Friday, July 3.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

TAYLOR & COMPANY *v.* GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

Contract—Carriage—Agreement between Railway Company and Coalmaster—Rates for Carriage of Coal—Mileage Standard—Declarator—Relevancy.

By agreement with a coalmaster (art. 5) a railway company bound themselves to carry to Ayr the coals from his pits at Enterkine, Sundrum, and Gadgirth, at a lump rate of 8d. per ton, and from Blackhouse at 6d. per ton, the distances being respectively six, seven, eight, and two miles.

Article 6 dealt with traffic to all other places than Ayr and Troon, and fixed a mileage rate graduated according to distance, the lower distances being charged a higher, and longer distances a lower rate per ton per mile; "provided and declaring always that in the event of the first party charging to any other coalmaster or coalmasters or other parties in the coal trade, in competition with the second party, rates lower than those fixed by this agreement, then the first party shall be bound to reduce the rates fixed by this and the preceding article to the rates given by them to the said competing parties, which reduced rate shall only continue, however, so long as the said reduced rate is given to said competing parties."

Lanemark Colliery, the property of a competing company, was twenty-three miles from Ayr, and the railway company charged for its coals a rate of 1s. 7d. per ton.

The coalmaster sought declarator that the railway company were not entitled to carry coals from coalfields further distant from Ayr than those mentioned in article 5 of their agreement at a lower rate per ton per mile than the pursuer paid under that article without giving him a corresponding reduction; and on the ground that the Lanemark rates were lower than those charged against him, he concluded for the difference between the rates he had paid and the reduced rate he was entitled to under article 6 of the agreement.

He averred that the Lanemark rate of 1s. 7d., divided up by mileage, gave a rate per mile a fraction less than was brought out by dividing up by mileage the pursuer's rate of 8d.

The pursuer relied further on a scale of rates contained in article 6 of the agreement, and also on a scale fixed under agreement with certain coalmasters in the Kilmarnock district, not including either the pursuer or the Lanemark Company.

The Court *held* (1) that there was no standard of comparison between the Lanemark rates and the rates specified in article 5 of the agreement, uniformly calculated by mileage; (2) that the rates scheduled in article 6 were not applicable, as they were confined to traffic to other places than Ayr; (3) that the rates fixed by the Kilmarnock agreement affected an entirely different district and were inapplicable; and *dismissed* the action as irrelevant.

In February 1865 Mr John Taylor Gordon was sole partner of the firm of George Taylor & Company, coalmasters at Annbank in the county of Ayr, and tacksman of the pits at Enterkine, Sundrum, Gadgirth, and Blackhouse, which were respectively six, seven, eight, and two miles distant from Ayr. He entered into an agreement with the Glasgow and South-Western Railway Company for the carriage of coals to Ayr, Troon, and other places. The agreement provided—"*Fifth.* The rates payable by the second party (Mr Gordon) to the first party (the railway company) on coal carried on the railways to be made under the authority of the said Act, from Enterkine, Sundrum, and adjacent coalfields to the harbour or other place of sale at Ayr shall be eightpence per ton; from these coalfields to the harbour at Troon, one shilling and fivepence per ton; and from Blackhouse to the harbour or other places of sale at Ayr, sixpence per ton. *Sixth.* To all other places than those above-named the rates on coal shall be as follows, namely—For distances not exceeding six miles, one penny half-penny per ton per mile; for distances exceeding six miles and not exceeding twenty-five miles, one penny half-penny per ton per mile for the first six miles, and one penny per ton per mile for the additional distance beyond six miles; for distances exceeding twenty-five miles, the above rates for the first twenty-five miles, and three farthings per ton per mile for the additional distance beyond twenty-five miles. The above distances shall be calculated at the actual distance from the junction of the second party's private railway with the main line: Provided and declaring always that in the event of the first party charging to any other coalmaster or coalmasters or other parties in the coal trade in competition with the second party rates lower than those fixed by this agreement, then the first party shall be bound to reduce the rates fixed by this and the preceding article to the rates given by them to the said competing parties, which reduced rate shall only continue, however, so long as the said reduced rate is given to said competing parties."

The partners of the firm as now in right of this agreement raised this action against the railway company for declarator "that the defenders are not entitled to carry coals from coalfields farther distant from Ayr and Troon than the coalfields mentioned in article 5 of an agreement between the defenders of the first part and John Taylor

Gordon, Esquire of Blackhouse, and then the sole partner of the pursuers' firm of the second part, dated 27th and 28th February 1865, at a lower rate per ton per mile than the pursuers pay under the said article without giving the pursuers a corresponding reduction; and the defenders ought and should be decerned and ordained by decree foresaid to make payment to the pursuers (first) of the sum of £25,386, 1s. 11d. sterling of principal, and (second) of the sum of £8348, 17s. of interest thereon, conform to state to be produced at the calling hereof, with interest at the rate of five per centum per annum on the said sum of £25,386, 1s. 11d. from the 31st day of December 1887, until payment."

