LORD MURE—I am entirely of the same opinion. The interlocutor of the 14th of June on the face of it bears to be an interlocutor dealing with the expenses incurred in connection with a preliminary defence, and with that question only.

LORD SHAND—My opinion is that this is a reclaiming-note against a judgment of the Lord Ordinary disposing not of the whole merits of the cause, but only a part of it, and that it must be reclaimed against within ten days, and even then, only with the leave of the Lord Ordinary. I think it is evident that when this objection has been disposed of, the cause between the nominal raiser and the other claimants will go on to the effect of the nominal raiser being next required to lodge a condescendence of the fund *in medio*, with regard to which there may be very considerable discussion, and till all this is finished there can be no concluded cause between the nominal raiser and the claimants.

I am of opinion therefore that the reclaiming-note now presented is incompetent, the leave of the Lord Ordinary not having been obtained.

LORD ADAM—As I understand the matter, the reclaimer says that the interlocutor of 20th February was an interlocutor disposing of the whole merits of the case as between the nominal raiser and the claimants, except in so far as it did not dispose of the question of expenses, and that if it had disposed of these it would have been a final interlocutor, which might be reclaimed against within twenty-one days. He now says that the present interlocutor does dispose of expenses, and that therefore the whole merits of the cause are now disposed of. I think he is mistaken. The preliminary defence which has been repelled is the same as a preliminary defence in an action of reduction. There is a great deal of necessary procedure to go on between the nominal raiser and the claimants. The first thing will be an order upon the nominal raiser to lodge a condescendence of the fund. If any questions arise on that, they will all be between the nominal raiser and the claimants. I think therefore that the interlocutor of the Lord Ordinary was one disposing of a strictly preliminary defence, and could not be reclaimed against without leave.

The Court refused the reclaiming-note as incompetent.

Counsel for the Reclaimer—C. S. Dickson. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for the Respondent—Guthrie. Agents—Cumming & Duff, S.S.C.

Wednesday, July 10.

FIRST DIVISION.

HIGHLAND RAILWAY COMPANY *v.* SPECIAL COMMISSIONERS OF INCOME TAX.

Revenue — Income-Tax — Railway — Expenditure on Improvements—Deductions from Profits.

A railway company in making their return for assessment under the Income-Tax Act claimed as deductions from the revenue of the year of assessment (1) a sum expended upon the improvement of the permanent way of one section in order to bring it up to the standard of the rest of the line; and (2) a sum representing the cost of the extra weight in relaying another portion of the line with steel in place of iron rails, and with chairs of additional weight. In the books of the company these sums were charged against capital.

In an appeal by the railway company, *held* that the sums so expended were properly charged against capital, and a determination of the Special Commissioners disallowing the said sums as deductions from revenue *affirmed*.

The Highland Railway Company in making their return to the Income-Tax Act of 1888-89, based on the profits of the preceding year, as shown by their printed accounts for the two half-years ended 31st August 1887 and 29th February 1888, claimed to deduct in addition to the several items charged as the expenditure of the year in working the railway, four sums of £9119, £755, £1555, and £878. These amounts were entered under the following heads in the said accounts of the company for the half-years ended 31st August 1887 and 29th February 1888—

£9119, August 1887 £1555, February 1888	Improvement of Sutherland and Caithness section, to bring it up to the standard of the rest of the main line.
£755, August 1887 £878, February 1888	Cost of extra weight. Relaying with steel rails and heavier chairs, &c.

The Special Commissioners, in assessing the profits of the Highland Railway liable under the Income-Tax Act of 1888-89, disallowed these four sums, on the ground that they were properly charged to capital, as shown in their own printed accounts, duly certified to by their auditors, and they added the amounts to the sum returned by the company's secretary, against which notice of objection was given on the 5th November 1888.

The company appealed, and the appeal was heard by the Special Commissioners at Edinburgh on 6th March 1889.

The company contended that the sums of £755 and £878, £9119 and £1555, before mentioned, expended for extra weight, &c., in relaying the railways, and improvement of the Caithness section, represented the extra cost necessitated by the inferior condition of the permanent way of the original line, and also that of Caithness line when amalgamated with the Highland Railway in 1884. The expenditure on

the Caithness line was stated to represent the extra cost of relaying the lines, over and above what would have been necessary to renew and relay the section as it was previous to the amalgamation in 1884.

The company failed to satisfy the Commissioners that the deductions were admissible, and the charge was confirmed to the extent of the addition of the four sums above described.

The ground of the Special Commissioners' decision was that the expenditure was an improvement of the property, and chargeable to capital; and as regarded the Sutherland and Caithness section, that the purchase of that railway in an inferior condition would obviously affect the cost at which it was obtained.

