there refused to grant a counter-issue of adoption by two co-acceptors, both of whom alleged that their signatures to the bill were forged, upon the bare averment that they had taken no notice of a letter addressed to them by the bank informing them of the existence of the bill before it was due.

In the next case, that of *Brown* v. *The British Linen Company*, May 16, 1863, 1 M. 793, the Court sustained the relevancy of the charger's averments and allowed a counter issue of adoption. These averments were that the bill was intimated during its currency to the person alleging forgery; that thereafter his agent, acting under his instructions, called at the bank and examined the bill; that the agent did not state that his employer's signature was forged, but, on the contrary, requested that the bank should send him an intimation when the bill fell due; and, moreover, gave the bank-agent to understand that if the bill was not paid at maturity by Walker (the alleged forger) his client wished it to be renewed.

None of these decisions appear to me to give the least support to the doctrine that mere silence after intimation, or even after demand for payment, of a forged bill necessarily implies adoption of a bill by one whose subscription to the bill is a forgery; and accordingly the Solicitor-General for Scotland, towards the close of his argument, mainly relied upon the case of *Urquhart* v. *The Bank of Scotland*, which was decided by the First Division of the Court in the year 1872.

The case of *Urquhart* v. *The Bank of Scotland* is not noticed in the regular reports, and is only to be found in the Scottish Law Reporter (vol. 9, p. 508). The facts established by the proof in that case, as they are detailed in the report, were somewhat peculiar. It was proved that the suspender's signature to the bill charged on was forged, but it was also proved that notice of protest of the bill for non-payment was received by him on or about the 2d of August 1871, and that he wrote to the bank on the 23d August that his signature was a forgery, his friend and intimate, the forger, having in the meanwhile absconded. It was no doubt proved that the forger was subsequently tracked out and apprehended under a criminal warrant; and it was also proved that the suspender knew, or had good reason to know, that the forger had for some years previously been in the habit of forging his name upon bills, and that in June 1870 he had given the forger money to retire one of those bills known by him to be forged. It is no doubt the case that the terms of the Lord Ordinary's interlocutor, and of the judgment of the Inner House, as reported, lay great stress upon the silence of the suspender as warranting their decision, which was against him. But there were obviously many grounds for the decision other than his silence, and I think it must be assumed that the judgment proceeded upon the whole circumstances of the case, and not upon silence alone. My Lords, all I can say is, that if these grounds were in the view of the Court the case was in my opinion well decided. But if it was intended by the Court to rest their judgment upon the mere silence of the suspender apart from other circumstances, which I greatly doubt, then, whilst agreeing in the result at which their Lordships arrived, I should be of opinion that the decision was not only unnecessary but erroneous and contrary to precedent.

Interlocutor appealed from reversed and interlocutor of the Lord Ordinary restored.

Counsel for Complainer (Appellant)—Brand—Rhind. Agents—William Officer, S.S.C.—R. Beveridge, S.S.C.

Counsel for Respondents — Solicitor-General (Balfour, Q.C.)—Chitty, Q.C. Agents—Mackenzie & Kermack, W.S.—W. A. Loch.

Thursday, February 17.

(Before the Lord Chancellor (Selborne), Lords Blackburn and Watson.)

CALEDONIAN RAILWAY COMPANY *v.* NORTH BRITISH RAILWAY COMPANY.

(*Ante*, July 16, 1880, vol. 17, p. 777, and 7 R. 47.)

Statute—Construction—Railway—Period of Payment of Dividends on Amalgamation of Two Railways.

The preamble of an Act of Parliament whereby a certain line of railway was transferred from the company to which it had hitherto belonged to a new company made up of that company and another, declared that it was expedient that the companies "should have equal rights and powers, and be subject to equal liabilities," in respect of the line transferred; by the said Act it was provided that the new company should pay to the company that formerly owned the railway, from and after the vesting period, half-yearly on 1st March and 1st September, a sum equal to one-half of the dividends, interests, and rents for which the former owners had been liable to the shareholders, creditors, and owners of lines in connection with their own respectively. The vesting period was 1st February 1880, the dividends accrued from profits earned in the period of six months preceding the 1st of February and were payable in March, the interests were payable half-yearly at Whitsunday and Martinmas, and the rents were payable annually on 1st February. *Held* (*aff.* judgment of the Court of Session), in a question as to whether the payments of dividends imposed upon the new company were to be made on 1st March or 1st September 1880, that on a fair construction of the terms of the statute they did not fall to be made till 1st September, the payments due before that date having to be met out of funds that had accrued before the period of vesting, and the object of the section of the Act under construction being to settle the proportionate liability of the parties in the new undertaking for the period after it should fall under their joint ownership.

This case was reported in the Court of Session of date July 16, 1880, *ante*, vol. 17, p. 777, 7 R. p. 1147.

The Caledonian Railway Company appealed. The terms of the Act of Parliament which was

submitted for construction will be found in the former report of the case.

