latest testamentary writing—if testamentary it can be held to be—for there she reverts to Edward Whish as her chief legatee; and I am of opinion that the document is testamentary. If the words "dear Teddy is still to be my chief legatee" had occurred in a letter by the testatrix addressed to a third party, merely in the course of an ordinary correspondence, they could not have been regarded in the present question. But looking at the document as a whole, and to the direct bequests it contains, I think it must be accepted as a testamentary paper. It contains a specific bequest of a gold watch to Edward Whish; and I think the preceding part of the letter referring to him must also be taken as testamentary. In this view I concur in the judgment to be pronounced.

The Court pronounced the following interlocutor:—

In answer to the three questions . . . "Find and declare that the legacy of £500 bequeathed to the party of the second part by codicil of 22d March is revoked to the extent of £100, but subsists unrevoked in favour of the party of the second part to the extent of £400: Find and declare that the legacy of £100 in favour of the party of the fourth part is effectual: Appoint the expenses of the parties to the Special Case to be paid . . . out of the executry estate, and decern."

Counsel for First Party — Gloag. Agents — Ronald & Ritchie, S.S.C.

Counsel for Second Party—Wallace. Agent—George B. Smith, S.S.C.

Counsel for Third Party — Thoms. Agent — George B. Smith, S.S.C.

Counsel for Fourth Party—J. A. Reid. Agents —Ronald & Ritchie, S.S.C.

Thursday, November 18.

SECOND DIVISION.

[Court of Exchequer.

THE CALEDONIAN RAILWAY COMPANY *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Income-Tax Act 1842 (5 *and* 6 *Vict. c.* 35), *sec.* 100—*Customs and Inland Revenue Act* 1878 (41 *Vict. c.* 15), *sec.* 12.

A railway company stated in their annual accounts that a sum of £253,389 had been expended in repairs or renewals of rolling-stock, and that that sum had been sufficient to keep their rolling-stock in good working condition and repair. In assessing the company under the Income-Tax Acts the Special Commissioners allowed a deduction from assessable income of that sum as having been expended by the company in order to make their profits. The company claimed a further deduction under section 12 of the Customs and Inland Revenue Act 1878 for wear and tear of newly added stock which had not required any repair or renewal. *Held* that the deduction for wear and tear to be made under that section is deduction for diminished value as a means of earning income, and not as a saleable subject, and that inasmuch as the stock in question was undiminished in value for the purpose of earning income, no further deduction could be allowed.

Customs and Inland Revenue Act 1878 (41 *Vict. c.* 15), *sec.* 12—*Review—Jurisdiction.*

This section provides that the Commissioners for general or special purposes may in assessing the profits of any trade, &c., for the purposes of income-tax, "allow such deduction as they may think just and reasonable as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the concern." The Commissioners having refused a claim for deduction on the ground of wear and tear, the company assessed appealed to the Court of Exchequer.

Question—Whether the words "as they may think just and reasonable" do not exclude review?

Act 37 *Vict. c.* 16 (*Customs and Inland Revenue Act* 1874), *sec.* 9.

Case stated by Commissioners for Court of Exchequer. *Remarks* (*per* Lords Justice-Clerk and Gifford) on the mode of stating such Cases.

The Act 5 and 6 Vict. c. 35 (Income-Tax Act 1842), amended by the Act 29 Vict. c. 36 (Customs and Inland Revenue Act 1866), provided by section 100 that the duties contained in Schedule D thereto annexed, which applied to "any trade, manufacture, adventure, or concern in the nature of trade not contained in any other schedule of the Act," should be assessed under the following among other rules:—"*Third*—In estimating the balance of profits and gains chargeable under Schedule D, or for the purpose of assessing the duty thereon, no sum shall be set against, or deducted from, or allowed to be set against or deducted from, such profits or gains on account of any sum expended for repairs of premises occupied for the purpose of such trade, manufacture, adventure, or concern, nor for any sum expended for the supply or repairs or alterations of any implements, utensils, or articles employed for the purpose of such trade, manufacture, adventure, or concern, beyond the sum usually expended for such purposes, according to an average of three years preceding the year in which such assessment shall be made, nor on account of loss not connected with or arising out of such trade, manufacture, adventure, or concern, nor on account of any capital withdrawn therefrom, nor for any sum employed, or intended to be employed, as capital in such trade, manufacture, adventure, or concern, nor for any capital employed in improvement of premises occupied for the purposes of such trade, manufacture, adventure, or concern, nor on account or under pretence of any interest which might have been made on such sums if laid out at interest, nor for any debts except bad debts, proved to be such to the satisfaction of the Commissioners respectively, nor for any average loss beyond the actual amount of loss after adjustment, nor for any sum recoverable under an assurance or contract of indemnity."

By sec. 12 of the Act 41 Vict. c. 15 (Customs

and Inland Revenue Act 1878) the following provision is made for deduction for depreciation of machinery or plant:—"Notwithstanding any provision to the contrary contained in any Act relating to income-tax, the Commissioners for general or special purposes shall, in assessing the profits or gains of any trade, manufacture, adventure, or concern in the nature of trade chargeable under Schedule D, or the profits of any concern chargeable by reference to the rules of that schedule, allow such deduction as they may think just and reasonable as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the concern, and belonging to the person or company by whom the concern is carried on; and for the purpose of this provision, where machinery or plant is let to the person or company by whom the concern is carried on, upon such terms that the person or company is bound to maintain the machinery or plant, and deliver over the same in good condition at the end of the term of the lease, such machinery or plant shall be deemed to belong to such person or company."