They averred—"(Cond. 4) The pursuers have been in the practice since 1874 of sending large quantities of coal and dross to Ayr and Troon by the defenders' line of railway, for which they have been charged the lump rates mentioned in article 5 of said agreement, conform to the detailed statements produced herewith. The whole of the rates paid by the pursuers, and of which they claim a rebate as after mentioned, were paid by them in ignorance of the fact that lower rates were being demanded from and paid by other traders. (Cond 5) The pursuers have recently discovered that since the beginning of 1874 the defenders have been charging other coalmasters, in competition with the pursuers, lower rates to Ayr than those fixed between the pursuers' firm and the defenders by the said agreement of 1865, or by the reduced scale granted in consequence of the issue of the Kilmarnock scale referred to in condescendence 8 hereof. In particular, the defenders have privately charged to the proprietors of the Lanemark Colliery, New Cumnock, for the carriage of their coal and dross from that colliery to Ayr harbour, a distance of twenty-three miles, the rate of 1s. 7d. per ton, while according to the scale in article 6 of said agreement it should have been 2s. 2d. per ton. (Cond. 7) A corresponding reduction in favour of the pursuers to the said rate so given to Lanemark Colliery to Ayr would entitle the pursuers to have their said rate of 8d. per ton to Ayr, which they were charged by and paid to the defenders, reduced to $5\frac{1}{3}$d. per ton, so as to make it bear the same relation to 8d. which the Lanemark rate bears to the rate they should have been charged. The pursuers are therefore entitled to a rebate of $2\frac{2}{3}$d. per ton on all the coal and dross carried for them by the defenders to Ayr, from the beginning of 1874 down to 31st December 1887, and which amounts, on the quantity of 2,526,425 tons so carried, to the sum of £22,673, 0s. 11d., conform to the detailed statement No. 1 herewith produced. (Cond. 8) If the pursuers are not entitled to a reduction on their lump rate as fixed under article 5 of the said agreement, but are bound to apply a rate calculated according to the mileage distance of their respective pits from the harbour of Ayr, in that case the pursuers contend that they are not restricted to the schedule rates in article 6 of said agreement, but are entitled to fall back upon another scale granted by the defenders, which, for the purpose of comparison according to mileage, is more favourable to the pursuers. Since 1874 the defenders have, by agreement and otherwise, charged various traders in competition with the pursuers in the Kilmarnock districts according to a scale known as the Kilmarnock scale, which is lower than the scale in article 6 of said agreement, and to all other places than Ayr and Troon, notwithstanding the scale in said article 6, the pursuers have had the benefit of it. According to the Kilmarnock scale, the rates are as follows:—When carried six miles or under, the sum of 7½d. per ton; when carried any distance above six miles, and not exceeding sixteen, the sum of 1¼d. per ton per mile; when carried any distance above sixteen miles, and not exceeding twenty-six miles, the preceding rate for the first sixteen miles, and for every mile thereafter, the sum of ¾d. per ton per mile; when carried any distance exceeding twenty-six miles, the preceding rate for the first twenty-six miles, and for every mile thereafter the sum of ½d. per ton per mile. According to this scale, the rate for Lanemark Colliery to Ayr would be 2s. 1¼d.; while, as previously stated, the actual rate charged to Lanemark was only 1s. 7d., being a difference of 6¼d. The rates for the pursuers' pits, under the Kilmarnock scale, according to their respective distances from Ayr (which are approximately correct as stated by the defenders), are 7½d., 8¾d., and 10d., which, being reduced in the proportion of 25¼ to 19, become $5\frac{65}{101}$, $6\frac{59}{101}$, and $7\frac{83}{101}$, and the sum claimed as rebate upon the quantities carried amounts to £18,285, 13s. 1d., conform to detailed statement No. 3 herewith produced. (Cond. 11) If the defenders are not due and resting-owing to the pursuers the rebate as specified and calculated in the preceding articles, the pursuers aver that the defenders are due and resting-owing to them a rebate on the said coal and dross carried for them by the defenders to Ayr, from the beginning of 1874 to the end of 1887, calculated as follows, viz.—The distance from Lanemark to Ayr harbour is twenty-three miles. From 1874 to 1887 the defenders have charged the proprietors of Lanemark Colliery for the carriage of their coal and dross from that colliery to Ayr harbour at the rate of 1s. 7d. per ton, or $\frac{1}{3}\frac{3}{5}$d. per ton per mile. The pursuers' pits are severally distant from Ayr harbour six, seven, and eight miles, and during the said period the defenders have charged the pursuers for the carriage of their coal and dross the rate of 8d. per ton, or 1⅓d. per ton per mile in the case of the six mile pits, 1⅔d. per ton per mile in the case of the seven mile pits, and 1d. per ton per mile in the case of the eight mile pits. The pursuers were thus, as compared with Lanemark, overcharged on said coal and dross sent to Ayr from their six mile pits at the rate of $3\frac{1}{3}$d. per ton, from their seven mile pits at the rate of $2\frac{2}{3}$d. per ton, and from their eight mile pits at the rate of $1\frac{2}{3}$d. per ton. The sum

due and resting-owing to the pursuers by the defenders in respect of said overcharge amounts to £26,311, 14s. 9d."

The pursuers pleaded—"(1) On a sound construction of the agreement libelled upon the pursuers are entitled to decree in terms of the declaratory conclusions of the summons."

