While by the resolutions of 1869 the Council agreed to pay—

(1) Annual grant, . . .	£100	0	0
(2) Interest on Queen Anne's mortification, . . .	8	6	8
(3) Maintenance of school buildings, say as before, . .	30	0	0
	£138	6	8

Now, although the resolutions of 1869 seem to commit the town to a considerably larger annual sum than was paid prior to the town's embarrassment in 1835, still, keeping in view the whole circumstances, the suspension of the town's management from 1835 to 1860, and the present condition of the town's affairs, I do not think that the resolutions of 1869 were an unreasonable reading of the town's customary obligation in reference to the burgh schools, and I think that the Town Council themselves then fairly measured and fixed what the customary obligation was. They dealt liberally with the burgh school, but they were quite entitled if not really bound to do so.

I am therefore of opinion that the sum now to be paid from the common good of the burgh of Dunfermline to the School Board in terms of the 46th section of the Education Act ought to be in conformity with the resolutions of the Town Council of 20th July 1869, and I propose to answer the special questions put accordingly as follows:—

Answer 1st—I think the Magistrates and Town Council are bound to pay to the School Board as from Martinmas 1875, and in perpetuity at the term of Martinmas yearly, the sum of £100, and also the sum of £8, 6s. 8d., being the interest on Queen Anne's mortification, and that from the corporation funds or common good of the burgh.

Answer 2d—I think the Magistrates and Town Council are also bound to pay to the said School Board as from Martinmas 1872, and in perpetuity at Martinmas yearly, the sum of £22, 10s. stg., as arranged by the parties as the average expenditure for maintaining the school buildings.

Answer 3d—But I think the Magistrates and Town Council are not bound to pay the School Board any farther sum, and in particular are not bound to pay any interest on the mortification of 1000 merks, that interest being held to be included in the sum of £100 stg. mentioned in the first answer.

Lord Ormidale and the Lord Justice-Clerk concurred.

Counsel for School Board—Vary Campbell. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for Town Council—Moncreiff. Agents—Morton, Neilson, & Smart, W.S.

Friday, October 25.

FIRST DIVISION.

ABERDEEN COMMERCIAL COMPANY AND ABERDEEN LIME COMPANY *v.* GREAT NORTH OF SCOTLAND RAILWAY COMPANY.

Railway—Jurisdiction—Railway Commissioners—Railway and Canal Traffic Regulation Act 1854 (17 *and* 18 *Vict. c.* 31), *sec.* 2—*Unreasonable Prejudice—Regulation of Railways Act* 1873, *sec.* 26.

Held that under the 26th section of the Regulation of Railways Act 1873 (36 and 37 Vict. c. 48) the Railway Commissioners have jurisdiction to determine that a railway company by making illegal or excessive charges for the conveyance of traffic infringes the provisions of the 2d section of the Railway and Canal Traffic Regulation Act 1854 (17 and 18 Vict. c. 31).

Railway—Tolls—Carrier—Railways Clauses Act 1845 (8 *and* 9 *Vict. c.* 33), *sec.* 79.

Held that a railway company which had power to charge certain limited rates as carriers of goods, and certain other and higher rates for the use of their line (*i.e.*, where parties carried their own goods either by means of their own waggons and locomotives or by hiring those belonging to the company) could not require a particular class of traders to pay the higher rates by declining to act as carriers of their traffic, and by forcing them to hire waggons and locomotives and thus to "carry" their own goods, but that the railway company in carrying these goods in ordinary goods trains under the care of their own servants were still acting as carriers, and entitled to charge no more than the limited rates.

The Aberdeen Commercial Company and the Aberdeen Lime Company traded in lime, coal, grain, manure, chemical and other merchandise chiefly connected with agriculture. Their manure traffic was conveyed from Aberdeen to its various destinations chiefly by means of the railways of the Great North of Scotland Railway Company. This traffic had up to February 1878 been conveyed in the ordinary way by the Railway Company as carriers, and charged for according to the provisions of the 55th section of the Great North of Scotland Railway Consolidation Act 1859, which was as follows:—"It shall not be lawful for the Company to charge in respect of the several articles, matters, and things, and of the several descriptions of animals hereinafter mentioned, conveyed on the railway or any part thereof, any greater sum, including the charges for use of carriages, waggons, or trucks, and for locomotive power, and all other charges incidental to such conveyance, than the several sums hereinafter mentioned—that is to say, for dung, compost, and all sorts of manure, lime, and limestone, and undressed materials for the repair of public roads or highways, twopence per ton per mile."

