able in their own nature were considered to be heritable by reason of their running for a tract of future time, to the effect of diminishing the fund divisible amongst the younger children. I think that the case where property, which is now moveable in regard to the rights of the younger children but heritable as regards the rights of the widow, is just the case described in the statute. Now, applying that description to the particular security with which we have to deal, it seems to me that this security completely answers the description, because it contains a promise to repay the capital and also a clause of interest or annual rent. Our decision of course would have no application to receipts for money in the ordinary form, which never contain an obligement to pay the principal, and not usually a clause of interest, that being left to stand upon implication or separate agreement.

I agree that the questions should be answered in the way that has been suggested by Lord Kinnear.

The LORD PRESIDENT concurred.

LORD ADAM was absent.

The Court found it unnecessary to answer the first question, answered the second question in the negative, and affirmed the first alternative of the third question.

Counsel for the First and Fourth Parties —Dickson—Deas. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Second Party—Shaw—Lyon Mackenzie. Agent—Andrew Urquhart, S.S.C.

Counsel for the Third Party — Abel. Agent—J. A. Cairns, S.S.C.

Wednesday, July 15.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

EDINBURGH NORTHERN TRAMWAYS COMPANY *v.* MANN AND BEATTIE.

(*Ante*, vol. xxviii. p. 828, July 14, 1891, 18 R. p. 1140; vol. xxx. p. 140, 20 R. (H. of L.) p. 7, November 29, 1892).

Company—Preliminary Expenses—Cost of Procuring Act—Professional Services of Promoters—Remuneration—Edinburgh Northern Tramways Act 1884, *sec.* 78.

It was provided by the 78th section of Edinburgh Northern Tramways Act of 1884 that "the company shall pay all costs, charges, and expenses of and incident to the preparing for, obtaining, and passing of this Act, or otherwise in relation thereto."

Held that the promoters of the company were not in a fiduciary relation to the company so as to bar them from receiving remuneration for professional services as law agent and engineer rendered by them incident to the preparing for, obtaining and passing of the company's Act, or otherwise in relation thereto.

Held further that the promoters were not entitled to charge a commission for procuring from a bank on their own credit the requisite Parliamentary deposit.

Observations (*per* Lord M'Laren and Lord Kincairney) as to the extent of the analogy between the positions of a trustee and a company promoter.

Process—Remit—Remit to Taxing Master of House of Commons to Report on Bill of Costs of Promoter of Company.

The Lord Ordinary having remitted to the Taxing Master of the House of Commons to report on certain objections lodged by a company in an accounting to the account of the promoter of the company, with instructions to the Taxing Master to distinguish any charges not incident to the promotion of the company's private Act of Parliament, that official presented his report taxing the account at a certain sum.

Objections having been lodged to his report, and the Lord Ordinary having again remitted to the Taxing Master to report on these objections, the Court *recalled* his interlocutor, the objectors having failed to show that the Taxing Master had mistaken the nature of the duty entrusted to him or had come to a wrong conclusion on a matter of principle.

In February 1889 the Edinburgh Northern Tramways Company brought an action against Mr William Hamilton Beattie, architect, Edinburgh, and Mr George Mann, S.S.C., concluding, *inter alia*, for an accounting by them in regard to all moneys, shares, or debentures received by either of them as promoters of the Tramways Company or in virtue of a certain agreement. The defenders were the engineer and solicitor of the company respectively.

The Lord Ordinary (TRAYNER) on 16th July 1890 pronounced an interlocutor by which he found that the defenders were bound to account as desired, and "appointed the defenders to lodge in process an account of all sums of money received by them, as also an account or accounts of all sums which they claim respectively to be entitled to set off against the before-mentioned sums."

The defenders reclaimed against this interlocutor, which was affirmed by the First Division and by the House of Lords. The accounts were duly lodged by the defenders, and the case having come before Lord Kincairney, various objections were lodged thereto by the pursuers. In particular, it was maintained on behalf of the pursuers that the defenders were not entitled to remuneration for their services as law-agent and engineer in preparing and obtaining the company's Act of Parliament,

but only to repayment of their outlays, including sums paid to other professional men who assisted them in these proceedings.

The defenders maintained that they were entitled to payment for their professional services, and founded upon the 78th section of the Northern Tramways Companies Act 1884, which provides that "the company shall pay all costs, charges, and expenses of and incident to the preparing for, obtaining, and passing of this Act or otherwise in relation thereto."

By an interlocutor dated 20th December 1893 the Lord Ordinary found that the defenders "are not barred from charging the pursuers for professional services rendered by them incident to the preparing for, obtaining, and passing of the pursuers' Act or otherwise in relation thereto by reason that they were promoters of the said Act at the time when such services were rendered, and remitted to various men of skill to tax and report on the accounts."