The defenders pleaded—"(2) The pursuers' averments are not relevant to support the conclusions of the summons."

Upon 30th January 1891 the Lord Ordinary sustained the defenders' plea and dismissed the action.

"*Opinion.*—In this action the pursuers, who are a firm of coalmasters in Ayrshire, seek to recover from the defenders, the Glasgow and South-Western Railway Company, certain alleged overcharges for the carriage of coal, the said overcharges extending over the period since 1874, and amounting in gross to upwards of £25,000. The claim is based upon the provisions of a certain agreement made in the year 1865, between the defenders and the pursuers' late partner and author, Mr John Taylor Gordon, and according to the pursuers it is a claim analogous to that sustained by this Court and the House of Lords against the same defenders, in the case of *Mackinnon* v. *The Glasgow and South-Western Railway Company*, 12 R. 1309, and 13 R. (H. of L.) 89.

"The agreement in question was made between the defenders and the late Mr Taylor Gordon, in consideration—as I think sufficiently appears—of the latter supporting a certain railway bill which the defenders were at the time promoting, and in consideration also of Mr Gordon undertaking to send along the proposed line of railway the whole traffic from his pits in the vicinity of Ayr. It is an agreement which contained a variety of provisions, and conferred various privileges on Mr Taylor Gordon, but in the view I take of the case it is only necessary to refer to those provisions which directly bear on the alleged overcharges. The other provisions are important as bearing on the question of the pursuers' title to sue, but that is a question which I do not find it necessary to decide.

"The provisions in question are contained in the fifth and sixth clauses, both quoted at length in the record.

"The fifth clause applied to traffic with Ayr and Troon, and the rates which it provided were lump-rates—that is to say, the defenders undertook to carry Mr Gordon's coal from his pits at Enterkine, Sundrum, and adjacent coalfields, to the town and harbour of Ayr at a lump-rate of 8d. per ton; from these coalfields to Troon at a lump-rate of 1s. 5d. per ton; and from Blackhouse to the town and harbour of Ayr at a lump-rate of 6d. per ton.

"The sixth clause applied to traffic to all other places than Ayr and Troon, and its rates were fixed on a different principle, viz., that of a mileage rate graduated according to distance, the lower distances being charged a higher and the longer distances a lower rate per ton per mile. It is not necessary to recite the particular charges, but at the end of the clause occurs the following provision, out of which the present question arises—'Provided and declaring always that in the event of the first party charging to any other coalmaster or coalmasters or other parties in the coal trade in competition with the second party rates lower than those fixed by this agreement, then the first party shall be bound to reduce the rates fixed by this and the preceding article to the rates given by them to the said competing parties, which reduced rate shall only continue, however, so long as the said reduced rate is given to said competing parties.'

"It is not disputed that this proviso falls to be read as applying both to clauses 5 and 6, that is to say, both to Ayr and Troon traffic on the one hand, and to general traffic on the other. Nor is it disputed that for the purposes of the present question its effect is the same as if at the end of article 5 there had been added a declaration that in the event of the railway company charging to any competing coalmasters rates lower than those fixed by article 5, the railway company should be bound to reduce the rates fixed by article 5 to the rates so charged to the said competing coalmasters.

"The question at the present stage is whether the pursuers have relevantly averred that a certain rate charged to a certain competing coalmaster—viz., the Lanemark Coal Company, for the carriage of coal to Ayr is a lower rate than the rate or rates to Ayr charged to the pursuers under the said fifth article. That is to say, the question is, whether what is averred on record with respect to the Lanemark rate, stamps it as being in the sense of the agreement a lower rate than the pursuers' rates under article 5. I have come to be of opinion that this question must be answered in the negative.

"The facts which have to be kept in view, I think, are these—The pursuers' pits at Enterkine, Sundrum, and Gadgirth, to which the 8d. rate applies, are situated at varying distances from Ayr and Ayr Harbour, the distances being, as is admitted, respectively six, seven, and eight miles. The distance from Blackhouse to Ayr, the rate for which is 6d., is not set out on record, but the map produced shows it to be about two miles or perhaps less. The distance from Lanemark Colliery to Ayr Harbour is on the other hand said to be twenty-three miles, and the rate charged to the Lanemark Company is said to be 1s. 7d. per ton. It is not necessary in the meantime to go into the figures with respect to Troon traffic, except perhaps to say that the distances from the pursuers' pits to Troon range from fourteen to sixteen miles.

"In this state of the facts, one thing is at the outset clear, viz.—that the Lanemark rate to Ayr is not absolutely lower than the agreement rate. It (the Lanemark rate) is 1s. 7d., while the highest agreement rate is 8d. I do not, of course, suggest that this is conclusive. On the

contrary, I quite see the difficulty of holding that when the agreement speaks of 'lower rates' it means rates absolutely lower than the agreement rates. For one thing the agreement has for Ayr traffic not one, but two rates, viz.—8d. for Enterkine, and 6d. for Blackhouse, and if the question were one of absolute rates, the inquiry would always be, which of the two was the rate to be compared? It is not, however, necessary to consider how far this difficulty is insuperable. It is enough to note that in whatever other sense the Lanemark rate may be lower than the agreement rate it is not and cannot be said to be lower absolutely.

