persuade me, even if the sum were a larger one, that we ought to reverse their finding, and to absolve the obligor in the bond of caution from that which he had undertaken to pay in respect of whatever the Court below should award in the name of damages and expenses. Taking the case as if it had been before us for the first time, and we had been only referred to the authorities and to the practice as we have been here, it would be a strong thing to say that I differed from the view entertained by the Court below upon it, and that I should not, even if it had been before us in the first instance, have come to the same conclusion. It would be a far stronger thing to say that I thought the Court below, upon a matter very much of their practice, had come to an erroneous conclusion, and by the result of that to absolve the cautioner from the obligation which he had incurred.

My Lords, I must say, that so far as my opinion goes, I desire it to be very distinctly understood that I do not partake of the doubt expressed by one of the learned Judges in the Court below with respect to the *bona fides* in this case. It is to me a new doctrine which would make a distinction between the obligation of a cautioner for an interdict obtained *bonâ fide*, and for an interdict held to have been unduly and improperly obtained, and therefore set aside. It is new to me that that question of *bona fides* can thus be entered into; and I hold, at any rate, we should be slow to countenance that doctrine even upon the statement of a doubt by one of the learned Judges. But that question is not before us; we are not called upon to dispose of it in one way or another. I only thought it right to enter my protest against its being understood that I partook of the doubt.

My noble and learned friend who was present yesterday (LORD ST. LEONARDS) takes entirely the same view of this case.

Interlocutor affirmed, with costs.

Appellant's Agent, John Cullen, W.S.—*Respondent's Agent*, J. B. Douglas, W.S.

MARCH 22, 1855.

WILLIAM BAIRD and Others, the Provisional Committee, *Appellants*, *v.* ROBERT ROSS and Others, Shareholders in the "Kilmarnock and Ayr Direct Railway Co.," *Respondents.*

Et è contra.

Railway—Subscribers' Agreement—Provisional Committee, Powers of—Costs of Bill in Parliament—*A provisional committee promoted a railway bill before parliament in* 1846, *and then withdrew it. They promoted a second bill for the same purpose in* 1847, *which was thrown out. The agreement was to promote the undertaking until an act of parliament shall be obtained for carrying the same into execution.*

HELD (reversing judgment), *though the majority of the subscribers disapproved of the second application for a bill, that the expenses of the first bill and also those of the second were a good charge upon deposits paid up before the first application to parliament.*

Contract—Promise to form Company—Repayment—*Where A gets subscriptions in order to form a company, and fails to do so, the subscribers can get their money back: but if A stipulated that he is to be reimbursed out of the funds, then he may set up as an answer to the subscribers, that he tried to form a company, but failed.*[1]

The pursuers appealed against the judgment of the Court of Session, maintaining in their case that it ought to be reversed—"1. Because the deed of agreement and subscription contract, executed by the parties to whom the scrip for the shares in the proposed 'Kilmarnock and Ayr Direct Railway Company' was issued, empowered the provisional committee to make a 'second application' to parliament for an act necessary for carrying into effect the projected undertaking, and to defray the expenses thereof from the deposits paid by the scripholders. It therefore followed, that, in accounting for the deposits, the appellants are entitled to deduct the expenses, whether the scrip for shares on which deposits were paid is held by original parties or has been transferred to others, as is the case with the respondents. *Garwood* v. *Ede*, 1 Exch. 264; *Jones* v. *Harrison*, 2 Exch. 52; *Vane* v. *Cobbold*, 1 Exch. 798; *Willey* v. *Parrat*, 3 Exch. 215. 2. The proceedings of the appellants, acting as the provisional committee, were taken by them, in conformity with the will of the shareholders, as declared at their meetings. And the powers

[1] See previous report 22 Sc. Jur. 602. S. C. 2 Macq. Ap. 61; 27 Sc. Jur. 342.

conferred on the appellants by the deed of agreement and subscription contract, and ratified and confirmed at the meetings of the shareholders, were not and could not be withdrawn or extinguished by the opposition, which the respondents, acting as individual shareholders, offered to the exercise of these powers by the appellants. Story on Partnership, third American edition, § 123. 3. The circumstance that a new parliamentary subscription contract was executed in terms of the standing orders of parliament, as a necessary preliminary to the introduction into the House of Commons of the second bill promoted by the appellants, did not affect or alter the right of the appellants to defray, from the deposits paid on the shares for which the respondents hold scrip, the expenses attending the second application made to parliament; because the second application was authorized by the original deed of agreement, executed by the subscribers to the undertaking, and continued to subsist as the deed by which the rights and liabilities of the shareholders were to be regulated.—*Clements* v. *Todd*, 1 Exch. 268; *Willey* v. *Parrett*, 3 Exch. 216."