This was a Case stated by the Commissioners of Inland Revenue on behalf of the Caledonian Railway under sec. 9 of the Customs and Inland Revenue Act 1874 (37 Vict. c. 16), which provides as follows:—"Immediately on the termination of any appeal under the Acts relating to income-tax by the Commissioners for the general purposes or by the Commissioners for special purposes of such Acts . . . . the appellant or the inspector or surveyor may, if dissatisfied with the determination as being erroneous in point of law, declare his dissatisfaction to the Commissioners . . . . and having done so, may, within twenty-one days after the determination, require the Commissioners, by notice in writing addressed to their clerk, to state and sign a Case for the opinion of the Court thereon. The Case shall set forth the facts and the determination, and the party requiring the same shall transmit the Case," &c.

The Case set forth that at a meeting of the Special Commissioners to hear appeals against income-tax assessment for the year ending 5th April 1880, the Caledonian Railway Company appealed against an assessment of £1,323,304 in respect of the profits of their concern. The company had been allowed, as deductions from the income on which they were assessed, a sum of £253,389 actually expended by them in repairs and renewals of rolling-stock, by which expenditure, according to the certificate of the company's locomotive superintendent, the rolling-stock had been maintained in good working condition and repair. The company had paid their half-yearly dividends on the footing that the deduction from profit falling to be made under the head of repairs or renewals of rolling-stock was the sum of £253,389 just mentioned. No other deduction on the ground of wear and tear of rolling-stock had been made. In addition to this deduction the company claimed—(1) a further deduction of £185,391 from the sum assessable as income, on account of depreciation upon rolling-stock; or alternatively (2) a deduction from the sum assessable as income of £49,344, being 4½ per cent. of the cost of additional new plant added during the last 5½ years. The grounds on which this deduction was asked will appear from the following extracts from the Case:—

"It was stated that the average life of their plant was about 22 years, and on this basis the Caledonian Company submitted that a sum at the rate of 4½ per cent. of the cost would represent the annual depreciation; whereas the sum allowed by the Commissioners therefor was only the amount charged in the company's accounts for plant worn out or renewed during the year, which only amounted to 2½ per cent. of the cost, and that this arose from the fact of the large amount of new plant having been *added* (not replaced), which new plant, although actually depreciating at the rate of 4½ per cent. per annum, required little or no repair during the first 5½ years of its existence. The whole plant is kept up to the standard of its being worth 75 per cent. of its original cost, but until the new plant has depreciated to the extent of 25 per cent. (that is, during the first 5½ years of its life) it requires no substantial repairs. The cost of *additional* new plant during the 5½ years prior to 31st January 1879 was £1,096,534, and 4½ per cent of that sum amounts to £49,344." "The company contended that they were entitled to the deduction claimed under the 12th section of the Customs and Inland Revenue Act of 1878, it representing the diminished value by reason of wear and tear during the year."

The Commissioners disallowed both alternative claims and confirmed the assessment at £1,323,304; and the railway company took this Case for appeal. The grounds of decision of the Commissioners will appear from the following paragraphs of the Case:—"(19) They considered that in arriving at the amount on which the assessment was to be made, by reference to the company's printed half-yearly accounts for the year preceding, the full sums stated in the accounts for the two half-years ended 31st July 1878 and 31st January 1879 to have been expended in the maintenance, repair, renewal, and reconstruction of the company's machinery and plant had been admitted as deductions therefrom, as well as a sum of £20,837 set aside from revenue on account of plant not yet renewed, carried to the credit of the rolling-stock renewal fund for value of plant not replaced at 31st January 1879.

"(20) That the whole of the sums stated to have been thus expended year by year in maintenance, repair, and renewals have been duly allowed as deductions in estimating the profits liable to be assessed from year to year, as well as the full sum at the credit of the rolling-stock renewal fund, and will hereafter continue to be yearly allowed in estimating the assessable profits.

"(21) That inasmuch as any diminution in value by reason of wear and tear during the year upon which the assessment was founded has been met by the allowances before detailed, it is not just or reasonable that any further deduction should be allowed by reference to the provisions contained in section 12 of the Customs and Inland Revenue Act 1878.

"The assessments of railways are, according to the terms of No. III., Schedule A., of the Act 5 and 6 Vict. cap. 35, by computation of the profits of the preceding year.

"It is the diminished value by reason of wear and tear for the year to which section 12 of the Customs and Inland Revenue Act 1878 relates. The year referred to in that section, so far as

respects a concern assessable on the profits of the preceding year, must be the preceding year, and the comparison, in order to arrive at the diminished value of the machinery and plant is between the value thereof in that year and the value in the year before it.

"(22) That the statement in the railway company's accounts of the value of the machinery and plant must be held as the company's estimate of the actual value of such as a going concern; that the effect of the allowance by the Commissioners for repairs and renewals is to keep up the value to the same amount; and this being so, diminished value by reason of wear and tear does not exist. If a percentage on the value were to be allowed as a deduction from the profits and gains as representing the diminished value by reason of wear and tear of the machinery and plant, then the deduction for repairs and renewals should not be allowed. To allow deduction of the cost of renewals and repairs as in this case, and also a percentage for diminished value by reason of wear and tear, would be to allow twice deduction for the same thing."

