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Friday, December 17.

## FIRST DIVISION.

[Railway Commissioners.

### NORTH EASTERN RAILWAY COMPANY v. NORTH BRITISH RAILWAY COMPANY.

*Railway—Railway Commissioners—Appeal—Competency—Regulation of Railways Act 1873 (36 and 37 Vict. cap. 48), sec. 8—Railway and Canal Traffic Act 1888 (51 and 52 Vict. cap. 25), sec. 17.*

Where the Railway Commissioners sit in lieu of arbitrators under the provisions of section 8 of the Regulation of Railways Act 1873, they exercise a proper jurisdiction not depending on the consent of the parties, and an appeal is competent under section 17 of the Railway and Canal Traffic Act 1888 to a superior court on a question of law.

*Railway—Railway Commissioners—Appeal—Competency—Railway and Canal Traffic Act 1888 (51 and 52 Vict. cap. 25), sec. 17.*

The Railway and Canal Traffic Act 1888 provides by section 17 that an appeal on a question of law, save as otherwise provided by that Act, shall lie from the Railway Commissioners to a superior court of appeal.

*Held* that an appeal was competent although the order appealed against disclosed no question of law, but where it appeared on the face of the judgments of the Commissioners that the order had been made because of a determination of a question of law.

#### *Railway—Running Powers.*

By an agreement entered into between the North Eastern and North British Railway Companies, scheduled to and incorporated with an Act of Parliament, it was provided that “for the purpose of maintaining and working in full efficiency in every respect the East Coast route by way of Berwick for all traffic between London and other places in England, and Edinburgh, Leith, Glasgow, and other places in Scotland, the North British Company shall at all times hereafter permit the company (*i.e.*, the North Eastern), with their engines, carriages, waggons, and trucks, to run over and use the North British Company’s railway . . . between Berwick and Edinburgh . . . subject to the payment by the company to the North British Company for such user of such tolls, rates . . . as have or has been or shall from time to time be agreed upon

by and between the said companies, or in default of such agreement, as shall be fixed by arbitration in manner hereinafter provided.”

Under their statutory powers the Railway Commissioners became the judges both of the extent to which the running powers so conferred were to be exercised and of the payments to be made for the use of the North British Company’s line.

In an application to the Commissioners, the North Eastern asked for an order authorising them to run the whole existing service of passenger trains upon the East Coast route.

*Held* that the fact that the North British Company were owners of the line gave them no legal right to run any of the East Coast passenger trains, and formed no legal obstacle to the Commissioners (in the exercise of their discretion) granting the North Eastern Company’s application.

This is a sequel of the case reported *ante* under date 17th December 1896, vol. xxxiv. p. 179, and 24 R. (H.L.), p. 19.

By article 8 of an agreement between the North Eastern and North British Railway Companies, scheduled to and incorporated with the North Eastern and Carlisle Amalgamation Act 1862, it is provided—“8thly. For the purpose of maintaining and working in full efficiency in every respect the East Coast route by way of Berwick, for all traffic between London and other places in England and Edinburgh, Leith, Glasgow, and other places in Scotland, the North British Company shall at all times hereafter permit the company, with their engines, carriages, waggons, and trucks, to run over and use the North British Company’s railway, sidings, stations, wharves, and stopping, loading, and unloading places, water, watering-places, and other conveniences at and between Berwick and Edinburgh and Leith, all inclusive . . . subject to the payment by the company to the North British Company for such user of such tolls, rates, or dues, or such share or proportion of tolls, rates, or dues, as have or has been or shall from time to time be agreed upon by and between the said companies, or in default of such agreement as shall be fixed by arbitration in manner hereinafter provided.”

By article 17 it is provided—“If and whenever any dispute or difference shall arise between the company and the North British Company as to facilities or accommodation to be given, or as to any rent or charge or allowance (terminal or otherwise) to be paid or allowed by either company to the other under this agreement, every such difference shall be determined by arbitration under the Railway Companies Arbitration Act 1859.”

Section 8 of the Regulation of Railways Act 1873 (36 and 37 Vict. c. 48) provides—“Where any difference between railway companies . . . is under the provisions of any general or special Act . . . required or authorised to be referred to arbitration, such difference shall, at the instance of

any company party to the difference, and with the consent of the Commissioners, be referred to the Commissioners for their decision in lieu of being referred to arbitration." . . .

By section 26 it was provided that the Commissioners must, at the instance of one of the parties, in certain cases, and might in others (of which section 8 was one) state a question of law for the determination of a superior court in the form of a special case. This clause was repealed by the Railway and Canal Traffic Act 1888 (51 and 52 Vict. c. 25).

Section 15 of that Act provides—"For the purposes of section 8 of the Regulation of Railways Act 1873, and any other enactment relating to the reference to the Railway Commission of any difference between companies, which under the provisions of any general or special Act is required or authorised to be referred to arbitration, the provisions of any agreement confirmed or authorised by any such Act shall be deemed to be provisions of such Act."

Section 17 provides—(1) No appeal shall lie from the Commissioners upon a question of fact, or upon any question regarding the *locus standi* of a complainant. (2) Save as otherwise provided by this Act, an appeal shall lie from the Commissioners to a superior court of appeal."

By section 6 of the Board of Trade, Arbitrations, Inquiries, &c., Act 1874 (37 and 38 Vict. c. 40), the Board of Trade are empowered, in the case of differences between railway companies, which are required or authorised under their Acts, to be referred to the arbitration of or to be determined or settled by the Board of Trade, to refer such matter to the Railway Commissioners, and appoint them arbitrators or umpire, with the same powers as if the matter had been referred to their decision in pursuance of the Regulation of Railways Act 1873."

The passenger trains upon the East Coast route were made up mainly of carriages which were the joint property of the North British, North Eastern, and Great Northern Railway companies, and prior to 1869 the North British Company supplied these trains with engines and guards upon their own line. From 1869 to 1894 the engines and guards were provided by the North Eastern Company under an agreement between that company and the North British terminable on three months' notice, by which a mileage rate for the use of North Eastern engines was payable by the North British Company.

In 1894 the North British Company raised an action against the North Eastern Company, in which they sought declarator that they were entitled to resume the haulage of the existing service of through trains upon their own line. The defenders maintained that these trains had been run by them as their trains in virtue of their running powers, and that they were not bound to hand them over to the pursuers.

The First Division of the Court of Session assailed the defenders. On appeal the House of Lords reversed this judgment,

and dismissed the action, holding that neither company had an exclusive right to the control of the through traffic, and that failing agreement the regulation of the exercise of the defenders' running powers was a matter for the decision of the Railway Commissioners—*ante*, vol. xxxiv. p. 179, and 24 R. (H.L.) 19.

On 17th December 1896 the North-Eastern Company gave notice to the North British Company that on the expiration of the existing arrangement, they proposed, "in exercise of their running powers, to run from Berwick to Edinburgh and from Edinburgh to Berwick trains timed in accordance with the timing of the existing through trains," and to pay the North British Company 66½ per cent. of the receipts. The latter company refused to accede to this proposal, and the companies having failed to agree as to the terms and conditions of the exercise of the North Eastern Company's running powers, an application was made by them to the Railway Commissioners under section 8 of the Regulation of Railways Act 1873, and sec. 15 of the Railway and Canal Traffic Act 1888 for an order determining the difference between the parties.

