

marks just when the last available cubic foot of space in the upper holds had been filled. It would not be a reasonable application of the direction to hold it to be inapplicable wherever this position is not exactly reached however near the approximation. In the present case it appears to me that the approximation was so near that the instruction must be held to have been applicable without any necessity or justification for considering the more complicated rules applicable to a non-homogeneous cargo.

The defenders rely, though as it appeared to me somewhat half-heartedly, upon counsel given to the master by Mr Barthold, the commercial agent of the defenders at New York. Mr Barthold advised the master to take water ballast. He did not do so, however, in virtue of his knowledge of Messrs Doxford's instructions. Nor did he do so as an expert. On the contrary, as he himself says, he stated to the master it was not his knowledge but his ignorance of turret ships that caused him some anxiety. The master was under no obligation either to take Mr Barthold's instructions or to defer to his advice. I am of opinion, therefore, that the action of Mr Barthold does not absolve the defenders. There is indeed one aspect of the matter in which Mr Barthold's anxiety in view of the nature of the cargo suggests an argument adverse to the defenders. The master paid no heed to it as being a landsman's idea. It seems to me not unlikely that it might have reminded him of Messrs Doxford's warning if that document had ever been brought before him.

The broad view of the matter appears to me to be this. A vessel of a peculiar type was lost under circumstances not satisfactorily explained. This led the builders to issue certain instructions in regard to the loading of such vessels. If these instructions had been observed the "Clan Gordon" would not have been lost. The defenders took no steps to bring these instructions to the knowledge of the master of the "Clan Gordon."

Upon the question whether the defenders are entitled to the benefit of the statutory limitation of liability I agree with the Lord Ordinary.

Upon the whole matter I have come to the conclusion that the interlocutor of the Lord Ordinary ought to be affirmed.

Their Lordships recalled the interlocutor of the Lord Ordinary and assolized the defenders from the conclusions of the summons.

Counsel for the Pursuers — Dean of Faculty (Sandeman, K.C.) — Normand. Agents—J. & J. Ross, W.S.

Counsel for the Defenders — Macmillan, K.C.—Jamieson. Agents—Webster, Will, & Company, W.S.

Friday, December 1.

## FIRST DIVISION.

[Appeal from the Railway and Canal Commission.]

### CALEDONIAN RAILWAY COMPANY v. LORD ADVOCATE.

*Railway — Annual Accounts — Lump-Sum Toll — Payments in respect of Running Powers — Whether to be Entered in Revenue Accounts among Items known as "Above the Line" — Railway Companies (Accounts and Returns) Act 1911 (1 and 2 Geo. V, cap. 34), sec. 1, First Schedule No. 8.*

In account No. 8 of the Statutory Form of Accounts contained in the First Schedule to the Railway Companies (Accounts and Returns) Act 1911 (1 and 2 Geo. V, cap. 34), the first seven items known as these "above the line" relate to revenue receipts and expenditure which are more or less affected by the varying volume of traffic. The remaining items grouped under the heading of "Miscellaneous receipts" and known as those "below the line" consist of items not affected by the varying conditions of traffic, such as rents from houses, hotels, and other rents, including "lump-sum tolls."

Under an agreement by which a railway company acquired running powers over a branch line belonging to another company, it was provided that in respect of the exercise of the said running powers the company acquiring them should pay to the other company a fixed toll of 1d. per ton on minerals and a fixed toll of 2d. per ton on other merchandise carried over the branch line or any part thereof, subject to the stipulation that the amount so payable in any year was not to be less than £3800. This sum having been paid for certain years in which the traffic was negligible, *held* that the payment was not a "lump-sum toll" within the meaning of Account No. 8, and that it therefore fell to be entered "above the line" in the account.

The Caledonian Railway Company presented an application to the Court of the Railway and Canal Commission, calling the Lord Advocate as representing the Ministry of Transport as *respondent*, for the determination of a difference which had arisen with reference to the amount of compensation payable to the applicants by the Government in respect of the latter having taken over the control of the applicants' railway at the outbreak of war on 4th August 1914.

The application raised several questions, but the argument in the appeal was limited to the question whether a sum of £3800, being a minimum sum payable yearly under an agreement by the North British Railway to the applicants in respect of running powers over part of the applicants' lines, fell to be entered under one or other of the

first seven items known as "above the line" in Account No. 8 of the First Schedule to the Railway Companies (Accounts and Returns) Act 1911, with the result of reducing the deficiency in receipts for which the applicants were entitled under their agreement with the Government to compensation, or whether the payment fell to be entered in the account under "Miscellaneous receipts," known as "below the line," under the item "other rents and lump-sum tolls," in which case it was not to be taken into account in estimating the deficiency.

