeny Oil Company, Limited (hereinafter called the Dalmeny Company), the lessees of certain of the said shale, gave notice, under the Railways Clauses Consolidation (Scotland) Act 1845, to the first parties of the lessees' intention to work certain shale under and adjoining the second parties' railway south of the Forth. The first parties intimated the said notice to the second parties. The second parties maintained that the matter was one for the first parties to deal with. The Dalmeny Company thereafter gave the same notice to the second parties as to the proposed working of the shale as they had previously given to the first parties. The first parties were advised that certain of the said shale should be left unworked for the support of the said railway, and it was arranged between them and the second parties that without prejudice to the contentions of each they should give joint notice to the Dalmeny Company that the parties required the Dalmeny Company to leave unworked certain shale, and intimate the willingness of the parties to make compensation to the Dalmeny Company for the same in terms of the Act of 1845. Such counter-notice was given by the parties to the Dalmeny Company of date 20th April 1920. None of the shale so required to be left unworked is necessary for the support of the structure of the bridge referred to in section 38 of the Act of 1882. 8. Compensation will be payable to the Dalmeny Company in respect of the shale left unworked for the support of the railway south of the Forth, and the first and second parties differ as to whether the compensation falls in law to be borne and paid by the first parties or by the second parties. 9. It is maintained by the first parties that the second parties as owners of the railway are bound in a question with the first parties to prevent the withdrawal by mineral workings of support from the railway, and that the stoppage of the shale workings and payment of the compensation for the shale for the support of the railway is a matter for the second parties and not for the first parties, that under the mineral sections of the Railways Clauses Act of 1845 the second parties alone have power to stop the working by counter-notice and payment of compensation, that the first parties are under no obligation of relief to the second parties in respect of the compensation which will have to be paid to the Dalmeny Company in order to obtain the necessary support for the railway, that the maintenance of the railway for which the second parties are liable under the statutes does not extend or apply to damage to or the destruction of the railway by the withdrawal of support through mineral workings, and that compensation for stoppage of working is a proper charge against capital, and only the second parties can legally pay it out of capital. 10. The second parties contend that the reservation of the minerals in question to be left unworked for the support of the parts of the railway other than the structure of the said bridge being necessary for the maintenance and repair of these parts of the railway, the first parties are upon a sound construction of section 38 of the Act of 1882 liable as in a question with the second parties to bear and bound to pay or relieve them of and against the compensation payable in respect of the non-working of said minerals. These parties admit that such compensation would be legally payable by them out of capital, but they do not admit that the first parties are unable legally to pay it out of capital."

The *question of law* was—"Does the cost of compensating the Dalmeny Company for leaving unworked minerals (subjacent and adjacent) required for the support of the said railway south of the Forth Bridge fall to be borne by the first parties or by the second parties?"

Counsel for the first parties in opening the case referred to a previous litigation between the parties—1896, 3 S.L.T. 253, and 4 S.L.T. 373—in which the relation of the parties was defined, and the second parties held liable as owners of the railway to pay the rates and taxes thereon.

Argued for the second parties—In interpreting section 38 of the Act of 1882 the whole situation must be kept in view. The second parties were merely a constructing company, the first parties obtaining exclusive possession of the railway when constructed. The section was the result of an agreement entered into between the parties in order to decide which of them was to keep up the different parts of the undertaking. The first parties had agreed to keep up the railway, and the meaning of the section was that they had to do so. Further, the payment of the compensation was properly maintenance. The first parties could either pay compensation or allow the minerals to be worked out and repair the subsidence. The position was similar to that arising from encroachment by the sea, which the first parties were bound to prevent. It could not be maintained that the first parties had no power to pay the compensation. The right to necessary support was implied from the right to maintain — *London and North-Western Railway Company* v. *Evans*, 1893, 1 Ch. 16, *per* Bowen, L.J., at p. 28, and the obligation to maintain implied an obligation to prevent the support being interfered with. The right to do so followed from the obligation and the possession given to the first parties under section 38—*Sevenoaks, Maidstone, and Tunbridge Railway Company* v. *London, Chatham, and Dover Railway Company*, 1879, 11 Ch. Div. 625, *per* Jessel, M.R., at p. 634; *The Queen* v. *Stephens*, 1876, 1 Q.B.D. 703; *North-Eastern Railway Company* v. *Scarborough and Whitby Railway Company*, 1893, 8 Railway and Canal Cases, p. 157. It was not correct to describe this as a case of postponed payment for support. The second parties had bought the land subject to the exception of minerals which might not have been there.