"*Opinion.*—Messrs Mann and Beattie have now, in compliance with Lord Trayner's interlocutor of 18th July 1890, lodged an account of the sums of money, shares, and debentures which they claim to be entitled to set against the considerations received by them from the Patent Cable Tramways Corporation, Limited, under the agreement dated 25th October 1884, but disallowed as promotion money by that interlocutor. The Tramway Company have lodged objections to these accounts, and parties have been heard in the procedure roll on the objections. Parties were agreed that the greater number of these objections cannot be disposed of without inquiry.

"There is, however, one main objection on which both parties desired a judgment in the belief that the point of law involved could be determined without inquiry, and that the decision of it would materially affect all the other objections.

"The objection is the first, and is this, that Mann and Beattie are not entitled to take credit for their accounts for professional services rendered in obtaining the Act incorporating the Edinburgh Northern Tramways Company. Each of these gentlemen has lodged a professional account for services rendered during the promotion of the company, and I am asked to negative absolutely their claims for these accounts, on the ground that, although the services may have been rendered, and may have been beneficial to the company, the accounts cannot be recovered, because Mann and Beattie were promoters of the company when the services were rendered.

"There is no need to make any attempt to define the term 'promoter,' because whatever limitations may be put on the meaning of the term, there can be no doubt that Mann and Beattie were promoters of the company. They do not dispute it, and the payment to them of £17,000 stipulated to be made to them by the Cable Corporation under the agreement of 25th October 1884 was disallowed just because it was promotion money.

"Messrs Mann and Beattie rest their claim on the 78th section of the Northern Tramways Companies Act, whereby it is provided that 'the company shall pay all costs, charges, and expenses of and incident to the preparing for, obtaining, and passing of this Act, or otherwise in relation thereto.'

"The argument of the objectors is that a promoter of a company is in law a trustee for the company which he is bringing into existence, and that the whole principles of the law of trust applicable to the relations between the trustee and the trust-estate apply to him, and that it is an elementary principle in the law of trust, not only that a trustee cannot make a secret profit at the expense of the trust-estate, but also that he cannot be *auctor in rem suam*, cannot make a traffic of his trust, and cannot charge for any professional services rendered by him to the trust-estate of which he is trustee.

"That these are elementary principles of trust-law cannot be questioned, and there can be no doubt that the accounts of Messrs Mann and Beattie must be disallowed if their position as promoters was precisely that of trustees, and if their charges are not authorised by the 78th section of the Act above quoted.

"The application of these principles of the law of trust to a promoter of a company was considered in the leading case of *The Huntingdon Copper Company* v. *Henderson*, 12th January 1877, 4 R. 294, *aff.* 29th November 1877, 5 R. (H.L.) 1. There a director of a company, who had been a promoter, was held bound to pay to the company £10,000, which during the course of the promotion of the company had been paid to him by the vendors of the concern for the purchase of which the company was promoted and incorporated. He was considered to be a trustee, and therefore not entitled to make a profit at the cost of the company, and it was considered that the £10,000 was truly paid by the company to the vendors and by the vendors to the promoters. Lord Young, who was Lord Ordinary, put his judgment on the general principle that a trustee shall not, without the knowledge and consent of his constituent, make a profit of his office, or take any benefit from the execution of it, or (expressing the doctrine with still greater generality) 'that a man who is charged with the duty of attending to the interests of another shall not bring his own interest in competition with his duty.' In the Inner House reference was made, particularly by Lord Mure, to the principle that a trustee could not charge for professional services rendered to the trust-estate, and his Lordship clearly indicated his opinion that that rule of trust law was applicable to the case of a promoter which was then under consideration, and I think the objectors are entitled to found on Lord Mure's opinion. But I do not think that the point now raised, viz., whether a promoter is entitled to credit for professional charges was decided in the Court of Session in the case of the *The Huntingdon Copper Company*. Neither do I think that any distinct opin-

ion on the point was expressed in the House of Lords. The case of *The Huntingdon Copper Company* seems to leave the point now made open, although there were certainly observations made on the bench to which the objectors are entitled to refer.

"The objectors referred also to *The Emma Silver Mining Company* v. *Grant*, 1878, 11 Ch. Div. 918; and *Lydney & Wigpool Iron Ore Company* v. *Bird*, 1886, 33 L.J. Ch. Div. 85, in which promoters were held bound to account for promotion money, but were allowed to take credit, and that on a liberal footing, for their outlays in promoting the company, so that they were held bound to account for their net profits only. The objectors founded on these cases because nothing but outlay was allowed, and nothing was allowed for services rendered. But it does not appear that in either of these cases any services of the kind had been rendered.