The company expressed dissatisfaction with this decision of the Special Commissioners as being erroneous in point of law, and they demanded a case for the opinion of the Court of Exchequer.

The present case (from which the preceding narrative has been taken) was accordingly stated by the Special Commissioners in terms of the Taxes Management Act 1880 (43 and 44 Vict. cap. 19), sec. 59.

In an appendix annexed to the case the details of the expenditure of the foresaid sums were set out as follows:—

MAIN LINE.

Amount expended during the year ending 29th February 1888—

£755 3 8
878 2 10

	Ton. Cwt. Qr.	Price.	£ s. d.	£1633 6 6
The additional weight of the steel rails over the iron ones, was, average, £4, 17s. 2½d., per ton,	105 15 2	95s. to 100s.	514 0 3	
The additional weight of chairs over the old ones was, average price, £3, 6s. 4½d. per ton,	337 6 3	65s. and 67s. 6d.	1119 6 3	
				£1633 6 6

SUTHERLAND SECTION.

Amount expended during the year ending 29th February 1888—

£9119 4 9
1555 15 4

	Ton. Cwt. Qr	Price.	£ s. d.	£10,675 0 1
Steel Rails,	833 8 2	110s.	4594 9 9	
Chairs,	327 10 0	65s.	1064 13 11	
Fish-plates and other accessories,	.. ..	..	648 15 1	
Sleepers,	No. 26,235	3s. 4d.	4372 11 4	
Engine power,	.. ..	..	135 0 0	
Timber beams for girder bridges,	.. ..	..	260 2 3	
Carriage of materials,	.. ..	..	7 16 8	
Wages of platelayers and labourers,	.. ..	..	857 16 3	
			11,941 5 3	
Cr. Old iron flange rails and fish-plates taken up	.. ..	..	1266 5 2	
				£10,675 0 1

Argued for the company—The case as stated by the Commissioners did not fairly represent the company's contentions, and there ought therefore to be a remit for a fuller statement. While for the purposes of the company, and as between the company and the shareholders, those outlays were charged against capital, yet they ought properly to be charged against revenue. They really were sums expended on the maintenance of the line. The mere circumstance that steel rails and not iron ones were used in connection with these repairs did not alter the character of the repairs. There was no such permanent improvement of the property as to make these outlays a proper charge against capital—*Caledonian Railway Company* v. *Special Commissioners of Income-Tax*, November 18, 1880, 8 R. 89. The company had never been allowed anything for depreciation under the Customs and Inland Revenue Act 1878 (41 Vict. cap. 15), sec. 12. If the deductions claimed were not allowed the company would not have enjoyed the profits upon which they had been charged. The company derived no additional revenue from these outlays, and so they were a proper deduction from the revenue of the year. The rules under Schedule D of the Income-Tax Act 1842 (5 and 6 Vict cap. 35), sec. 100, had no application to the present case —*Coltness Iron Company* v. *Black*, April 7, 1881, 8 R. (H. of L.) 67.

Argued for the Commissioners—There was sufficient stated to enable the Court to deal with the question between the parties. The company were condemned by their own actings in entering this expenditure against capital, and in so doing they acted properly, as the money laid out had materially improved the permanent way, and had made the company's property more valuable. The repairs on the Sutherland section were really a portion of the cost of the undertaking, as owing to its inferior condition it had been purchased so much the cheaper. The repairs on the main line had been actual renewal, not maintenance, and they had been properly charged against capital both by the company and the Commissioners.

At advising—

LORD PRESIDENT—I am of opinion that the deliverance of the Commissioners is right. The sums which the appellants propose to charge against income are, it must be kept in mind, entered in their own accounts as a proper charge against capital, but it is urged that these sums properly form a part of the outlay essential for the upkeep of the line, and indeed it is only upon this ground that the contention of the appellants can in any way be maintained.

Now, it is to be observed that by charging in their accounts these sums complained of against capital the company has been able to declare a much larger dividend than they could have done if these sums had been set against revenue, and one result of adopting their present contention would be that the aggregate sum of income-tax deducted by the company from the dividends of their shareholders would be considerably larger than the sum which the company would have to pay to the Inland Revenue, and the company would thereby be gainers to a considerable extent. This is somewhat of an anomaly, but it is one result of the way in which the sums are dealt with in the books of the company taken along with their present contention.

I do not say that this result is conclusive of the present question, but it is a result arising from the way in which the appellants have kept their books.

If we turn now to the items complained of, we see that in connection with the Sutherland section the £9119 was expended, according to the appellants' own showing, on the "improvement of Sutherland and Caithness section to bring it up to the standard of the rest of the main line." Now this, I think, presupposes that in acquiring this portion of the line the company were aware that it was not up to the standard of the rest of

the main line, and further, that they in consequence acquired it at a lower figure on account of its being in an inferior condition. That being so, the sum expended in renewing the section of the line, and bringing it up to the standard of the main line, was just part of the cost of taking it over, as if it had been in good order the appellants would have had to pay just so much more for it.