Answers were lodged by the North British Company, who averred that the North-Eastern Company had not exercised their running powers since 1869, the haulage of the through trains by their engines having been done on payment by the North British of haulage at a fixed rate per mile. They contended that as the company own the line between Edinburgh and Berwick, they were entitled to run the existing through trains without prejudice to the right of the North Eastern Company to exercise their running powers, and to run such new and additional trains as might be necessary or advantageous for the public. They denied, however, that any such new trains were needed, the existing trains being sufficient to accommodate the whole traffic.

After a proof, the nature of which is sufficiently indicated in the opinions of the Railway Commissioners, that Court pronounced the following order dated 28th April:—"Now, therefore, having heard counsel and witnesses for the North Eastern Company and the North British Company respectively, this Court doth decide and determine as follows:—*First*, That the North Eastern Company are entitled to exercise their running powers over the railway belonging to the North British Company between Edinburgh and Berwick, although the North British Company may be able and willing to carry East Coast traffic over that portion of the East Coast route as efficiently in North British Company's trains: *Secondly*, That the North Eastern Company, in the exercise of their running powers over the railway belonging to the North British Company between Edinburgh and Berwick, are entitled to run one half of the East Coast through passenger trains as running-power trains of the North Eastern Company, and that which of the East Coast through pas-

senger trains between Edinburgh and London are to be running-power trains of the North Eastern Company over the railway belonging to the North British Company between Edinburgh and Berwick shall be agreed on between the two companies, and in case of difference be settled by this Court: *Thirdly*, that the amount to be paid by the North Eastern Company to the North British Company in respect of such running-power trains between Edinburgh and Berwick shall be at the rate of £75 per cent. of the gross receipts from the traffic carried in such trains over the North British Railway between Edinburgh and Berwick, and that the allowance for working expenses shall be at the rate of £25 per cent. of the gross receipts, and that the payment of such £75 per cent. by the North Eastern Company to the North British Company shall include all claim by the North British Company against the North Eastern Company for payment by way of rent for station accommodation and station services at Edinburgh under the aforesaid scheduled agreement: And whereas the two companies failed to agree as to which of the East Coast through passenger trains between Edinburgh and London were to be running-power trains of the North Eastern Company over the railway belonging to the North British Company between Edinburgh and Berwick: And whereas the general managers of the two companies respectively have been heard in the matter of such difference, this Court doth hereby decide and order that the East Coast through passenger trains set out in the schedule to this order are to be the running-power trains of the North Eastern Company over the railway belonging to the North British Company between Edinburgh and Berwick: And it is further ordered that the number of such trains, and the times of the arrival and departure of such trains, set out in the schedule to this order, shall be subject to alteration from time to time as may be agreed on by the said two companies: And this Court doth not think fit to make any order as to the costs of and incidental to this application up to and including the date of this order. Dated this 28th day of April 1897."

The opinions delivered by the Commissioners were as follows:—

**LORD TRAYNER**—The main questions to be determined under this application are the extent to which, and the conditions under which, the North Eastern Company are to be allowed to exercise their running powers over the railway belonging to the North British Company between Edinburgh and Berwick. That railway forms a part of what is known as the East Coast route between Edinburgh and London, the other parts of which belong to the North Eastern Company and the Great Northern Company respectively. In the application presented to us the applicants state that they intend, in exercise of their running powers, to run a full service of through passenger trains between Edinburgh and England by the East Coast route; that the times at which

they propose to run such trains are set out in the schedule appended to the application; that the defendants have refused to accede to this; and they practically ask an order from us which will enable them to carry out their intention. From the schedule it appears that the trains which the applicants propose to run are the whole through trains at present running between Edinburgh and London, departing and arriving at the respective termini at the hours now observed. Put more briefly (as indeed it is put by Mr Gibb, the manager of the North Eastern Company in his evidence), what the applicants ask is an order from us which will have the effect of giving to the applicants the control of all the trains which now constitute the service by the East Coast route between Edinburgh and London. The grounds—at all events the principal grounds—on which the applicants maintain that the application should be granted are (so far as I can gather from the proof adduced and the arguments addressed to us) these three—(1) their legal right; (2) the practice of other railways; (3) that the defendants have an interest which may operate adversely and prejudicially to the interests of the East Coast route. I take the second and third of these grounds first, as they can be easily disposed of.

I. With regard to the practice of other railways, it is probably the case that in England the company possessing the running powers does, as matter of fact, control the through traffic, does all the haulage, arranges the hours for the arrival and departure of trains, and so on. But they do not do so as matter of right. In any case we have heard of, such an exercise of running powers is under agreement between the company owners of the line and the company having the running powers. But what certain companies agree upon is no criterion of the rights, and cannot affect the rights, of other companies who do not agree. It would be unreasonable to hold that the North British Company are bound to accept a limitation of their legal rights because certain English companies have agreed (under circumstances and upon terms of which we are ignorant) so to limit their rights. I dismiss that ground, therefore, from my consideration as having really no relevant bearing upon the questions now before us.

II. The interest which it is said or suggested that the North British Company have adverse to that of the East Coast route is their line by the Waverley route from Edinburgh to Carlisle. This is longer than the line from Edinburgh to Berwick by about 40 miles, and the suggestion is that the North British Company, in order to earn the profit which their longer mileage would give them, may send through passenger traffic by Carlisle (and thence by the Midland Railway to London) instead of sending it by the East Coast route. This, of course, is possible, in the sense that the North British Company might try to do so, but it has never been done, and the applicants do not say it has

ever been done. All that the applicants do say is, that the North British Company have used this possibility as a ground for declining to join in the expense of advertising the East Coast route as the applicants wished to advertise it, and as a means of obtaining a bonus from the applicants. I take this statement (subject to Mr Conacher's explanation) as correct. But it only comes to this, that the North British Company have used a position they possess as a means of obtaining from the applicants better terms than they would otherwise have obtained. It does not suggest to my mind, far less establish as a fact, that the North British Company have ever done or threatened to do anything to interfere with the development of the East Coast route. Mr Conacher's evidence is that "The North British Company have always recognised that it was vital to their position in Scotland, as against the West Coast route, to do their very best for the East Coast route, and they have co-operated with the other Companies (*i.e.*, the applicants) in every way they could to improve the service." There is no evidence to the contrary of this. In acting as Mr Conacher describes, the North British Company have only been doing what is best for themselves, and in that fact is to be found the best guarantee for the continuance of the same co-operation. The idea of the North British Company starting or maintaining a route from Edinburgh to London, by way of Carlisle, and thence by the Midland Railway, in opposition to either the East or the West Coast route, would not be entertained seriously by anyone at all acquainted with the passenger traffic between Edinburgh and London. And indeed I think the applicants do not seriously apprehend any risk of that happening which they suggest might happen. At any rate, they have cried out, not only before they were hurt, but before they had any real apprehension that they were likely to be hurt. I am of opinion that there is no evidence to support the view that the North British Company have failed in any way loyally to co-operate with the applicants in making the East Coast route as efficient and attractive as it could be made.