"The point therefore really is, whether the Lanemark rate is relatively lower than the agreement rate, or rather the agreement rates. And this involves the question whether the pursuers have been able to point to any common standard of comparison applicable to both rates, and tested by which the Lanemark rate is lower than the agreement rates. After the best consideration I have been able to give to the pursuers' record, I am of opinion that they have failed to set forth any such common standard of comparison; that is to say, that they have failed to indicate any scale or standard capable of being applied to the two rates in contrast and capable of being so applied consistently with the true construction of the agreement.

"Their first suggestion is that the two rates fall to be compared simply according to mileage; that is to say, they suggest that the agreement lump-rate of 8d. falls to be broken up into as many rates as there are pits at different distances within the defined district, and that the rate per mile being for each pit thus ascertained, that rate falls for each pit to be compared with the Lanemark rate (1s. 7d. for 23 miles), which is equal to $\frac{1}{2}\frac{3}{3}$ of a penny per mile. The result is to exhibit the Lanemark rate as lower relatively than any of the agreement rates, the latter being in the case of the eight mile pits, 1d. per ton per mile; in the case of the seven mile pits, 1¼d.; in the case of the six mile pits, 1⅛d.; and in the case of Blackhouse (which is close to Ayr), about 3d. per ton per mile.

"In my opinion this method of calculation is illegitimate. A simple mileage standard is not, in my opinion, applicable to the pursuers' rates under article 5. It cannot, I think, be held that the parties to the agreement intended that the rates under article 5 should be judged by such a standard. Nothing seems plainer than that the rates in question were fixed altogether irrespective of mileage. The 8d. rate applies equally whether the pits are distant eight miles or seven miles or six miles, and would equally apply if pits were opened within the district mentioned, ten miles or twelve miles from Ayr. Moreover, the 6d. (Blackhouse) rate is, judged by mileage, about three times higher than the 8d. rate, and altogether it is quite obvious that article 5 proceeded on the principle first (as between the 8d. and 6d. rates) of charging higher rates per mile for short distances than for long; and next (as among the various pits within the Enterkine and Sundrum district) of ignoring mileage altogether. How in these circumstances it can be predicated that the Lanemark rate being $\frac{1}{2}\frac{3}{3}$rds. of a penny per mile for twenty-three miles is a lower rate in the sense of the agreement than either or both of the pursuers' rates under article 5, I do not understand. It is impossible to say what would have been the agreement rate for twenty-three miles had the pursuers' district extended to that radius. Judged by the difference between the two rates stipulated, it is quite possible that for so long a distance the rate would have been quite as low as the Lanemark rate.

"In point of fact (apart from the difficulty of at all breaking up lump rates into mileage rates, and apart also from the difficulty that, when so broken up, the result is not one but several mileage rates) the pursuers' contention involves, as it seems to me, this cardinal absurdity. It assumes that rates for long distances were, according to the intention of the parties to this agreement, to be charged for at the same rate per mile as short distances. But this is contrary to all practice and all experience, and the absurdity is well illustrated by taking the 6d. rate from Blackhouse and applying the pursuers' principle to that rate. The result would be that because Lanemark (twenty-three miles) gets a rate of 1s. 7d., the Blackhouse rate (two miles) would have to be reduced from 6d. to something like 1½d. in gross, or 3¼d. per ton per mile, notwithstanding that for distances under six miles, the minimum rate shown on any of the tables or scales produced is 1½d. per ton per mile.

"It appeared to be thought that the adoption of a simple mileage standard receives support from the case of *Mackinnon*. That, however, is not so. The pursuers in that case were themselves charged according to a mileage scale graduated according to distance, and there was no difficulty in applying that scale, both to the pursuers' traffic and to the traffic of the competing traders who were said to have got lower rates; Accordingly, what was there done was first to compare the lower rate complained of with the rate which according to the graduated mileage scale, was the appropriate rate, and then to reduce the pursuers' rate proportionately to the difference between the appropriate rate and the actual rate charged to the competing traders. This method was obviously legitimate, and made full allowance for the diminution of the mileage rate according to distance; and accordingly all that was struck at in *Mackinnon's* case was an undue diminution in the mileage rate, which the difference in distance did not justify. There was no suggestion in that case of a simple mileage standard such as is suggested here. The question was between rates absolutely lower, and rates relatively lower according to a prescribed and graduated mileage scale; and what the Court held was only this, that where 'lower rates' are mentioned in an

agreement for rates fixed according to mileage, the reference is not to rates absolutely lower, but rates relatively lower according to the prescribed mileage standard.

"I reject, therefore, as quite inadmissible the pursuers' first standard of comparison. But, apparently conscious of the difficulties which I have pointed out, the pursuers have on record suggested two other standards of comparison in the shape of two graduated scales or schedules which they find in force on the defenders' system, and by means of which they seek to perform the same comparison as was properly and successfully performed in the case of *Mackinnon*.