The application stated, *inter alia*—"2. By an agreement between the applicants and the North British Railway Company, dated 12th April 1912, it was agreed by article first thereof that 'the North British Company shall have right in perpetuity to run over and use for the purposes of merchandise traffic of every description the branch railway of the Caledonian Company forming part of the Caledonian Company's Leith lines so far as the said branch railway extends between the junction therewith of the spur line to be constructed by the North British Company as hereinafter mentioned, and the termination of the said branch railway at the boundary of the Caledonian Company's property on the south-east side of Albert Road, Leith, and any part or parts of the said branch railway so far as aforesaid. . . . ' 3. By article second of the said agreement it is further provided that 'in respect of the exercise of the said running powers the North British Company shall pay to the Caledonian Company a fixed toll of one penny per ton for minerals of every description carried by the North British Company over the branch railway or any part thereof, and a fixed toll of twopence per ton for merchandise other than minerals carried as aforesaid. If the amount of the said fixed tolls payable to the Caledonian Company in any year ending 31st December is less than Three thousand, eight hundred pounds sterling, the North British Company shall pay to the Caledonian Company such sum as may be necessary to make up the amount of the said fixed tolls to the said sum of Three thousand, eight hundred pounds sterling for the year.' 4. By article fourth of the said agreement it is further provided that 'the powers by this agreement conferred upon the North British Company shall entitle them to equal facilities and advantages for the purposes of traffic on the branch railway with the Caledonian Company, and the Caledonian Company shall not give any preference, priority, or advantage over the trains or traffic of the North British Company to their own trains or traffic or to any other trains or traffic. . . . ' 11. On the declaration of war between Great Britain and Germany on 4th August 1914 the Secretary of State, pursuant to the powers contained in the Regulation of the Forces Act 1871, took over the control, *inter alia*, of the railways of the applicants, and in connection with the compensation payable to the applicants in terms of the said Act of 1871 in respect of the taking over of the control of their railways it was agreed between the applicants

and the Government, *inter alia*, as follows:—'To ascertain the compensation payable the aggregate net receipts of all the railways taken over during the period for which they are taken over shall be compared with a similar aggregate for the corresponding period of the previous year. The ascertained deficiency shall be the amount of the compensation due. Provided that if the aggregate net receipts for the first half of the year 1914 are less than the aggregate net receipts for the first half of the year 1913, the ascertained deficiency shall be reduced in the like proportion. Any question as to the amount of the deficiency shall in default of agreement be determined by the Railway and Canal Commission.' The said agreement was subsequently modified by the deletion of the proviso above narrated, and subsequently by Instruction 211 of the Railway Executive Committee acting on behalf of the Government, dated 3rd March 1915, it was explained—'Briefly stated, the intention of the Government in respect of compensation under the offer which has been made is that the net receipts in respect of railways, steamboats, canals, docks, harbours, and wharves, as well as hotels and refreshment rooms' (those are items Nos. 10 to 16 inclusive in Account No. 8 of the Statutory Form of Yearly Accounts) 'shall for the current period of control be based on the net receipts for the year 1913 without application of the reducing factor under the proviso—that is to say, without any deduction whatever—and that each company will receive full compensation on that basis.' The applicants, by letter dated 9th March 1915 addressed by their Secretary to the chairman of the Railway Executive Committee, agreed to the terms of the said arrangement. 12. Items Nos. 10 to 16 in Account No. 8 of the Statutory Form of Accounts annexed to the Railway Companies (Accounts and Returns) Act 1911 relate to the revenue receipts and expenditure of the whole of the undertaking in relation to (10) railway, (11) omnibuses, &c., (12) steamboats, (13) canals, (14) docks, &c., (15) hotels and refreshment rooms, (16) other separate businesses. The remainder of the account falls under an item headed 'Miscellaneous receipts,' which are excluded from the above-mentioned agreement with the Government and are known as 'below the line.' These miscellaneous receipts include, *inter alia*, (a) rents from houses and lands, (b) other rents including lump-sum tolls, (c) interest and dividends from investments in other companies, (d) transfer fees. 13. Account No. 10 of the schedule to the said Accounts and Returns Act 1911 relates to receipts and expenditure in respect of railway working. On the revenue side of said account there is a heading entitled 'Gross receipts,' and in connection therewith there is a footnote which is as follows:—'Gross receipts to include the whole of the receipts from traffic carried over the company's lines except where (a) the traffic is carried over the company's line by trains of other companies and no annual payment is made therefor, or where (b) the payment is made by way of a fixed rent.' 14. The payments