At delivering judgment—

Lord Chancellor—My Lords, I cannot say that I think this case free from difficulty. There is always some presumption in favour of the more simple and literal interpretation of the words of a statute or other written instrument, and so much as this must, I think, be conceded to the appellants that the 6th section of The North British Railway (Dundee and Arbroath Joint-Line) Act 1879 does at first sight seem to appoint the 1st day of March 1880 as the day on which the first of a series of equal half-yearly payments is to be made by the North British to the Caledonian Company. This impression is produced not only by the *prima facie* import of the introductory words of the first clause of the section, but also by the facts that instead of saying that the North British Company shall pay and contribute one-half of the specified half-yearly liabilities of the Caledonian at the times when they respectively become due, the Legislature has said that it shall pay "a sum equal to one-half of the aggregate" of these liabilities, and that it shall do so half-yearly on days which confessedly do not correspond with the times at which the liabilities in question will become payable in respect of the same half-years by the Caledonian Company, and which must therefore to some extent involve payments in advance by the North British Company, with benefit of interest to the Caledonian if those payments are not punctually made. On the other hand, it may justly be said that this arrangement would not be substantially at variance with the principle of an equal division of these liabilities between the two companies if the amount to be paid by the North British were in fact equal to one-half of the liabilities of the Caledonian Company in respect of each of the same half-years, the Caledonian Company being answerable for the whole amount to the creditors; and that it was not unreasonable that the North British Company should be bound to contribute beforehand their share of this amount so that the Caledonian Company might always have funds in hand to make payment at the proper time. The more literal construction ought not to prevail if (as the Court below has thought) it is opposed to the intentions of the Legislature as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated.

The Court below has founded its judgment mainly upon the intention unquestionably declared in the preamble of the statute that the two companies "should have equal rights and powers, and be subject to equal liabilities, over and with respect to the railways" (between the points therein mentioned) "as thereafter provided." If the effect of the appellants' construction of the sixth section would be to disturb, and that of the respondents' construction to preserve, the equality contemplated by that preamble, that is an argument of much weight in the respondents' favour.

The appellants have contended that the word "liabilities" as used in the preamble ought to be understood only of such liabilities of the joint-line as might for the first time come into existence after the 1st February 1880 (the "vesting period" when the union of interests between the two companies was to take effect), and not of any which though accruing due after that period might result from obligations previously contracted by the Caledonian Company.

The words "as hereinafter provided" suggest the inquiry, what subsequent provisions as to "liabilities" there are in the Act? As to "rights" and "powers" there are various detailed provisions. As to "liabilities" (if the 6th section were excluded), I find the word mentioned only in sub-section 23 of section 8, where it relates, not to any burdens which were to be borne equally, but to some which were to be thrown solely upon one company in exoneration of the other, because arising out of that company's own acts or defaults. The working expenses of the joint-line are provided for on the principle of equality by sub-section 24 of section 8 (and perhaps also by section 12), and all expenditure upon capital account for new works is provided for in like manner by sub-section 31 of section 8. Future liabilities having their first inception after the vesting period are, no doubt, in this way covered, but it is rather under the conception of outlay or disbursement than under that of liability or indebtedness.

On the other hand, all the payments of which one moiety is thrown upon the North British Company by section 6 are declared on the face of that section to have been when the Act passed "liabilities" of the Caledonian Company ("payments for which the Caledonian Company are now liable") in respect of their acquisition of the Dundee and Arbroath Railway, being a railway in which the two companies were to have equal rights—liabilities which though arising out of obligations previously contracted, and others in force, would accrue and become due periodically in every half-year after the vesting period. According to the natural meaning of the words used in the preamble, they were "liabilities" to be met and provided for after the vesting period, quite as much as if they had then first originated, and they were also liabilities "with respect to the said railways between the points aforesaid," because the Caledonian Company had incurred them in respect of their "acquisition of the Dundee and Arbroath Railway." According to the reason of the thing, as apparent from the 2d sub-section of clause 6, and from the admitted operation of the first sub-section of that clause in every half-year but the first, they come within that principle of equality on which the preamble is founded.

I conclude therefore with the Court below that we have in that preamble a sufficient guide to the solution of anything that may be ambiguously or imperfectly expressed in the first sub-section of section 6, if one construction would produce or substantially approximate to, and if another would defeat and substantially depart from, equality.

With this guide it seems to me that if we regard the influence of the introductory words "from and after the vesting period" as pervading the whole sentence in which they occur (so as to apply not only to the direction to pay but to the ascertainment of those "half-yearly payments" for which the Caledonian Company were liable, of which one-half was to fall on the North British Company), we shall do less violence to the

intention manifested by the Legislature than if we were to confine them to the mere direction for payment, so producing an arbitrary and substantial inequality between the two companies in the first half-year, and in that half-year only. I read the clause as if it had been expressed thus:—"The company shall pay to the Caledonian Railway Company, half-yearly on the 1st day of March and the 1st day of September in each year, a sum equal to one-half of the aggregate of the following half-yearly payments for which the Caledonian Railway Company are now liable in respect of their acquisition of the Dundee and Arbroath Railway, such liabilities of the Caledonian Railway to be ascertained as from the 1st day of February 1880, and such payments to be made by the North British Railway Company accordingly." So understood, a liability of the Caledonian Company which (though postponed as to the declaration of the state of accounts on which the amount depended and as to the time of payment till a later date) had really and in substance accrued before the 1st February 1880, belongs to a period antecedent to the vesting, and ought to be excluded from the computation. Under the Act of 1866 those liabilities of the Caledonian Company, which are numbered 1, 2, and 3 in the first sub-section of section 6 of the present Act, had really accrued on the 31st January 1880; they were by the express terms of that Act dividends payable as of right for the half-year ending on that day out of profits earned during the year then ended, exclusively of all subsequent profits. Every fact on which the right and the liability depended was then fixed and capable of being ascertained. The payment was at that time *debitum* if on taking the account the profits earned in the preceding year should be found sufficient to meet it; and the facts that this would not be done till the usual time for the declaration of a dividend in March or April, and that the payment would not be made till afterwards, could not make the liability itself attributable to a half-year subsequent to the 1st of February. There is more, I think, than guess or speculation in the argument of the respondents' counsel that the vesting period was fixed for that day (the 1st February), for this very reason, that according to the previous Acts of Parliament that was the day which divided the earnings and the liabilities of one half-year from those of another.

