Thursday, December 11.

OUTER HOUSE.

[Lord Shand, Ordinary.

THE CALEDONIAN RAILWAY COMPANY *v.* WYLIE GUILD.

Carriers—Railway Clauses (Scotland) Act, 1845, § 90—*Construction—Tolls.*

Held that a Railway Company's right of lien under the statute covers general charges on a running account for the carriage of goods by them as carriers—not merely tolls for the use of the line paid by persons employing their own carriages.

This case was an appeal on behalf of the Caledonian Railway Company against the deliverance of Mr Wylie Guild, C.A., Glasgow, trustee on the sequestrated estates of the East Hermand Shale Company. The deliverance bore date 19th March 1873, and was as follows:—"The trustee admits this claim in so far as to entitle the claimants to an ordinary ranking for the debt specified therein; but rejects it in so far as regards the preference or lien which the claimants allege they hold over certain waggons and tanks also referred to therein, in respect that (1), at common law a railway company has no general lien or preference over the goods or property of traders for whom the Company act as carriers, and which may happen to be in their hands, for rates for the carriage of other goods; (2) the lien conferred on railway companies by the 19th section of the Railways Clauses (Scotland) Act, 1845, applies only to tolls for the use of the railway line by those using their own carriages; and (3) the tank-waggons referred to in the claim are not the property of the bankrupts, but of the Scottish Waggon Company (Limited), and the other waggons referred to are the property of the railway company."

The appellants prayed the Court to recall the deliverance submitted to review; to find that, in the circumstances, they were "by virtue of the 90th section of the 'Railways Clauses Consolidation (Scotland) Act, 1845,' entitled to a lien over the seven oil tanks referred to in the claim of £703, 14s. 8d. made by them on the sequestrated estates of the East Hermand Shale Company, and of the said Matthew Dunnett and James Mungo Brown, the individual partners of said company, and to retain the said tanks on account of said claim; and further, to direct and ordain the said James Wylie Guild, trustee foresaid, to admit and rank the said claim on the said sequestrated estates, under deduction of the sum of £280, being the price or value put by the appellants on the said oil tanks presently in their possession."

The following were the circumstances out of which the appeal arose:—The estates of the East Hermand Shale Company were sequestrated on November 4, 1872. In 1871 the Shale Company applied to the appellants for, and obtained, four waggons, on which they mounted oil-tanks of their own, for the purpose of carrying oil from place to place on the Caledonian Railway. In addition to these four waggons which belonged to the appellants, the East Hermand Shale Company had several other waggons which belonged to themselves or to other parties from whom they were hired, upon which tanks belonging to the shale company were also placed. At the date of the sequestration the appellants had in their possession seven waggons, upon all of which oil-tanks were placed. Four belonged to the appellants, and the other three to the Scottish Waggon Company (Limited); but all the tanks attached to these seven waggons belonged to the East Hermand Shale Company. Mr Guild wrote to the appellants on December 6, 1872, demanding that they should deliver up to him all the tanks, and also the three waggons said to belong to the Scottish Waggon Company, but this they refused to do, on the ground that they had a lien upon the whole of the tanks, or a right to detain and sell the same for payment of the accounts then due to them by the East Hermand Shale Company, and amounting, conform to affidavit and claim lodged by the company, to £703, 14s. 8d. Of this sum £263, 4s. 2d. consists of charges or tolls for carriage of oil in the said tanks in the possession of the respondents conveyed over the line from West Calder to St. Rollox and Aberdeen during the months of April, June, July, August, September, and October 1872. No charge is made by the appellants for the use of the four waggons belonging to them. The charges contained in the foresaid account of £703, 14s. 8d. consist of—(1) Tolls for the use of the appellants' railway by the tank-waggons from station to station; (2) of charges for the supply of engine power and other expenses in conveying the waggons along the railway; and (3) rates for the carriage of other goods along the railway, including therein tolls for the use of the railway. The amount of tolls for the mere use of the railway far exceeds the sum of £280. The sums of £120 and £160 mentioned in the affidavit are the values put upon the said seven tanks belonging to the bankrupts, being at the rate of £40 for each tank.