On 4th February 1878 the Company issued to these traders, among others, a notice in the fol-

lowing terms:—"Notice is hereby given that the Great North of Scotland Railway Company do not profess to act and do not act as carriers of the undermentioned articles, viz.—Dung, compost, manures, bones (manufactured or unmanufactured), guanos, phosphates, sulphates, nitrates, muriates, kainit coprolites (in any state), potash salts, and all articles of a like nature. The Company, however, at the request of parties, and upon certain conditions and at agreed rates (but not otherwise), will provide waggons or locomotive power or both to persons desiring the use of the railways owned, worked, or used by the Company for the purpose of allowing them to forward any of the above-named articles from or to any of the stations and on the harbour rails at Aberdeen. This notice to take effect on and after 1st March 1878." Notices in the same words were posted up and publicly displayed at the Company's goods stations and offices. In pursuance of the notice of the 4th February, the Company on 1st March abandoned the use of consignment notes for manure traffic, and introduced requisition notes for the use of traders, by the terms of which the traders were to request the Company to provide them with waggons and locomotive power, and to allow them the use of their line, and in consideration of providing these the Company claimed right to charge the traders tolls for the use of their line and plant in terms of the 52d and 53d sections of their Act of Parliament, which were in these terms:—"Section 52. It shall be lawful for the Company to demand any tolls for the use of their railway not exceeding the following—that is to say, first, in respect of the tonnage of all articles conveyed upon the railway or any part thereof, as follows—For all dung, compost, and all sorts of manure, lime, and limestone, and all undressed materials for the repair of public roads or highways, per ton per mile twopence; and if conveyed by carriages belonging to the Company an additional sum per ton per mile of one penny. Section 53. The toll which the Company may demand for the use of engines for propelling carriages shall not exceed one penny per mile for each passenger or animal or for each ton of goods or other articles in addition to the several other tolls or sums by this Act authorised to be taken." The charges that might be made by the Company under these sections were therefore much higher than they were entitled to exact as carriers of goods under the 55th section of their Act quoted above.

The traders objected to the use of requisition notes in the above form. The Company, however, refused to allow their manure traffic to be conveyed along their railways without the traders' signature to such a requisition note in every case. The traders thereupon served formal protests on the Company. Subject to these protests they regularly used and signed the requisition notes after 1st March 1878.

After that date the Company regularly, upon requisition notes in the form above referred to being filled up and signed by the traders, supplied them with waggons for their manure traffic. The waggons (with the exception of a few cases in which the traders brought their goods in carts to the stations) were handed over to them at Aberdeen goods stations, and removed to their own premises, and there loaded and returned by them to the Company's goods stations and handed over to the Company. The Company supplied the locomotive power for the conveyance of the waggons to the stations to which the manures placed therein were addressed. The waggons on reaching the respective stations to which their contents were addressed, were placed in the sidings of the Company, and the manures contained therein removed by the local agents of the traders or the parties to whom they were addressed. The Company did not load or unload any portion of the manure traffic, but they employed and paid the engine-drivers, firemen, and brakesmen of the trains of which the waggons containing the traffic formed a part, and by which they were conveyed from the Aberdeen goods stations to the delivery stations.

In these circumstances, the traders applied to the Railway Commissioners for redress under the Regulation of Railways Act 1873 (36 and 37 Vict. c. 48) for an order enjoining the Great North of Scotland Railway Company to afford them all due and reasonable facilities for receiving and forwarding and delivery of traffic upon the several railways belonging to or worked by the Company, and to desist from charging them any higher rates than by law the Company were authorised to charge.