At advising—

LORD PRESIDENT — The Forth Bridge Railway Company gave notice to the Dalmeny Oil Company under section 71 of the Railways Clauses Consolidation (Scotland) Act 1845, as incorporated with the Forth Bridge Railway Acts, desiring them to leave certain minerals under and within the prescribed distance of a portion of their railway unworked.

The question in this Special Case relates to the compensation payable to the Dalmeny Company in virtue of that notice. The Forth Bridge Railway Company maintains that upon a sound construction of section 38 of the Forth Bridge Railway Act 1882 the compensation falls to be paid not by them but by the North British Railway Company. By that section it was provided that upon the construction of the Forth Bridge Railway (followed by the approval of the Board of Trade) "the North British Company shall take possession thereof and shall for ever thereafter maintain in good working order and condition and work the railway in the same manner and with the same powers and obligations as if the railway formed part of the North British system." Then follow clauses which provide that the burden of maintaining the structure of the bridge over the Firth of Forth, other than the permanent way of the railway across the bridge, shall be borne by the Forth Bridge Railway Company. While the North British Railway Company was (in virtue of this provision) placed in possession of the railway, it is plain that they were not made the owners of it. The property both of such of the lands which the Forth Bridge Railway Acts authorised to be acquired and which the Forth Bridge Railway Company actually purchased, and of the railway and works constructed thereon by that company, remained with the Forth Bridge Railway Company. The obligation of maintaining the latter—that is, the railway and works — rests under the Act of 1882 wholly on the North British Railway Company, and the same powers and obligations in behalf of maintenance as that company possesses or is subject to under its own statutory powers with relation to its own railway are made available to it for the purpose of performing its obligation to maintain the Forth Bridge Railway in good working order and condition. The argument is that the exercise of the powers conferred on railway companies by section 71 of the Railways Clauses Consolidation (Scotland) Act 1845 is a part of the maintenance of the railway, and that consequently the expense attendant on the exercise of those powers—and particularly the payment of compensation — is one of the costs of such maintenance.

I do not think it can be said that the expense of defending the railway from encroachment or damage at the hands of persons legally entitled to encroach or interfere with it forms any part of the cost of maintaining it in good working order and condition. In working its minerals the Dalmeny Oil Company is merely using its property in accordance with its legal rights, and these are safeguarded by the statutory limitations of the Forth Bridge Company's title to the lands it was authorised to acquire, and by the provisions of the Railways Clauses Act of 1845. Maintenance relates in my opinion to the upkeep of the *opera manufacta* of which the railway and works consist, not to the remedy of deficiencies inherent in the titles to the lands on which the railway and works are constructed—however injurious to the railway and works the consequences of these deficiencies may prove. The expense of remedying such deficiencies is far removed from the class of acts which a railway company is authorised to do for purposes of maintenance under the "general powers" forming one of the heads embraced in section 16 of the statute last mentioned. Under what I have called deficiencies I include the exception from the Forth Bridge Railway Company's titles of such parts of the minerals under the land purchased by them as are not necessary to be dug, or carried away, or used in construction of the works in terms of section 70 of the Act. That exception no doubt exposes the railway to risk of encroachment or damage by the owner of the excepted minerals. But that is a very different kind of thing from deterioration and injury resulting from tear and wear, and exposure, and the accidents of situation, against which it is the proper province of maintenance to provide. Another example of such deficiency might be provided by the case of an interest in the land authorised to be acquired which the Forth Bridge Railway Company had omitted to purchase. Unless compensation were paid within the six months prescribed by section 117 of the Lands Clauses Consolidation (Scotland) Act 1845 the working of the railway might be seriously interfered with by the person entitled to the omitted interest—see *Stretton* v. *Great Western and Brentford Railway Company*, (1870) L.R., 5 Ch. 751. But could it be said that payment of the compensation was part of the cost of maintaining the railway in good working order and condition?

It was suggested that the word "obligations" occurring in the expression "with the same powers and obligations as if the railway formed part of the North British system" referred in some way to a duty to defend the railway against injurious mineral working. I think its presence in the clause is amply accounted for otherwise — for example, in relation to accommodation works which the Forth Bridge Railway Company had become bound not only to make but at all times to maintain, in terms of section 60 of the Railways Clauses Consolidation (Scotland) Act 1845.