The railway company did not ask a judgment on the first of their alternative claims for deduction. On the second they argued—Under Schedule D of the Act of 1842 there had been a great hardship to undertakings such as railways, because no allowances being there made for renewals and repairs, the companies were really taxed on the capital they were obliged to expend for that purpose in order to make their profits. To remedy this the Act of 1878 was passed, in order to allow deductions to be made for depreciation by tear and wear. Now, allowance had been made by the Commissioners here for repairs, but the stock during the first five years of its life needed no repairs. Nevertheless, during those five years it was deteriorating in value by tear and wear at the rate of 4½ per cent. each year, and allowance fell to be made for that by section 12 of the Act of 1878, and the Commissioners had made no such allowance. Supposing the railway to be only five years old, and therefore no expense to have been incurred for repairs, the result of the system of the Commissioners would be to allow no deductions at all for wear and tear. The result of the contention for the other side would be that no additional use was allowed by the Act of 1878.

At advising—

Lord Justice-Clerk—This is a Case stated by the Special Commissioners of Income-Tax in a question as to the assessment for income-tax of the Caledonian Railway. The Commissioners having confirmed the assessment, and the Caledonian Railway Company having demanded a Case, the Case now before your Lordships has been prepared and presented for that purpose. The kind of question that we have to decide in regard to the mode in which the income derived from carrying on a trading concern like the Caledonian Railway Company is to be estimated is one of course with which we are not generally familiar, and that fact has rendered the discussion and the consideration of it somewhat difficult. But I am sorry to say that the difficulty has been a great deal increased by the way in which this Case has been presented. I think it would have been very desirable, and for the future I trust it will be so considered, to follow the injunctions of the statute in the stating of Cases of this kind. The statute directs in the 9th section of the Customs and Inland Revenue Act (the 37th of the Queen), that immediately upon the determination of any appeal under the Acts relating to income-tax by the Commissioners for special purposes, or of any appeal under the Acts relating to the inhabited-house-duties, the appellant or the inspector or surveyor may, if dissatisfied with the determination as being erroneous in point of law, declare his dissatisfaction to the Commissioners; and then the Commissioners are to state and sign a Case. The Case is to set forth the facts and the determination; and the party receiving the same is to lay it before the Court. Then it is provided that the Court shall hear and determine the question or questions of law arising on the Case transmitted under the Act; and the 3d sub-section is, that the Court shall have power, if they think fit, to cause the Case to be sent back for amendment, and thereupon it shall be amended accordingly.

When I come to look at the Case that is now before us, I find that it states neither the law nor the facts. It neither states the facts as matter of fact, nor does it state the question of law in any shape whatever which we are required to decide; and if I had had more difficulty upon the substance of the question raised before us, I think it would have been essential to send it back and have it put into the form consistent with the provisions of the statute. What the Case does is to narrate at considerable length the process by which the Caledonian Railway Company have made up their accounts, and secondly, the process by which the ultimate result is attained. But these matters are not stated as matter of fact; they are stated in the way of narrative. And then the conclusion at which the Commissioners have arrived is set out, and substantially, I suppose, they mean to say to us that they did not proceed on any question of law at all, but entirely upon a question of fact.

Now, I have made these observations because I must say the form of it has rendered the consideration of the case somewhat perplexing. But as it is, I am prepared to give my judgment upon it, finding in it sufficient matter of fact stated to enable us to consider the question, although it is not very easy to find the real question that is at issue between the parties.

The Case stated by the Special Commissioners for our opinion, divested of arithmetical details which do not affect the matter, raises a very simple issue. The object of the calculations explained in the Case is to exhibit the process by which the amount of assessable income realised by the Caledonian Railway Company for the year 1879-80 has been ascertained. The principle which underlies the process is of course to ascertain the amount of clear profit realised by this commercial concern within the year, and to determine this (which really is at the very root of the matter) all the outgoings which are necessary to attain the sum of gross profit must of course be deducted from that sum before the clear or assessable value of the income for the year can be arrived at. The material appliances used by this trading company in order to create nett income or profits, which are the subjects of the tax, are (apart from the general expenses of management)