"No clause authorising payment of the costs, charges, and expenses of promotion was founded on in any of these cases, and there seems to have been no such clause.

"Had a claim for services been advanced in any of these cases, it seems that it would have been open to the further answer that such services must have been rendered without any contract, because until a company is incorporated, there is no one with whom a promoter can contract, and therefore no claim for such services in such a case could have been rested on contract. But this difficulty is obviated by the 78th section of the pursuers' Act, a clause which is usual in such statutes, and the object of which appears to be to meet this difficulty.

"The previous judgments in this case leave the present question undecided, although opinions were expressed in the course of the proceedings which certainly appear to be favourable to the objection.

"In these circumstances it is with no little mistrust that I have come to the conclusion that I cannot sustain the objection.

"I think that the analogy between a trustee and a promoter is defective, and that all the principles and practice applicable to a trustee cannot be applied to a promoter. Mann and Beattie were not in a strict sense trustees when they were engaged in promoting the company. They could not be, because they had no constituent or beneficiary. They were creating the trust, and even the strictest law applicable to trusts does not bar an agent from making professional charges for framing the trust-deed by which he is made a trustee. Again, a promoter may lawfully promote a company for the purpose of selling to it his own property, and a sale by a promoter of his own estate to the company which he promoted might be unobjectionable. To use the language of Lindley, 5th ed. 349, 'It is unsafe to say that any particular person was a promoter of a particular company, and to infer from thence that he is liable to account to it, as if he had been its trustee.' It cannot be affirmed that during the whole time when a promoter is concerned with the promotion of a company he is under the disabilities of a trustee. It seems to be a question of circumstances in each particular case when such disabilities begin to attach.

"There is no doubt that a promoter cannot make secret profits, and that all promotion money is illegal. But I cannot affirm that his duties towards the company which he promotes are the same as the duties of a trustee towards the trust-estate, or towards the beneficiaries under the trust law, and I think that it is stretching the analogy of trust law too far to affirm that a promoter can never be paid for his professional services in virtue of a clause which requires the company to pay the costs, charges, and expenses incident to the obtaining of the Act.

"That clause is a clause in favour of promoters chiefly or solely, and it has been decided in England that it is not a clause for the protection of those who render services on the employment of promoters, but of those who have no one to look to except the company when it is brought into existence, that is to say, of promoters —*Wyatt* v. *Metropolitan Board of Works*, 1862, 11 C.B. (N. S.) 744; *Skegness and St Leonard's Tramways Company*, 1888, 41 Ch. Div. 215.

"I think that the words 'costs, charges, and expenses' ought to be read as extending beyond outlays. For, according to the cases of *The Emma Silver Mining Company* and *Lydney, supra*, outlays would be allowed without the sanction of any such clause, and unless the words go beyond outlays, they are ineffectual. The case of *Shaw's* claim in *re Brampton & Langtown Railway Company*, 1875, 10 Ch. 177, appears to be in point. In that case a claim of a solicitor, who was promoting a railway company, for professional services rendered by him was allowed against the company. A similar claim was disallowed in *Wyatt* v. *The Metropolitan Board of Works, supra*, but there the person making the claim was not the promoter, and it was held that his recourse was against the promoter.

"The right of a promoter to make professional charges under this clause appears distinctly recognised by Lindley, J., who says that in *Wyatt* v. *The Metropolitan Board of Works* it was in effect decided 'that only those persons can sue the company upon a clause in the usual form who have incurred expense or bestowed time and trouble in forming the company and in getting its Acts passed, and who have no other paymasters. For example, solicitors or Parliamentary agents who have thus acted, and who have not been employed by other people who are liable to them, can sue the company on such clauses'—Lindley on Company Law, 5th ed. p. 147.

"On the whole, I come to the conclusion that there is no sufficient authority for applying to the case of a promoter the rule that a trustee cannot be allowed his professional charges, and that such charges may be allowed under the words 'cost, charges and expenses' in the 78th section of the pursuers' Act.

"There are some of the objections which apparently cannot be disposed of without

proof or further admissions. Of these, with, as I understand, the assent of the parties, I have reserved consideration. I understand that this interlocutor will be submitted to review, and in that view it may be more convenient that I should not name the accountant or the civil engineer to whom it will be necessary to remit several of the objections."

The pursuers reclaimed, and the First Division, holding it inexpedient to pronounce general findings on the rights of the defenders till the accounts had been taxed, recalled the interlocutor of the Lord Ordinary, *hoc statu*, in so far as it referred to the defenders not being barred.