The appellants were incorporated by the Caledonian Railway Act, 1845, with which is incorporated the Railways Clauses Consolidation (Scotland) Act, 1845. By the 90th section of the last-mentioned Act it is enacted as follows:—"If, on demand, any person fail to pay the tolls due in respect of any carriage or goods, it shall be lawful for the company to detain and sell such carriage, or all or any part of such goods, or if the same shall have been removed from the premises of the company, to detain and sell any other carriages or goods within such premises belonging to the party liable to pay such tolls, and out of the monies arising from such sale to retain the tolls payable as aforesaid, and all charges and expenses of such detention and sale, rendering the overplus, if any, of the monies arising by such sale, and such of the carriages or goods as shall remain unsold, to the person entitled thereto, or it shall be lawful for the company to recover any such tolls by action at law."

The respondent explained that the arrangement between the parties regarding the carriage of goods was by agreement, dated January 1872, but coming into operation in May 1871, and under this agreement the waggons were supplied. Further, that the claim of £263, 4s. 2d. was for carriage of oil conveyed by the Caledonian Railway Company as common carriers under this agreement, at rates thereby fixed, and in waggons belonging to or hired from third parties.

The appellants pleaded—"(I) Under and by virtue of the 90th section of the 'Railway Clauses Consolidation (Scotland) Act, 1845,' the appellants are entitled to detain and sell the said tanks, and

out of the monies arising from such sale to retain the tolls payable as aforesaid, and all charges and expenses of such detention and sale; or otherwise to be ranked and preferred on the bankrupt's estate in terms of their claim. (2) The appellants are entitled, in the circumstances above condescended on, to have the deliverance of the trustee recalled, and their claim sustained, with expenses."

The respondent pleaded—"(1) The appellants have not set forth facts relevant or sufficient to warrant the appeal being entertained, and the same should be dismissed with expenses. (2) The deliverance brought under review being well founded and supported by the facts and law of the case, the appeal should be dismissed, with expenses. (3) The accounts claimed by the appellants being for charges incurred to them as common carriers, or at any rate not being for tolls, the statutory rights claimed by them are inapplicable. (4) The goods having been carried by the appellants under the agreement libelled, the statutory rights claimed by them are inapplicable. (5) At all events, as the section of the statute founded on by the appellants does not in the circumstances of the present case confer upon them the rights claimed for them, the appeal should be dismissed, with expenses."

The Lord Ordinary pronounced the subjoined interlocutor and note:—

"*Edinburgh, 26th November* 1873.—The Lord Ordinary having considered the cause, recalls the deliverance of the respondent appealed against, and remits to him with instructions to rank the appellants as creditors on the sequestrated estate, having a preference in respect of a right of retention and sale of the seven oil tanks in their possession belonging to the bankrupts, and mentioned in the affidavit by the respondents, in security of the sum of £703, 14s. 8d. due to them by the bankrupts for the carriage of goods and minerals between April and October 1872, both inclusive, and as entitled to be ranked as ordinary creditors for the balance of the said debt after deducting the value of their security over the said seven oil tanks: Finds the appellants entitled to expenses: Allows an account thereof to be given in, and remits the same, when lodged, to the Auditor to tax and to report.

"*Note.*—This case raises a question in railway law of much general importance, and depends for its decision on the true meaning of the words in the 90th section of the Railways Clauses Scotland Act, 1845 'the tolls due in respect of any carriage or goods.' The appellants, the Caledonian Railway Company, maintain that these words cover and include the rates or charges levied by them for the carriage of goods entrusted to them as carriers, and on that view of the statute they claim right to retain certain oil tanks in their possession belonging to the sequestrated estates of the East Hermand Shale Company, on which the respondent, Mr Wylie Guild, is trustee, and that for security and payment not merely of their charges for the carriage of these tanks on the occasions when they came into the Company's possession, but for payment of a general account for carriage of goods between April and October 1872 due to them by the Shale Company, and amounting to £703, 14s. 8d. Mr Guild, as trustee on the bankrupt estate, on the other hand, maintains that section 90 of the statute only authorises the detention of goods for tolls chargeable by the company for the use of the railway line against persons using their own waggons or carriages for the conveyance of goods, and he has accordingly repelled the claim of the appellants to detain the oil tanks at a valuation put upon them; but has admitted their claim to an ordinary ranking for the full debt.