—first, permanent way, stations, and other fixed property, forming what is popularly called the line of railway; and secondly, the plant or rolling-stock, consisting of locomotive engines, carriages, waggons, implements, and the like. The present case relates entirely to the mode of estimating the amount which ought year by year to be deducted from gross profits as representing the outlay necessary to enable the company as a trading concern to realise them. This was originally regulated by Schedule D of the Income-Tax Act of 1842, which provided what deductions were, and what were not, to be allowed in the case of expenditure on plant. The clause of the statute is printed, and I need not read it at length. It was contained in the original Income-Tax Act of 1842, and provides in the 3d section, that in estimating the balance of profits or gains chargeable under Schedule D, or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains on account of any sum expended for repairs of premises, &c., nor for any sum expended for the supply or repairs or alterations of any implements, utensils, or articles employed for the purpose of such trade, beyond the sum usually expended for such purposes, according to an average of three years preceding the year in which such assessment shall be made. That substantially is the principle upon which from 1842 down to 1878 this calculation was made. The statement contained in the Case exhibits in some detail the process by which the Commissioners of Income-Tax endeavoured to apply practically the statutory provisions. Railway profits cannot be realised without a constant use of the rolling-stock, and as this use necessarily deteriorates the plant and diminishes its value as a means of producing profit, it requires repair and renewal. The Commissioners, taking the original cost as it stands in the company's books as the standard, have capitalised the sums actually expended on repairs and renewals, so as to keep the estimate of the total expenditure on the plant up to the full value, subject to a deduction of 25 per cent.—that is to say, to keep the total expenditure on the plant up to 75 per cent. of the whole. This deduction of 25 per cent. is taken from the valuation by the assessor of railways under the Valuation Act, whose duty it is to ascertain the annual value of that part of the company's undertaking which consists of real property, and that mainly for the purpose of assessment upon lands and heritages in other matters, but apparently that principle having been sanctioned upon appeal to the Lord Ordinary the Commissioners of Income-Tax adopted it, and the reason why they did so comes out clearly enough in the sequel. There is also a statement in the Case—I wish it had been a statement of fact, and not (as it bears to be) only a statement of what the Caledonian Railway Company had said—which has a very material bearing upon this matter. They say—"The whole plant is kept up to the standard of its being worth 75 per cent. of its original cost, but until the new plant has depreciated to the extent of 25 per cent. (that is, during the first five and a-half years of its life) it requires no substantial repairs." That is not a plain statement of fact, but is a statement of what the aledonian Railway Company had alleged; but assuming it to be an admission or a statement by the Caledonian Railway Company, assumed by the Commissioners to be true, I think that has a very material bearing on the matter. It thus appears that the average life of railway plant is roughly estimated at twenty-two years' purchase, that for the first five of these years it requires no substantial repairs, that for the remainder of the period it admits of being kept in working order by repairs, and after twenty-two years it requires to be renewed. That is the state of the fact on which I proceed. The only complaint now made by the Caledonian Railway Company, to which their claim is restricted, relates to additional plant said to have been furnished during the five years prior to January 1879, and is founded on the provisions of the 12th section of the Income-Tax Act of 1878. The claim which they originally made has been withdrawn, and I understand that in regard to the rest of the assessment, or rather the principle on which it is ascertained, they are content to take the plant as kept up to the value of 75 per cent. of the whole, and that what they now demand is that they shall be allowed the value of what they allege to be the wear and tear upon additional plant furnished by the railway company for the five years prior to the year 1879. That they say has not been allowed for by any repairs or renewals, because there have been no repairs or renewals, but they say the plant is older than it was, and therefore its value must be depreciated by the use for the five years; and they found that upon the clause of the statute of 1878—the 41st of the Queen, c. 15—which runs thus—"Notwithstanding any provision to the contrary contained in any Act relating to income-tax, the Commissioners for general or special purposes shall, in assessing the profits or gains of any trade, manufacture, adventure or concern in the nature of trade chargeable under Schedule D, or the profits of any concern chargeable by reference to the rules of that schedule, allow such deduction as they may think just and reasonable as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the concern, and belonging to the person or company by whom the concern is carried on; and for the purpose of this provision, where machinery or plant is let to the person or company by whom the concern is carried on, upon such terms that the person or company is bound to maintain the machinery or plant and deliver over the same in good condition at the end of the term of the lease, such machinery or plant shall be deemed to belong to such person or company." Now, unquestionably this was a clause intended to alter and to extend in favour of the person or company assessed the provisions of the Act of 1842, and Schedule D thereto annexed. About that there can be no doubt at all, because it allows and enjoins the Commissioners to make a deduction which certainly was not allowed by the original Income-Tax Act. It is, however, to be such a deduction as they may think just and reasonable as representing the diminished value by reason of wear and tear. Now, that being the nature of the claim, which arises simply in this way, that neither repairs nor renewals of plant are the foundation for it, but additional plant contributed or furnished during the five years prior to January 1879, the question is, Whether the Commissioners

were bound to make allowance for the wear and tear on that plant? The railway company complain that as far as this plant is concerned, while its value has been diminished by wear and tear during the five years in question, no allowance has been made on this head by the Commissioners in terms of the statute. As a matter of fact I take the last statement to be true. The Commissioners have made no allowance for the diminution of the value of this plant during the five years in question, while it cannot be disputed that after a period of use the engines and carriages are not, and probably cannot be, as valuable a commodity for sale as they were when new. There are some grounds to which the Commissioners have appealed as supporting their determination in the confirmation of the assessment to which I attach no importance at all, and I think it is unfortunate that they are stated as grounds for judgment—if they are so stated, about which I have some doubt. The first was, that a sum of £20,000, to which we were referred, was an equivalent allowance on this head; but it seems to me that that sum has no connection whatever with the question raised in this case. That sum of £20,000 was properly made a subject of deduction upon its own merits. It was a sum withdrawn from profits, and therefore not clear profits, and set apart to meet a prospective demand for renewal, and was not therefore an allowance for past wear and tear in any sense whatever. Neither do I think it could be successfully contended that this 12th section was sufficiently carried out by the allowance already referred to for renewals, if it appeared as matter of fact that there had been a diminution of value in regard to any part of the plant which these allowances did not cover; for the clause in question certainly meant to go beyond the deductions allowed in the Act of 1842. But I am nevertheless unable under this case to give the Caledonian Railway Company the redress which they ask for. I think the Commissioners were entitled to hold, and that their judgment proceeds on that footing, that the value of the additional plant in question was not diminished by wear and tear during the five years in question, and they do so find in express terms in the words of their judgment, and I am not prepared to review or alter their decision on that question of fact. The ground on which the Special Commissioners seem to have proceeded is the alleged and assumed fact that during the first five years of the life of a railway locomotive or carriage it requires no repairs, and is therefore of the same value—that is, capable of earning the same amount of income—as when it was new. That manifestly is a principle quite capable of being maintained, and in my apprehension it is sound. The view seems to be this—the whole plant has been allowed for up to 75 per cent. of its value, and as there is no diminution by wear and tear for the first five years in the sense of producing profit—that is to say, the plant requires no repairs to enable it to produce the same amount of profit that it did at first—then it is clear that from first to last the plant has been in the position that it was at starting, and is capable therefore of producing the same amount of profit by the same outlay, and no more. If the Commissioners assumed that the expression "diminished value" in the 12th section of the Act of 1878 signifies value for the purpose for which it was intended in a going concern, I cannot say they were wrong in so holding. I do not think that the words had any reference to the value of the plant as merchantable or marketable articles, because its capacity to earn income constitutes its sole value to the railway company, and is the only quality contemplated under the statutes relating to the taxation of income. I am the more confirmed in this impression by the terms of the second part of the first paragraph of the 6th section, relative to the valuation of plant in the hands of a tenant leased by the railway company under an obligation to restore it to the owner in as good condition as it was when they received it. By the terms of the section such plant is to be held to belong to the proprietor, and is to be settled with for income-tax on precisely the same principles as it would have been if he had been the proprietor; but it is plain enough that if the plant is restored as it was by the tenant under such a contract within the first five years of its existence, assuming that no repairs or renewals are required during that period, his obligation is fulfilled, and he could have no possible interest in the marketable value of an article which he had no power to sell. But even if these things were not so, I must say, that looking to the terms of the 12th section of the Act of 1878, I should feel very great difficulty in interfering with the result at which the Commissioners have arrived. They have held, following out the wide discretion vested in them by the statute, that no wear and tear has taken place in this plant for which any allowance would be just and reasonable. I cannot see how we can review that conclusion. If, indeed, we were satisfied that the Commissioners had misread the statute, and had not applied their minds to the question, we might have sent the Case back to them for consideration obviously. But I am satisfied that they have applied their minds very directly to the question, and have come deliberately to the conclusion that the plant had suffered no diminution in value in the sense intended by the statute, but was of as much value to the company, and was capable of producing with the same outlay the same amount of profit, as it had been at any former period. The plant, it will be observed, was not five years old at the termination of the period. I am therefore disposed to refuse the appeal and confirm the judgment of the Commissioners. It may be asked, in this view, What is the real meaning and intendment of this 12th section of the statute? I do not know that I should be able to give a very clear response to that question without more practical knowledge than is disclosed or is to be derived from this Case. But I can understand that there may be plant deteriorated after the five years by wear and tear on which no sum has been expended for repairs or renewals within the period of assessment; and probably the Income-Tax Commissioners had felt themselves hampered before the passing of the statute by the very stringent words of Schedule D of the Act of 1842. But that is more speculative than anything else. Meantime I am not prepared to alter, and therefore I propose that we should confirm the judgment of the Commissioners.