under the said agreements began to accrue on and after 15th February 1914, but the North British Company did not commence to exercise the running powers conferred upon them by the said agreements until 13th March 1916, on which date the junction of their railway No. 3 of the Act of 1913 with the applicants' railway had been completed." [Sums received by the applicants under article 2 of the agreement of 12th April 1912, including a yearly sum of £200 payable under article 6 thereof, were then narrated.] "15. On receipt of the said sums the applicants credited the amount thereof to the item 'Other rents including lump-sum tolls,' under the head of 'Miscellaneous receipts' in the before-mentioned Account No. 8 scheduled to the Railway Companies (Accounts and Returns) Act of 1911. All sums credited to this item are excluded from the said agreement with the Government. 16. No payments excepting under abstracts A and B, regarding which there is a special arrangement, pass between railway companies during the period of control in relation to items 10 to 16 of Account No. 8, these being accounted for to the Government direct. Having this in view the North British Railway Company in or about May or June 1917 ceased to make payments (other than the yearly sum of £200) falling to be made by them to the applicants under the said agreements. In so doing they maintained that the said payments fell to be credited under 'Gross receipts' in Account No. 10 and fell under the said agreement with the Government." ... [It was then narrated that the Committee of Accountants appointed by the Railway Executive Committee and the Government Accountant took the view that it was incorrect to credit the payment "below the line," and proposed to estimate the amount of compensation accordingly.] "18. In the circumstances before narrated a difference has arisen between the applicants and the respondent having reference to the amount of the deficiency in the aggregate net receipts of the applicants, which question falls to be determined by the Railway and Canal Commission. 19. The applicants contend that the fixed payment of £3800 referred to in the agreement of 1912 and the £500 additional payment referred to in the supplementary agreement of 1913 are of the nature of 'rents including lump-sum tolls,' and they found on the fact that these payments are in no sense related to or dependent on the tonnage carried by the North British Company. The applicants accordingly submit that they were justified in crediting the said payments to 'Miscellaneous receipts' in Account No. 8, and they refer to the footnote in Account No. 10 before mentioned, which excludes from 'gross receipts' any payment by way of a fixed rent."

The respondent the Lord Advocate on behalf of the Minister of Transport, *inter alia*, admitted the agreement of 12th April 1912 and the statements contained in paragraphs 11-18 of the application, and contended that the payment in respect of running powers was not a fixed rent or lump-sum toll, was improperly credited

"below the line," and should have been credited "above the line" as traffic receipts of the applicants' railway.

The North British Railway Company adopted the answer for the Lord Advocate on behalf of the Minister of Transport so far as relating to the question whether the payment in respect of running powers fell to be credited "above the line" or "below the line."

On 4th November 1921 the Commissioners after a proof pronounced an order finding that on a sound construction of the agreement dated 12th April 1912, the payment of £3800 fell to be credited in the applicants' accounts "above the line."

LORD MACKENZIE—The main question in this application relates to yearly payments of £3800 by the North British Railway to the Caledonian Railway in respect of running powers by the former over branch lines belonging to the latter. The controversy is how these payments are to be entered in the railway accounts during the period of Government control.

The applicants' contention is that these payments fall under the head of "Miscellaneous receipts" in the Railway Companies (Accounts and Returns) Act 1911, which are excluded from the agreement with the Government regulating compensation and are known as "below the line." Miscellaneous receipts (net) include "rents from houses and lands, rents from hotels, other rents, including lump-sum tolls," as provided in Revenue Account No. 8 of the Act. The Caledonian Railway says the yearly payments of £3800 are "lump-sum tolls." The Lord Advocate contends that they form part of the gross receipts in respect of railway working under Account No. 10, and that the Government are entitled so to treat the payments in settling the amount of compensation payable to the applicants in respect of the deficiency in their aggregate net receipts for the period under consideration. Which of these two contentions is correct depends upon the construction to be put upon the agreement between the Caledonian Railway and the North British Railway. It is dated April 1912 and is scheduled to the North British Railway Act 1913.