This conclusion is fortified rather than otherwise by the nature of the fourth and fifth items in the first sub-section of section 6, one of them representing interest accruing in point of law *de die in diem*, and the other rent apportionable over the whole period in respect of which it accrued. One of these two items was in the year 1880 properly apportionable between the period before and that after the vesting, so that the mention of a payment to be made on the 1st of March was not as to that particular year nugatory according to the construction which excludes all liabilities properly referable to the time before vesting. It is apparent on the face of the section that the sum payable in any one half-year would not necessarily be the same as in every other half-year; it would on each half-yearly day be a moiety of such of the liabilities mentioned as were *de facto* and *de jure* payable by the Caledonian Company in respect of the current half-year, considering the first half-year as having its commencement on the 1st February 1880. Independently of the fact that something (though no doubt a small sum) would in fact be payable according to this construction on the 1st of March in the first year, I should think any inference drawn merely or chiefly from the mention of March before September in this contest very precarious. The phraseology of the clause may well be supposed to follow the natural order of the months in the calendar, in view not so much of one particular year as of the long tract of time during which these periodical payments would recur.

One other argument of the appellants' counsel requires notice—that founded on the words which introduce the 6th section—"The consideration for a transfer of the joint-line shall be as follows." If a bargain for a payment of a premium or for some other advantage to the Caledonian Company had been recited, or ought to be inferred from this clause itself or from any other part of the Act, no doubt this might properly be described as a "consideration." But the assumption of half the existing liabilities of the joint-line and the repayment of half the cost and value of the existing permanent way, &c., might with quite equal propriety also be so described. There is no recital in the Act of any bargain such as the appellants' argument supposes; there is a recital that the liabilities generally were to be borne equally, which is *prima facie* inconsistent with the supposition that an unequal apportionment of the existing liabilities so as to give some advantage (in one half-year only) to the transferring company was part of the consideration. The inferences therefore to be drawn from the rest of the Act repel rather than support the view that there was any such bargain. With the language and scheme of this clause itself I have already dealt.

Upon the whole I am unable to dissent from the decision of the Court of Session, and I move your Lordships to affirm the interlocutors appealed from and to dismiss the appeal with costs.

Lord Blackburn—My Lords, I also have come to the conclusion that the interlocutors should be affirmed and the appeal dismissed with costs. The matter turns upon the construction of an Act of Parliament, which is an instrument in writing. I believe there is no dispute at all that in construing an instrument in writing we are to consider what the facts were in respect to which it was framed, and the object as appearing from the instrument, and taking all those together we are to see what is the intention appearing from the language when used with reference to such facts and with such an object. The facts here and the object are all apparent without stepping out of the Act itself, and those other Acts of which being public Acts we must take judicial notice.

As appears by the recitals here and by these Acts, the Caledonian Railway Company were at the time the Act in question received the Royal assent owners of the line originally made by the Dundee and Arbroath Company whilst it was a separate and independent undertaking. They were also lessees of a line which originally was made by the Arbroath and Forfar Company when they were

an independent company, and which was let in perpetuity at a fixed rent to the Aberdeen Company, from whom the Caledonian Company acquired the lease. And the North British Company had an interest in the Dundee East Station and an interest in the station at Broughty Ferry; and the recital in the preamble of the Act is that it is expedient that the whole of the Dundee and Arbroath Railway belonging to the Caledonian Company, and a portion of the Arbroath and Forfar line belonging to the Caledonian Company, and the whole of the interest of the North British Railway Company in those two portions, should from a certain day become transferred to and vested in the company (that is, the North British Company) jointly and equally with the Caledonian Company, and that the North British and Caledonian Companies should have equal rights and powers, and be subject to equal liabilities, in this which is called the joint-line. That is the object of the Act.

In order to understand what follows I think it is necessary to consider for an instant how and in what manner the Caledonian Company acquired the Dundee and Arbroath Company's line. That line was originally made by the Dundee and Arbroath Company—then an independent company—by means principally of money contributed by shareholders who took shares, and those shareholders in respect of the money they had advanced, which had been thus spent, received, or were entitled to receive, dividends accruing during the half-years into which the railway year is divided.

In Scotland, in general, and in the case of all the companies with which we have now to deal in particular, the railway year is divided into halves —one beginning on the 1st of February and ending on the last day of July, and the other beginning on the 1st of August and ending on the 31st of January. The shareholders of the Dundee and Arbroath Railway Company were entitled therefore at that time to payments which accrued during each half-year ending at those days. Perhaps the amounts were not at that date ascertained, but they then became ascertainable, and became *debita in præsenti* to them at the conclusion of each half-year—that is to say, upon the 1st of February and the 1st of August in each year. They were not payable then; they were payable at the time when the company should declare its dividends, which time is by the statutes provided to be in the months of March and April, and the months of September and October, and which in practice was almost always about the end of March and end of September. They might for all practical purposes be considered as payable *in futuro* upon the last day of March and the last day of September; they were therefore *debita in præsenti solvenda in futuro.*