It was urged that when the details of the sum are looked at they show items which much more naturally fall under the heading of maintenance than as proper charges against the capital account, but these items must be read along with the pursuers' books, and so looked at it becomes perfectly clear that the sum of £9119 should be treated as the Commissioners have done, and that it really is a proper charge against capital.

As regards the alterations on the main line, it is to be observed that these do not take the form of a mere re-laying of the line after the old fashion, for that would not alter the character of the line. But when one kind of rail is substituted for another, and the new rail is of a superior quality, then the *corpus* of the heritable property of the company is thereby improved. Further, all that is charged by the Commissioners is for additional weight of steel rails and chairs, and this is a charge made for the permanent improvement of the appellants' property.

If the proprietor of an estate erects a new house on his lands the cost of this would properly be made a charge, not against income, but against capital; and so if a proprietor carries a line of railway through his lands the expense of this would be similarly treated. I therefore entertain no doubt as to the soundness of the Commissioners' determination upon both points.

Lord Mure, Lord Shand, and Lord Adam concurred.

The Court affirmed the determination of the Commissioners.

Counsel for the Appellants—Low—Salvesen. Agents—J. K. & W. P. Lindsay, W.S.

Counsel for the Respondents—Gloag—Young. Agent—D. Crole, Solicitor of Inland Revenue.

Wednesday, July 10.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

BLAIR *v.* THE NORTH BRITISH AND MERCANTILE INSURANCE COMPANY.

Bankruptcy — Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 22—*Sequestration —Oath of Verity—Terms of Oath.*

In a process of sequestration the debt of the petitioning creditors was constituted by two Sheriff Court decrees to which they had obtained an assignation. The oath set out in general terms that the debt in question was due, and the decrees and assignation were produced to the Justice of Peace.

A petition by the bankrupt for the recal of the sequestration, on the ground that the oath did not set forth in terms that the sum in the decrees had not been paid either to the assignees or to the cedent, *refused.*

Observations upon cases of *Taylor* v. *Drummond*, 10 D. 335, and *Glen* v. *Borthwick*, 11 D. 387.

On 31st January 1889 a petition was presented by the North British and Mercantile Insurance Company to the Lord Ordinary on the Bills praying for the sequestration of the estates of William Blair, bookseller and stationer, Dundee, and on 1st April 1889 the Lord Ordinary (Wellwood) granted the prayer of the petition.

In May 1889 Blair presented a petition praying for the recal of the said sequestration. The grounds upon which this application was made are fully narrated in the opinion appended to the interlocutor of the Lord Ordinary (Kyllachy), who refused the petition.

"*Opinion.*—The recal of the sequestration is sought upon various grounds, some of which have been considered by my predecessor, but on none of which a final judgment has been pronounced. I have therefore considered the questions raised as still open, and have heard a full argument upon them.

"(1) The first ground of recal is the allegation that the petitioning creditors' debt, being also the debt upon which notour bankruptcy was constituted, was not justly due, in respect that although constituted by two decrees obtained of consent in the Sheriff Court of Dundee, those decrees had been accompanied by an arrangement that no diligence should be used upon them as against the bankrupt, and that the debt therein contained should be treated as a debt only against the bankrupt's property. Of this allegation the bankrupt now desires a proof, with a view to the recal of the sequestration. It appears to me to be quite clear that no such proof can be granted, the proposal being truly a proposal to contradict or qualify the terms of a formal decree by a general proof—that is to say, by parole evidence —which appears incompetent.

"(2) The second ground of recal is rested upon an objection to the terms of the petitioning creditors' oath, which is said to be disconform to the statute as interpreted by certain decisions, viz., *Taylor* v. *Drummond*, 10 D. 335; *Glen* v. *Borthwick*, 11 D. 387. The debt of the petitioning creditors is, as before-mentioned, constituted by two decrees of the Sheriff Court of Dundee, to which the petitioning creditors have obtained an assignation. The objection is, that the oath did not set forth in terms that the sum in the decrees had not been paid either to the assignees or to the cedent. In point of fact the oath is in general terms, and simply sets out that the debt in question is due to the petitioning creditors, the decrees and assignation being produced to the Justice of the Peace, but the oath itself not going into particulars. My opinion is that this objection is not well founded. The statute does not require that the oath shall set forth more than that the particular debt is justly due (secs. 21 and 22), and the oath in the present case in my opinion sufficiently complies with the statute. No doubt it has been held that where the petitioning creditors' title to the debt depends upon an assignation, and the oath proceeds upon the