"At the date of the sequestration the appellants had in their possession seven waggons, upon all of which oil tanks were placed. The whole of these tanks belonged to the Oil Company, but the waggons on which three of them were placed belonged to the Scottish Waggon Company (Limited), having been hired from them by the Shale Company. A question of some difficulty might be raised as to whether, in any view, these three waggons could be detained as belonging to the Shale Company, at least in a question with the appellants, but at the discussion which took place before the Lord Ordinary the parties were agreed that it was unnecessary to raise or decide this question, because the tanks on these three waggons were themselves of the value put upon both the tanks and waggons in the appellants' claim. There are seven tanks in all in the hands of the appellants. Each of these is valued at £40, and the appellants thus deduct £280 from their claim on the footing that to that extent they will be reimbursed by detention of the tanks, and claim to be ranked as ordinary creditors for the balance. The trustees' right to have the tanks properly valued or sold, and their actual value ascertained, should he desire to do so, will not be affected by the Lord Ordinary's judgment.

"The question, whether the Railway Company's right of lien or retention under the statute covers tolls or charges for the carriage of goods by them, and not merely tolls for the use of the line by parties using their own carriages, has not been decided, or even raised, so far as the Lord Ordinary is aware, in this country. The Lord Ordinary believes, however, that such a right has frequently been asserted and acquiesced in, in practice.

"In the case of *The North British Railway Company* v. *Carter*, July 15, 1870, 8 Macph. 998, it was assumed at the bar, and on the bench, that the Railway Company had the right of lien or retention which they here claim. In that case the tolls or charges for which the company had detained and sold a bankrupt debtor's goods, and which amounted to £852, due to the company as carriers, and not for the use of the line by the bankrupts with their own waggons; and it was assumed throughout the discussion that the company were entitled to detain and sell goods in their hands belonging to the bankrupt—the only question raised being whether the sale had been lawfully carried through by a demand for payment of the rates having been made previous to the sale, in terms of the statute. The Court held that the sale was lawfully made in exercise of the company's right. If the respondent be right in the view of the statute to which he has given effect, it follows that the company in the case of *Carter* had no right of lien or detention over the goods, and no right to sell them, and the case would have been differently decided but the point was not raised for decision, The effect of the statute is thus stated in that case by the Lord President—'Two novelties are introduced by this section of the statute—(1) the company may retain goods for payment of tolls upon their goods; and (2) if on demand the debtor fails to pay, the company have power to sell the goods.

By this latter provision the passive security of retention is turned into the active title of a pledge with a power of sale.'

"The appellants found on this case as an authority, but they can only do so to the effect of showing a *prima facie* probability in favour of the soundness of the view maintained by them, from the circumstance that it did not occur either to the counsel for the debtors in that case, nor to the Court, to doubt that the company's right of retention covered their charges as carriers for the conveyance of goods, and the practice of railway companies hitherto may be legitimately referred to for the same purpose.

"The case of *Carter* was decided in July 1870. In the previous month of January the Court of Exchequer in England, in the case of *Wallis* v. *The London and South-Western Railway Company*, Law Reports, vol. v. (Exchequer), p. 62, had decided that the 97th section of the English Railway Clauses (1845) Act, which is in the same terms as section 90 of the Scotch Act, gave a lien only for tolls previously due for the use of the line by persons conveying goods in their own carriages. To this decision, which was not cited in the case of *Carter*, and which has probably guided Mr Guild in making the deliverance complained of, the Lord Ordinary will afterwards refer.