Objections were lodged by the pursuers to the defenders' accounts, calling in question various articles therein. Objection XI. was in the following terms:—"The pursuers claim that the account of William Hamilton Beattie be remitted to a competent party for taxation. The defenders are called upon to produce the diaries of the said W. H. Beattie, and all memoranda, drawings, plans, specifications or other writings prepared by him, and also receipts for all outlays, so that the said account may be properly instructed." In Objection XV. the pursuers objected to a charge of £1070 as commission for procuring the necessary Parliamentary deposit in connection with the Bill. The Lord Ordinary (KINCAIRNEY) on 20th March 1896 pronounced the following interlocutor:—"Of consent, remits" to John Wilson Brodie, C.A., to report on the pursuers' objections, "and remits also to C. W. Campion, Taxing Master of the House of Commons, to report on Objection XI., with instructions to distinguish in the latter case any charges not incident to the promotion of the pursuer's Act."

In addition to his account the defender Beattie submitted to Mr Campion a detailed statement of particulars of the work performed by him, and counsel were heard by Mr Campion thereon.

Mr Campion having reported and taxed Mr Beattie's account at £2494, 1s. 6d. plus £62, 10s. as costs of taxation, the Lord Ordinary on 12th March 1895 allowed objections to be lodged.

Mr Brodie also presented his report in which, *inter alia*, he left for the decision of the Court the question whether the defenders were entitled to a commission for procuring the necessary Parliamentary deposit.

Objections and answers to both reports having been lodged, the Lord Ordinary on 20th March 1896 pronounced the following interlocutor:—"Remits to Mr C. W. Campion to consider and report on the objections by the pursuers to his report;" with regard to Mr Brodie's report, "sustains the objection of the pursuers to the charge of £1070 for procuring the Parliamentary deposit, and disallows said charge."

Opinion.—. . ."The pursuers' objections to the report and the answers consist of statements and counter-statements as to the allowance or disallowance by Mr Campion of various charges. Of course nobody but Mr Campion can tell whether the pursuers or the defenders state the more correctly his mode of dealing with the defenders' account; and I confess I think that it is desirable to know what charges of the character objected to Mr Campion has allowed or disallowed, and also his reason for doing the one or the other. Now, the only mode in which this can possibly be ascertained appears to me to be by remitting the defenders' account back to Mr Campion, with the pursuers' objections and the defenders' answers, and asking him to report on the objections and answers. . . . This course may no doubt involve a good deal of trouble and expense, but it seems essential for the disposal of the cause." . . .

The pursuers reclaimed against the interlocutors of 20th December 1893 and 20th March 1896.

Argued for reclaimers—(1) As to bar—Promoters were in a fiduciary relation to a company, and accordingly were barred from claiming remuneration for services to the company floated by them. They might get their outlay like a trustee out of a trust-estate, but no profits. The principles on which this rule was held to govern trustees were laid down in *Lord Gray* v. *Dundas & Wilson*, November 12, 1856, 19 D. 1, and were to the effect that as a matter of prudence the Court would not allow a trustee to be the judge of how much work required to be done if he were paid for doing it himself, since it would be to his interest to magnify the work, and that a trustee could not be *auctor in rem suam*. These grounds applied equally to the case of a company promoter. The positions of a trustee and promoter were assimilated by Lord Mure in the case of *Huntingdon Copper Company* v. *Henderson*, January 12, 1877, 4 R. 294; November 29, 1877, 5 R. (H. of L.) 1. Nothing but outlay was allowed in the cases of *The Emma Silver Mining Company* v. *Grant*, 1878, 11 Ch. Div. 918; and *Lydney & Wigpool Iron Ore Company* v. *Bird*, 1886, 33 L.J., Ch. Div. 85. In none of the English cases had remuneration beyond this been allowed except in that of *Shaws* (quoted by Lord Ordinary), and there the claim was opposed, not by the company, but by certain contributories, and it was held that the contract averred was not between the promoter and the company, but between the promoter and each contributor, and that accordingly the objection was bad. The Lord Ordinary was right as to the commission of £1070. (2) Mr Campion had allowed expenses not incidental to the promotion of the Act, or at all events he had not set out in detail the precise nature of the defenders' charges. With regard to the charge for commission in connection with the Parliamentary deposit, the defenders were no doubt entitled to take credit for the amount of commission actually charged by the bank which had advanced the money, but they were not entitled to a procuratorial commission at the rate of twenty per cent. for themselves.