Article second of the agreement provides that in respect of the running powers given by article first "The North British Railway shall pay to the Caledonian Railway a fixed toll of one penny per ton for minerals of every description carried by the North British Railway Company over the branch railway or any part thereof, and a fixed toll of twopence per ton for merchandise other than minerals carried as aforesaid. If the amount of the said fixed tolls payable to the Caledonian Railway in any year ending 31st December is less than £3800, the North British Railway shall pay to the Caledonian Railway such sum as may be necessary to make up the amount of the said fixed tolls to the said sum of £3800 for the year." It is plain that under this article the North British Railway were under an obligation to pay sums in each year which would vary in direct ratio to the volume of

the traffic carried on the lines. The payments were to consist (1) of the tonnage rate of one penny per ton for minerals, and twopence for merchandise other than minerals, and (2) the difference between this sum and £3800. These tonnage rates are called in the agreement fixed tolls. The word tolls *prima facie* indicates revenue for the use of the railway. The true character of the £3800 is not that it is a lump-sum payment. It is composed so far of the tonnage tolls of one penny and twopence, and if these fall short of £3800 then the North British Railway are to make up the amount of the tolls until the total of £3800 is reached. This is referred to in articles fifth and seventh as the minimum payment, which under article tenth is to be subject to revision if and when it becomes inequitable. The language used when a rent was stipulated is quite different, as is seen from article sixth, which provides for a rent of £200 for the use of the locomotive depot. No dispute arises as to this being a payment "below the line." On a sound construction of the agreement the payments of £3800 do not fall "below the line." The applicants' contention was that the amount of traffic carried during the period in question—the period of control—was negligible; that no statements giving particulars of tonnage were ever rendered, as provided for under article second; and that the payments should therefore be regarded as lump-sum tolls. The fortuitous amount of the traffic carried cannot in my opinion affect the legal character of the stipulated payments. This must depend upon the terms of the agreement, which do not support the applicants' case. . . .

MR TINDAL ATKINSON—I am of the same opinion. There is a difficulty in giving a satisfactory and exhaustive definition of what a lump-sum toll consists of. It is certainly in my opinion not a sum which is liable to be altered in its character by the amount of traffic carried. If the contention on the part of the Railway Company is correct, then the sum payable up to 30th December in any year may be a lump-sum toll, but on the last day of the year may be converted into the earnings of the Railway Company by the carriage of goods at so much a ton. A lump-sum toll may be increased from time to time, but it remains a lump sum and retains its character as such to the end.

I think the wording of the second clause in the agreement of April 1912 supports the view that the £3800 was intended by the parties to represent earnings at so much a ton—"The North British Company shall pay to the Caledonian Company such sum as may be necessary to make up the amount of the said fixed tolls (viz., so much a ton) to the sum of £3800." In my opinion these words were intended to impress upon the sum of £3800 the character of fixed tolls at so much a ton. It would have been easy if it was so intended to have described the sum of £3800 as being a lump sum in lieu of tolls. In such case it might have been difficult to resist the contention of the company. . . .

SIR LEWIS COWARD—The question raised by the applicants in reference to the claim of £3800 and £500 depends on the construction to be placed on the two agreements of 1912 and 1913. That is a question of law, and under the statute, as one knows, the opinion of my Lord prevails on any question of law. But I concur in the opinion expressed by my Lord and my brother Commissioner. Upon the question of the £3800 payment, that turns upon the construction to be placed on the agreement of April 1912 between the Caledonian Railway Company and the North British Company. At first I rather inclined to the view that this should be treated as a lump-sum payment and should fall below the line, but the argument of the Solicitor-General, to which I listened very carefully, has satisfied me that it is a payment which should not fall below the line.

The applicants appealed to the First Division of the Court of Session, and argued—The £3800 fell to be entered "below the line" as a "lump-sum toll." It was a fixed minimum payment for which, under the agreement, other privileges were given besides merely the running powers; it was payable whether any traffic was carried or not, and its amount was based not on the traffic but upon the interest on the sum expended in the construction and maintenance of the line. Such a payment was similar in its nature to the other items "below the line," viz., payments fixed in amount and not interfered with by the Government's control. Further, all the items "above the line" were of the nature of traffic or business receipts, but here no traffic had actually been carried, so that the sum could not be treated as a receipt for traffic, and there was no heading "above the line" under which it could be included. The fact that if the traffic exceeded a certain amount a larger sum would be payable did not alter the character of the fixed minimum. And if the applicant had to sue for payment he would sue for the lump sum of £3800 under the contract.

Argued for the Minister of Transport—The payment of £3800 was not a lump-sum toll. A lump-sum toll did not vary according to work done or services rendered. Here, however, the agreement contemplated that the sum payable in respect of running powers should vary according to the amount of traffic. The character of the payment was thus established by the agreement, and could not be altered by the mere fact that the fixed minimum only was payable. The payment was, further, revenue from the railway, and if not a lump-sum toll could only be entered "above the line," all the other items "below the line" being income from property owned apart from the railway. Further, if the applicants were suing under the contract, they would require to sue for the amount due according to the tonnage carried, and if this was less than £3800 they would add the difference.