When the Scottish North-Eastern Railway Company acquired this line they bought it from the Dundee and Arbroath Company, and the shares of the Dundee and Arbroath line ceased to exist. There were substituted for them shares of the Scottish North-Eastern Railway Company equivalent in value, or supposed to be equivalent in value thereto. When the Caledonian Company in their turn acquired the line there were substituted for the Scottish North-Eastern shares shares of the Caledonian Company which were equivalent in value, or supposed to be equivalent in value, thereto. Subsequently, by the Caledonian Act for simplifying the accounts and shares, they were enabled to convert these, so that those who represent the original Dundee and Arbroath shareholders where they held Caledonian preference shares before now hold Caledonian 4 per cent. stock, the dividends on which are equal within 6s. 4d. to the amount which was payable before; and for the contingent dividend, which depended upon whether the Caledonian Company should earn 7 per cent. or not, there was substituted an amount of Caledonian deferred ordinary stock No. 1, the dividend on which I presume is calculated, but I do not exactly know how, as being equal to the dividend which they would have had in respect of their original contingent dividend. But the stocks into which the original shares were converted now all retain their original feature, that the dividends on them accrue in the half-year, and become *debita in præsenti* on the first day of the next half-year—the 1st of February for example—but are not payable till the March or April, although practically payable on the last day of March—*debitum in præsenti solvendum in futuro.* These are the three first items in section 6, sub-section 1, which I have to deal with.

But the railway was not built by means of money advanced by the shareholders alone; it was also built in part with borrowed money, for which the Dundee and Arbroath Company, borrowing the money upon mortgage, were liable. This borrowed money was laid out partly in building the line and partly in buying rolling-stock and other moveable properties. When the Scottish North-Eastern Company acquired the line they took upon themselves the liability to make good this mortgage debt, and they took to themselves absolutely, and I suppose have long ago used up, all the rolling-stock that was there; the balance (after deducting the value of the rolling-stock) was part of the cost of the line, and that they became liable for, substituting their liability for this mortgage debt for that of the Dundee and Arbroath. The interest on that mortgage is the fourth of the items in section 6, sub-section 2, and there it is mentioned that the proportion payable for the rolling-stock is to be ascertained by arbitration and to be deducted, and the rest is to be considered part of the liabilities.

Now, though interest no doubt accrues *de die in diem*, yet by convention between the mortgagees and the company it was payable upon the usual term-days in Scotland—that is to say, at Whitsuntide, the 15th of May, and on Martinmas, the 11th of November; *de die in diem* that interest was accruing, but it was payable *in futuro* upon those two days. And it does so chance, and it makes a little complication, that the periods beginning upon the 15th of May and 11th of November are not coterminous with either of the periods of six months into which the railway year is divided. Two months and a-half of the interest, though accruing *de die in diem* during the railway half-year, would not be yet payable on the termination of the railway half-year. Those are the first four items, and they are all concerning the Dundee and Arbroath line.

There is a further item which I must notice, not that it was of so much consequence, but that it throws in my mind a good deal of light upon the construction of the Act. It is mentioned in

the proviso contained in the second sub-section. Besides those moneys which had been furnished by the shareholders and by the mortgagees which the Caledonian Company had not advanced, but the interest upon which they had become bound to pay, the Scottish North-Eastern Railway Company and the Caledonian Railway Company had spent, or at least are assumed in this proviso to have spent, moneys in improving the line and maintaining the line afterwards that is mentioned in the proviso, which is in the centre of the second sub-section, as part of the cost of the line —moneys which the Caledonian or the Scottish North-Eastern Company had actually disbursed out of pocket, and which had gone towards building this line.

Then comes the fifth item mentioned in the 1st sub-section of the 6th section, which is as to the Arbroath and Forfar line that is to be part of the joint line. It is only a very small portion, but still it is a portion. The perpetual lease of the Arbroath and Forfar line had been acquired upon the terms that the Caledonian Company should pay an annual-rent, originally in part contingent, but since ascertained and become commuted for a fixed sum, which annual-rent is for the whole railway year, beginning to accrue upon the 1st of February but not being payable until that year expires upon the 1st of February ensuing. Accruing as it does during the whole course of the year, it becomes *debitum in præsenti et solvendum in præsenti* at the same instant of time that the latter railway half-year expires. The amount of the rent which is apportionable to the portion of line which is to be taken by the joint company is to be determined by arbitration. That is provided for under the fifth head of the 1st sub-section of the 6th section.

Now, taking these facts, which all appear upon the Acts, and which I hope I have succeeded in stating in such a way as to make them intelligible, we come to see how and upon what terms has the Legislature carried out the intention which they declared in their preamble to convey the joint-line to the two companies to be held jointly with equal rights and subject to equal liabilities. They have done this in three sections. First I mention the 4th and 5th, which refer to the interest of the North British Company in the two different portions of the joint-line. As to each of those they say they shall be vested jointly in the two companies as part of the joint-line upon terms to be fixed by agreement between the two companies, and failing agreement by arbitration. So far as the North British Railway Company's interest is concerned, therefore, we have nothing to do with that—it is to be settled elsewhere; but as regards the Caledonian Company's interest the 3d section says—"On the 1st day of February 1880 (in this Act called the vesting period) all interest, of whatever nature or kind soever, which the Caledonian Company possess or enjoy" in the Dundee and Arbroath Railway "shall by force and virtue of this Act be transferred to and vested in the Caledonian Railway Company and North British Railway Company, jointly and in equal proportions, in manner provided by this Act," and "the manner provided by this Act" is that specified in section 6, upon the meaning of which the controversy arises. I think, as I said before, the facts I have mentioned are all material to the construction of that section.