Lord Gifford—I concur in the opinion which your Lordship has expressed, and will confine

myself to a very few additional or supplemental observations.

This is an appeal against a determination of the Special Commissioners under the Income-Tax Acts assessing the profits of the Caledonian Railway Company for the year 1879-80 at the sum of £1,323,304. The appeal to this Court as the Court of Exchequer in Scotland is taken under the 9th and 10th sections of the Statute 37 Vict. cap. 16 (8th June 1874), known as The Customs and Inland Revenue Act 1874. By the 9th section of that Act it is made competent to the railway company or party assessed, "if dissatisfied with the determination of the Commissioners as being erroneous in point of law, to declare" dissatisfaction therewith, and to require the Commissioners to state and sign a Case for the opinion of the Court thereon. It is provided that the Case shall set forth the facts "and the determination," and that it shall be transmitted to this Court for decision.

From these provisions it appears that it is only on proper questions of law that there is any appeal to this Court as the Court of Exchequer in Scotland. All review upon questions of fact which are to be ascertained by evidence of any kind is excluded, review being allowed only upon pure and proper questions of law; and in order that the law and the fact may be kept entirely separate it is provided that the Case to be stated by the Commissioners shall "set forth the facts" —that is, shall specify all the matters of fact upon which the legal determination proceeds—and shall also set forth "the determination"—that is, the decision in law—which the Commissioners have pronounced upon the facts proved or admitted before them; and it is this determination, so far as proceeding upon grounds of law, which alone is the subject of appeal to this Court.

I cannot say that I am quite satisfied with the manner in which the present Case is framed. In many of the statements which it contains law and fact are mixed with the claims and statements of the railway company, and it is difficult to ascertain and to separate what is meant to be stated as matter of fact from what is decided or inferred as matter of law, and there is no precise statement anywhere in so many words of what the legal determination is against which the Caledonian Railway Company appeal. The short but very precise direction of the statute has not been implicitly followed—That the Case shall set forth, first the facts, and second the determination; and under the twenty-three heads or numbered paragraphs which the Case contains I have difficulty in saying which of these numbered heads are statements of fact, and which of them embrace determinations in law.

I am aware of the difficulty of separating law and fact in cases like the present, and of the nicety which there must always be in setting forth categorically matters of fact which are not to be touched by the Court of review, so as to bring to a point, precise and clear, the questions of law which the Court of review is to settle, so as finally to regulate all future practice, however extensive or far-reaching. But however difficult the operation may be, the statute requires that it shall be attempted, and before any case of this kind can be satisfactorily disposed of, the Court must have before it distinctly, on the one hand, the questions and matters of fact which it is to assume as finally ascertained, and, on the other hand, the question or questions of law which arise therefrom, and as to which the assessing authorities and the parties liable in the assessment have differed.

But while I have thought it right to make these remarks, I agree with the view taken by your Lordship. The legal determination which is to be the subject of review I am not unwilling to gather so far as possible from the present Case —the true questions between the parties, and what must be held to be the admitted facts out of which these questions arise. With the assistance of the statements at the bar, I think this is possible, and if the real question can be got at with sufficient clearness, I think the parties are entitled to our judgment.