Argued for respondents—(1) They did not deny that if they were in the position

of trustees, as in the case of *Lord Gray*, the rules there laid down would apply, but the present case was as though the charge for making the trust-deed had been objected to. The respondents were not in a strict sense trustees when they were engaged in promoting the company, for they had no constituent or beneficiary. They were creating the trust, and the strictest law applicable to trusts did not bar an agent from making charges for framing the trust-deed by which he was made a trustee. The clause of indemnity was one in favour of promoters chiefly if not solely, and was intended to protect those who had no one to look to for remuneration for their services except the company. The case of *Shaws*, *supra*, was directly in point, and the Lord Ordinary's reasoning on that and the other cases was sound. The Lord Ordinary was wrong with regard to the commission of £1070. (2) The defender's arguments with regard to Mr Campion's report, and the charge for commission, appears sufficiently from Lord M'Laren's opinion.

At advising—

LORD M'LAREN—We are now to dispose of two successive reclaiming-notes against interlocutors of the Lord Ordinary disposing of objections to the accounts of the defenders Mann and Beattie for services rendered in connection with obtaining the Act of Parliament under which the Northern Tramways Company was incorporated and empowered to create certain works, and to carry on the business in which it is engaged.

It is not necessary to refer to the previous history of the litigation further than to say that by a decision of this Court, affirmed by the House of Lords on appeal, it was determined that the defenders were not entitled to take benefit by an agreement under which they claimed to retain a sum of £17,000 which they had received from the Cable Corporation in consideration of relieving that company of their obligation to pay the cost of obtaining the Act of Parliament. Under the 78th section of this Act the Edinburgh Northern Tramways Company were empowered to pay the costs, charges, and expenses of and incidental to the preparing for, obtaining, and passing the Act, and it is not disputed that the defenders in accounting for the sum of £17,000, which I understand was paid partly in cash and partly by a transfer of shares, are entitled to set off or retain whatever sums they can establish to be due to them as costs and charges falling within the scope of the 78th section. Accordingly, by the interlocutor of Lord Trayner, dated 18th July 1890, which was adhered to by this Division of the Court, and affirmed on appeal, the defenders were appointed to give in an account of the moneys, shares, &c., received by them under the said agreement, and also an account or accounts of all sums which they claim respectively to be entitled to set against the before-mentioned sums of money, shares, &c.

The case having come to depend before Lord Kincairney, it was maintained on behalf of the pursuers that the defenders were not entitled to remuneration for their services as law agent and engineer in preparing and obtaining the company's Act of Parliament, but only to repayment of their advances, including sums paid to other professional persons who assisted in the preparation of the Bill and carrying it through its stages.

On 20th December 1893 the Lord Ordinary dealt with those objections by an interlocutor in which it is found "that the defenders Mann and Beattie are not barred from charging the pursuers for professional services rendered by them incident to the preparing for, obtaining, and passing of the pursuers' Act, or otherwise in relation thereto, by reason that they were promoters of the said Act at the time when such services were rendered." These findings are followed by a remit in which the different heads of the account are referred for audit to professional persons named by the Lord Ordinary.

This interlocutor is the subject of the first of the reclaiming-notes under consideration, the reclaiming-note which is dated 21st December 1893.

After hearing argument at this stage of the case, we were not disposed to dissent from the legal opinion of the Lord Ordinary on the subject of the rights of promoters to compensation for services rendered under a clause authorising in general terms the payment of costs and charges incident to the obtaining of an Act of Parliament. But the accounts before us had not been taxed, and to some extent the claims depended on disputed matters of fact. The claims were not before us in a shape in which we could distinguish between legitimate and illegitimate charges, and in such circumstances we considered that it was inexpedient to pronounce general findings defining the rights of the defenders in relation to accounts which could not be assumed to represent the actual expenditure of the defenders in money and services.

We therefore recalled the finding which I have quoted *hoc statu*, and the case went back to the Outer House for further procedure under the operative part of the Lord Ordinary's interlocutor of 20th December 1893.

The accounts have now been reported on by Mr Campion, Taxing Master of the House of Commons, and Mr Wilson Brodie, Accountant, to whom different portions of the accounts had been remitted for taxation. Objections to these reports and answers thereto were lodged by the pursuers and defenders respectively, and the interlocutor of 20th March 1896 disposing of these objections is the subject of the second reclaiming-note which is under consideration.

Before adverting to the specific objections which the pursuers maintain under this reclaiming-note, I may state that the reporter Mr Campion, in his taxation of the account, has allowed Mr Beattie to take credit for his time and trouble in connection with preparing for and obtaining the bill, including not only professional services as engineer of the undertaking, but a large amount of general agency, and

similarly Mr Mann's charges as law-agent have been sustained. It may be convenient, first, to consider the general objection to allowing the defenders to take credit for such charges.