I have probably given this ground for the application more consideration than it deserves, but I proceed now to consider the remaining ground. What are the legal rights of the applicants? And in reference to that question neither the facts nor the law appear to me attended with difficulty.

III. In May 1862 the North Eastern Company and the North British Company entered into an agreement whereby (section 18) it was provided that the parties thereto should maintain and work in full efficiency in every respect the East Coast route for all kinds of traffic, and that all facilities which either of the parties could legally afford should be adopted and carried out on such route for the cultivation and development of such traffic; further, that the North British Company should grant to the North Eastern Company

running powers over the line from Berwick to Edinburgh. It was also agreed that a clause for giving full effect to and for rendering binding in perpetuity that portion of the section just referred to, giving running powers to the North Eastern Company, should be inserted in a bill then before Parliament. Accordingly, in a schedule to the North Eastern and Carlisle Amalgamation Act 1862, we find the following clause:—"Eighthly, For the purpose of maintaining and working in full efficiency in every respect the East Coast route by way of Berwick for all traffic between London and other places in England, and Edinburgh, Leith, Glasgow, and other places in Scotland, the North British Company shall at all times hereafter permit the Company (*i.e.*, the North Eastern Company) with their engines, carriages, &c., to run over and use the North British Company's railway, &c., between Berwick and Edinburgh," &c. When that Act was passed, matters stood thus between the two contracting companies: The North Eastern Company had running powers over the railway between Berwick and Edinburgh—this was statutory; and the North British Company, under agreement, were entitled to demand and get every facility from the North Eastern Company which the latter could legally afford for the forwarding to the south of any traffic which the North British Company might take to Berwick. The practical difference between their positions was that, whereas the North Eastern Company were entitled under their running powers to go over the North British Company's line with their engines and carriages, and so convey the traffic from the south of Berwick to Edinburgh, the North British Company could not enter upon the North Eastern Company's line with traffic conveyed from Edinburgh to Berwick, but could only ask the North Eastern Company to take that traffic on. In short, the North Eastern Company could convey traffic from south of Berwick to Edinburgh, but the North British Company had to give up their traffic from the North to Berwick at the latter station to the North Eastern Company.

That being the state of matters between the parties, the first question that requires to be attended to is the argument maintained by the counsel for the North British Company on the effect of the eighth article of the agreement scheduled to the Act of 1862. It was argued by him that that clause only gave the North Eastern Company a right to exercise the running powers "for the purpose of maintaining and working in full efficiency in every respect the East Coast route;" that unless it was necessary "for that purpose" the running powers could not be exercised; that it was not in fact necessary for that purpose that the powers should be exercised, as the North British Company were willing and able to work efficiently the traffic of the East Coast route from Berwick to Edinburgh. There is no serious dispute regarding the matter of fact. I assume that the North British Company are quite

able and willing to work efficiently the traffic between Berwick and Edinburgh. But, nevertheless, I regard the argument as unsound. In the first place, the North Eastern Company are not desiring to exercise their running powers for any other purpose than that for which such powers were given to them. They seek to exercise their running powers solely with the view of maintaining and working the East Coast route in full efficiency. In the second place, it is no reason for preventing the North Eastern Company from exercising their right that the North British Company is willing to do the work for them. For reasons satisfactory to themselves, the North Eastern Company prefer to do their own work rather than allow it to be done for them by others. And in the third place, the argument for the North British Company can only proceed on the assumption of a limitation of the North Eastern Company's right, which is not imposed by the agreement scheduled to the Act of 1862. That agreement does not make the exercise of the running powers thereby conferred conditional upon the North British Company being unable to do what under the running powers the North Eastern Company are authorised to do. On the contrary, both the private agreement and the scheduled agreement proceed upon the view that both companies are able and bound to maintain in their own respective portions of it the efficient working of the East Coast route, concurrently with the exercise or possible exercise of the running powers. I have no doubt, therefore, that the North Eastern Company are entitled to exercise their running powers over the North British Company's railway although the latter company are able and willing to do what would make such exercise unnecessary.

The question, however, remains—To what extent are the North Eastern Company entitled to exercise their running powers? The views of the North Eastern Company on the subject are stated with unmistakable clearness by Mr Gibb, their manager. He says—"In the present application we propose to run nine trains the one way and ten the other, at times which are set out in the schedule to the application. That will constitute a full service of trains meeting fully the wants of the public." If the North Eastern Company are authorised to run all these trains—"a full service meeting fully the wants of the public"—it follows that the North British Company will not be able to run any of the through trains at all; there would be no need, and indeed no room for other trains. Accordingly, the result of granting the application now before us would be to prevent the North British Company from using their own line at all, so far as through traffic was concerned, between Edinburgh and Berwick. I know of no principle of law or good sense upon which effect could be given to such a claim. The North British Company are the owners of the line, and entitled as owners to the fullest use and enjoyment of their own property which the law permits.

They are not the less absolute owners of their line because the North Eastern Company have running powers over it. The right of the North British Company is that of ownership—the right of the North Eastern Company is the inferior right of servitude, and it is to me a novel view to maintain that the owner of a servitude can use, or claim to use, the subject over which his right extends to the exclusion of the owners of the subject. Take a familiar example. A road, the property of A, is subject to a right of passage thereon to B. The first principle in reference to the subordinate right is that it shall be exercised in the manner least burdensome to the superior right. But if the owner of the servitude proposed to use his right so as to practically exclude the owner of the road altogether, or to exclude a particular use thereof by the owner, or the use thereof altogether during certain hours of the day, the principle I have referred to would be subverted. That would not be using the servitude in the least burdensome fashion, but would be making it as burdensome as possible. It would, in effect, on the one hand, be conferring on the servitude holder the benefits of ownership, and, on the other, reducing the right of ownership to a very limited right of servitude. I cannot give effect to such a contention. To do so would, in my opinion, be something a great deal more than regulating the use of co-existing rights; it would be an unwarrantable invasion of the rights of the North British Company. I am not to be understood to say that the Court could not, under any circumstances, grant such an application as that now before us. I can conceive circumstances under which it might, as, for example, if the North British Company were unable to work the through traffic efficiently—or refused to do it—or were clearly acting in such a way as to injure the East Coast route, which it had bound itself to maintain and work. Probably, in such circumstances, the Court might interfere. But in the circumstances of the case before us I am clearly of opinion that the Court cannot grant this application as made, because by so doing they would be depriving the North British Company of the proper and legitimate use of their own property—in short, doing it a wrong.