As explained at the bar, the whole legal question really turns upon the legal import and effect of the 12th section of the Statute 41 Vict. cap. 15 (27th May 1878), known as The Customs and Inland Revenue Act 1878. This section 12 provides—"Notwithstanding any provision to the contrary contained in any Act relating to income-tax, the Commissioners for general or special purposes shall, in assessing the profits or gains of any trade, manufacture, adventure, or concern in the nature of trade chargeable under Schedule D, or the profits of any concern chargeable by reference to the rules of that schedule, allow such deduction as they may think just and reasonable as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the concern and belonging to the person or company by whom the concern is carried on." The statute goes on to provide for cases of machinery and plant being let on lease or otherwise, or held under condition of maintenance in good condition, but the substance of the enactment is, that in estimating profits deduction shall be given for tear and wear of plant and machinery—that is, an allowance spread over a reasonable number of years, which will enable the trader to keep up his plant and replace it when it is worn out.

Now, the complaint of the railway company is that they have not received allowance or deduction from profits, or have not received sufficient allowance or sufficient deduction from profits for what they call depreciation upon rolling-stock and machinery, and they claim as additional deductions from the estimated profits for the year in question either, *first*, a sum of £185,391 as the deterioration of their whole plant for the year in question, 1879-80. No doubt this first claim was given up at the bar, but it is important to keep in view that in the case before us this claim stands on the same footing as the alternative claim, which is alternatively—*second*, deduction of a sum of £49,344, being 4½ per cent. of the cost of additional new plant added during the last five and a-half years. The question of law sought to be raised by the railway company is, Whether they are entitled in point of law to deduction from the assessed amount of their income and profits of one or other of the above sums in respect (I take the words of the Act) "of the diminished value by reason of wear and tear during the year of their machinery or plant." The statute requires that the diminished value shall be occasioned by reason of wear and tear, and it must be wear and tear "during the year" in question.

Now, the first point to observe is that this Special Case does not state what the diminished value of the plant is by reason of wear and tear during the year in question. This is a question of fact, and was a question for the Commissioners and not for this Court, and so, even if the railway company are entitled in law to an estimated deduction for wear and tear, there are no materials before the Court for fixing such deduction, and the reason of this is obvious. The Special Commissioners, at the instance of the railway company, or at least with their consent, have fixed the deduction for wear and tear on a different principle altogether from that contemplated in the Act of 1878. Instead of attempting to fix "diminished value by reason of wear and tear during the year," they have allowed the company deduction of the actual sums expended by them for repairs and renewals, amounting to £253,389, and as it is stated and certified by the railway company themselves that by the expenditure of this sum the whole plant has been maintained in good working order and repair, this sum may fairly be taken as making up the whole deterioration which the wear and tear of the year has occasioned. The view taken by both parties seems to me to have been fair and reasonable. Instead of the Commissioners guessing at probable deterioration by taking percentages or round sums, which is necessarily a rough mode of getting at the result, they have taken the company's own plan of calculating, namely, taking the actual sums expended in repairing and renewing the plant, and this although the renewed plant was better and more expensive than that which was worn out. This is perfectly fair, and the plan over a series of years will be perfectly equitable. The Caledonian Railway is a continuing company with perpetual duration, and if it receives deductions over a series of years for the actual expense of repairs and renewals, so as to keep up its plant in undiminished efficiency, this will be better than any mere guess or estimate which the Commissioners could make. The railway company will get deduction for their actual expenditure instead of a mere estimate of what their expenditure would probably be. At all events, this is the view upon which the assessment has been made, and there are no materials for throwing this assessment aside and making it up of new upon another principle. The railway company themselves do not complain of this. They accept—indeed it appeared from the argument that they asked—deduction of the whole cost of repairing and renewing their plant, and this has been allowed, and they decline to go back upon this ; but they ask an additional deduction on a different principle altogether, and they claim both deductions accumulatively.

It seems to be quite clear, as the Commissioners observe, that the railway company cannot get deduction for deterioration twice over—first, by deducting the actual expense of repair and renewal, and then by deducting an additional estimate sum for the same thing. Nor will it do, as the railway company urge to make a distinction between old and new plant, and to deal with the old plant in one way and with the new in another. I think the same principle must be applied to both.

Still further, the assessment has been made in entire accordance with the railway company's own accounts. In striking their annual profits so as to fix the sum divisible as dividend, the railway company have gone upon actual expenditure, and not upon a mere estimate of probable wear and tear. I see no reason why the income-tax to Government should not be fixed upon the same principle as that which determines the dividend to the proprietors, and *prima facie* it seems very anomalous that the railway company should tell their shareholders that they have realised a certain sum as profit which they propose to divide as dividend, and should yet maintain as in a question of taxation that their real profit is a much less sum. The contention of the railway company implies the admission that for the year in question they are paying dividend to some extent out of capital. Surely no complaint can be made if the railway company pay income-tax only upon what they themselves divide as dividend or net profit, and upon which they get back or retain from their shareholders precisely the income-tax which they have paid.

At all events, I am perfectly clear that this Case does not contain the materials necessary to enable the Court to interfere with the determination of the Commissioners. For example, there is no finding in point of fact of what the average life of the plant is, but a mere statement by the railway company that it was about twenty-two years ; but if a slump or estimated deterioration is to be taken, founded upon the life of the plant, this life of the plant must be found as a matter of fact by the Commissioners. Indeed, the Commissioners must themselves, in the case supposed, fix in figures the deduction for wear and tear for the year. This they have not done, and they were never asked to do so. Without such finding the Court cannot give effect to the claim.

The statute seems to regard deterioration from wear and tear during the year as the true criterion, and this answers another objection of the railway company, that upon new or added plant there is little deterioration during the first five and a-half years of its existence. If this be so, then the statute only allows little deduction. It is actual deterioration only that is to be taken into account.