The Railway Company in the first place submitted that the Commissioners had no jurisdiction to grant the present application, nor to determine (1) whether the Company were or were not bound to act as carriers of guano or the other articles above referred to, or (2) whether the charges made by the Company for the use of their railways and for locomotives and waggons were or were not illegal and excessive; and further argued that the charges referred to were made, not under the "limiting charges" clauses, which were only applicable to traffic of which the Railway Company acted as carriers, but under the "tolls clauses" of their Acts, which alone were applicable where, as in the case of the only traffic now in question, the Company did not act as carriers. On the other hand, the complainants' allegations of illegal and excessive charges were made solely on the supposed basis of the "limited charges" clauses. They were also made on the assumption that these clauses, and they alone, regulated the charges which might be made by the Railway Company in respect of the traffic in question. Unless and until the question was decided by the Court of Session which of these clauses was applicable, there was and there could be no common basis between the parties for determining whether the charges made by the Company were or were not illegal and excessive: and upon the Commissioners giving judgment in terms which will sufficiently appear from the questions stated below, they asked the Commissioners to state a Case for the Court of Session.

The following questions were accordingly stated by the Commissioners upon the case as narrated above—"(1) Whether our determination that a railway company does not afford according to its powers all reasonable facilities within the meaning of section 2 of the Railway and Canal Traffic Act 1854, if it makes illegal or excessive charges for the conveyance of traffic, is or is not in accordance with the true construction of that section? (2) Whether, where a railway company carries and conveys traffic upon its railway, it can by such a notice and under such circumstances as in the above

Case stated relieve itself from the obligation of carrying at rates not exceeding those which have been fixed by Parliament as the rates at which a company shall carry, and which in this case, pursuant to section 79 of the Railway Clauses Consolidation (Scotland) Act 1845, are the sums fixed by the Great North of Scotland Railway Consolidation Act 1859, and by the corresponding sections of the Deeside Railway Acts? (3) In the event of its being decided it can so relieve itself, Whether, considering that the Railway Company admits that the agreed rates mentioned in the notice must at any rate be limited by its toll clauses, and refers to such clauses upon the face of its requisition notes, the 55th section is or is not one of such clauses, and its amounts consequently the limit of what can be charged as tolls for the services therein mentioned?" With reference to the third question, the Commissioners had in giving judgment held that the 55th section would limit the rates that were leviable by the Railway Company even although they should be held to have acted as toll-takers and not as carriers.

In the Court of Session it was argued on the question of jurisdiction by the Railway Company —The Railway and Canal Traffic Act 1854, under the provisions of which the Railway Commissioners proposed to entertain this question, took no account of rates leviable for the carriage of goods except in so far as preferences were conferred. There was here no question of preference.

By the trading companies—If the Railway Company should be held to be right in this question, the Railway Commissioners' jurisdiction would be entirely destroyed, for there was no better way of stopping traffic than by charging too high, and to take an excessive charge was to create an obstruction in the sense of the 2d section of the Act. The case of *Evershed* v. *London and North-Western Railway Company*, Feb. 1877, L.R. 2 Q.B. 254, and other decided cases, showed that the jurisdiction of Courts of Law and of the Railway Commissioners was concurrent. *Great Western Railway Company* v. *Sutton*, 1868-9, L.R., 4 H. of L. Eng. and Ir. Apps. 226. The establishment of the Railway Commissioners as a tribunal was for the object of giving parties a summary method of procedure in such cases.

On the merits, it was argued by the Railway Company—*Johnson* v. *Midland Railway Company*, 26th June 1849, 18 L. J. Exch. 316, and 4 Welsby, Hurlstone, and Gordon, Exch. Reps. 367, showed that a railway company might by such a notice as that of 4th February here retire from conveying a certain class of goods altogether. The double sense in which "tolls" was used throughout the Railways Clauses Act showed that a railway company might carry goods either as a carrier proper or by letting its line and plant to another party to carry his own goods. "Carrying" did not necessarily mean acting as carriers. It was susceptible of interpretation as "tolls." What the nature of the act was depended on the terms of the contract, and hence the importance of regarding the terms of the notice and requisition notes here. The physical facts were of much less importance.

By the traders—"Tolls" no doubt might have reference to the charge made by the company either as a carrier or as a toll-taker for the use of its line. Hence the importance of attending to the state of fact, for it was in vain that the railway company said they would not act as carriers if in point of fact they did. The limiting section of their Act was applicable to the things done, and not to the profession they made. The state of facts here showed that the character assumed by the company was that of carriers.