The North Eastern Company has not asked us to consider any alternative scheme, such as a division or apportionment of the through service between them and the North British Company. We might, therefore, have simply refused the application. But although no such alternative scheme has been presented to us, we have considered what should be done in the matter of apportionment, as to decide that now will prevent the expense already incurred under this application from being thrown away, and avoid the expense of another application. For my own part, I incline to the opinion that in any division or apportionment of the train service the North British Company, as owners of the line, have the higher and prior claim. But the prevailing view, to which I accede, is

that the train service in question should be equally divided, and that is what we determine. If the parties cannot agree upon how that is to be done, they can present their respective views to the Court, who will adjust that.

The terms upon which the applicants are to be allowed to exercise their running powers have now to be fixed. It is admitted that the gross receipts are to be paid to the owners of the line (the North British Company), under deduction of the working expenses. The applicants offer to pay to the defendants 66 $\frac{2}{3}$  per cent of the gross receipts between Edinburgh and Berwick, retaining 33 $\frac{1}{3}$  per cent. for working expenses. These figures are supported by a reference to existing working agreements in England. But as I said before, in reference to another matter, the agreements of other railways do not, of course, bind anyone other than the parties to them, although they may fairly enough be considered as what parties who were protecting their own interests thought fair and reasonable. We find, however, a safer criterion in what has been done by various Acts of Parliament, some of them very recent, and, adopting that criterion, we are of opinion that the applicants, in respect of the trains running under their statutory powers, should pay to the defendants 75 per cent. of the gross receipts, and retain 25 per cent. for working expenses. This allowance of 75 per cent. is to be held as including all claim for station rent. If the North British Company receive the whole receipts, less what it costs to earn them, it is obvious that they are thus being paid for the station accommodation. Without that accommodation they could not earn the 75 per cent.

SIR FREDERICK PEEL—The question here is, which of two companies shall run the trains for through traffic by the East Coast route over that portion of the route which extends from Berwick to Edinburgh. The North British own the line, and if free to use their powers relative to working, can, of course, run trains for through or local traffic, and any through traffic arriving at their terminal station at Berwick and going south would be delivered by them to the North Eastern Company. By an agreement between the companies, dated 12th May 1862, it was provided (article 18) that the two companies should maintain and work in full efficiency in every respect the East Coast route *via* Berwick for traffic between London, &c., and Edinburgh, &c., and that through rates and fares, exchange of rolling-stock, and other facilities, should be adopted and carried out on such route for the cultivation and development of such traffic. The North Eastern Company, therefore, would be bound to afford these facilities to through traffic received by them at Berwick from the North British Company, and to forward with all due dispatch rolling stock tendered to them for continuation. The same article further provides that the North British shall give running powers and station accommodation to the North Eastern Company, and it was at the same

time agreed (article 41) that clauses for giving full effect to the portion of article 18 giving running powers and station accommodation to the North Eastern should be inserted in a bill then before Parliament. This was in effect done by an agreement which the same parties entered into two days later, and which was scheduled to and made binding upon them by the North Eastern and Carlisle Amalgamation Act 1862. Article 8 of this agreement provides that the North British Company shall at all times permit the North Eastern Company, with their engines, carriages, waggons, and trucks, to run over and use the North British railway, sidings, stations, &c., between Berwick and Edinburgh and Leith, all inclusive, subject to the payment for such user of such tolls or dues as in default of agreement shall be fixed by arbitration. The North Eastern desire to use these powers, and to take their carriages and engines to convey coaching traffic along the North British line, and they apply to us to settle the terms, and, as to trains and their times, to transfer to them all the existing East Coast trains to and from Edinburgh. The North British say in reply that these trains are being run on their own line as their trains, and that they are able and willing to work their part of the East Coast route efficiently in every respect, and they maintain that so long as they are prepared to do this they may refuse to let the North Eastern come upon their line as a running company. Now, no doubt they undertake by the agreement of 12th May to maintain and work the East Coast route, but they also undertake by the same agreement, and the later one confirmed by Act of Parliament, to permit at all times the North Eastern Company to run over and use their railway, and I see nothing in either agreement to bear out the view that the North British can at their own option determine whether they will or will not maintain and work the through route, and whether they will or will not permit the North Eastern to run. The words of the agreements are not permissive as to either matter, and as to the running powers, these are granted without limit, and the North British have no choice but to permit the North Eastern to use their railway if that company seek to have those powers, and their own ability to give an efficient service for through traffic does not affect their obligations. It is enough that the North Eastern think that the interests of the East Coast route, as regards its being efficiently maintained and worked, require the exercise of the running powers. The haulage of trains could no doubt be as well done by the North British as by the North Eastern, but an exchange of engines at Berwick must always cause some delay, especially to trains which, if the service was continuous in one hand, might pass the junction without stopping, and run through without a break between Newcastle and Edinburgh.

The North Eastern regard also their presence at Edinburgh as conducive to the development of East Coast traffic. The

route *via* Berwick is not the only route from Edinburgh to London in which the North British Company are interested. They have also the Waverley route *via* Carlisle and the Midland Railway, and as they own nearly one-fourth of the distance by that route (97 miles out of 405), and one-seventh only of the distance *via* Berwick (57½ miles out of 392 miles), their mileage proportion of a through fare is higher by their Carlisle route than by their Berwick route. Consequently while the East Coast companies have no interest in traffic at Edinburgh going south by any route but that *via* Berwick, the same cannot be said of the North British Company, and it is natural therefore for the East Coast Companies to think that they will be more secure of traffic if the trains in and out of the terminal station of the East Coast route are worked as their trains, and they have their own agents at Edinburgh to attract and attend to traffic.

It appears, then, that both the North British and the North Eastern possess statutory powers to use the line from Berwick to Edinburgh for through traffic, and as the powers each have are sought to be exercised, the only way of reconciling them in practice and making them work harmoniously is to divide the service between the two companies, and to give to each a separate portion of it. Considering, then, that the North Eastern Company have liberty at all times to run over and use the line between Berwick and Edinburgh, and, on the other hand, that the North British Company own and work that line, and retain their right of carrying traffic of every kind over it, it seems to me that the two companies are equally circumstanced in respect of right to be accommodated, and that a case is made out for dividing the train service equally between them. I think therefore that the extent to which the application should be granted as regards the trains and times to which it refers should be in accordance with this view. This may not be making the best possible train arrangements for a railway communication between London and Edinburgh, but the scheduled agreement does not appear to make that the main point to be considered in determining a difference arising under it. Whether with the facilities at their command the North British will be as well able to satisfy the public as the other company will be for them to consider. They are entitled to connecting trains conveniently timed, and as far as the North Eastern Company are concerned, to exchange of rolling-stock, but the wants of traffic are, of course, better met when it can travel through without change of trains, and as conveniently or nearly so as if the whole route was in the hands of one company. It is very desirable that communication between London and Edinburgh should be as rapid when East Coast Company's trains are worked in connection with North British trains as when they are not, so that the public may have the same number of opportunities presented to them as hitherto of travelling through

in fully efficient trains, and if the powers the North British have at present for getting their traffic forwarded should not be sufficient to effect that object, they can no doubt be increased by arrangement with the East Coast Companies, and the North British may find it to their advantage to be prepared to transfer to the East Coast Companies some of the trains that, according to our division, may belong to their own share of the running if in return these companies agree to treat impartially as to facilities and forwarding over the route between Berwick and London traffic going by the North British trains, and exchanged at Berwick, and traffic going by the running-power trains.