"In the meantime, viewing the question as raised for the first time in Scotland, the elements for its decision are to be found (1st) in the clauses of the Company's special Act authorising them to levy tolls and rates, and next in the interpretation clause of the Railway Clauses Act, taken along with the 90th section.

"By the special Act, being the Caledonian and Scottish Central Railways Amalgamation Act 1865, particular provision is made in regard to the tolls chargeable for the use of the appellants' railways and carriages—section 38, and the immediately succeeding sections. By section 38 it is provided that 'it shall be lawful for the company to demand and recover for the use of the several railways . . . and for the use of carriages thereon, any tolls not exceeding the following, that is to say—

"'First, in respect of all passengers conveyed upon the said railways, or any part thereof, as follows: For every person so conveyed, per mile, twopence; and if conveyed in or upon any carriage belonging to or provided by the company, an additional sum per mile of one penny.

"'Second, in respect of all articles, matters, or things conveyed upon the said railways, or any part thereof, as follows':—Here follows an enumeration of various classes of goods and minerals, with a specification of the rate or toll chargeable per ton per mile on each class of goods and minerals, and with the addition in every case of the words—'and if conveyed in or upon carriages belonging to or provided by the company, an additional sum per ton per mile of one penny.' Section 39 of the statute provides that 'the toll which the company demand for the use of engines for drawing or propelling carriages upon the said railways shall not exceed one penny per mile for each passenger or animal, or for each ton of goods or other articles, matters, or things, in addition to the several other tolls or sums by this Act authorised to be taken.'

'From these sections of the special Act it will be observed that the charges authorised to be made by the company are designated 'tolls,' and that these tolls are of three classes—(1) A rate per mile on passengers, goods, and animals by whomsoever conveyed; (2) an addition to this rate, if such passengers, goods, or animals are conveyed by the company as carriers; and (3) still an additional rate if the company shall be the parties to supply locomotive power. After these general sections, there are clauses limiting the charges for conveyance of passengers and goods and animals by the company to sums of smaller amount than the gross amount of the rates previously stated, and, in particular, sections 41 and 43 have that operation and effect. Thus, section 43 provides that it shall not be lawful for the company to demand in respect of conveyance on the said railways of the several descriptions of 'goods and animals after-mentioned any greater sum, including the charges for the use of carriages and locomotive power, and all other charges incidental to such conveyance . . . . than the several sums hereinafter mentioned.' After which follows an enumeration of more limited charges than those before mentioned. The nature of the charges, however, is the same as is specified in sections 38 and 39—a toll or rate for passengers, goods, or animals, with an addition for carriage accommodation, and a farther addition for locomotive power if supplied. Under these sections, if persons used their own waggons or carriages and locomotive power, they would simply be liable for the toll for the use of the railway on the passengers, goods, or animals conveyed, there being no separate or additional toll on the carriages or waggons; and if the company were called on to supply locomotive power an additional toll also, estimated on the passengers, animals, and weight of goods carried, would be leviable. Where the company themselves supply the carriage accommodation also, the tolls are leviable and estimated in the same way in respect of the passengers, animals, or goods conveyed, but the rates are limited as above explained.

"Turning next to the Railways Clauses Act, it is provided, as introductory to the part of the Act dealing with the construction of its terms, as follows:—'And with respect to the construction of this Act, and other Acts to be incorporated therewith, be it enacted as follows (section 3)—that the following words and expressions, both in this and the special Act, shall have the meanings hereby assigned to them unless there be something in the subject or context repugnant to such construction, that is to say, ... The word toll shall include any rate or charge or other payment payable under the special Act for any passenger, animal, carriage, goods, merchandise, articles, matters, or things conveyed on the railway.' And by section 90 it is provided that 'If, on demand, any person fail to pay the tolls due in respect of any carriage or goods, it shall be lawful for the company to detain and sell such carriage, or all or any part of such goods; or, if the same shall have been removed from the premises of the company, to detain and sell any other carriages or goods within such premises belonging to the party liable to pay such tolls, and out of the monies arising from such sale, to retain the tolls payable as aforesaid, and all charges and expenses of such detention and sale, and such of the carriages or goods as shall remain unsold, to the person entitled thereto, or it shall be lawful for the company to recover any such tolls by action at law.'