At advising—

Lord President—This is a case stated by the Railway Commissioners for the opinion of the Court under the authority of the Regulation of Railways Act 1873, in which the Great North of Scotland Railway Company are in the position of appellants, and the Aberdeen Commercial Company with the Aberdeen Lime Company, in whose favour the deliverance of the Railway Commissioners was given, are in the position of respondents. The respondents—these trading companies—have been in the practice of sending certain traffic along the appellants' line, the nature of that traffic being what is described under the first head of the toll-charges exigible according to the provisions of the Great North of Scotland Railway Consolidation Act 1859; these apply to "all dung, compost, and all sorts of manure, lime and limestone, and all undressed materials for the repair of public roads or highways." This species of traffic till the beginning of this year was carried in the ordinary way for ordinary charges made by the Company as carriers, but in February of this year the Railway Company gave notice that they would not after 1st March carry this kind of traffic on the same footing as formerly. In that notice they state that they "do not profess to act and do not act as carriers of the under-mentioned articles—viz., dung, compost, manures, bones (manufactured or unmanufactured), guanos, phosphates, sulphates, nitrates, muriates, kainit coprolites (in any state), potash salts, and all articles of a like nature." They add—"The Company, however, at the request of parties, and upon certain conditions and at agreed rates (but not otherwise), will provide waggons or locomotive power, or both, to persons desiring the use of the railways owned, worked, or used by the Company for the purpose of allowing them to forward any of the above-named articles from or to any of the stations and on the harbour rails at Aberdeen." Their object is no concealed one. It is avowed that this proposed change is to enable the Railway Company to make higher charges than they could do while they acted, as they say, as "carriers." Their design is to make charges under the 52d and 53d sections of their Act instead of under the 55th section. The same observation applies to two other special Acts under which they levy tolls and make charges. The Railway Company do not pretend to have right to make this new charge if they are acting as carriers, but they maintain that under their notice they are no longer carriers but owners of the line and owners of the carriages and locomotives by means of which the goods are carried, and which are hired from them by the two trading companies. The whole case turns upon the inquiry into a matter of fact—whether the Railway Company have in fact been acting as carriers? The Railway Commissioners consider—and I think consider rightly that they have finally determined this question of fact. They have determined that the Railway did *de facto* carry this traffic in a certain way, and the questions now put to us involve

a question of law, whether what they have done was done by them as "carriers?" We must take the facts stated in the Case, and see what is the legal construction to be put on these facts.

Now, the Railway Company refused to take this traffic unless the traders would make application for carriages and locomotive powers to propel them in terms of certain requisition notes, into the terms of which I do not now propose to enter particularly. They bore, it is sufficient to say, that the traders applied for waggons and locomotive power for the purpose of conveying their traffic along the line of railway. The traders objected to use these notes, but submitted to them finally under protest, and applied to the Railway Commissioners for redress. The Commissioners state in the third article of the Case—"The applicants do not own waggons or locomotives. Their manure traffic is conveyed over the railways of the Company in waggons of the Company, and by means of locomotives also belonging to the Company, and worked by their servants;" and in the seventh article they add—"Since the 1st March 1878 the Company have regularly, upon requisition notes, in the form above referred to, being filled up and signed by the applicants, supplied them with waggons for their manure traffic. The waggons (with the exception of a few cases in which the applicants brought their goods in carts to the stations) were handed over to the applicants at Aberdeen goods stations, and were by the applicants removed to their own premises, and there loaded and returned by them to the Company's goods stations and handed over to the Company. The Company supply the locomotive power for the conveyance of the waggons to the stations to which the manures placed therein by the applicants are addressed. The waggons, on reaching the respective stations to which the applicants address their contents, are placed in the sidings of the Company, and the manures contained therein removed by the local agents of the applicants or the parties to whom they are addressed. The Company do not load or unload any portion of the applicants' manure traffic. But they employ and pay the engine-drivers, firemen, and brakemen of the trains of which the waggons containing the applicants' traffic form a part, and by which they are conveyed from the Aberdeen goods stations to the delivery stations."