I come next to the question of terms—to the payment to be made to the North Eastern for their working expenses. They propose that they should be paid their actual cost of working, which they reckon at 1s. 5d. a train mile, and that they should be allowed to retain in respect of that cost 33½ per cent. of the gross receipts attributable to the North British portion of the through route. This appears to be the proportion usually paid in England to a running company for locomotive cost and provision of carriages, leaving 66½ to be received by the owning company for providing the railway and stations and the staff in connection with them. The North British, however, submit in their answer that they ought to receive not less than 80 per cent. of the receipts, and in addition a large annual sum for each North Eastern train each way by way of rent for station accommodation and station services at Edinburgh. Terms such as these would require the North Eastern to run their trains at a very considerable loss, and I see no good reason why such a pecuniary sacrifice should be imposed upon them. Nor do I think that the North British should be greater gainers in profits or net earnings than they would be if trains worked by the North Eastern were worked instead by themselves. Cost of terminal accommodation must be paid, like locomotive cost or any other item of expense, out of the earnings of the trains for which the accommodation is provided; and if in the case of trains run by the North Eastern Company to and from Edinburgh the whole earnings, less only what engine power and other running charges cost that company, are paid to the North British, the earnings so received include the provision which has always to be made out of that fund to pay terminal expenses, and the North British have no claim to any further payment for them. The amount, therefore, of any rent or charge fixed under article 12 of the scheduled agreement in respect of the North British station at Edinburgh, and paid directly by the North Eastern, would swell the proportion of traffic receipts which would have to be allowed to that company. As to what this proportion ought to be, apart from any such payment, the North British estimate the cost of a train on the Berwick and Edinburgh section of railway at a fraction over 1s. a train mile,

as against the 1s. 5d. of the North Eastern Company, but they base this estimate on the average cost of their passenger trains over their whole system, and it seems to me probable that the average cost would be exceeded on this particular part of it, having regard to its gradients and to the speed of trains of an express through service. But even at 1s. per train mile the total cost amounts to quite 25 per cent. of the present gross receipts, and I do not think any less proportion should be paid to the North Eastern. As to any higher proportion, 25 per cent. appears to be the general rate in Scotland, and though no rate has been prescribed in this case, as a rule Scottish railway Acts which give running powers allow 25 per cent. for working expenses. My view is that the North Eastern should have that proportion for their expenses, and that the balance for the North British should be deemed to include any rent or charge payable under article 12 of the scheduled agreement.

VISCOUNT COBHAM'S opinion was read in his Lordship's absence by the Registrar, as follows:—If this could be considered as an ordinary application to the Court by a railway company having running powers over the line of another company for our sanction of a scheme of trains to be run under those powers, I doubt whether we should be in any sense entitled to refuse it. It is not contended that the running of these trains will in any way hamper the North British in working their own service, and although it is true that the trains proposed constitute the whole of the present through service, yet the taking of them over by the North Eastern under running powers would not be an unusual arrangement, or one oppressive to the owning company. It is in the interest of the North British that the East coast traffic should be worked in the most efficient manner possible, for the better the service the more they will get out of it. No doubt, under certain circumstances the North British may cease to have as much interest in this traffic as the other two companies concerned in it. The Midland and Waverley route might be brought into competition with the East Coast route, and it might suit the North British better to carry passengers the long distance between Edinburgh and Carlisle rather than the short distance between Edinburgh and Berwick. But we are assured by the North British Company that no such scheme is contemplated or even feasible, and that their interests are bound up with the East Coast route. If this be so, and if the North Eastern has shown, as I think they have, that their position and powers give them on the whole the best means of working the through passenger traffic, then it would be in the interest not only of the public and the North Eastern, but of the North British Company itself, subject, of course, to the question of terms, that the North Eastern should work it. It is, I think, important to remember in this connection that the exercise of running powers in this case will

be more than ordinarily innocuous to the owning company. The effect, if not the object, of the grant of running powers is, as a rule, to divert traffic from the owning company, but nothing of the sort will happen here. The traffic, if worked by the North Eastern, will be carried on the North British system just as far as if worked by the company owning it. If fair terms are fixed, I cannot therefore see that the North British would run any risk of material injury from the granting of this application. It may be, in a sense, a grievance that a company like the North British should not have the exclusive control of its own line, but that objection was dealt with when the running powers were granted, and the same may be said of a good many arguments which have been urged in this case.

Having exclusive regard therefore to the merits of this application, and independently of the legal effect of antecedent circumstances, my inclination would be to grant it in full. But the learned Judge strongly holds that under the circumstances of the case we are precluded from giving anything in the nature of "exclusive control" to either of the parties, and that we must apportion the through trains between them. I do not feel sure that the term "exclusive control" is quite applicable to the working of nineteen trains, which happen at the present time to constitute the through service over the line to and from the south, leaving the remainder of the passenger traffic and the whole of the goods and mineral traffic in the hands of the owning company. But I am not desirous of maintaining points involving legal considerations or questions of construction against the authority of the learned Judge, and as Sir F. Peel also considers that an apportionment must be made, it only remains to decide what proportion of the service should be allotted to each company, and the terms upon which the North Eastern should work their share. I have nothing to add to what has been said by my colleagues upon these points, and I concur in their conclusions thereon.

The North Eastern Company appealed against the order of the 28th April, their appeal being directed against the second clause, and that dealing with the apportionment of the trains according to the schedule.

The North British Company also appealed against this order, but withdrew their appeal.

The North British Company objected to the competency of the appeal of the North Eastern Company against the order of 28th April.

Argued for North British Company—The Commissioners here had been acting as arbiters, and not as a court, and accordingly their award must be held final. The language of the 8th section of the 1873 Act applied to the conduct of an arbitration, not to a court dealing with matters within its own jurisdiction. The words "refer to for decision" were clearly applicable to an



arbitration. The agreement between the parties had been to settle their disputes by arbitration; the intention of the statute was merely to enable the parties to obtain good arbiters, not to put an end to the contractual finality of their decision. There was a strong presumption against such a result. An analogous case was that of differences between railway companies referred to the Board of Trade, which under section 6 of the 1874 Act the Board of Trade could refer to the Railway Commissioners "and appoint them as arbitrators." There could be no doubt that no appeal would lie from a decision given by the Commissioners acting under that section, and the same principle would apply here. The power of stating a case given in the 1873 Act had been abolished by the 1888 Act, and the right of appeal given in section 17 applied, not to cases where the Commissioners were acting as arbiters, but where they had jurisdiction as a court.