On the whole, I am for affirming the determination of the Commissioners. If the railway company want the assessment made upon a different principle—that is, upon estimated wear and tear, and not upon actual wear and tear—they may be entitled to insist on this last. Counsel at the bar stated that they did not seek to open up the assessment altogether, but only claimed an additional deduction. If the principle of the statute of 1878 is sought to be applied, I think the whole assessment must be reviewed, and the question raised in a different form. I would humbly suggest for the consideration of the railway company, however, whether the actual expenditure will not give a more equitable result than any mere estimate could, especially as the actual cost is the criterion adopted in their own accounts.

Lord Young—I arrive at the same result, and, I confess, without any difficulty. I agree with both of your Lordships that the case as stated is somewhat perplexing. I daresay the Commissioners were themselves perplexed in stating it by the requirements of the contending parties, each desiring that what he considered very material

should be set out, and the Commissioners, I daresay, being very willing to gratify both in so far as they reasonably could. Another source of perplexity in the statement of the case, and in the present consideration of it, probably arises from what is apparently a very extravagant demand on the part of the railway company, and which they themselves came at length so to regard—for they abandoned it at the bar—I mean the claim which is the special subject of paragraph thirteen of the Special Case. In the result the railway company confined their demand to that which is the subject of the 14th paragraph; and that being so, really the only paragraphs in the Case which are material to be considered are the 14th, the 19th, the 20th, and the 21st. The others may really be laid aside altogether. It is not material that we should know what amount of capital was originally invested in plant and machinery, and the amount of capital so originally invested does not at all enter into the adjudication of the Commissioners. I understand it to be quite certain that in assessing for income-profits—no deduction whatever is allowed in respect of the capital originally invested in plant and machinery—no more than upon the money capital invested in any manufacture or mercantile adventure. That for which allowance may be made is the cost payable out of income or profits of maintaining the machinery and the plant. That is all. I say that at present without reference to the provision of clause 12 of the Act of 1878, which I momentarily lay out of view. But the cost of maintaining plant and machinery which is paid out of income consists of repairs and renewals; and in so far as the renewals are of a character which go beyond maintaining the plant and machinery in its existing state, why, that is investment of capital, and no allowance ought to made at all for that. And in so far as deduction is allowed in respect of the cost of new materials of other and more costly description than that which they have replaced, the railway company have in my opinion been liberally dealt with, for they are entitled to no more allowance than of the expenditure out of income in maintaining the plant or machinery in its existing state. Now, the railway company say, and I assume say truly, although the Commissioners have not stated it as a fact in the Case, that by repairs and renewals they keep up their plant and machinery. I quote the language which they themselves use in the fourteenth paragraph of the Case as it is reported to us by the Commissioners—"the whole plant is kept up to the standard of its being worth 75 per cent. of its original cost." But then they say—and it is here only that the question arises, for it is upon this that the claim immediately under consideration is based—that new plant takes about five and a-half years to depreciate to the amount of 25 per cent., or to be renewed to 75 per cent. only of its original cost. And they say that this diminution in value during these five and a-half years of its life from 100 to 75, or diminution of 25 per cent. overhead, is a diminution in value by reason of wear and tear, and that they are entitled to an allowance accordingly for that under clause 12 of the Act of 1878. And the claim is quite intelligible, although I agree with your Lordships in thinking, when the case comes to be understood, extravagantly erroneous. I assume that the plant bought during the last five and a-half years is not deteriorated, any part of it, until five and a-half years of its life has gone—that is to say, a locomotive bought new will only gradually lose its original value for the next five and a-half years, and then it will stand still, with only the repairs which are put upon it, at 75 per cent. of its original value; I assume that. But what is the allowance which the Commissioners make to the Caledonian Railway Company for that locomotive? The whole cost price of it—what it cost them. That is what they allow. But they want a deduction of more than it cost them. They want a deduction of its cost *plus* 25 per cent., because it would fall off in value and use. Now, that is what appears to me to be utterly absurd. They are allowed, the Commissioners say, not only all the repairs they put upon the plant, but the whole cost price of new plant. It is not 75 per cent. of it that is there allowed, but the whole cost price, and what earthly reason there can be for adding 25 per cent. to the whole that it cost them I cannot perceive. But although I have a very clear opinion, upon the grounds which I have stated, that the company are not only legally but liberally dealt with, it is sufficient for the determination of this case that the Commissioners certify to us that when the whole sums expended upon repairs and renewals are allowed, it is not in their opinion just or reasonable that any deduction should be made for depreciation by tear and wear in addition to that. That seems to me to be conclusive under clause 12, because clause 12 does no more than provide, that if the Commissioners think any deduction for diminished value by reason of tear and wear just and reasonable, they shall allow it notwithstanding any provision to the contrary contained in any previous Act. But when they certify to us that they do not consider any deduction just and reasonable where a deduction is made for the full sums expended upon repairs and renewals, I do not see why we should substitute for the words of the statute what this Court might consider just and reasonable. If we were to interfere, I should agree with the Commissioners that no deduction in respect of diminished value by wear and tear was just and reasonable upon the facts which they state, the material fact being an allowance of the full sums expended upon repairs and renewals. But even if I thought otherwise, it is the Commissioners' judgment upon that matter that the statute refers to. If they do not consider it just and reasonable, it is not to be allowed. If they do, then they are directed to allow it, notwithstanding any provision to the contrary in any Act of Parliament. Upon that ground alone I should be prepared to refuse this appeal, but I have thought it right at the same time, agreeing with your Lordships as I understand to that effect, to say that I think the Commissioners have regarded this case justly, and I think their judgment is right—that it was not just or reasonable to allow any further deduction—and that the Caledonian Railway Company in the deductions which have been made have been liberally dealt by.