The respondents supported the judgment on the following grounds:—"1. The appellants, as the committee of management, having withdrawn the bill before parliament in the session of 1845-6, were not justified in proceeding with a second application to parliament, in opposition to the wishes of the great body of the subscribers; and, at any rate, the respondents, as the holders of upwards of two thirds of the shares in the original undertaking, were entitled, in the circumstances, to decline, as they did, being parties to a second application, and cannot be subjected in any portion of the expenses incurred in its prosecution. 2. The respondents not having been parties to the second application, and the said undertaking having been prosecuted under a contract to which they were not parties, and for a company of which they were not shareholders, they have incurred no liability for any portion of the expenses; and the appellants, in accounting for the deposit money, are not entitled to take credit for any portion of these expenses."

In a cross appeal the respondents maintained, that, "1. The appellants' provisional committee are not entitled to take credit in accounting with the respondents for any portion of the expenses attending the first application to parliament, in respect the undertaking was rendered fruitless and abortive by the illegal and unauthorized act of the appellants in withdrawing the bill, to obtain which the shareholders had associated themselves together. No power to abandon the bill was conferred upon the appellants, as the committee of management, by the subscribers' deed of agreement, or existed at common law; and the appellants are responsible for the loss occasioned by their illegal and unjustifiable proceedings. 2. Assuming that the consent of all the shareholders was not necessary to warrant an abandonment of the bill, the appellants were bound to have concluded the arrangement with the Ayrshire Company, under which that company was to pay £1500 in consideration of the bill being withdrawn, and which arrangement the appellants were instructed and empowered to conclude by a general meeting of the shareholders. If the appellants failed to conclude that arrangement, and thereby keep the shareholders clear of expense, they must be held in law to have done what they ought to have done, and can only be entitled to take credit for the expenses attending the first application, which had been legitimately incurred at the date of the said offer by the Ayrshire Company, under deduction of the sum of £1500, which the appellants ought to have recovered, and which they failed to recover by their neglect of the interests of the shareholders, and their disregard of the instructions received from them, and upon which they were bound to have acted.

The provisional committee answered, that, "1. In withdrawing the 'first application' made by them to parliament for the act necessary for carrying into effect the proposed 'Kilmarnock and Ayr Direct Railway Company,' the provisional committee acted within the powers conferred on them by the deed of agreement and subscription contract; and they were entitled to defray the whole expenses, without deduction,—and, in particular, without deduction of the £1500 mentioned in the record,—from the deposits paid on the shares in the undertaking by the parties to whom the scrip for these shares was issued; consequently, in accounting for the deposits, the respondents, as representing the provisional committee, are entitled to deduct the amount of expenses, whether the scrip for the shares on which these deposits were paid is held by those parties to whom it was originally issued, or has been transferred by the original holders to other parties, as is the case in regard to that portion of the scrip to which the appellants in the cross appeal allege that they have right. 2. The conduct of the provisional committee in withdrawing the first application to parliament, was approved of and ratified by the shareholders at their meetings, and cannot now be challenged by the appellants in the cross appeal. The appellants in the cross appeal having failed to show that they required the scrip previous to the withdrawal of the first application to parliament, are not entitled to object to the provisional committee deducting the expenses attending that application from the amount of the deposits paid upon the shares, the scrip for which is now held by the appellants in the cross appeal."

Solicitor-General (Bethell), and *R. Palmer* Q.C., for appellants.—The true construction of the subscribers' agreement is, that the commitee were to have power to make an application or applications to parliament, and they had a discretion allowed them to select the proper time or times for doing so. The contract was, that the committee should pay out of the deposits the expenses incurred in the applications. They have acted throughout *bonâ fide*, and within the

scope of the authority given to them. They are therefore entitled to the expenses of the second application to parliament. The Court of Session thought that, because a majority of the shareholders objected to the second application, the committee had no right to go on; but so long as a single shareholder was of a contrary opinion, and wished them to go on, they were bound to do so, and to carry out the original object of their common enterprise. In these circumstances the allottee cannot recover back his deposits, as has often been decided in England.—*Vane* v. *Cobbold*, 1 Exch. 178; *Jones* v. *Harrison*, 2 Exch. 52; *Willey* v. *Parratt*, 3 Exch. 216. Moreover, the conduct of the committee was approved of by the shareholders at their meetings, and it is not true that a great body of them were opposed to the proceedings, as was assumed in the Court of Session. But even if it were so, the committee were entitled under the original subscription contract to go on, so long as some of the shareholders required them to do so.