Now, I believe there is not much doubt about the general principle Lord Wensleydale used to enunciate (I have heard him many and many a time)—that which he called the golden rule for construing all written engagements. I find that he stated it very clearly and accurately in *Gray and Pearson* (6 H. of L. Cas. p. 106), in the following terms:—"I have been long and deeply impressed with the wisdom of the rule, now I believe universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills, and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further."

I agree in that completely, but unfortunately in the cases in which there is real difficulty it does not help us much, because the cases in which there is real difficulty are those in which there is a controversy as to what the usual grammatical and ordinary sense of the words used with reference to the subject-matter is. To one mind it may appear that the most that can be said is, that the sense is what may be contended by the one side, and that the inconsistency and repugnancy is very great, that you should make a great stretch to avoid such absurdity, and that what is required to avoid it is a very little stretch or none at all. To another mind it may appear that the meaning of the words is perfectly clear, that they can bear no other meaning at all, and that to substitute any other meaning would be, not to interpret the words used, but to make an instrument for the parties, and that the supposed inconsistency or repugnancy is perhaps a hardship—a thing which perhaps it would have been wiser to have avoided, but which we have no power to deal with. This present case is about as good an illustration of that as can very well be. The Court below did not cite what Lord Wensleydale said; perhaps as they were Scotch lawyers, not English ones, they had never heard of it; but the Lord President said after commenting upon the clause, and saying what he thought of it—"There is nothing in this clause, I think, that is fairly susceptible of that construction. At the very best, the argument could go no further, I think, than this, that the words which I have cited are ambiguous—that it may be intended that there should be such an anomalous thing as this" (that is, what Lord Wensleydale would call an inconsistency) "and it may not. It may be merely intended to express that these are to be the days of payment in each year, but not that it is to commence on the first day of March 1880; and if there be ambiguity at all—if there be room for two constructions—then I apprehend we must appeal to the whole scope and purpose of the Act." So that in the Lord President's view of the words of this Act (which I shall comment upon myself presently) Lord Wensleydale's rule would be in favour of the North British Railway Company.

Lord Mure takes quite the opposite view of it. He says in effect and substance that the words are quite clear, and that they do mean, as the Caledonian Company says, that there shall be a payment made upon the 1st of March 1880, and that that may be a harsh bargain; he calls it an

inequitable bargain. I am inclined to agree with what the learned counsel for the appellants said, that this last is not a correct phrase—a bargain is a bargain. If a man chooses to bargain that he will pay ten times the value of a thing, I do not think you have in the absence of undue influence any right to cut down the price to the tenth part of what was agreed upon. But although this may be a harsh bargain (Lord Mure urges) he saw no reason for interfering with it; he says that the plain sense of the words is what the Caledonian Company contend, and that there is no such repugnancy or inconsistency as to lead one to modify them. If Lord Mure's view of the words is right, Lord Wensleydale's rule would be altogether in favour of the Caledonian Company.

The 6th section begins thus—after saying "the consideration for the transfer of the joint-line shall be as follows," it says "from and after the vesting period." Pausing here for a moment, the vesting period is the 1st of February 1880, and the counsel for the appellants argued—"put in the 1st of February" instead of "the vesting period" and it will read "from and after the 1st of February 1880." Now, that I do not think was quite right. I think if the words had been the 1st of February that the argument on behalf of the respondents would have been, that they put in that date because it was the vesting period, and that therefore it should be read as if the vesting period had been mentioned, and not the particular day. That argument is not needed, for the Legislature expressly said "from and after the vesting period the company" (that is, the North British Company) "shall pay to the Caledonian Company half-yearly, on the 1st day of March and on the 1st day of September in each year, a sum equal to one-half of the aggregate of the following half-yearly payments for which the Caledonian Railway Company are now liable in respect of their acquisition of the Dundee and Arbroath Railway—that is to say." Then it mentions the four first items I have already referred to.

Now, what I have to say here is, that I think the words "now liable" require to be expanded or explained, for I think a great deal of the argument of the appellants was rested upon what seemed to me a fallacy in that respect. The Legislature is speaking on the 21st of July 1879, a few days before the railway half-year (which would terminate upon the last day of July of that year) expired. At that time, in the sense of being liable to make a present payment, the Caledonian Company were liable for nothing. There had accrued a certain part of the dividends during the half-year which would terminate at the end of July. The greater part of those had accrued at that time, a small portion—ten days—had yet to accrue, and upon the 1st day of August then ensuing the company would become liable as *debitum in præsenti* for the amount of those dividends, and upon the last day of September they would become liable to make payments *in præsenti* of that money, so that both that portion which had accrued in respect of that half-year and that which still had to accrue would become payable long before the vesting period. The interest upon the fourth item—the mortgage money—had been paid up to the 15th of May. At this time nearly two months, and a small portion of the next ensuing six months, had expired, and during that time interest accruing *de die in diem* had accrued against the Caledonian Company, and when the 11th of November came afterwards interest would have accrued for the remaining three months and something more than a-half, and then, and not until then, upon the 11th of November 1879, interest upon the mortgage money would be payable.