"If the provision of the special Act be read with these sections only of the Railways Clauses Act, there appears to be no doubt that the railway com-

pany have right to detain the goods of parties coming into their possession for payment of the sum due to them as carriers of goods—and that on account not only of the carriage of the particular goods which remain undelivered—which is the common law right of carriers generally—but of goods previously carried, the charges for which remain unpaid. Reading the word tolls in the 90th section as including the tolls or rates payable under the special Act for goods conveyed on the railway, it is obvious that this covers the charges of the railway company as carriers. The word tolls must be read in section 90 as having this scope, because there is nothing in the subject or context repugnant to this construction.

"It is maintained, however, for the respondent that, when due regard is paid to the provisions of the sections which immediately precede and follow section 90, it will be found that the tolls mentioned in section 90 are of much more limited character, and include only the rates or charges leviable by the company for the use of the railway by persons who employ their own carriages or waggons.

"It is of course quite competent, and indeed proper, to refer to other sections, and particularly to those occurring immediately before and after the particular section as to the interpretation of which a question has arisen, but in doing so it must be here borne in mind that the term 'tolls,' which the respondent maintains to have the limited meaning which he attaches to it, must be taken to have the more comprehensive signification for which the appellants contend, unless the respondent can show that there is something in the subject or context to be gathered from these other clauses repugnant to this construction.

"In the argument for the appellants the clauses particularly founded on are from the 86th to the 95th, both inclusive, but in the opinion of the Lord Ordinary, if the question is to be decided on provisions of the statute other than the interpretation clause and section 90th, it is necessary to take into consideration the whole of the clauses beginning, with the introduction to section 79th, and ending with the 95th. The result of the consideration of these clauses on the mind of the Lord Ordinary, as bearing on the present question, is (1) that section 90th is to be regarded as independent and complete in itself, and is not so bound up or united with the sections which immediately precede and follow it as to give to these sections the character of a context from which a controlling and limiting effect of the meaning of the word 'Tolls' is to be derived, and (2) that even if section 90th is not to be taken as independent and complete in itself, and the sections referred to are to be regarded as the context, still there is not to be found in the context expressions or enactments repugnant to the comprehensive meaning of the word 'toll' in the interpretation clause as the true meaning of that word in the 90th section.

"The preamble to section 79th and the succeeding clauses is in these words, 'And with respect to the carrying of passengers and goods upon the Railway, and the tolls to be taken thereon, be it enacted as follows.' Passing over the intermediate sections, and holding these words as prefixed to section 90, it will be seen that the provisions of that section still do not present any ambiguity. The section may be read and construed without difficulty as independent altogether of the immediately preceding and also of the succeeding sections. Its purpose—and it is the only section devoted to that purpose—is, as was stated by the Lord President in the case of *Carter*, to convert in certain circumstances the Company's right of retention of goods into a right of pledge, with a power of sale for payment of the whole tolls due by the party to whom the goods belong. There appears to be no reason, from anything ambiguous or of doubtful meaning in the section itself, to require that for its sound interpretation other sections occurring inmediately before and after it, but none of which deal with a right of retention or pledge or sale of goods, should be referred to. It farther appears to the Lord Ordinary that these other sections each in like manner has an independent subject or purpose of its own, with reference to which the meaning of the word 'toll' there used must be considered, and can properly be determined without reference to section 90, or other sections. Section 88 is no doubt directly connected with the two sections which immediately precede it, but that only because it refers to the boards and milestones 'hereinbefore directed' to be exhibited and set up, but not because these sections are to be referred to for the meaning of the term 'tolls' which in section 88 is expressly limited to tolls 'for the use of the railway.'

"Taking however the other sections above referred to into view, it will be found that, generally speaking, the term 'tolls' has the meaning affixed to it by the interpretation clause, for it is only in special instances that there is anything in the subject or context repugnant to that constructiion.