"The first of these scales or schedules they find in article 6 of this very agreement, and if that schedule had been applicable to Ayr traffic, and had been the schedule under which the pursuers' traffic here in question was charged, the reference would have been no doubt legitimate. But the conclusive answer, I think, is that the schedule in the 6th article is expressly confined to traffic to places other than Ayr and Troon, while both the Lanemark traffic and the pursuers' traffic is traffic to Ayr. The schedule in question therefore cannot possibly form a standard of comparison between the pursuers' and the Lanemark Company's traffic to Ayr. It not only does not apply to both—it does not apply to either. Moreover, it is a schedule by which it would be quite unfair to judge the pursuers' rates; for this reason if for no other, that it starts on a higher scale than the pursuers' rates—I mean those under article 5. The pursuers' 8d. rate under article 5 would, under the schedule in article 6, have been 9d., 10d., and 11d., according to the distances from Ayr of the respective pits. To say therefore that the Lanemark rate is lower than the schedule rate in article 6, is by no means to say that the Lanemark rate is lower than the pursuers' rate. The pursuers' rate is also lower than the schedule rate. But yet this is really what the pursuers' second method of calculation comes to. The matter is perhaps a little complex; but so soon as it is understood, the fallacy is I think apparent.

"The second schedule or scale, to which the pursuers appeal, is in my opinion, even more obviously inadmissible. It is a scale or schedule fixed under a totally different and subsequent agreement—viz., an agreement, dated in 1875, with a number of coalmasters in the Kilmarnock district, not including either the pursuers or the Lanemark Company. To that agreement there is a schedule of rates appended, graduated according to distance; and the pursuers' suggestion is that, because the Lanemark rate is lower than the rate fixed by that schedule for the Lanemark distance (twenty-three miles), it (the Lanemark rate), is therefore lower than the rate charged to the pursuers under article 5 of the pursuers' agreement. I confess I am quite unable to understand how this follows; or indeed, how this Kilmarnock agreement can in any way be a medium of comparison as between the pursuers and the Lanemark Company. In point of fact the rates in the Kilmarnock scale bear no sort of relation to the rates under the pursuers' agreement, and in particular to the rates under article 5. They are in one case (that of the six-mile pit) fractionally lower, but in all other cases they are considerably higher; and therefore, to say that the Lanemark rate is lower than the Kilmarnock rate for the same distance is really, it seems to me, to say what has no possible bearing on the question.

"I therefore find that the pursuers have failed to set out any facts or figures which imply or enable me to affirm that the Lanemark rate is lower than all or any of the pursuers' rates under article 5. And this is tantamount to saying that the pursuers have not stated a relevant case, and that their action must be thrown out. I have not found it necessary to decide—and indeed it is impossible to do so by anticipation—what exactly the agreement means when it speaks of lower rates. It may be that in some future case rates may come into controversy, the amounts and conditions of which may make it possible, or even easy to affirm that they are lower than the agreement rates. But for the purposes of the present case it is, I think, enough that the Lanemark rate complained of is not shown to be a lower rate in the sense of the agreement, assuming everything to be true which the pursuers aver.

"I have said nothing as to the minor question, as to the Galston rate to Troon Harbour. The same reasoning applies *mutatis mutandis*.

"Neither have I said anything as to the pursuers' title to sue. I assume their title, at least as regards the period subsequent to 1877. Indeed, I incline to be of opinion that the agreement is one which it was intended should be assignable to Mr Gordon's successors in the collieries, and which was therefore well assigned to the present firm by the contract of copartnery. But it is not necessary to decide those points or either of them. I find the action irrelevant on its merits, and dismiss it with expenses."

The pursuers reclaimed, and argued—The Lord Ordinary was wrong in thinking that the pursuers had produced no standard by which the two rates could be tested. The case was peculiar in this way, that it was the first time two lump sums charged as rates for the carriage of coals had to be compared. The pursuers, however, reduced both the lump sums to a mileage rate, taking into account the length of the distance sum, and the actual amount paid per ton. When this was done it was found that the Lanemark Company paid a smaller rate per ton per mile than the pursuers did under the agreement, therefore the railway company were bound to reduce their rates so as to be equal to the Lanemark Coal Company's rates. The case was therefore entirely within *Mackinnon's* case. The distance could be taken into calculation only for ascertaining what was the rate per ton per mile paid in the lump sum. *Mac-*

kinnon's case had decided that the giving of distance meant the giving of money. It might be that in the proof, which was all that was now sought, the defenders might be able to show that in calculating the rate per ton per mile, which was afterwards averaged into a lump sum, they had gone upon the principle of giving a lessening rate as the distance increased, but it was not necessary for the pursuers to aver that, it was for the defenders to prove it. The pursuers had only to aver that the rate per ton per mile charged to any other coalmaster carrying his goods to the same destination was lower than the rate paid by the pursuer. If this was not so, the railway company could neutralise the natural advantage obtained by the pursuers' position near a shipping port, and favour the Lanemark Company to their disadvantage. If that plan was not satisfactory, then the pursuers were willing to have the two sums reduced to mileage, and tested by what was called the Kilmarnock scale, which was a very general scale, but even under that the defenders were liable in a large sum—*Mackinnon* v. *Glasgow and South-Western Railway Company*, July 15, 1885, 12 R. 1309; *Dalmellington Iron Company, Limited* v. *Glasgow and South-Western Railway Company*, February 26, 1889, 16 R. 523.