LORD PRESIDENT—The question raised by this appeal is whether a certain payment

made by the North British Railway Company to the Caledonian Railway Company under an agreement between the two companies ought to be entered in Account No. 8 of the statutory form of accounts contained in the First Schedule to the Railway Companies (Accounts and Returns) Act 1911, among the first seven items usually described as those "above the line," or whether it ought to be entered under one of the later items usually described as those "below the line." Very briefly, the distinction between those two groups of items is this—those which stand "above the line" are items which are directly affected by the varying volume of the railway company's traffic and business as reflected in its revenue from railway rates, omnibus charges, steamboat rates, or canal and dock dues, or in its revenue from railway hotels and other subordinate undertakings, which is in like manner dependent upon the varying volume of the company's traffic. On the other hand, the items which lie "below the line" are those which are not affected by the varying conditions of traffic but may be described rather as permanent and invariable, such as rents.

Now the question of the character of this particular payment depends in the first instance on the terms of the agreement and especially upon the Second Article thereof. According to that article the consideration which was to be paid by the North British Company for the power to run over and use certain lines and accommodation of the Caledonian Railway Company at Leith was a fixed toll of 1d. on minerals and a fixed toll of 2d. on other merchandise, subject to the stipulation that the amount so payable in any year was not to be less than £3800. I do not think I am paraphrasing to any extent the language of article second in thus summarising its effect. There are provisions for monthly accounts and for the substitution of commuted tonnages for actual tonnages in certain cases. In short, the consideration is a payment of fixed tolls subject to a minimum of £3800. Whether any traffic is actually carried or not, the minimum payment is a sum based in the contemplation of the agreement on the tolls earned; and whether no more than the minimum is payable, or whether a large sum is payable, depends upon the varying amount of tonnage of coal and other merchandise using the Caledonian Company's lines and accommodation.

The contention of the appellants is that the minimum payment of £3800 under the second article is a "lump-sum toll" within the meaning of the entry "below the line" in Account No. 8 of the schedule, described as "Other rents, including lump-sum tolls." Now what is a "lump-sum toll"? The ordinary toll which is payable for railway service is, as everybody knows, a payment for the use of the railway company's line per ton-mile; the tolls payable under article second are not of that kind. They are "fixed tolls" payable (no matter what the mileage travelled by the traffic may be) upon each ton of the traffic in question which runs upon or uses the particular lines

and accommodation to which the agreement refers. A "lump-sum toll," as its designation implies, is different from both of these. It is a payment fixed once and for all, subject neither to increment nor to decrement in accordance with variations in tonnage carried or mileage travelled, which enfranchises the payer in the right to use the line in question or any part of that line. I therefore concur in the reasoning by which Lord Mackenzie in the Railway and Canal Commission arrived at the judgment appealed from. It will be seen from the considerations above stated why a "lump-sum toll" is put into the company of "other rents" in Account No. 8. It is because it is a permanent or invariable payment, the amount of which is in no way affected by the amount of traffic using the line.

I think the decision of the Railway and Canal Commission ought to be affirmed.

**LORD SKERRINGTON**—It appears from the opinion of Lord Mackenzie that the only question discussed before the Railway and Canal Commission was whether the yearly payments of £3800 were "lump-sum tolls" within the meaning of the eighth account in the schedule of the Statute of 1911. I asked the junior counsel for the appellants whether he assented to that statement of the question upon which he desired us to pronounce judgment, and he replied that the question had been correctly stated by Lord Mackenzie. The Commission decided this question adversely to the appellants, and their counsel failed to satisfy me that any error of law underlay this decision. I therefore concur with your Lordship in thinking that the appeal fails.

**LORD CULLEN**—A lump-sum toll being of the nature which your Lordship has explained, it appears to me to be clear that the judgment of the Commission was right.

**LORD SANDS**—I concur, although I confess the result does not appear to me altogether satisfactory, because I cannot help thinking, if regard be had to the intention of the framers of the statutory form of account that this ought to fall "below the line," because it would have come to the Railway Company in any case apart altogether from any question as to the traffic over their line. I am further impressed by the consideration that the substance of this bargain might have been maintained and an entirely different result might have been reached simply by a change in the language of the agreement. But as it stands I do not think we can come to any different result from that which your Lordship in the chair recommends.

The Court dismissed the appeal.

Counsel for the Applicants and Appellants—Dean of Faculty (Sandeman, K.C.)—Jamieson. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Minister of Transport—Solicitor-General (D. P. Fleming, K.C.)—Mackintosh. Agent—John Prosser, W.S.  
Counsel for the North British Railway Company—MacRobert, K.C.—E. O. Inglis. Agent—James Watson, S.S.C.