"Section 79th authorises the company to become carriers on the line, and to make such reasonable charges in respect thereof as they may fix, not exceeding the tolls by the special Act authorized to be taken by them. The word tolls must here have the meaning given to it in the interpretation clause. It could not be intended that the company as carriers should not be entitled to charge more than the tolls leviable by them for the use of the railway from others employing their own carriages. Sections 80th and 81st provide for contracts being made with other companies, and refer obviously and exclusively to tolls in the limited sense, for the use of the railway as a highway; for the subject of these sections is the passage of carriages along the line, and not contracts of carriage of passengers or goods. Section 82d has no reference to tolls, but reserves to railway companies the protection and privileges of common carriers. Sections 83d and 84th appear obviously to refer to tolls in the sense of the interpretation clause of the Act,—the first giving a power of varying the tolls or charges according to circumstances, but so as not to favour any particular company or person and the second providing that in the case of amalgamated railways, they should be treated as one line in regard to tolls. In section 85th, again, the term tolls appears to be used in its more limited sense, for in the first part of the section it is employed as in contrast with a charge for the carriage of passengers or goods, and in the second it referred to the amount demandable from persons using the railway with engines and carriages properly constructed. Up to this point the word has been used in its general sense, excepting in the 80th and 81st sections, which relate to the passage of carriages alone, and the 85th section, where tolls are expressly contrasted with charges for carriage.

"The next section, viz., the 86th, it is main-

tained by the respondent, refers only to tolls chargeable for the use of the railway by third parties. The Court had to consider the effect of this section, and also of sections 87 and 88, in the case of *The Scottish North Eastern Railway Co.* v. *Anderson*, 8th July 1863, 1 Macph. 1056. An alleged debtor of a railway company there pleaded, in defence to an action for an account for carriage of goods by the company, that the action could not be maintained because the company had failed to put up a list of the tolls authorized to be taken in terms of section 86th of the Act. The Court there held that section 88th applied 'only to tolls for the use of the railway, and not to tolls exigible by the company as common carriers for the conveyance of passengers and goods.' The ground of the decision is apparent from the fact that the tolls mentioned in that section, which the company forfeit if their list is not published, are tolls 'for the use of the railway,' language which throws out of view carriers' charges for services, including the use of waggons and locomotive power. The respondent contends that this decision settled the question that the list of tolls to be published under section 86 refers to tolls in the limited sense, viz., for the use of the railway, but this does not follow, and the Lord Ordinary observes from a report of the same case in the Scottish Jurist that the Court 'without deciding whether or not the list of tolls were limited to tolls for the use of the railway,' as had been argued on behalf of the railway company, held that the tolls forfeited by the 88th section were so limited. The Lord Ordinary is of opinion that the list referred to in section 86 as 'a list of *all* the tolls authorized by the Special Act,' etc., must be held as including charges for carriage as well as for the use of the railway, for he does not think there is anything in the subject or the context which can be represented as repugnant to that construction. If a list of all the tolls be put up, it must include the toll for the use of carriages authorized by the special Act. It is not repugnant to this construction that the board shall be put up 'on the stations or places where such tolls shall be made payable,' for it seems only reasonable that at every station where charges or tolls are levied by the company, the list should be appended. It is worthy of notice that later enactments have rather extended than limited this obligation, for the Lord Ordinary observes that by the Act 31 and 32 Vict., cap. 119, (The Regulation of Railways Act 1868) every company is bound to exhibit at each station a list containing the particular fares of passengers from that station to every place for which passenger tickets are there issued. Nor does it appear to follow that because the forfeiture of tolls is limited to tolls for the use of the railways the lists published must be equally limited to such tolls. The words of section 86 are, 'a list of all the tolls,' and the Legislature might reasonably require that the list should include the company's charges as carriers, of which it is important that the public should have notice, without imposing a forfeiture of the tolls or charges leviable on this account. There is no such penalty attached to the violation of the clause just noticed in the more recent Act for the regulation of railways; and the provision could be enforced by interdict or other legal proceeding without imposing as a penalty the forfeiture of the tolls. Section 87 does not refer to the subject of tolls farther than as providing a check on overcharges by requiring milestones to be put up. Section 88 is, as already stated, in its terms expressly limited. Section 89, which immediately preceeds the important section in this case, is not so limited, and it appears to the Lord Ordinary that there is not enough either in the subject or the context to give to the word tolls as there used a limited meaning repugnant to that contained in the interpretation clause. The Lord Ordinary is of opinion that it would only be a proper compliance with this section that the company in their lists should give the names of the collectors and station-masters at the different stations on the line.