The respondents argued—This case did not fall under the principle of *Mackinnon's* case at all. The pursuers here agreed to have their coals carried for a certain distance, a varying distance for a certain lump sum—that was the bargain; but they now brought an action against the railway company, and asked to have their lump rate turned into a mileage rate. It was impossible to compare the pursuers' lump rate and the Lanemark lump rate; they had been arranged for with all the varying accessories which went to the making up of a lump rate. The reason of the difference was that the Lanemark rate was a rate for a long distance, while the pursuers' rate was for a short distance, and the only way in which this equality clause could come into operation was where the distances, the rates for which were to be compared, might reasonably be considered the same. The pursuers ignored the question of the distance altogether, but that question could not be put out of sight as it was plain that the rates for a long and a short distance might be different, the amount for labour and haulage being plainly very different. The pursuers had no averment that they would calculate the rate according to a graduated scale, all that they asked for was to find the rate per ton per mile paid by each company, and if by that rough division it was found the pursuers paid more per mile than another company the rate was to be reduced to them. There was also no averment as to the Kilmarnock scale, and the pursuers were not within the limits to which that scale applied. The defenders withdrew the plea of no title to sue, to which the Lord Ordinary referred.

At advising—

Lord Justice-Clerk—The pursuers ask by the declaratory conclusion of the summons that it be found and declared that the defenders "are not entitled to carry coals from coalfields farther distant from Ayr and Troon than the coalfields mentioned in article 5 of an agreement between the defenders of the first part, and John Taylor Gordon, Esquire of Blackhouse, and then the sole partner of the pursuers' firm of the second part, dated 27th and 28th February 1865, at a lower rate per ton per mile than the pursuers' pay under said article without giving the pursuers a corresponding reduction." The article here referred to provides that "the rates payable by the second party to the first party on coal carried on the railways to be made under the authorisation of the said Act" [which was an Act empowering certain railways to be made in the counties of Ayr and Dumfries] "from Enterkine, Sundrum, and adjacent coalfields to the harbour or other place of sale at Ayr, shall be 8d. per ton; from these coalfields to the harbour at Troon 1s. 5d. per ton, and from Blackhouse to the harbour or other place of sale at Ayr 6d. per ton." Clause 6 of the agreement contains a proviso which is applicable to the agreement in clause 5, that "in the event of the first party charging to any other coalmaster or coalmasters or other parties in the coal trade in competition with the second party, rates lower than those fixed by this agreement, then the first party shall be bound to reduce the rates fixed by this and the preceding article" [that is, the 5th article] "to the rates given by them to the said competing parties, which reduced rate shall only continue, however, so long as the said reduced rate is given to said competing parties."

The pursuers aver that they for many years have paid the rates set forth in article 5 in so far as traffic from the Enterkine, Gadgirth, and Sundrum districts is concerned, but that there has been no Blackhouse traffic—that accordingly they have been paying 8d. per ton from these districts to Ayr. They further aver that they have recently discovered that the defenders have for sixteen years been allowing to a colliery company carrying on business at Lanemark Colliery, New Cumnock, lower rates than those charged to the pursuers, and that accordingly the pursuers were entitled to have their coals carried at rates below those stipulated for in article 5, and they seek to recover the difference between the full rate which they have paid during the sixteen years, and the reduced rate which they maintain they were entitled to in accordance with the proviso appended to article 6.

There are other rates given to other traders of which the pursuers complain, but in considering the question of relevancy, which is the only question now before the Court, it is unnecessary to take any note of these, for a consideration of the case as regards Lanemark is sufficient. If there is no relevant case as regards the Lanemark rate, there can be none as regards any of the other alleged cases. Lanemark may be taken as a test case.

The pursuers' averments make it plain that they themselves do not pay a mileage rate in the strict sense of a fixed rate per mile regardless of distance. For in one case they are bound to pay 6d. for a distance of only two miles, namely, Blackhouse to Ayr, in other cases they pay 8d. for six miles, 8d. for seven miles, and 8d. for eight miles, namely, Enterkine, Gadgirth, and Sundrum to Ayr. The rates they are liable to pay are agreed-upon lump rates from different districts, and while fixed undoubtedly upon considerations of distance in some degree, are not fixed by mileage alone.