Putting out of view the terms of the notice and of the requisition notes, which are not, as I think, material in the case, what is the substance of these statements? The goods were loaded on the premises of the traders in sidings connected with the Railway Company's line, and unloaded upon the sidings of the Railway Company again by the traders themselves. That is also, I think, immaterial, for there is no doubt that nothing is more common in the course of railway traffic than that the trader himself should load and unload his goods. But in sending the goods along the railway they are sent in waggons belonging to the Railway Company, propelled by locomotives belonging to the Railway Company, and the waggons in which they are sent form part of composite goods trains made up of other waggons containing goods belonging to other traders. In short, they form part of a goods train which the Railway Company is taking along its line in the ordinary way.

Are they then acting as toll-takers under the 52d and 53d sections of their statute, or under those other clauses which entitle them to act as carriers and oblige them to charge less than they are entitled to charge under the 52d and 53d sections? The 52d section provides—"It shall be lawful for the Company to demand any tolls for the use of their railway not exceeding the following (that is to say), First, in respect of the tonnage of all articles conveyed upon the railway, or any part thereof, as follows:—For all dung, compost, and all sorts of manure-lime and limestone, and all undressed materials for the repair of public roads or highways, per ton per mile twopence, and if conveyed by carriages belonging to the Company an additional sum per ton per mile of one penny." Here, then, there is first a charge for goods conveyed in carriages belonging to the traders of 2d. a mile, and if the Company hires out carriages they are entitled to 1d. additional. The 53d section provides:—"The toll which the Company may demand for the use of engines for propelling carriages shall not exceed one penny per mile for each passenger or animal, or for each ton of goods or other articles, in addition to the several other tolls or sums by this Act authorised to be taken." This toll is a toll for the use of an engine, not a charge for the use of propelling power, and therein there is a material difference between this section and the 55th, where locomotive power is what is to be charged for. The charge for "the use of an engine" is a charge for the exclusive use of an engine. In short, the mode of conducting the traffic which is contemplated under the 52d and 53d sections is that the trader may bring his own carriages and locomotive loaded with his own goods and convey them for himself, or else may hire the waggons and locomotives of the Company and convey his own goods by means of them. The conduct of the carriages and engine in either case while the train is passing along the line is in the hands of the trader and not of the Company. But in the case before us, instead of that *species facti*, the trucks loaded with these traders' manure form part of an ordinary train and are in charge of the servants of the Company. That is something quite different from what is contemplated in the 52d and 53d sections.

Now, let us turn to the 55th section, and see if this *species facti* corresponds with what is provided for there. Section 55 provides—"It shall not be lawful for the Company to charge in respect of the several articles, matters, and things, and of the several descriptions of animals hereinafter mentioned, conveyed on the railway or any part thereof, any greater sum, including the charges for use of carriages, waggons, or trucks, and for locomotive power, and all other charges incidental to such conveyance, than the several sums hereinafter mentioned." This section plainly contemplates that the charge here is to be made by the Company as working their own line. I think there is a distinct contrast between the 52d and 53d sections on the one hand and the 54th and 55th on the other. The 54th provides for the case of passengers what the 55th does for the case of goods.

It is the more clear that a distinction of this kind is intended to be drawn here and in similar Acts, because there is through the whole course of

railway legislation a distinction drawn between the two functions of a railway company. The first function is to make a road, which is to be a public road, and to recompense them for their outlay in this they are authorised by the general Railway Act and by special Acts to charge certain tolls for the use of the roads. These they charge in the character of makers, or lessees it may be, of these roads. But they have another character, viz., that of carriers. That is not the principal purpose of their incorporation, but it is given them by special permissive legislation, of which the leading enactment, as every one knows, is the 79th section of the Railways Clauses Act of 1845. It is not unimportant in the present question to see what railway companies are under that section entitled to do:—"It shall be lawful for the company to use and employ locomotive engines or other moving power, and carriages and waggons to be drawn or propelled thereby, and to carry and convey upon the railway all such passengers and goods as shall be offered to them for that purpose, and to make such reasonable charges in respect thereof as they may from time to time determine upon, not exceeding the tolls by the Special Act authorised to be taken by them." The word "tolls" is used in this statute in two different senses, as was pointed out in the case of the *Highland Railway Co.* v. *Jackson*, June 16, 1876, 3 Rettie 850, but in this clause it plainly means charges for carriage. It is instructive then to observe the special thing they are authorised to do in order to act as carriers on their own line. They are to be entitled to "employ locomotive-engines or other moving power, and carriages and waggons to be drawn or propelled thereby," and they are "to carry and convey all such goods as shall be offered to them," and they are "to make reasonable charges in respect thereof." That is what the Legislature considered to be acting as carriers. Let us see whether the Railway Company here does the things contemplated by the General Act. According to the statements in this Case they certainly do all these things, and therefore they do a great deal more than they could do under the 52d section. This is to my mind conclusive as to whether the Railway Company are acting as carriers. I think they are. That which they do, in fact, and claim to be remunerated for, is neither more nor less than acting as carriers. I am therefore of opinion that the second question put by the Commissioners ought to be answered favourably to the respondents. That is to the effect that the Railway Company cannot relieve themselves from their obligations to carry at the limited rates of the 55th section.