"The different clauses of the statute up to section 90 now in question have thus been considered, and the Lord Ordinary has not found anything in these sections to lead him to put the limited meaning contended for on the word 'tolls' in section 90. There is this special consideration having a contrary bearing, that there are no limiting words in section 90, as in section 88,—tolls 'for the use of the railway.' The presence of these words in that section, and their absence in section 90, is a strong argument in favour of the construction for which the appellants contend.

"Of the succeeding sections, 91st to 95th inclusive, the Lord Ordinary will only say that he does not find in their terms anything which limits the force of the word 'tolls' so as to take away the effect of the interpretation clause. Thus, section 91 refers to the collector of tolls as attending 'for the purpose of receiving goods or of collecting tolls for the part of the railway on which the carriage of goods may have travelled or be about to travel,' and the concluding words refer to goods 'brought for conveyance as aforesaid' which seems to show that this section refers to accounts of the number and quantity of goods given to a company as carriers, as well as goods conveyed by the carriages of third parties. Again, the disputes to be settled by the Sheriff under section 93 refer to tolls generally, and not to tolls in any limited sense. Throughout these sections there is no doubt looseness and inaccuracy of expression, showing a considerable want of care on the part of the framers of the Act. This is particularly obvious in section 95, which provides for the punishment by a pecuniary penalty of any 'collector or other officer' who has acted vexatiously, for it is somewhat remarkable that the jurisdiction of the Sheriff under the section arises not at the instance of the party who may have suffered the injury, but of the company, who are his own employers, who may have instigated him to throw obstruction in the way of carriers, and who have the remedy of dismissal in their own hands for the punishment of any wrongdoer without any necessity to appeal to the Sheriff. Taking the sections which the Lord Ordinary has thus reviewed as a whole, there appears to be no guiding rule or principle followed in the use of the word 'tolls' which can be traced, or which interferes with the effect of the interpretation clause, and it is therefore all the more necessary that that clause should receive its full effect.

"It was argued for the respondent that while it was reasonable that a railway company should have a right of detention and sale of goods for tolls for the use of the railway which they had made, there was no good reason for extending the right so as to give them a security for their charges as carriers, a privilege which no other carriers had. If the language of the statute in its 90th section had

drawn or indicated any such distinction, this reasoning would not have been without force. There is nothing of the kind, however, in the section, and a good deal may be said in favour of the view that the Railway Company having usually made, or being proprietors of, the line on which they carry, should have more than ordinary privileges as carriers—besides which, it may be important even for the public, that in regard to goods traffic carried by railway, the company should not be driven or induced to insist for payment of the charges for carriage of each parcel of goods when delivered;—but in order to prevent detention in the ordinary delivery of goods, should have a right of detention over other goods of the same party afterwards coming into their hands.