It appears to me that in a case like the present it is necessary to distinguish between the special disability which applies only to trustees, or to persons standing in a *quasi*-fiduciary position towards beneficiaries whose estates are in their hands for administration, and the more general rule which disentitles any agent or representative person from appropriating to himself a benefit which according to his duty he ought to secure for his constituent.

It may not be strictly accurate to describe the promoter of a private bill as an agent for a company which does not exist until the bill becomes an Act; but if Parliament thinks fit to recognise his services in obtaining the Act, and gives him a claim against the company for his costs and charges, I think it is a condition of his claim that he must put himself in the position of an agent for the company which he has promoted, and must regulate his relations towards the company according to the duty of an agent. According to this standard of duty the action of the present defenders in taking the £17,000 which would otherwise have gone to the company was judged illegal; or rather, the transaction was open to the double objection, (1) that it was an application of assets of the company to purposes not authorised by the Act of incorporation, and (2) that it was inconsistent with the duty which the defenders owed to the company that they should accept a sum of money for which they had given no consideration, and which they ought to have secured for the company under the agreement which they made on its behalf. But I do not find in the opinions delivered in the House of Lords, or in this Court, any expressions which imply that the defenders were disentitled to fair professional remuneration for services of which the company had the benefit. To say that they were trustees is to assume the question. Persons who agree to act as trustees are understood to give their services gratuitously, and it may very well be that even when Parliament has authorised the payment of the expenses of obtaining an estate Act, such authorisation will not be construed as creating an exception to the rule that accepting trustees have no claim to professional remuneration. This I take to be the grounds of judgment in the case of *Lord Gray*, 19 D. 1. But in the present case there is no trust. The defenders never agreed to undertake any fiduciary duties that I know of; and I venture to think that it is only in a very remote and unreal sense that the language of trust law can be used with reference to the relation of a company to its promoters. I think that the services of promoters, and especially their professional services, are fairly within the scope of such a clause as this 38th section, which authorises the payment of costs and charges connected with obtaining the Act.

On the subject of the decisions which touch this point I have nothing material to add, because I agree in the Lord Ordinary's statement of their import. The cases fall under two heads—those which relate to Parliamentary companies where the payment of costs and charges is authorised by the Act, and cases of registered companies where the preliminary expenses are usually provided for by a contract, of which notice is given in the company's prospectus, or sometimes by the terms of the memorandum of association. It has been considered that in the absence of such express agreement or authority the payment of preliminary expenses would not be a legitimate application of the company's money.

The cases falling under the first head are *Wyatt* v. *Metropolitan Board of Works*, 1862, 11 C.B., N.S. 744; *re Brampton and Langtown Railway Company*, 1875, 10 Ch. 177; and *Skegness* v. *St Leonard's Tramways Company*, 1888, 41 Ch. Div. 215. In these cases the principle is recognised that the usual indemnity clause in a private Act of Parliament is designed to empower the company to indemnify solicitors and others who have given their time and money in promoting the formation of the company and in obtaining its Act. The Lord Ordinary's view of the cases is also supported by the high authority of Lord Justice Lindley, who (in the passage cited) says that Parliamentary agents who have thus acted, and who have not been employed by other people who are liable to them, can sue the company on such clauses. I do not understand his Lordship to exclude from the contemplation of the usual statutory clause the case of solicitors who have a guarantee, but it is right that I should say that in my apprehension the question in such cases is, whether the bill of costs represents costs incurred in preparing for and obtaining the Act, and that it is not a good answer to the claim to say either that the claimant holds a guarantee from the promoters of the company or that he is himself in the position of a promoter.

I pass now to the objections which have been stated to certain findings in the second of the interlocutors under review. I have already mentioned that the Lord Ordinary, giving effect to our wish for further information regarding these accounts, had made certain remits for purposes of taxation. *Inter alia*, by interlocutor dated 13th June 1894, the account of Mr William Hamilton Beattie was remitted for taxation to Mr Campion, Taxing-Master of the House of Commons. The print contains the account, with Mr Campion's taxation in a separate red-letter column, and his certificate appended thereto, allowing the sum of £2494, 1s. 4d., together with £62, 10s. as costs of the taxation.