Sir F. Kelly Q.C., and *Anderson* Q.C., for respondents.—The appellants ought to be debited with the £1500 which the Ayrshire Company offered to pay them, for the bill was withdrawn in consequence of that agreement. At all events, the appellants might have obtained that sum in consideration of their withdrawing the bill, and ought to have done so, having been instructed by the meeting of shareholders to close with the offer. If the appellants did not withdraw the bill in consequence of the offer of the Ayrshire Company being accepted, then they withdrew it of their own authority, and they had no right to do so. It is well settled, that, unless some special contract give them the power, a provisional committee have no implied power to abandon the bill which they were instructed by the shareholders to prosecute. *Knockels* v. *Crosby*, 3 B. & C. 814; *Walstab* v. *Spottiswoode*, 15 M. & W. 501; *Hutton* v. *Thompson*, 3 H. L. Cas. 190. These cases establish the position, that if the promoters of a bill have no power, by special contract, from their constituents to abandon the bill, the allottees can recover back their entire deposits without deduction. The present contract gave no power whatever to the committee to abandon the bill. They were therefore not entitled to take credit for the expenses of the first application to parliament. Far less were they entitled to take credit for the expenses of the second application, as it was not authorized by the contract, and it was objected to by the great body of the shareholders.

Cur. adv. vult.

LORD CHANCELLOR CRANWORTH.—My Lords, this is an action which was instituted in the Court of Session by William Baird and several other gentlemen, who constituted a committee of management for carrying through parliament a bill for enabling a company to form a railway from Kilmarnock to Ayr, to be called "The Kilmarnock and Ayr Direct Railway." And the summons states the facts, which are scarcely, if at all, in dispute, viz., that in the spring of the year 1845, in the month of April, a contract was entered into, to which these gentlemen and others were parties, whereby it was agreed that a fund should be raised for the purpose of carrying this railway forward. There were several other contracts according to the Scotch form —one in one name and another in another name—but it may be treated as one contract, whereby a certain number of persons agreed to take shares of £25 each—a deposit of £2 10*s.* to be paid upon each share, for the purpose of making this, which was a small railway, the whole capital being £130,000. Subscriptions were entered into to the amount of £15,000, less five shares, that for some reason or other were not taken; but we may treat it as if the whole £15,000 had been subscribed—the deposits being £2 10*s.* upon each share. The summons states all these facts; and it further states, that the present pursuers, together with a gentleman of the name of Buntine, who afterwards died, and four other persons, who never would concur with the pursuers, were constituted a committee of management; so that the present pursuers may be represented as constituting the committee of management; and they state, that under the powers that were so given to them they caused plans to be made, and they introduced a bill into parliament in the session of 1846; that for reasons stated the bill was withdrawn, and in the following year, in the spring of 1847, the application was renewed. But that bill again failed; and then the pursuers state, that after paying the expenses of both those abortive attempts, there still remained a fund in their hands, and they instituted this, which is an action of multiplepoinding, for the purpose of having the rights of the different persons claiming that fund decided by the Court, so that the pursuers might be exonerated.

My Lords, the course which the matter took was this:—The pursuers said that they held in hand this fund *in medio*, viz., the £15,000 that had been subscribed, less the expenses incurred with reference to the bill introduced in 1846 and the bill introduced in 1847. On the other hand, the defenders said that the fund *in medio* ought not to be treated as that balance only, but that the real fund *in medio* was the whole £15,000, or if not the whole £15,000, the defenders said that the fund held *in medio* was £15,000, less the expenses of the first application only.