I should have much greater difficulty in answering the third question, but in respect of the answer I propose to give to the second it does not arise for decision. It runs thus—"(3) In the event of its being decided it can so relieve itself, whether, considering the railway Company admits that the agreed rates mentioned in the notice must at any rate be limited by its toll clauses, and refers to such clauses upon the face of the requisition notes, the 55th section is or is not one of such clauses, and its amounts consequently the limit of what can be charged as tolls for the services therein mentioned." That hypothesis does not arise, but I am bound to say that if the Company could escape from the obligation of the 55th section as carriers I should have great difficulty in saying that it bound them as toll-takers; it is not applicable to toll-takers but to carriers.

One word on the first question—"Whether our determination that a railway company does not afford, according to its powers, all reasonable facilities within the meaning of section 2 of the Railway and Canal Traffic Act 1854, if it makes illegal or excessive charges for the conveyance of traffic, is or is not in accordance with the true construction of that section?" In one sense that question scarcely requires an answer. If the Railway Company makes illegal or excessive charges for the conveyance of traffic, and the Railway Commissioners found that that was illegal, that would surely be in accordance with the statute. But the question is intended to be raised, whether the determination that the Railway Company is making illegal or excessive charges is within the jurisdiction of the Commissioners? I have little hesitation in saying that it is. By the Acts of 1854 and 1873, taken in combination, the Commissioners are entitled to enforce the duty that is laid upon companies by the 2d section of the Act of 1854—the duty, namely, of refraining from giving "any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." There cannot be the smallest doubt that the grievance here complained of is an "undue and unreasonable prejudice" to a particular description of traffic, and accordingly, on the question of the jurisdiction of the Commissioners I have no doubt at all.

LORD DEAS and LORD MURE concurred.

LORD SHAND—I concur in the proposed judgment and in the reasons given by your Lordship therefor. The first question must be read in reference to the particular statements given by the Commissioners as to the dispute that arose between the parties. That dispute was of this nature: these merchants complained that the particular class of traffic in which they dealt was being subjected to undue prejudice. The truth of that complaint was denied by the Railway Company, and that is precisely one of the cases for which the Act of 1854 was to provide a remedy. They had, therefore, in my opinion, jurisdiction.

With reference to the second question, his Lordship pointed out that there were in the Act two sects of clauses—one intended to apply where the company acted as carriers, the other where other parties required the use of their line, and it might be their waggons and engines. The latter clauses authorised higher charges, as their object was to prevent undue competition by a neighbouring company. The Company was not entitled itself to make use of these clauses so as to exact rates higher than they were entitled to as carriers. But in point of fact the Company did act in the cases complained of as carriers, and were only, therefore, entitled to charge carriers' rates.

With reference to the terms of the notice and requisition notes, his Lordship said—"These contracts were entered into of necessity, as the Company had a monopoly of the traffic; but notwithstanding the

terms of the contracts the language there used will not avail to change the fact. If these are trains belonging to the Company you cannot alter that fact by calling them traders' trains and charging different rates.

In regard to the third question, it is quite true that the Court are asked to answer that only in the event of its being decided that the Company can relieve itself from the obligation of carrying at rates not exceeding those fixed by Parliament as the rates at which it shall carry. I cannot refrain from saying that on the principle on which we have proceeded I am bound to take a different view of that question from what the Commissioners have taken.