Objections to this account were lodged on behalf of the pursuers; and by the first head of the interlocutor under consideration the Lord Ordinary has remitted to Mr Campion to consider and report on these objections. I am very clearly of opinion, in common I believe with all your Lord-

ships, that sufficient cause has not been shown for sending back the account to the Taxing-Master for reconsideration, though I do not say that this might not be done if it could be shown that the Taxing-Master had made a mistake as to the nature of the duty entrusted to him, or had come to wrong conclusions on some matter of principle. If, for example, it should be held that Mr Beattie was not entitled to remuneration for time and trouble, it would be necessary that the account should be reconsidered on that basis. I observe that the account on which the certificate is written only sets forth the heads of Mr Beattie's claim for outlay and professional services; but for the purposes of taxation Mr Campion was furnished with a statement of particulars in which the work done day by day is recorded with the number of hours occupied in the performance of each piece of business. It is admitted that the parties were heard by Mr Campion with reference to this statement of particulars, and it is not said that the account was not taxed according to the practice of the Taxing-Master's office.

Now, this is not an account like that of a solicitor, to which a table of fees can be applied, and I may safely affirm that no two persons taxing such an account independently could (unless by accident) arrive at the same numerical result, though if they were qualified by experience their taxations might not differ very widely. I am not satisfied that the method of taxation employed differs from what would be employed by our Auditor, but if it does, it must be remembered that this is a case of a remit to a public officer accustomed to tax accounts of this description, and that a true result is most likely to be reached by leaving him free to proceed according to methods which in his experience have been found to be best.

I do not think it is a good objection to the report that it does not distinguish or point out "charges not incidental to the promotion of the pursuers' Act," because I assume that such charges, if any, were disallowed, and again I think it is not a good objection to the report that it "fails to furnish information as to the precise nature of the defenders' charges," *i.e.*, the entries in the account, because this information is furnished by the detailed account on which the report proceeds. I apprehend that the Lord Ordinary desired this information, not so much for the satisfaction of his own mind, but rather in view of the wish expressed by this Division of the Court for further information, and if your Lordships agree with me on the question first considered, it is not now necessary that we should have the particulars of the professional charges allowed by Mr Campion. But if the reasons clearly stated by his Lordship, and supported by counsel in the argument addressed to us are insufficient to displace the presumption in favour of a report which is evidently the result of very careful consideration, it follows that the report should now be approved. The account claimed amounts to £4200. From this there has been taxed off £1705, 18s. 8d., and I think we should approve of the allowance of £2494, 1s. 4d. as the taxed amount of the bill of costs, with the further sum of £62, 10s. as costs of the taxation.

The Lord Ordinary next deals with the report of Mr Wilson Brodie and the objections thereto. Subject to any explanations which your Lordships may desire from counsel as to unvouched items which his Lordship has held to be a subject of proof, I am entirely satisfied as to the correctness of these findings. The parties have already had an opportunity of making representations before the Lord Ordinary against the findings of Mr Brodie, and I do not propose to go over these objections *seriatim*, because I do not think we should encourage reclamations against the decisions of a judge on matters of mere account. I shall only refer to one point, which seems to me to raise a question of principle—I mean the pursuers' objection to the charge of £1070 for procuring the Parliamentary deposit—an objection which was very properly referred by the Accountant to the decision of the Lord Ordinary and the Court. The deposit was obtained by an advance from the Union Bank on a promissory-note signed by seven obligants, including the defenders Mann and Beattie. The deposit has now been repaid. The charge for commission is defended on the ground that the defenders risked their money for the benefit of the company which they sought to bring into existence. Supposing the risk to have a real existence, I think this is a risk which the defenders voluntarily took on themselves, and is not a charge of the nature contemplated by the 78th section. I presume that the deposit is required as a guarantee that there is a body of subscribers to the undertaking possessed of means, and that the time of Parliament may not be occupied in considering speculative schemes for which money is not likely to be found. In the ordinary course of such business the deposit would be provided by the subscribers in proportion to their prospective interests in the undertaking, and then no commission for obtaining the money would be required. But if the money is obtained from bankers, the shareholders ought not, in my opinion, to be called on to meet a charge which would not have been incurred if the money had been found in the ordinary way.

The Lord President, Lord Adam, and Lord Kinnear concurred.