That being the state of the case, Lord Wood, the Lord Ordinary, pronounced an interlocutor on the 17th March 1848, by which he directed the pursuers to condescend upon the subject of what did constitute the fund *in medio*, in order to have the question decided—Whether the expenses of the first application, and the expenses of the second application, or either of those

expenses, were expenses in respect of which the committee of management were entitled to take credit, before they called upon the Court to adjudicate upon the balance which remained? Condescendences were accordingly made up, and statements of facts on the part of the defenders, and ultimately there were these pleas put in. The pleas in law for the pursuers state that they are only bound to account for the deposits received by them, under deduction of the proper and necessary disbursements and expenses of the undertaking. The pursuers have on this footing rightly accounted, and the deductions from the fund *in medio* claimed by them are right deductions—that is, the deductions of the expenses of both applications. That was disputed by the present respondents, the then defenders, and the matters so coming before the Lord Ordinary, he, on the 30th of May 1850, found that the pursuers were entitled to take credit for the expenses of the first application, but that they were not entitled to take credit for the expenses of the second application; and, consequently, that the fund *in medio* was made up of the £15,000, less the first class of expenses, but not making any deduction in respect to the second class of expenses. That interlocutor of the Lord Ordinary was brought, by way of appeal by a reclaiming note, before the Court of Session, and the Court of Session approved *in omnibus* of that which had been done by the Lord Ordinary. Against that interlocutor of the Court of Session the present pursuers first of all appealed to your Lordships, claiming that they ought to have had credit for the expenses of the second application to parliament; and, on the other hand, the defenders instituted a cross appeal, saying that the whole sum subscribed ought to have been accounted for, and that the pursuers ought not to have had credit for the expenses of the first application; or if they were to have credit for the expenses of the first application, then they said they ought to have been charged with a sum of £1500, which they might have obtained in reduction of these expenses, under these circumstances, viz., that just previously to the withdrawal of the first bill a rival railway company had offered them £1500 if they would withdraw. The appellants in the cross appeal alleged that they did withdraw, and ought therefore to have withdrawn upon the terms of receiving the £1500; and that, consequently, the £1500 ought to be treated as a fund in their hands.

My Lords, I have thought it necessary thus shortly to state what the facts are; indeed, it can hardly be said that there are any facts in dispute. If there were any question as to the amount of costs claimed, that would be a matter to be settled in some other form; the principle is such as I have indicated in the few observations I have made as to the facts.

The first question to which I think the attention of your Lordships should be directed is this—What authority was given by the original contract to that committee of management? When I say that that is the first matter to which your Lordships' attention ought to be directed, in my opinion, in truth it is the whole question. Now what was the authority conferred by that document? I call it that document. I believe I should be more accurate in saying these documents, for there were in the Scotch form several documents executed one after another, but they all constituted what may be considered as one instrument. I say that that is the first or the only question, because I take it to be clear, that if a number of persons, meaning to join in a common undertaking, and for that purpose to raise a common fund, eventually to be increased, but commencing by a deposit, put those deposits for a common object into the hands of a committee, with directions to them to do certain acts, it is not competent for any one, or for one hundred of them, afterwards to withdraw and say—"We think you ought not to go any further." I, who am not of their opinion, have a right to say—"I gave my money upon the faith that we were all embarked in one common undertaking, and till that has been done which we agreed should be done, no one, or no ten, have a right to withdraw and say you shall not go any further. We have embarked in a common undertaking, and are bound to prosecute it throughout."

Now, my Lords, the first question then is—What were the powers that were given to this committee of management? It is quite plain that they had power to apply for an act of parliament. The terms of the original contract are these:—"The persons following shall be a committee of management for promoting and carrying into effect the objects of the said undertaking, until an act of parliament shall be obtained for carrying the same into execution." Now, I have considered the thing a good deal. My opinion, I confess, at times has fluctuated about it; but looking at that language, coupled with what follows, I cannot come to the opinion that the committee of management were confined to an act of parliament in the session of 1846. I think that they clearly contemplated the possibility that that might not be a session in which they could obtain an act of parliament, but they might obtain it in a subsequent session. I infer that from several circumstances, not only from the conduct of the parties, but from the language of the contract deed. The committee of management were, in the first place, "to enter into contracts and agreements for or in anywise relating to the undertaking, and for all matters incident to the obtaining of the proposed act or acts of parliament;" "and in the event of an application or applications being made to parliament in the next or subsequent session, and not being successful, or in the event of no such application being made," and so on, such things shall be done. Then, again, further on in the deed, the parties stipulate that "they will, when required, from time to time, subscribe, execute, seal, and deliver all such further contracts or agreements as might be required by the standing orders or other orders of parliament."