The Court pronounced this judgment:—

"The Lords . . . . . make answer and say—(1) The complaint of the respondents, the Aberdeen Commercial Company, and the Aberdeen Lime Company, against the appellants the Great North of Scotland Railway Company, is in substance that by their recent proceedings they have subjected the particular traffic in which the respondents are interested to an undue or unreasonable prejudice or disadvantage. This, if established, is a direct contravention of the provisions of sec. 2 of the Railway and Canal Traffic Act 1854. The determination of the Commissioners therefore in this Case was, in the opinion of the Court, within their jurisdiction. (2) The Court are of opinion that in the circumstances stated in the case the Great North of Scotland Railway Company, appellants, have since the 1st March 1878 carried the traffic of the respondents as public carriers on their own railway, and are therefore not entitled to charge for such carriage any higher rates than are limited and authorised by the 55th section of the Great North of Scotland Railway Consolidation Act 1859, or by any of the corresponding sections of the Deeside Railway Acts. (3) Having negatived the hypothesis on which the third question proceeds, the Court finds it unnecessary to answer the question. The Court therefore affirm the determination of the Commissioners, and find the appellants liable to the respondents in the expenses of the proceedings, and remit to the Auditor to tax the account of said expenses and to report."

Counsel for Appellants (The Traders)—Asher—Murray. Agents—Tods, Murray, & Jamieson, W.S., and Simson, Wakeford, & Simson.

Counsel for Respondents (The Railway Company)—Kinnear—Balfour—Jameson. Agents—T. J. Gordon, W.S., and Dyson & Co.

Friday, October 25.

SECOND DIVISION.

CREE (LIQUIDATOR OF THE BONNINGTON SUGAR REFINING CO., LIMITED) *v.* SOMERVAIL AND OTHERS (THOMSON'S TRS.)

Public Company—Ultra vires *Act—Power to Directors to Buy Shares—Trafficking in Shares—Reduction of Capital.*

The memorandum of association of a sugar refining company formed under the Companies Act of 1862 provided that no transfer of any shares either upon a sale or in consequence of the bankruptcy of any shareholder should be valid or effectual without the consent of a majority of the other shareholders expressed in writing, but that if the other shareholders declined to consent to any such transfer they should be bound to take the shares at the price offered in a case of sale, or at the market price in other cases. Provision was made for the forfeiture of shares in the event of non-payment of calls.

Objections to a *bona fide* direct purchase of shares by the directors in trust for the company—in respect it was *ultra vires* as being, *inter alia*, unauthorised by the memorandum of association, outside the business of the company, and tending to diminish its capital—(*diss.* Lord Ormidale)—*repelled*; and *held* that in the circumstances of the case the purchase was subsequently ratified by the shareholders.

This was a petition presented by James Cree, voluntary liquidator of the Bonnington Sugar Refining Company (Limited), praying the Court to find that Peter Somervail and others, as trustees of James Thomson deceased, "should be placed on the list of contributories of the said Company in respect of fifty shares," upon which "£1 per share has been paid up," and also for a decerniture against the trustees for £1500, the amount of a call of £30 per share, with interest at the rate of 5 per cent. since April 22, 1878.

The Bonnington Sugar Refining Company was formed in 1864, its capital consisting of £50,000 divided into 500 shares of £100 each, and the whole capital was paid up, Mr Thomson being one of the original shareholders. In 1873 the capital was increased by £50,000 divided in the same manner, but only £1 per share of the new shares thus issued was paid up, each of the then existing members accepting one new share for each of those originally held by him, and being entered on the register as holder thereof. Mr Thomson died in 1875, leaving a trust-disposition and settlement appointing the respondents his trustees, and they were entered as at 7th February 1876 as holders of the shares in question. The Company by special resolution, confirmed on March 27, 1878, agreed to wind up, and appointed Mr Cree their voluntary liquidator. Mr Cree accordingly on 12th April 1878 made a call of £30 on each of the shares not paid up, and after this petition was presented another call was made by him. The respondents refused to pay calls, on the ground that they were not in anyway shareholders or contributories. In the end of 1876 the trustees had become desirous of withdrawing from the company and of realising their shares, and Mr