But at the time when the Legislature was speaking neither of these were liabilities in any sense; and the same remark applies exactly to the fifth head, that portion of the rent of the Arbroath and Forfar Railway which was in respect of that portion which was to be part of the joint-line. The rent was accruing from the 1st of February 1879, and it would all become due upon the 1st of February 1880, but no portion of that rent was on 21st July 1879 either due or payable. Therefore the Caledonian Company were liable only in this sense, that under statutory engagements the Caledonian Company would be liable for them as debts when they had accrued, and would be liable to pay them when the period for payment had arrived; some of them would have accrued and would be payable before the 1st of February, others would accrue after the 1st of February 1880, and be payable afterwards. Now, it is with this view that I mention it; the words in my view require not to be altered but to be expanded and explained—when that is done I think the rest of the 6th section is intelligible and can be construed readily. I may say that the whole of the 6th section must be taken together; it is divided into the first sub-section and the second sub-section; but we must not construe the first sub-section until we have mastered and understood the meaning of the second—we must not construe the second sub-section until we have mastered and understood the meaning of the first; and then the two must be taken together. In explaining your views you take first the second or the first as seems convenient. I prefer to take the second sub-section first to explain what it means. It begins—"On the vesting period, or as soon thereafter as the amount shall be fixed or determined, as hereinafter provided, the company," that is, the North British Company, "shall pay to the Caledonian Railway Company a capital sum equal to one-half of the value of the joint-line by this Act transferred to the two companies, subject to the half-yearly payments hereinbefore stipulated." They therefore took the value of the line subject to these half-yearly payments. Strictly it was not subject to them. The line had before it had been acquired by the Scottish North Eastern Company been liable for them. As a matter of fact the Caledonian Company became liable for them, and were to keep down the interest on them, so that they no longer, strictly speaking, were burdens upon the Dundee and Arbroath Railway Company. But it is plain the Legislature are here dealing with them as if they were burdens.

Then comes the proviso—"Provided that such sum shall in no case be less than one-half of the principal sums expended on capital account on the joint-line by the Aberdeen Railway Company, the Scottish North-Eastern Railway Company, and the Caledonian Railway Company respectively, or any of them, previously to such payment, as the amount of such value shall be fixed by agreement between the two companies,

or determined by arbitration." I point that out, because, although I suppose probably the value would be larger than that cost, and that proviso would not come into play, it is plain enough that that part of the consideration is to be the transfer of the actual fixed line, the real property of the line, in payment of the value, as it might be, never to be less than the money actually expended upon it, and subject to the payments for those various charges, which were in reality payments of interest in respect of money which had been expended upon the line, but which capital sum had not been paid by the Caledonian Company, the Caledonian Company merely becoming liable, in the sense I have already explained, to pay interest for those different sums. And that does seem to me to be pretty strong to show that when the payment was to be the value of the line as it was upon the 1st of February, subject to those half-yearly payments, it meant the value of the line as it was upon the 1st of February, subject to these half-yearly payments, which would both accrue and become payable after that date, and not, as the Caledonian Company contend, subject to all such half-yearly payments which though they had accrued as a *debitum* before the vesting period had not been paid before that.

I think that view is fortified by what follows, namely, that "the company shall also pay interest to the Caledonian Railway Company on the said capital sum at the rate of 5 per cent. per annum from the vesting period till paid,"—interest upon the money they had actually disbursed and spent if the proviso comes into operation and is to run from the 1st of February. Payments to keep down the interest upon money which had been previously spent surely one would say were payments to keep down that which accrued as well as had become payable after the 1st of February. I think that is enough to make me say that the construction which the Caledonian Company contend for, that the payments shall include not only those which have accrued subsequently to the 1st of February 1880, but also those payments which had accrued previously to the 1st of February 1880, but were not in fact payable till afterwards, is an inconsistency with the general object.

Now, let us see, that being so, and that being, as it strikes me, upon that view a repugnancy with the general scheme, are the words so strong that one must say that they must not be, as Lord Wensleydale would say, modified to that extent necessary to avoid it? The first point is that the payments shall be made half-yearly on the 1st of March and the 1st of September in each year. Now, I agree with the conclusion come to by the Lord President, that the most natural meaning of that is, not that the first payment shall be upon the 1st of March 1880, but that the 1st of March and the 1st of September are the two days in the year upon which such payments as are to be made at all shall be made; those shall be the termly days upon which the payments shall fall due and become payable hereafter after the bargain is completed. It might mean not merely that this 1st of March and 1st of September shall be the termly or pay-days, what Lord Deas says is generally expressed in Scottish leases, "beginning the first payment" on a particular day. If the Legislature had said the first payment to be on the 1st of March 1880 I should have understood it.

But it then goes on to say "for which the Caledonian Company is now liable." I have already explained my view upon that point, and substituting for those words the detailed explanation I have given, it does seem to me that it bears the meaning that there are these three sums which are to be accruing and payable before the vesting period, such as the interest payable in November 1879 and the dividends payable in September 1879; no one could contend that the North British Railway is to pay any part of that. As regards that portion which is both accruing in the period subsequent to 1st February 1880, and payable afterwards, no one could dispute that the North British Company were to pay half of that; the question is, whether the words are so clear as to show that the Caledonian Company is to receive, and the North British Company to pay, half of that interest which the Caledonian Company had become bound to keep down, which interest had accrued in respect of the period before the vesting period, though not payable till after? I have perhaps worked myself into the condition of thinking it clearer than it really is, but my feeling is that the fair and ordinary grammatical meaning of the words would be in favour of the North British Company. I am quite content to say that at least, as the Lord President says, it is ambiguous and might bear one meaning or the other. The passage I have pointed out in the second sub-section as to the value and the recital in the earlier part that they are to be on equal terms all strongly lead me to the conclusion that there is a repugnancy and inconsistency with the general object of the scheme of the Legislature in saying that they would include those; and consequently, taking Lord Wensleydale's golden rule which I have already quoted, and applying it literally to that, I think that the words, if they do not actually mean what the North British Company say, at least are so near it that it is no strain upon them to say that they do mean what the North British Company say they do, and that to put the other construction upon them would produce such a manifest inconsistency with the general scheme of the Act that the North British contention should be adopted. That is, in substance, the view which the majority of the Court of Session have adopted, and I think the decree ought to be affirmed, and, of course, affirmed with costs.