Now it would seem to me, that, reasoning *a priori*, if you have persons subscribing to a fund, authorizing a committee to get an act of parliament if they can, the fair presumption would be, that that committee was to take the best steps, and to take the best and most favourable opportunity, whether in the present or in any subsequent session of parliament, for carrying that into effect; and the conduct of the parties clearly shews, that, with regard at least to a great number of them, that was their understanding; and the language of the original contract is difficult, I might almost say impossible, to reconcile with any other construction, for there was to be an application to parliament in the present or in any subsequent session of parliament. The only way in which that can be explained consistently with the hypothesis of the respondents is this, that it must mean in the present session, or if you do not apply in the present session, in any subsequent session; but why are you to introduce these words? They are appointed a committee until they have obtained an act of parliament, and they are to take certain steps there pointed out, and to make application or applications in the present or any succeeding session of parliament. Therefore, I come to the conclusion, that, according to the true construction of the contract that was entered into, the committee of management had a discretion given to them—of course I assume that they are to be acting in all these transactions *bonâ fide*, and for the purpose of best furthering the objects of the subscribers—but they had a discretion to apply for an act, and prosecute it in that session; or if, for any reason, it appeared to them, after they had applied, that it was not a favourable opportunity, and that it would best promote the objects of the undertaking to withdraw then and apply in a subsequent session, they had authority so to do.

My Lords, that being so, what are they to do in respect of the deposits placed in their hands? They are to get surveys made, and to incur all the necessary expenses of promoting the ultimate object they had in view, and then, in the event of their making an application, or in the event of its not being successful, or in the event of its not being made at all, "all the costs, charges, and expenses of every description, already incurred, or thereafter to be incurred, in respect of such application to parliament, or in any manner incident to the undertaking, or to any of the matters aforesaid, should be borne and paid by the several subscribers to the said undertaking rateably, in proportion to the number of shares taken by each subscriber." Now, my Lords, I cannot say that I think it is a matter which admits of a moment's doubt, that any expenses that are incurred in pursuance of the authority given by that contract, are expenses which the committee of management were intended to deduct—which they were authorized to deduct out of the deposits that were in their hands. Therefore I entirely concur in the first proposition of the Court of Session, that out of those deposits, before the fund *in medio* was to be ascertained, the committee had the right of deducting all the expenses properly incurred in the first application to parliament.

It was argued by the respondents, however, that, inasmuch as no act of parliament was ever ultimately obtained, the object of the subscription had, according to the language common in our Court, and probably in the Courts of Scotland also, wholly failed, and consequently the subscribers had a right to recover back the money upon the ground that the object had wholly failed; in short, that they were entitled to have the whole sum recouped to them. And for that purpose they cited several well known cases, *Knockels* v. *Crosby*, 3 B. & C. 814, and a much more recent case, *Walstab* v. *Spottiswoode*, which was decided when I had the honour of being in the Court of Exchequer, when the subject was very much considered, and when, undoubtedly, though at first sight the proposition somewhat startles one, yet, when it is considered, it seems to be founded on perfect good sense. The proposition that was there recognized and established was this—That if I put my money into the hands of a person who says to me, "I am forming a company, would you like to have so many shares in it?" and he fails in forming the company, he must give me back the money that I have given to him, for I only put the money into his hands because he told me that he was going to form a company. In doing that I placed the money in his hands, he undertaking to do something which he has failed to do, and he must therefore give me the money back. It is no answer to me that he has been endeavouring to do it, and has incurred expense in doing it. That was his business, not mine. I never entered into any engagement, authorizing him to do anything of the sort. But that reasoning wholly fails as applied to this case, as was pointed out in several cases in the Court of Exchequer, when persons put money into the hands of agents who are to form a company, and they stipulate that those agents shall be at liberty out of that fund to reimburse themselves. You can there say the object had failed. The object was, that the agents should employ the money in an attempt, which means a *bonâ fide* attempt, to form a company, and when they have so applied it, they have applied it in the mode in which they were directed to apply it. I think there can be no possible doubt of the correctness of the decision of the Court of Session, that the committee of management had a perfect right so to apply a proper portion of the funds in indemnifying themselves for the expenses which they had so incurred.