"The Lord Ordinary has considered the case and the various statutory provisions above referred to thus fully, because he has decided the point raised directly against the decision in the case of *Wallis* above referred to, in the Exchequer Court in England. In regard to that case itself, he may observe, that, as in the Scotch case of *Carter*, it did not occur to the Counsel for the plaintiff that he could maintain that the word 'tolls' in section 90 had the limited meaning now contended for. Accordingly there was no argument to that effect in the case. The point was apparently started by the Court, and given effect to at once without judgment being reserved, and without that deliberate argument which the Court would have had on a point for which Counsel had been prepared, and which has been fully considered. The Lord Ordinary is of opinion that if the point is to be decided on anything beyond the terms of the 3d and 90th sections of the General Act, and the clause in the Special Act regarding tolls, that, whatever may be the result, a careful consideration of the whole of the clauses above referred to is necessary, and judging from the report he doubts whether the matter received such consideration in the case of *Wallis*. The opinions of the learned Judges may have been fuller than the report shows. The Lord Ordinary can only say that, with the utmost respect for these learned Judges, he does not think the reasoning there stated is satisfactory. After the best consideration which he has been able to give to the statute, he has formed an opposite opinion from that at which these learned Judges arrived, and he has thus felt constrained to decide the case contrary to the view to which they gave effect. Whether the decision in the case of *Wallis* has been accepted by the legal profession in England, and has been acted on by railway companies since its date, the Lord Ordinary cannot tell; but he may observe there is nothing in the report to show whether the amount at stake was such as to warrant an appeal, and the case is one in which the railway company had evidently another formidable plea stated against them, for the charges were made partly for the carriage of goods by sea to Jersey, and this circumstance might of itself be sufficient to prevent an appeal being taken with the hope of success.

"The Lord Ordinary thinks it unnecessary to deal with the other grounds of appeal stated in this case in detail. He may, however, say that he is of opinion that if the appellants do not succeed on the ground now dealt with, the trustee's deliverance ought to be affirmed. It appears to the Lord Ordinary that the appellants, having been employed by the bankrupts simply as carriers, are not entitled to split down their rates of carriage into parts, and thus claim a right to retention of the goods for so much of the charges as they may estimate to be for the use of the line only. The bankrupts dealt with the appellants as carriers, making charges as such, and not as the owners of the line charging tolls for the use of the line.

"As little does it appear to the Lord Ordinary that there is any ground for the argument that the appellants acquired a right of lien or retention under special agreement between the parties. The Lord Ordinary has been unable to discover in the agreement any terms which either expressly or by implication could confer such a right."

This interlocutor was extracted and became final on December 11, 1873.

Counsel for Appellants—Lord Advocate (Young), Q.C., and Johnstone. Agents—Hope, Mackay, & Mann, W.S.

Counsel for Respondents — Solicitor-General (Clark), Q.C., and Maclean. Agents—Hill, Reid, & Drummond, W.S.

Thursday, December 11.

SECOND DIVISION.

[Lord Gifford, Ordinary.

MACDOWALL *v.* RENFREWSHIRE ROAD TRUSTEES.

Renfrewshire Road Trustees—Security—Ranking of Creditors.

Held—(1) that the effect of the statutes regulating the Renfrewshire roads is to create a community of interest in the creditors on the turnpike roads of the county; (2) that creditors in right of bonds creating a security over the tolls of special roads mentioned therein, are entitled to rank *pari passu* with the general creditors for whatever surplus funds to meet the *cumulo* debt might be in the hands of the road trustees.

The summons in this action, at the instance of Major-General Day Hort Macdowall of Garthland, and William Cuninghame, Esquire, late of Craigends, captain in the 11th Regiment of Hussars; against Andrew Hoggan and William Henry Hill, writers in Glasgow, clerks to the Trustees on the Roads in the County of Renfrew, and as such representing the said last-mentioned trustees, concluded for payment out of the funds, assets, and revenues, under the charge of the said Trustees, to the pursuer the said Major-General Day Hort Macdowall, of the sum of £1333, 6s. 8d. sterling, and to the pursuer the said Captain William Cuninghame, of the sum of £833, 6s. 8d. sterling, being the respective amounts paid by the pursuers respectively to the respective creditors in right of certain bonds dated 1793 and subsequent dates, and which bonds were granted under the authority of the Act 32 Geo. III. c. 121, (1792) upon the credit of the tolls of particular roads mentioned in the bond; and the question raised was whether, on a sound construction of the statutes regulating the Renfrewshire roads, the pursuers were placed in the situation of general creditors and entitled to rank *pari passu* upon the whole *cumulo* funds of the Renfrewshire