Lord Watson—My Lords, the controversy between these two companies turns upon a very narrow point, and appears to me to be attended with considerable difficulty. But I have come to be of opinion, that, taking into account the scope and object of the other clauses of the Act of 1879, the construction of sub section 1 of section 6 which has been adopted by the majority of the Judges in the Court below is the right one.

The leading purpose of the Act was to vest in the appellants and respondents jointly, and in equal proportions, "on and after the 1st day of February 1880, therein termed the vesting period —(1) The Dundee and Arbroath Railway, and (2) a part of the Arbroath and Forfar Railway." These were originally separate undertakings, but had been amalgamated with and vested in the Caledonian Railway Company under an Act of 1866, and the terms of the preamble show that, except in so far as otherwise provided, the two

companies were to have equal rights and powers, and be subject to equal liabilities, over and with respect to the joint-lines.

By the terms of the statutory arrangement under which the Dundee and Arbroath Railway Company was absorbed in the undertaking of the Caledonian Company, the preference and ordinary stocks of the Dundee and Arbroath Railway were severally converted into Caledonian Railway Company's four-per-cent. consolidated guaranteed stock, and a certain amount of Caledonian Railway Company deferred ordinary stock No. 1 was allotted to the holders of Dundee and Arbroath ordinary stock. The appellants were accordingly liable to pay in perpetuity a half-yearly dividend at the rate of 4 per cent. per annum upon these converted stocks, and of a contingent dividend upon the deferred ordinary stock No. 1, besides which they were liable to pay interest at 5 per cent. on £81,619, 6s. 6d., being the amount of mortgage and other debts affecting the Dundee and Arbroath Railway.

The Arbroath and Forfar Railway was in the year 1846 transferred to the Aberdeen Railway Company under a perpetual statutory lease by which the original shareholders of the line leased became entitled to a fixed yearly rent together with a share of profits above a certain limit which might be earned by the lessors. This contingent share of profits was afterwards commuted for a fixed annual payment, and the appellant's company prior to the Act of 1879 were owners of the Arbroath and Forfar line as part of their general undertaking, and were consequently liable to pay the foresaid annual-rent *plus* the commuted amount of contingent profits.

The half-yearly dividends upon the stocks of the appellant's company are derived from profits earned during the six months respectively preceding the 31st day of January and the 31st day of July in each year. And the dividends upon the stocks assigned to the Dundee and Arbroath shareholders accruing during these periods are by statute made payable "on the same days in the months of March or April and September or October as the other preference and ordinary dividends of the Company shall be payable." Interest upon the mortgage and other debts affecting the Dundee and Arbroath Railway is payable half-yearly at the terms of Whitsunday and Martinmas (15th May and 11th November) in each year, whilst the rent falling due in respect of the Arbroath and Forfar Railway is payable yearly on the 1st day of February.

It appears to me to be clear that it was not intended by the framers of the Act of 1879 that the Dundee and Arbroath Railway and the part in question of the Arbroath and Forfar Railway should vest in the appellants and respondents freed of all incumbrances, but, on the contrary, that it was to become vested in them jointly, subject to those perpetual termly payments of dividends, interests, and rents which the Caledonian Company was under obligation to make to original shareholders and creditors of these undertakings or their successors. That obligation was in substance a statutory condition attaching to the right of the appellant's company as owners and occupants of these two railways.

Had these termly payments been made specific charges upon the railways vested in the two companies by the Act of 1879, and the revenues thence arising (as in the case of moneys heritably secured on land), the North British Company would have become liable in respect of their joint ownership to pay one-half of the dividends, interests, and rents accruing after the vesting period without any statutory provisions to that effect. But the shareholders and creditors of the Dundee and Arbroath Railway and the shareholders of the Arbroath and Forfar line—although they might still have a lien over what had once been their own undertaking—had become either shareholders or creditors of the Caledonian Company, and were entitled to payment of their dividends, interests, and rents out of the revenues of that company. It formed no part of the scheme of the Act of 1879 to alter the rights of these parties or to disturb their position as shareholders and creditors of the Caledonian Company, and it was therefore necessary to make some provision as to the manner in which the North British Company was to bear its fair and equal proportion of the termly payments made by the Caledonian Company in so far as these accrued after the vesting period. That section 6, sub-sec. 1, of the Act was, *inter alia*, designed to meet that necessity does not appear to me to admit of serious dispute. The respondents maintain that it was intended to accomplish that object and nothing more; but the appellants contend that it was thereby intended to make the North British Company not only liable for dividends and rents accruing after that company became a joint-owner, but for a half-year's dividend which accrued before the vesting period, whilst the appellant's company had the sole property and possession of the railways falling within the vesting clause of the Act.

Section 6, sub-section 1, enacts that "From and after the vesting period the company" (that is, the North British Company) "shall pay to the Caledonian Railway Company half-yearly, on the 1st day of March and 1st day of September in each year, a sum equal to one-half of the aggregate of the following half-yearly payments for which the Caledonian Company are now liable;" and then follows a specification of the several dividends, interests, and rent already mentioned—the sum payable in the case of the Dundee and Arbroath Railway being a proportion of the total amount of rent and commuted profits corresponding to the portion of that railway by the Act transferred to the two companies.