Then the appellants in the cross appeal say—That may be so; but you might have had in your pocket towards these expenses £1500, and we are entitled to treat that £1500 as if it had got into your pocket, because it was offered to you, and it was your own folly not to receive it. You

were bound to do the best you could for your constituents, who were *cestuis que trust* (beneficiaries), so to speak, and having failed to do so, you must be charged as if you had done so.

Now, my Lords, I think, if in truth these persons were right in their proposition, possibly there might be some foundation for their argument; but when the facts are looked at, there is nothing to warrant such a proposition. There was a rival line going on to Ayr. I assume that. It appeared to the managers of this £15,000 fund early in the session of 1846, to be almost hopeless to carry their bill in that session, and a proposal was made by the rival company that they would pay a certain amount of the expenses to be incurred—£1500,—if the committee of management would abandon their line. The committee, thinking that this was a project that would not succeed, that they would not get the sanction of parliament, jumped at this proposal, and accordingly they met on the 14th March 1846, and in the minute of the meeting the committee state this: "The provisional committee are of opinion—Mr. Morris (that is, one of the shareholders) dissenting,—that if the Ayr Company," that is, the rival company, "shall agree to pay one half of the expenses of the company, but so as not to exceed in all £1500, they would call a meeting of the shareholders to authorize the withdrawal of the bill and winding up of the company, the other company making a certain line." That was on the 14th of March. It was necessary to have this point immediately decided; consequently, on the 16th they issue a notice for a meeting, and on the 18th a meeting of some 15 of the shareholders takes place, and then they say that they approve of this; that is all done within three or four days. The first suggestion had been on the Saturday, and this meeting was on the following Wednesday; and no doubt that meeting approved of the proposal that the line should be abandoned, and that the £1500 should be accepted.

My Lords, I think that the committee of management, if they had thought that that was the best thing to be done for the company, would have been authorized in taking that course; because a very complete discretion seems to have been intrusted to them. But I suppose they felt themselves in difficulty and embarrassment, and thought that a meeting of shareholders called at two days notice, if they were not taking the best course for the company, could hardly be considered very satisfactory authority to them, and, therefore, though they got this sanction, they did not choose to act upon it. Now the question is—Whether, merely because a meeting called in that way had sanctioned the committee in doing this, if they thought fit to do it, they, not thinking fit to do it, are to be held responsible for the money which it is suggested they might have received. I cannot think that that would have been a legitimate conclusion, and it appears certainly not to have been the view taken of it by the great majority of the shareholders, because they, not thinking that it was expedient to abandon the line altogether, anticipating that a more favourable opportunity might occur in the ensuing session, when they might gain their object, did not choose to act upon that.

First of all, the committee of management might think it was not a sufficient sanction—the meeting being called in such a hurry; and if it was a sufficient sanction, they might have thought it was not the best and most expedient course to pursue. Accordingly they let the matter stand over, and, in my opinion, they were remitted to their former rights. On the 30th of September another meeting of the shareholders takes place, and at that meeting the committee report all that had been done about this £1500, and the withdrawal of the bill, and, in short, the whole that had taken place. They reported that, on the 7th April, not thinking that there was any reasonable hope of succeeding in that session, they withdrew the bill; and upon that occasion one of the gentlemen present moved—"That the meeting, having heard the report now read, approve thereof, and especially approve of the conduct of the directors in not pressing forward the bill last session, and thereby endangering its rejection by the committee of the House of Commons, and insuring a large increase to the expenses incurred if they had gone on." And then it was moved—"That it be remitted to the committee of management to resume the negotiation as to the £1500." It seems that they did resume the negotiation, but the rival company, though they had been willing in March to give the £1500, seem afterwards to have said that they would not give it; and in consequence another meeting was called, upon due notice, on the 4th of November, at which the committee stated that they could not get the £1500, and then it was resolved, on the motion of Mr. Henderson,—"That, in the circumstances of the case, the committee of management be authorized to proceed or not, as they shall think fit; and if they resolve to proceed, that they have power to make calls, deposit plans, and apply for a bill for a railway;" and they express their great disapprobation of the conduct of the rival company in withdrawing from their offer of £1500.