Argued for the North Eastern Company—The Commissioners were sitting, not as arbiters, but in lieu of them, to give a decision as a court. Having created the tribunal, the Legislature proceeded in section 8 of the 1873 Act to utilise it in this fashion. By the 26th section of that Act the Commissioners were authorised, or required, as the case might be, to state a case upon a point of law. Under the 1888 Act the scope of the cases to be dealt with by the Commissioners was amplified so as to embrace one such as the present, and for the power to state cases was substituted the right of appeal given under section 17. Surely if an appeal would have been competent in this class of cases by means of a case stated under the 1873 Act, it was equally competent by the machinery provided by the 1888 Act.

LORD PRESIDENT—By the Act of 1888 there are transferred to and vested in a new body of Commissioners all the jurisdiction and powers which had formerly been vested in the old Railway Commission. One of its duties and powers is that described in section 8 of the Act of 1873. By that section it is competent to any company, party to a difference, which under the provisions of the general or special Act required to be referred to arbitrators, to bring that dispute to the Commissioners for their decision in lieu of its being referred to arbitrators. It is to be observed, it is true, that the consent of the Commissioners is one of the conditions of that reference, but the effect of it is unambiguous. Arbitration is set aside; the jurisdiction of the Commissioners is invoked. Now, it happens that that section 8 is slightly amplified by the 15th section of the Act of 1888, so as to bring in scheduled agreements as well as actual provisions of statute; and it happens that it is under this amplification that the present question has been raised. But none the less is the jurisdiction exercised in the matter before us under section 8. Well now, it is said that there is no appeal from the Commissioners acting

under section 8. Just let us see first how the matter stood under the Act of 1873. Under the Act of 1873 the Commissioners were not final, because if they chose they could state a question of law for the determination of a superior court, and that in the form of a special case. The Act of 1888 does away with the appeal clause of the Act of 1873. While the appeal clause of the 1873 Act discriminated between proceedings under certain sections, of which No. 8 is not one, and another set of sections of which No. 8 is one, and in the former case required the Commissioners to state a case, while in the latter set of sections it only authorised them if they chose to state a case, the Act of 1888 obliterates all such distinctions, and although its provisions are carefully limited to questions of law, yet not the less is the scope of the provision absolute and universal. "Save as otherwise provided by this Act an appeal shall lie from the Commissioners to a superior court of appeal." It seems to me, therefore, as clearly established—first, that the matters here in hand are proceedings before the Commissioners not as arbitrators, but as a Commission coming in lieu of arbitrators; and second, that this appeal, necessarily limited as it is to matter of law, is properly brought under section 17 of the Act of 1888. Therefore I think the objections to the competency must be repelled.

LORD ADAM—I am of the same opinion, and on the same grounds.

LORD M'LAREN—I also concur in the views expressed by your Lordship. The jurisdiction in the matter which is sought to be brought before us by appeal is defined by the 8th section of the Act of 1873, and then that definition must regulate the construction of the Act of 1888, under which the jurisdiction originally given to statutory commissioners is transferred to the existing Railway Commission. Now, if it be necessary—and I rather think it is necessary—for the decision of this point, that we should determine whether the jurisdiction of the Railway Commissioners in matters arising under section 8 of the 1873 Act, as extended by section 15 of the Act of 1888, is proper jurisdiction or is arbitration, I am clearly of opinion with your Lordship that it is proper jurisdiction, because it has all the notes of independent jurisdiction. It is a permanent court consisting of members nominated by public departments, and its intervention in any particular case does not depend on the consent of the parties, but may be invoked by either of them. The Commissioners may reject the application, and I think it is not difficult to see the reason of that restriction, because they are to judge whether this is a case suitable for their determination, or whether it may not be more properly left to be settled in the manner originally contemplated by the parties, viz., by arbitrators nominated by themselves. Besides these considerations, there is the express provision of section 8, which is very differently expressed from

the 6th section of the Act of 1874. The provision of the Act of 1874 is that certain matters may be referred to the decision of the Railway Commissioners by the Board of Trade, who are to appoint them arbitrators or umpires; the provision of the Act of 1873, section 8, is to the effect that the matter is to be referred to the decision of the Commissioners in lieu of being referred to arbitration. That being so, and indeed I should add, whether this is arbitration or jurisdiction, there lies, in my view, an appeal under section 17 of this Act of 1888, because it is not said that an appeal shall lie from a legal decision of the Commissioners, or that an appeal shall lie under certain conditions, but that "save as otherwise provided by this Act, an appeal shall lie from the Commissioners"—that is, from every act of the Commissioners done under statutory authority, save as otherwise provided. We are not called upon to decide anything under the Act of 1874, and one can see that it might be maintained that even under the powers given by section 6 of that Act an appeal would lie, in respect that the terms of the appeal clause are so comprehensive as to embrace matters referred to the Commissioners as arbitrators as well as matters referred to them judicially. But that question does not now arise. I am satisfied that to the extent to which the statute of 1888 permits—that is, for the purposes of review on a proper question of law—this appeal is competently taken.

LORD KINNEAR concurred.

The Court repelled the objection to the competency of the appeal.

The argument on the other points in the case appears from the opinion of Lord Trayner, and from the opinion of the Court delivered by the Lord President.

The appellants (the North Eastern) cited *Midland Railway Company v. Ambergate, Nottingham, and Beeston Railway Company*, 1853, 10 Hare 359.

The respondents (the North British) cited *Midland Railway Company v. Overseers of Badgworth*, 1865, 34 L.J. Ch. 24; *Balla and Dolgelly Railway Company v. Cambrian Railway Company*, 1874, 2 N. & M. 47; *Highland Railway Company v. Great North of Scotland Railway Company*, June 30, 1886, 23 S.L.R. 762.

The LORD PRESIDENT delivered the opinion of the Court:—The Railway Commissioners, by the order dated 23rd April 1897, against which these appeals are taken, have determined that the North Eastern Railway Company shall be entitled to run, between Edinburgh and Berwick, one-half of the East Coast through passenger trains between Edinburgh and London. The order fixes the amount to be paid by the North Eastern to the North British in respect of these trains. The application of the North Eastern Company, which set the Commissioners in motion, was for right to run about double the number of trains which the Commissioners

have allowed. It is admitted that the trains which the North Eastern Company claimed form what is called a complete service—that is to say, that they are all the trains required for the due service of the East Coast route between London and Edinburgh.

On the face of the order no question of law purports to be decided; on the face of the order what is decided is the number of trains and the amount of money. In this respect the order seems quite properly to represent the fulfilment of the duties of the Commissioners as coming in place of arbiters under the sections of the agreement scheduled to the special Act to which we have presently to refer.

Such being the form and substance of the order, it has been argued that no appeal lies, inasmuch as the order discloses no decision of a question of law. To this argument we are unable to accede. It is true that an appeal only lies to this Court on questions of law, but it does not follow that an appeal only lies where the order expresses a decision on a question of law. The order is the expression of the ultimate practical and operative conclusion arrived at, and it by no means necessarily sets forth the ground of judgment upon which it is based. But if it shall authentically appear that the *medium concludendi* is a decision on legal right, then the circumstances that this decision is not expressed in the words of the order cannot affect the right to appeal.