The pursuers' contention is that the defenders are carrying coals from Lanemark to Ayr at a rate of 1s. 7d.; the distance being twenty-three miles, and that this is a lower rate than those fixed by their agreement. The mode in which they set this forth in averment is to be found in article 7 of the condescendence—"A corresponding reduction in favour of the pursuers to the said rate so given to Lanemark Colliery to Ayr would entitle the pursuers to have their said rate of 8d. per ton to Ayr, which they were charged by and paid to the defenders, reduced to 5 11-13d. per ton, so as to make it bear the same relation to 8d., which the Lanemark rate bears to the rate they should have been charged. The pursuers are therefore entitled to a rebate of 2 2-13d. per ton on all the coal and dross carried for them by the defenders to Ayr, from the beginning of 1874 down to 31st December 1887, and which amounts, on the quantity of 2,526,425 tons so carried, to the sum of £22,673, 0s. 11d., conform to the detailed statement No. 1 herewith produced." Now, this averment does not in any way distinguish between one distance and another as regards the pursuers' traffic. It simply avers that where the pursuers, whether for one number of miles or for another, have been paying 8d., they should only have been paying 5 11-13d. instead of 8d. It is plain therefore that while they divide up the rate paid by Lanemark into exact mileage, and treat it as a uniform mileage rate only, they do not in formulating their claim for repayment of what they allege to have been exacted from them contrary to their agreement, attempt to state their case upon the footing that their rates are mileage rates and nothing else. Indeed it is impossible for them to do so, for under their agreement if it were to be treated as being an agreement at so much per mile, they are liable to 3d. a mile in one case, and a penny and a fraction per mile in other cases, and to an exact penny per mile in yet another case. It would follow therefore if the words in the proviso in article 6, "rates lower than those fixed by this agreement," meant "lower rates per mile than those fixed by this agreement," without regard to distance, that any rate given by the defenders to other collieries if lower in proportion to mileage than any of the sums agreed to by the pursuers, would put an end to the rates of 6d. for Blackhouse, and 8d. for Enterkine, Gadgirth, and Sundrum, and entitle the pursuers to have their coals carried at one mileage-rate, whether from a greater or a less distance. Thus if Lanemark coals were carried for say 3s. 4d. per mile, the rate from Blackhouse would be 1s. ½d. instead of 6d., and the rate from Enterkine about 6½d. instead of 8d. This would be a complete subversion of the agreement by which a charge of only about 33 per cent. more is made for four times the distance as between Blackhouse and the pits which are eight miles from Ayr. It is plain that no such interpretation can be put upon the agreement, and the pursuers do not attempt to put their case on that basis.

Accordingly, the pursuers in stating their case confine their demand to a deduction not from a rate per mile alleged to be paid by them, but from the lump sum of 8d. paid by them for various distances; in other words, they demand that a deduction from each 8d. paid is to be made in proportion to the greater or less number of miles from the pit to Ayr. They ascertain the proportion to mileage of the 1s. 7d. paid by Lanemark, and demand repayment of the difference between the 8d. paid for each ton of coals by them and what would have been paid if they had paid as much per mile as that ascertained proportion. They calculate this out either in a general way at 2 3-13d. per ton all round, or alternatively by dividing up the 8d. paid from each pit into a mileage rate according to the distance of the pit from Ayr, and calculating the difference between a mileage rate so ascertained and the rate per mile which is represented by the 1s. 7d. charged to Lanemark. It may here be noticed in passing that while the case is not in fact complicated by the separate high rate chargeable for Blackhouse traffic, as it so happens that since the date of the agreement the Blackhouse pits have not been worked, the pursuers' contention involves in logic the startling proposition, that if Blackhouse pit had been working they would have been entitled to a deduction from the agreed-on sixpenny rate of upwards of 4d. Nor is this all. It would involve further, that even if the defenders had charged Lanemark twice as much per mile as the pursuers allege they are paying in their 8d. from the outermost pit they are now working, they would even then have been entitled to a deduction of 2d. from the 6d., which under the agreement the defenders could charge for Blackhouse traffic.

It appears to me to be certain that the attempt to find any absolute standard of comparison between the Lanemark rates and the rates agreed upon between the pursuers and defenders, uniformly calculated by mileage, regardless of distance, necessarily fails. The pursuers' own rates, if mileage be the standard, must be held to be adjusted on a varying basis as regards mileage, a short distance being charged a higher rate by mileage than one that is longer. There is therefore in the pursuers' agreement no standard mileage rate with which a rate given to another trader can be compared if it be desired to ascertain

whether that other trader is being charged a lower rate per mile. If the agreement were to be read as referring to a "rate lower" than any rate whatever charged to the pursuers, their case would necessarily fail. For the pursuers are taken bound to pay in one case 3d. per mile, if a mileage standard be taken, which, it is admitted, would be an absolutely prohibitory rate if applied to long distances. But the terms of the agreement make no distinction between one rate and another. It speaks in the plural of "rates lower than those fixed by this agreement." Now, if that does not mean "any rate per mile lower than any rate per mile fixed by this agreement"—as it plainly does not—then it is equally plain that it does not mean "any rate per mile lower than one particular rate per mile fixed by this agreement." In whatever way the agreement is turned in order to find a mileage standard for comparison, the difficulty of doing so seems to be insuperable.

I come therefore to the conclusion that the pursuers' averment that the defenders have been charging Lanemark 1s. 7d. for carrying their coals, and that that rate divided up by mileage gives a rate per mile a fraction less than is brought out by dividing up by mileage the pursuers' rate of 8d. under their agreement for carriage from Enterkine, Gadgirth, and Sundrum, is not a relevant averment. I find nothing to indicate that the agreement sets up a standard of mileage without regard to distance. In so far as the agreement gives any indication of a standard, it must, I think, be held to be one which does have regard to distance in fixing a rate, a higher rate in proportion to distance being charged for a short distance than for a long.