Now, my Lords, that was, as far as that meeting could go, an express sanction to the committee to proceed in the ensuing session of parliament. I do not rely upon that as the ground upon which I think they were justified in proceeding, because, if the original contract only authorized them to proceed in one session of parliament, it would be no answer to any shareholder who was not a party to the proceedings of this meeting, that a meeting of some other parties had authorized them to do something which the subscribers to the original contract had not authorized them to do; but the proceedings of that meeting, and all the subsequent proceedings, are cogent

evidence to shew, that no person was misled, and that these managers, if they had, as I have already stated I think they had, authority to proceed under the original contract, were acting *bonâ fide* in endeavouring, in the best mode they could, to discharge their duty; and having called a meeting, and the meeting having authorized them, as far as they could give authority, to proceed, I think it is impossible to say, that they were not perfectly justified in proceeding in the way in which they thought it was best to proceed. My Lords, I am clearly also of opinion, that if the committee had thought the contrary, or if, in the teeth of the meeting, they had said—You have given us a discretion, and we see that it is idle going on, for you will only waste your money by giving in; if they had chosen not to proceed, they would have been perfectly warranted in taking that course. The committee were authorized to do either one or the other. I think that they had an authority to do one or the other under the terms of the original deed; and therefore, with all deference to the Court of Session, I cannot concur in the view which the learned Judges seem to take of the case, viz., that because the state of things had altered, and there was then a repugnance on the part of the great body of the subscribers to proceed, therefore this money so expended is not money for which the committee of management are entitled to take credit. I go this length—and it is very often that an extreme case is the only satisfactory way of testing a principle—if every subscriber but one had said—"I disapprove of your going on—I forbid you going on;" but the one had said—"I do not forbid you to go on; and I say, act upon the original deed;" if the committee had acted upon the original deed, and proceeded, in my opinion they would have been perfectly safe. It might have been a very indiscreet act. If there had been an almost unanimous resolution of the shareholders against their proceeding, it would have afforded cogent evidence of something like *mala fides*, if they had acted in the teeth of that resolution; but, strictly, I do not think that the authority of any subsequent meeting was binding upon them, or that any subsequent meeting, unless absolutely universal, could have taken away the right given to the committee of management originally. That is an extreme case, and particularly extreme in the present instance, where this meeting of the shareholders gave to them, so far as they could give, authority to act exactly in the mode in which they have acted, viz., according to the best of their judgment, in executing the trusts of the original deed.

Under these circumstances, I think the Court of Session were right in saying, that the committee of managers were entitled to have credit for the whole of the expenses of the first application to parliament, and that they were wrong in saying that they were not entitled to take credit for the expenses of the second application. The result of that will be, that the first appeal succeeds and the cross appeal fails; therefore I move your Lordships that the interlocutors may be varied, by declaring that the fund *in medio* consists of the whole of the £15,000, *minus* the expenses of the first and second applications.

Solicitor-General.—I will suggest to your Lordships the words:—"Reverses so much of the interlocutor of the Lord Ordinary as declares that the raisers are not entitled to take credit for, or deduct any portion of, the expenses attending, or incident to, or created by, the second application made to parliament, and so much of the interlocutor of the Inner House as refuses the reclaiming note of the appellants, and finds no expenses due to them; and adheres to so much of the Lord Ordinary's interlocutor as is not hereby reversed; and let the reclaiming note of the respondents against the interlocutor of the Lord Ordinary be refused, with expenses to appellants of both reclaiming notes; and declares that, in accounting for the deposits received by them, the appellants are entitled to be allowed the expenses properly incurred of and attending both applications to parliament, and that without any deduction in respect of the £1500 alleged to be payable by the Glasgow, Paisley, Kilmarnock, and Ayr Railway Company; and with these directions and declarations remits, &c. Dismisses cross appeal with costs."

LORD CHANCELLOR.—Exactly.

LORD BROUGHAM.—My Lords, I had originally, I do not say an opinion, but a doubt, amounting certainly to an inclination of an opinion the other way; but upon fully discussing the matter with my noble and learned friend, and having had the great benefit of his statement, which he had reduced to writing, of his view of the case, and again consulting with my noble and learned friend, my doubts have been removed, and I entirely agree in the view that he has taken upon both points—that is, that the interlocutor should be reversed, with alterations, to the extent which is stated very distinctly in the minute read by the Solicitor-General.

Interlocutors in part reversed, and cause remitted with declaration.

Cross appeal dismissed with costs.

Campbell and Smith, S.S.C. *Appellants' Agents.*—Patrick Grahame, W.S. *Respondents' Agents.*