Let it be observed that while under the Act of 1873 appeal only lay upon a special case stated by the Commissioners at the request of the party aggrieved, that system has been done away with, and in place of it has come the more general and elastic provision of section 17 of the Act of 1888. It is true that now, just as much as under the former practice, this Court can only entertain questions of law, but the point is that under the present system the appeal is not confined to questions formulated by the Commissioners. In order therefore to effectuate the existing right of appeal, this Court may examine the judgments of the Commissioners for authentic information as to whether the decision on the practical matter in hand truly depended on a conclusion formed as to legal right. This Court will not be prone to search for or to discover legal questions, and the incidental expression of opinion on legal rights would not let in an appeal. But if it shall be seen on the face of the judgments of the Commissioners that because of a conclusion on a question of law the Commissioners have decided in a certain way, or have held themselves precluded from doing what otherwise they were free to do, then the order thus pronounced is open to appeal, and must depend on the soundness of the legal decision.

In this view it is necessary to consider, first, what was the question before the Commissioners. The Commissioners as coming in place of arbiters were sitting to determine, under sections 8 and 17 of the Scheduled Agreement of 14th May 1862, what trains

they should order the North British Company to allow the North Eastern Company to run between Berwick and Edinburgh. Now, in exercising this jurisdiction the Commissioners had a very free hand indeed, derived from the contract between the two companies as embodied in those two heads of the agreement. A great deal has been said about the relative rights of owning companies and companies having running powers. We have not to consider, nor had the Commissioners to consider, any such abstract question. Between the two companies before us it is matter of agreement that, for the purpose of maintaining and working the East Coast route in full efficiency in every respect, the North British shall permit the North Eastern to use their railway between Berwick and Edinburgh to such an extent and for such payment as the Commissioners shall determine. If, then, it be asked, as matter of law, what number of trains is the North British Company bound to allow the North Eastern Company to run, the answer is, exactly such number, be it large or be it small, as the Commissioners shall determine. If it be asked what number of trains the North Eastern has a legal right to, the answer is the same. By the contract no reservation of legal right is made from the complete surrender of the question to the discretion of the Commissioners. It is of course necessary that the North Eastern trains are to be run for maintaining and working in full efficiency the East Coast route; but this being the common interest to be advanced, the Commissioners are to be the absolute judges of how many North Eastern trains shall be run and on what terms. The power of the Commissioners to fix not only the number of trains, but the money to be paid for them by the North Eastern, afforded the Commissioners the fullest means of equitably adjusting the balance between the parties.

In this view it was entirely open to the North British to advance to the Commissioners all sorts of considerations as entitling them to have fewer North Eastern trains imposed on them than the North Eastern asked, and, among these considerations, or at the head of them if they pleased, the fact that they were owners. On the degree of cogency or relevancy belonging to this argument we have no occasion to pronounce. One Commissioner might lawfully attach much weight to it, another might equally lawfully deem it to have little or no bearing on the question compared with other considerations in the case. All that it is needful to say here is that the fact of the North British being the owners formed no legal obstacle to the Commissioners granting the North Eastern all that they asked in their application.

Now, when we turn to the judgments of the Commissioners, we find that two out of the three Commissioners have proceeded upon the legal proposition that the fact that the North British were owners rendered it legally impossible to grant the application of the North Eastern.

The theory of Lord Trayner's opinion is

that the relations between the North British and the North Eastern are those of the owner of a private road and a person having a servitude of passage over that road. We do not think that this view is sound in principle, and it is misleading. A private road is private property which the owner might but for the servitude close and apply to any other uses. That is not the legal position of a railway; nor are these the rights of an owning company. The "notion," says Mr Justice Wills in *Hall v. The London Brighton and South Coast Railway Company*, 15 Q.B.D. 505, at p. 536, "of the railway being a highway for the common use of the public in the same sense that an ordinary highway is so, was the starting point of English railway legislation. It is deeply engrained in it. In the early days of railways it was acted upon at least occasionally, and although it enters but slightly into modern railway practice, no proper understanding of a good deal of our railway legislation, and pre-eminently of clauses relating to tolls or rates, can be arrived at unless it is firmly grasped and steadily kept in view."

The difference which has now been pointed out is so essential that it is impossible to ascribe to the company owning a railway the rights of the owner of a private road. Again, when the agreement is examined, upon which the present application of the North Eastern is rested, it does not place or leave the contractual right of parties on any such footing as that of servitude. The two companies are pledged as allies to the furtherance of a common enterprise, forming part of the traffic of each of the allied companies, viz., the East Coast route traffic, for which a certain amount of use, although not an exclusive use, of the North British line is required. By contract, the North British Company places their line at the disposal of the North Eastern for the furtherance of this East Coast traffic, to whatever extent the Commissioners, as coming in place of arbitrators, shall determine. It does not seem to us that the right thus conferred on the North Eastern is a servitude in the sense in which that term is known in Scotch law, any more than the position of the North British antecedent to the contract could be described as that of an owner of a private road. Still more clearly, under the statutory contract which the Commissioners had to deal with, no legal right of the North British was reserved which could be invaded by the Commissioners granting the full number of trains asked by the North Eastern.

Now, in the very lucid opinion of Lord Trayner there is no ambiguity in the law which he lays down. We have very carefully considered the judgment as a whole, as well as the passages in which the matter now before us is specifically dealt with; and nothing in the rest of the judgment detracts from the precision with which the legal result is stated. "To do so," that is to say, to grant the North Eastern power to run the whole of the trains in dispute, "would in my opinion be something a great deal more than regulating the use of

co-existing rights; it would be an unwarrantable invasion of the rights of the North British Company. I am not to be understood to say that the Court could not, under any circumstances, grant such an application as that now before us. I can conceive circumstances under which it might, as, for example, if the North British Company were unable to work the through traffic efficiently—or refuse to do it—or were clearly acting in such a way as to injure the East Coast route, which it had bound itself to maintain and work. Probably in such circumstances the Court might interfere. But in the circumstances of the case before us I am clearly of opinion that the Court cannot grant this application as made, because by so doing they would be depriving the North British Company of the proper and legitimate use of their own property—in short doing it a wrong.”

Upon the law of the case as thus laid down, Lord Trayner himself proceeds; for remarking that, as the North Eastern presented no alternative scheme, “We might therefore have simply refused the application,” he goes on to consider what would be a proper apportionment. Lord Cobham acted upon the law thus laid down, for he held himself precluded by that law from the course which he would have followed, if the merits had been open to him, of granting the application. His words are these—“Having exclusive regard therefore to the merits of this application, and independently of the legal effect of antecedent circumstances, my inclination would be to grant it in full. But the learned judge strongly holds that under the circumstances of the case we are precluded from giving anything in the nature of ‘exclusive control’ to either of the parties, and that we must apportion the through trains between them. I do not feel sure that the term ‘exclusive control’ is quite applicable to the working of nineteen trains, which happen at the present time to constitute the through service over the line to and from the south, leaving the remainder of the passenger traffic and the whole of the goods and mineral traffic in the hands of the owning company. But I am not desirous of maintaining points involving legal considerations or questions of construction against the authority of the learned judge, and as Sir F. Peel also considers that an apportionment must be made, it only remains to decide what proportion of the service should be allotted to each company, and the terms upon which the North Eastern should work their share.”