I think the Forth Bridge Railway Company alone was entitled to give the notice to the Dalmeny Oil Company requiring the minerals to be left unworked, because it alone had the power to give such a notice in virtue of the incorporation of the general Act in the special Acts which authorised it to construct the Forth Bridge Railway; and I think the Forth Bridge Railway

Company alone is liable for the compensation which may become due to the Dalmeny Oil Company in consequence of that notice having been given.

LORD MACKENZIE—I concur.

LORD SKERRINGTON—I concur.

LORD CULLEN—I am of the same opinion. In dealing with the landowner the Forth Bridge Company elected to acquire the surface only, and to postpone liability to pay for the minerals until the necessity therefor might arise. On a construction of the words "maintain in good working order" occurring in section 38 of the Act of 1882, I do not think that this species of postponed liability connected with the acquisition of land for the construction of the railway is included in the obligation of maintenance imposed thereby on the North British Railway Company.

The Court answered the second alternative of the question of law in the affirmative.

Counsel for the First Parties—Macmillan, K.C.—MacRobert, K.C.—Dickson. Agent—James Watson, S.S.C.

Counsel for the Second Parties—Gentles, K.C.—Graham Robertson. Agents—Robson, M'Lean, & Paterson, W.S.

Friday, March 3.

SECOND DIVISION.

[Lord Ashmore, Ordinary.

PREMIER BRIQUETTE COMPANY *v.* GRAY.

Company—Shares—Principal and Agent—Authority to Apply for Shares — Sub-Underwriting — Offer and Acceptance—Non-Intimation of Acceptance — Sub-Underwriting Letter Accompanied by Application for Shares in Question — Application Transmitted to Issuing Company—Allotment.

A sub-underwriter filled up a printed form for sub-underwriting an issue of shares to the extent of five hundred shares of £1 each, and returned it to the underwriters with a form of application for the shares in question addressed to the issuing company, and a cheque for £25, being the application money for the shares. The form bore that the contract and application should be irrevocable on the part of the sub-underwriter. The underwriters filled up a docquet accepting the underwriting of the shares in question, but did not intimate the acceptance of the proposal to the sub-underwriter. They subsequently transmitted the letter of application and the cheque to the issuing company without notice of the sub-underwriting contract, and the company allotted the shares to the sub-underwriter. The sub-underwriter refused to pay the instalments on the shares on the ground that there had been no intimation by the underwriters to him of their acceptance of his proposal, and that therefore they had no right to pass on his application for shares to the company. In an action at the instance of the company against the sub-underwriter, *held* (*diss.* Lord Salvesen) that in the circumstances the dealings of the parties precluded the defender from denying that he knew of the underwriters' acceptance; (2) that the letter of application was a firm application not conditioned by the sub-underwriting letter, and that the company were therefore entitled to allot shares to the full amount applied for.

The Premier Briquette Company, Limited, London, *pursuers*, brought an action against Henry John Gray, advocate, Aberdeen, *defender*, for payment of £225, being instalments due by him on 500 shares allotted to him in terms of letter of application addressed by him to the pursuers. The letter of application had been sent by the defender along with a sub-underwriting contract for 500 shares in the pursuers' company and a cheque for £25, being a deposit for 1s. per share to the Mining, Commercial, and General Trust, Limited, London, who had agreed to underwrite 100,000 shares in the pursuers' company. The sub-underwriting contract was docqueted with an acceptance for and on behalf of the Mining Trust and signed by W. W. Macalister, its managing director, but the acceptance was not expressly intimated to the defender.

The pursuers *pleaded, inter alia*—"1. The pursuers being entitled in terms of the defender's said letter of application to payment by him of instalments on the shares applied for by him, amounting to the principal sum sued for, are entitled to decree therefor as craved."

The defenders pleaded, *inter alia*—"3. Defender's application for shares having been lodged with the pursuers by the said W. W. Macalister without defender's knowledge and without his consent and without any right or authority whatsoever, the allotment following thereon is invalid and the defender is entitled to absolvitor. 4. The defender's letter of application having been signed by defender solely in pursuance of and subject to his proposal to sub-underwrite the shares therein mentioned, and the proposal to sub-underwrite not having been accepted and no intimation of any acceptance thereof having been made to defender, and *separatim* having been withdrawn before allotment, the alleged allotment to the defender is inept and invalid and the defender is accordingly entitled to decree of absolvitor. 5. The defender's application for shares (subject to his underwriting proposal) having been put in the hands of the said W. W. Macalister to hold subject to the said sub-underwriting offer, the said W. W. Macalister had no right in the circumstances to deliver the said letter to the directors of the pursuer company, the allotment following thereon is invalid and the defender should be assoilzied."