The words of the statute which I have just quoted do not appear to me to fix conclusively that the respondents are to pay to the appellants on the 1st of March 1880, one month after the vesting period, half-yearly dividends which had accrued before that period, and which were payable in respect of the property and use of the Caledonian Company alone. At the time when the Act received the Royal assent the dividend paid by the Caledonian Company in September or October 1879 had not yet accrued, and therefore the expression "half-yearly payments for which the Caledonian Railway Company are now liable" must refer to dividends to accrue at some future time, and not necessarily to dividends accruing before the vesting period; and the words "half-yearly on the 1st day of March and 1st day of September in each year" do not, in my opinion, necessarily imply that full payments shall be made at both of these terms in the first year subsequent to the vesting period. They

would be equally appropriate in designating the terms of payment throughout the course of years which was to follow the vesting period if it had been expressly enacted in another clause that the North British Company was not to be liable except for one-half of the dividends, rents, and interest accruing after the vesting period. In that case they would aptly express the rule that one-half of such of the yearly dividends as had accrued after the vesting period and previously to one or other of those terms should be paid at such term by the North British Company. And they must, in my opinion, receive that interpretation, if it be a matter of fair implication from the other enactments of the statute that the North British Company was merely to bear its just share as joint-owner of dividends accruing after vesting, and was not to pay by way of premium to the Caledonian Company half of a six months' dividend which accrued whilst that company had still the sole and exclusive possession of the joint railways.

The controversy between the parties appears to me to turn upon this—whether the words "the following half-yearly payments," &c., are to be held as referring to payments "accruing" after the vesting period, or to payments which have accrued before but are not exigible until after that period? I prefer the first of these alternatives, because section 6, sub-section 1, was necessary in order to give effect to that which the Act did certainly contemplate, viz., that after the railways became joint property the North British Company should bear an equal share of the termly payments falling to be made to the original owners and creditors of the railways held by them and the Caledonian Company as a condition of their joint-occupancy and use of these railways, and because I cannot decern within the four corners of the Act any indication of an intention to give the appellants a premium in the shape of a moiety of sums which they were bound to pay for their own use of the joint railways.

I therefore agree with your Lordships in thinking that the judgment appealed against ought to be affirmed.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Counsel for Appellants — Benjamin, Q.C. — Chitty, Q.C. Agents—Grahames, Wardlaw, & Currey—Hope, Mann, & Kirk, W.S.

Counsel for Respondents — Solicitor-General (Balfour, Q.C.)—Asher. Agents—W. A. Loch, —Adam Johnstone, Solicitor.

COURT OF SESSION.

Friday, February 25.

SECOND DIVISION.

[Sheriff of Lanarkshire.

SHEPHERD *v.* HENDERSON.

Ship—Insurance — Abandonment — Constructive Total Loss — Date at which Validity of an Abandonment is to be Determined.

A ship plying on the coast of India was run on shore during a violent storm in the end of May. The monsoon winds begin to blow early in June and continue till October, and during that period it was impossible to get the ship off. Before the monsoon began the ship was not got off, but after it was past the insurer floated her and returned her to the owners completely repaired. The owners had in June intimated to the insurers that they had abandoned the ship, and claimed as for a total loss, and in October, before the ship was got off, raised an action for recovery of the sum insured, the abandonment not having been accepted. *Held* on a proof that at the date of the intimation there was no constructive total loss—the test being whether a prudent man uninsured would in the circumstances have abandoned the ship.

Question—Whether the state of matters at the date of the intimation or at the date of raising the action, as in the law of England, was to determine whether there was a constructive total loss or not?

In 1878 there was built for Joseph Augustus Shepherd, merchant in London, an iron screw-steamer called the "Krishna." Her net register tonnage was 198·65 tons, and she was taken to Bombay to ply the passage between Goa and Bombay. On the 23d September 1878 Messrs Gray, Dawes, & Co., the owner's agents, effected an insurance in Glasgow on his behalf through William Euing & Co., insurance brokers there, over the hull and machinery of the vessel for £8000, "for and during the space of twelve calendar months, commencing with the 23d day of September 1878, and ending with the 22d day of September 1879, both days inclusive, as employment may offer at port and at sea, in docks and on ways, at all times and in all places, and on all services whatsoever and wheresoever, under steam or sail." Early on the morning of 23d May 1879 the "Krishna" started from Goa for Bombay properly manned and found, but she had not been long at sea when she was overtaken by a storm, which increased so much in violence that the master, not knowing at what time the ship might founder, and for the safety of the lives of all on board, ran her on a small sandy bank to the northward of Raree Fort, on the west coast of India. On this beach the surf broke heavily, the south-west monsoon having now begun to blow. For a week no attempt was made in consequence of the state of the weather to extricate the ship, but during the succeeding fortnight all was done that could be done, by the use of chains, hawsers, and anchors on board, aided by the steamer's engine, to get her afloat. All attempts however failed, and on the 5th June the master intimated to the owner by telegram, and afterwards by letter, in the following words:—"Though I have virtually given up the ship as lost, I think the crew had better remain until I hear from you about the stores. In the meanwhile I have given the engineers orders to carefully coat with white lead and tallow all bright portions of machinery, and cover the cylinders over with the remnants of old awnings. The funnel will also be covered over to protect the tubes from rain water. All portable gear about the decks, such as binnacle-tops, lamps, boats, oars, masts, sails, buckets, cooking-house, doors, &c., will be put below, and all the ventilating cowls taken off and put below, and the wood plugs placed in