The Court affirmed the decision of the Commissioners.

Counsel for Railway Company—Kinnear—R. Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Counsel for Commissioners of Inland Revenue —Lord Advocate (M'Laren, Q.C.)—Rutherfurd. Agent—D. Crole, Solicitor of Inland Revenue.

Saturday, November 20.

FIRST DIVISION.

[Sheriff-Substitute of Forfarshire.

IRELAND *v.* NORTH OF SCOTLAND BANKING COMPANY.

Bankruptcy—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *secs.* 35, 38, *and* 101—*Unvouched Claims—Deed of Arrangement—What Creditors are Entitled to Vote and to Sign Deed of Arrangement.*

A majority in number and four-fifths in value of the creditors of a deceased bankrupt agreed at the first statutory meeting to wind-up the estate by deed of arrangement. Certain non-concurring creditors objected to the claims of three subscribers to the proposed deed, which were founded on alleged loans to the bankrupt many years before, on which no interest had been paid, and in support of which no writing was produced. The Sheriff disallowed these claims, and the subscribing creditors whose debts were over £20 in value being then less than the four-fifths in number and value required by sec. 38 of the Act, he refused to approve of the proposed deed, and appointed the sequestration to proceed. One of the creditors whose claim had been disallowed appealed. Appeal *refused.*

On 22d April 1880 the estates of the deceased John Ireland, hardware merchant, Dundee, were sequestrated by the Sheriff-Substitute of Forfarshire, and the statutory meeting for election of a trustee, in terms of the Bankruptcy (Scotland) Act 1856, appointed to be held on 8th May following. At that meeting it was resolved, by a majority in number and four-fifths in value of the creditors present or represented, that the estate should be wound-up by a deed of arrangement; and a petition was accordingly presented to the Sheriff-Substitute to sist proceedings for a period not exceeding two months, in terms of sec. 36 of the Act. This petition was granted without opposition. On 10th July the Sheriff-Substitute ordered intimation of the production of the deed of arrangement to be made to the non-concurring creditors. Objections to the deed were lodged for the North of Scotland Banking Company and others, in which it was argued that the deed was not "reasonable" in the meaning of sec. 38 of the Act, upon the grounds, *inter alia*, that the claims of various alleged creditors who had voted at the first meeting were unfounded, and their grounds of debt invalid. Objection was made amongst others to the claims of—(1) William Thoms, mason, who made affidavit and claim for £43, 7s. 6d., grounded on an alleged loan of £30 to the bankrupt in 1871, on which interest had never been paid and now amounted to £13, 7s. 6d.; (2) John Ireland, porter, who claimed £53, 10s. 3d., on an alleged loan to the bankrupt in 1871 of £37, with interest since that time; and (3) John Duff, teacher, who claimed £53, 0s. 1d., on an alleged loan of £40 made in 1873 and interest. In none of these cases had any interest been paid, and no writing was produced in support of the claims. It was answered that the objection to the validity of these claims as not being properly vouched was not a competent one, in respect that having lodged affidavits these claimants were entitled to vote at the first statutory meeting and to sign the deed of arrangement. It was also answered, that in counting the number of creditors for the purpose of voting every creditor must be computed whether his debt amounted to £20 or not.

On 15th October the Sheriff - Substitute (CHEYNE) refused to approve of the proposed deed of arrangement, and with a view to the sequestration proceeding appointed a meeting of creditors for the election of a trustee. He added this note:—

"*Note.*—I am satisfied, after a careful consideration of it [the deed] with the account given in by the executrix, and I think it by no means improbable, that when the expenses of the sequestration have been provided for, the creditors will find themselves worse off than they would be were the proposed arrangement to receive effect. It is therefore with much reluctance that I have come to the conclusion embodied in my interlocutor; but at the same time I am bound to see that all the requirements of the statute have been complied with, and I have been unable to satisfy myself that this has been done. . . . . The objection which I have found it impossible to get over relates to the claims of John Duff, John Ireland, and William Thoms. These claims were all for loans of money alleged to have been made to the bankrupt years before his death, but it was conceded that in none of the cases was there any writing, either of the bankrupt or of the executrix, tending to instruct the loan, and also that in none of them has any interest ever been paid. It may be that on fuller investigation the trustee may see the way to admit them as good claims against his estate, but in the circumstances above stated I am not satisfied as to their validity, and I must therefore strike them out of the computation; but the result of doing so is to bring the majority, so far as the creditors entitled to be reckoned in number are concerned, below the statutory four-fifths, for the remanent subscribers of such creditors (*i.e.*, creditors having debts above £20) are only ten out of fourteen; and this being so, it follows—assuming that I am right in throwing the claims in question out of view—that I must decline to approve the deed of arrangement, and allow the sequestration to take its natural course." . . . .

John Ireland, one of the creditors whose claim was thus disallowed, appealed to the Court of Session.

At advising—

LORD PRESIDENT—Two points are raised in this appeal. In the first place, in computing the number of creditors who have signed a deed of arrangement, the claims of the three persons mentioned by the Sheriff-Substitute have been disallowed, and so the number of signing creditors is under the majority in number and four-fifths in value required by the statute. As I understand the appellant's contention, it amounts to this, that anyone who lodges an affidavit is entitled to vote at the meeting under sec. 35 of the Act, and to sign a deed of arrangement, or at any-