The full effect of this is understood when it is remembered that the Act of 1888 provides that the opinion of the judge shall prevail upon any question which in the opinion of the Commissioners is a question of law. That this was, in the opinion of Lord Trayner and of Lord Cobham, a question of law is shown by their judgments; and as Lord Cobham’s judgment was read in presence of Lord Trayner, it is plain that Lord Cobham was under no miscon-

ception in deeming it had been laid down that the prayer of the application could not be granted without an invasion of legal right.

In these circumstances it appears that by two out of the three Commissioners this application has not been considered on the merits, the two Commissioners having held themselves precluded from doing so by what were held to be the legal rights of the owning company. By those two Commissioners it has been assumed that of the through trains in question the North British must, as of legal right, have some. Our opinion is that there is no such legal right; that no legal right stands in the way of or limits the free exercise of the judgment of the Commissioners.

It is consistent with the view of the question which has now been stated, or rather it results from it, that the fact of the North British being owners of the line is one of the very numerous matters which legitimately enter the consideration of the Commissioners. As already pointed out, we have no occasion, no duty, and no right to assign to this its proper place or precedence among other matters; that is entirely for the Commissioners.

Again, our judgment on this appeal does not indicate, and is not intended to suggest, any opinion whatever as to whether all or how much of what the North Eastern ask ought to be granted. We have no occasion, no duty, and no right to express or to form any such opinion. For anything we know, a consideration of the merits of the case might lead the Commissioners to pronounce exactly the same order as we are now to recal, and the repetition of the order would not be in the slightest degree inconsistent with our present decision. Our duty is merely to decide the question of law which is raised by the appeal.

The appeal of the North Eastern is, quite naturally, directed against that part of the order which specifies the number of trains, and the trains which they are to be allowed to run, and not against those parts of the order which fix the rates. It is plain, however, that these matters are directly related, and that the Commissioners, if they are to reconsider the one, must be free to reconsider the other. We have ample power to bring this about; and our judgment is as follows:—

“Having heard counsel for the parties on the competency of the appeal, Repel the objections thereto by the North British Railway Company: And having resumed consideration of the appeal against the order of The Railway and Canal Commission dated 28th April 1897, pronounced upon the application of the North Eastern Railway Company, and heard counsel for the parties, recal the whole order: Find that the fact that the North British Railway are owners of the line between Berwick and Edinburgh does not of itself entitle them, as of right, to run some of the East Coast through trains in dispute, and does not constitute a legal objection to the application

of the North Eastern Railway Company, but may be considered along with the other circumstances of the case in disposing of that application, and decern: And remit the application, with the proof and whole proceedings, to the Commissioners to proceed as shall be just: Find the North Eastern Company entitled to the expenses of the appeal," &c.

Counsel for North Eastern Company—Lord Advocate, Graham Murray, Q.C.—Guthrie, Q.C.—A. O. Mackenzie. Agents—Cowan & Dalmahoy, W.S.

Counsel for North British Company—Dean of Faculty, Asher, Q.C.—Sol.-Gen. Dickson, Q.C.—Grierson. Agent—James Watson, S.S.C.

Wednesday, December 15.

## SECOND DIVISION.

[Lord Stormonth Darling,  
Ordinary.

### RATTRAY v. RATTRAY.

*Proof—Written Evidence—Admissibility—Letter Taken from the Post Office contrary to the Post Office (Offences) Act—Post Office (Offences) Act 1837 (7 Will. IV. and 1 Vict. cap. 36), secs. 28 and 29.*

The pursuer in an action of divorce for adultery obtained possession of a letter from the defender to the co-defender by illegally obtaining possession of it from a post office official. No objection was taken at the proof to this letter being put in evidence as against the defender, and it was deposed to by her in her examination.

It was suggested from the Bench in the Inner House that the letter could not be used by the pursuer as evidence in respect he had obtained it by means of a crime.

*Held (diss. Lord Young)* that the letter was admissible as evidence against the defender.

*Proof—Divorce for Adultery—Letter Despatched by Defender to Co-Defender, but not Received by him.*

*Opinion (per Lord Trayner)* in an action of divorce for adultery that a letter despatched by the defender to the co-defender, but intercepted, and consequently not received by him, is not evidence against the co-defender.

*Opinion reserved by Lord Moncreiff.*

This was an action of divorce for adultery at the instance of Alexander Wellwood Rattray of Fellowhills, Associate of the Royal Scottish Academy, residing in Glasgow, against his wife Mrs Jemima Douglas or Rattray, and Robert Darby Anderson, stock and share broker, as co-defender.

The pursuer went to the post office at Skipness, and by representing that he

wanted to get back a letter which he said had been posted by mistake, induced the postmistress to show him the letters which had been posted there that day. Among these letters he discovered one which had been written by his wife to the co-defender. This letter he took from among the letters in the post office and retained in his own possession. It was consequently never received by the co-defender. This letter was as follows:—"My Dearest,—Just a hurried line to say Winnie, Jessie, and I leave here on Thursday first by 'Columba;' the others are to follow on Monday, so perhaps you could meet us at the station, dear—of course no one need know but what it is by accident. I have not been to Skipness since my return, so could not post a letter to you. Wellwood does not know we were in the house when I was up, so you understand. Trusting to seeing you very soon.—Ever your own, MINA. We leave for Loch Lomond on Friday, the fourth."

The defender obtained a diligence to recover documents, which covered the letter in question, and thereupon the pursuer lodged it in process. No objection was taken before the Lord Ordinary to this letter being put in evidence against the defender, and it was put to and its terms were deposed to by her in her examination. It was maintained, however, that it was not evidence against the co-defender, as it had never been received by him.

By interlocutor dated 15th June 1897 the Lord Ordinary (Stormonth Darling) found facts, circumstances, and qualifications proven relevant to infer the defender's guilt of adultery with the co-defender, found the defender guilty of adultery with the co-defender accordingly, and pronounced decree of divorce with expenses against the co-defender.

*Opinion.*—[After stating the facts and reviewing the evidence]—"So far as the case against the defender is concerned, the strongest colour of all—and a colour affecting the whole evidence—is afforded by the letter No. 12 of process. I am utterly unable to accept her explanation of its terms, and it seems to me fatal to her case.

"But it was strongly urged by counsel for the co-defender that the letter was no evidence against him, because he never received it. It is certainly true that the confessions of a defender are not evidence against a co-defender. Whether that rule applies with equal force to a letter actually despatched by the one to the other, though intercepted before its receipt, I am not quite sure. I do not require to solve that question, for I think there is sufficient evidence against the co-defender apart from the letter. I shall therefore condemn him in costs, both the pursuer's own and those he has to pay for his wife. I shall not, however, award any damages to the pursuer, for in my opinion he deserves none."

The defender and the co-defender reclaimed.

Between the date of the Lord Ordinary's interlocutor and the date of the hearing in the Inner House the pursuer was tried and