The Court pronounced an interlocutor finding that the defenders "are not barred from charging the pursuers for professional services rendered by them incident to the preparation for obtaining and passing of the pursuers' Act, or otherwise in relation thereto by reason that they were promoters of the said Act at the time when such services were rendered," and "to that extent and effect" adhering to the Lord Ordinary's interlocutor of 20th December 1893: "Recal the said interlocutor of 20th March 1896 in so far as it remits to Mr Campion to consider and report upon the

objections by the pursuers to his report and the answers thereto by the defenders: Recal also the same interlocutor in so far as it sustains the objections by the pursuers to the charge of £1070 for procuring the Parliamentary deposit, and disallows said charge: Repel the said objections of the pursuers to the said report by Mr Campion on the account of Mr W. H. Beattie: Approve of said report: Find that in terms thereof the defenders are entitled in the accounting in the present action to credit for the sum of £2494, 1s. 4d., being the taxed amount of said account: Find that the defenders are also entitled to take credit in the accounting for the sum of £1803, 17s. 5d., being the amount at which the Auditor of the Court of Session has taxed the account of Messrs A. & G. V. Mann: Find that the defenders are also entitled in the accounting to take credit for the commission paid by them to the Union Bank in connection with the said Parliamentary deposit, with interest thereon at such rate as may be allowed in the accounting."

Counsel for the Pursuers—Salvesen—C. K. Mackenzie. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for the Defenders—H. Johnston—Clyde. Agents—A. & G. V. Mann, S.S.C.

Wednesday, July 15.

FIRST DIVISION.

[Lord Low, Ordinary.

ANTROBUS AND ANOTHER *v.* ACCOUNTANT OF COURT.

Statute—Court of Session Consignations (Scotland) Act 1895 (58 *and* 59 *Vict. c.* 19), *secs.* 3 *and* 5—*Titles to Land Consolidation Act* 1868 (31 *and* 32 *Vict. c.* 101), *sec.* 122—*Whether Enactment in Conveyancing Statute Repealed by Implication by Statute Dealing with Judicial Arrangements.*

Whatever the import of its general language may be, the effective and operative provisions of the Court of Session Consignations Act 1895 indicate that its scope is confined to consignations of money in judicial proceedings in the Court of Session.

Held accordingly that that Act does not by implication repeal sec. 122 of the Titles to Land Consolidation Act 1868, and therefore that money consigned in terms of that section was properly consigned.

Opinion reserved as to whether money directed by Act of Parliament to be consigned subject to the orders of the Court would fall under the provisions of the Consignations Act.

In 1895 Lord Overtoun and others, trustees of the Free Church of Scotland, called up a bond and disposition in security for £24,000 which they held over the estate of Kinnaird, and in virtue of the powers contained in the bond and disposition in security exposed the said estate for sale by public roup.

The estate was sold for £28,650, and on 11th November 1895, after applying that sum in liquidation of the bond and disposition in security and in various other payments, the said trustees, in terms of sec. 122 of the Titles to Land Consolidation Act 1868, consigned the surplus of the price, amounting to £2528, in the joint names of the sellers and purchaser in the National Bank of Scotland, Limited.

On 27th February 1896 Hugh Lindsay Antrobus and the Hon. Henry Dudley Ryder, the holders of a postponed bond and disposition in security for £12,000 over the estate of Kinnaird, presented a petition for authority to uplift the money so consigned upon the narrative that both the sellers and the purchaser declined to endorse the consignation receipt.

The Accountant of Court presented a note, in which, after citing sections 2 and 3 of the Court of Session Consignations Act 1895, quoted below, he prayed the Court to refuse the prayer of the petition until consignation should be made in terms of that Act.

The Titles to Land Consolidation Act 1868 (31 and 32 Vict c. 101), sec. 122, provides that the creditors selling under a heritable security shall, upon receipt of the price, be bound to hold count and reckoning therefor with the debtor and postponed creditors or any other party having interest, and to consign the surplus which may remain (after deducting the debt secured, interest and expenses) in bank "in the joint names of the seller and purchaser for behoof of the party or parties having best right thereto."

The Court of Session Consignations (Scotland) Act 1895 (58 and 59 Vict. c. 19), sec. 2, enacts—"In this Act the expression 'consignation' shall extend or apply to any sum of money consigned or deposited in any bank under orders of the Court, or in virtue of the provisions of any Act of Parliament, and shall include any sum of money . . . received by the Accountant of Court or by any of the clerks of Court, as the case may be, for deposit or consignation in any cause or proceeding, whether by order of Court or otherwise, and any sum of money lodged by way of caution or security in corroboration of any bond." Sec. 3—"The provisions of sec. 35 of the Judicial Factors Act 1869, and of sections 5 and 6 of the Bill Chamber Procedure Act 1857, so far as relating to consignations, are hereby repealed, and in lieu thereof it is hereby provided that the Accountant shall be the sole custodier of all consignations under this Act, and the Clerk of Court, in each process in which, after the passing of this Act, a consignation is made, shall forthwith lodge the same with the Accountant, whose receipt therefor shall be a discharge to such clerk." Sec. 5—"Within ten days after receipt of any consignation in money the Accountant shall lodge the same on