I do not see how a standard by mileage can be fixed in this case, having regard to the varying charges fixed by the agreement, unless it be a standard of mileage rate graduated according to distance. But if such a standard were adopted it would be fatal to the pursuers' case. For any graduated scale by which a diminished rate per mile would be permissible in proportion to increase of distance would necessarily result in the Lanemark rate being a perfectly fair rate in comparison with the rate charged to the pursuers. For while the rate of 8d. to the furthest off pit of the pursuers is only one-third of the rate per mile stipulated for from Blackhouse, on distances of eight miles and two miles respectively the Lanemark rate is only a fraction below a penny a mile, while the pursuers' rate for a distance thirteen miles less is only 1d. per mile.

But the pursuers put forward another standard for comparison. They found upon the rates fixed by article 6 of the agreement between the pursuers and defenders. It appears to me that the Lord Ordinary is right in holding that the rates in article 6 cannot be appealed to. For the rates under the schedule applicable to article 6 are expressly confined by the article itself to traffic to other places than Ayr and Troon. But the pursuers' conclusions relate solely to traffic going to Ayr and Troon, and that seems conclusive upon the question.

The pursuers further found upon an agreement with certain coalmasters for the Kilmarnock district, and they endeavour to establish a comparison between the Lanemark rates and rates charged to these coalmasters. I am unable to see how a comparison between Lanemark rates and rates in a different district can affect the question in this case. The agreement founded on in this case relates to lower rates as between the pursuers and coalmasters in competition with them in trade to Ayr and Troon. A scale fixed for another district cannot be appealed to to test the question whether Lanemark is being charged "rates lower" than those fixed by the agreement itself.

Whether the pursuers could make any case against the defenders upon the ground that, having regard to distance, the rate allowed to Lanemark was not a fair rate in comparison with the rates charged to them under the agreement, and that therefore the proviso comes into operation, we are not called upon to determine. The pursuers have no averments on record under which such a case could be considered, and I understand from what occurred at the debate that they do not propose any amendment for the purpose of enabling them to have that question determined.

I do not think it necessary to notice any of the cases referred to by the parties at the debate with the exception of *Mackinnon*. That case seems to me to be absolutely distinguished from this one by the circumstance that every rate brought into question in that case was a rate stated in express terms as a definite mileage rate. The conditions were—"Any distance above six miles and not exceeding sixteen miles, the sum of one penny farthing per ton per mile. When carried any distance above sixteen miles and not exceeding twenty-six miles, the preceding rate for the first sixteen miles, and for every mile thereafter the sum of three farthings per ton per mile. When carried any distance exceeding twenty-six miles, the preceding rate for the first twenty-six miles, and for every mile thereafter the sum of one half-penny per ton per mile." This language is different from and in direct contrast to the language of the agreement in the present case, which makes no mention of any rate per mile, but fixes two lump sums, one for a fixed distance and another for certain distances varying between six and eight miles. In *Mackinnon's* case it was only necessary to divide up the rate charged to any trader for, say twenty-five miles, by applying one penny farthing per mile to each of the first sixteen miles, and dividing the remainder by nine. If such division by nine brought out a less figure than three farthings, then the trader was being charged a less rate than *Mackinnon*. No such mode of calculation can be applied here. The case of *Mackinnon* seems to me to have a bearing on this case only in so

far as it brings into marked relief the fact that a uniform mileage rate without regard to distance is not according to practice in the case of such traffic as that of the pursuers. It would be very surprising indeed if it were.

I arrive without difficulty at the conclusion that we should adhere to the Lord Ordinary's interlocutor, and I move your Lordships accordingly.

The other Judges concurred.

The Court adhered to the Lord Ordinary's interlocutor and dismissed the reclaiming-note as irrelevant.

Counsel for the Appellants—Asher, Q.C. —Wallace—Hunter. Agents — Mackenzie & Black, W.S.

Counsel for the Respondents — D.-F. Balfour, Q.C. — Guthrie. Agents — John Clerk Brodie & Sons, W.S.

Friday, July 3.

FIRST DIVISION.

CHAMBERS AND OTHERS *v.* THE EDINBURGH AND GLASGOW AERATED BREAD COMPANY, LIMITED.

Public Company—Rectification of Register —Misrepresentation—Shares Applied for on Faith that Certain Parties would be Directors.

A company was formed in July 1888, and the memorandum of association bore that the registered office would be in England. The prospectus, which was issued in December 1888, stated that E would be chairman and C one of the directors. In the copy of the memorandum of association printed on the back of the prospectus it was stated that the registered office would be in Scotland. The shares were applied for. In consequence of the above discrepancy the company was wound up and a new company was formed and registered in Scotland. A circular was addressed to applicants intimating this, and stating that "as the company will now fall to be managed in Glasgow, Messrs E and C, the two members of Parliament (whose Parliamentary duties will prevent their attendance at the board)," and another, had retired. The circular requested applicants to give their consent to the course followed, and to make new application for shares.

Certain shareholders who had applied after receiving the circular petitioned the Court to remove their names from the register on the ground that they had acted in the belief that E had agreed to be chairman and director, that he had a good opinion of the company, and that he had retired from these offices only because his Parliamentary duties would interfere with his attendance, but that this belief had been induced by the misrepresentation of the promoters and was unfounded in fact.

It appeared on a proof that the directors were justified in advertising E as chairman of the original company, and that he had withdrawn along with C on account of certain differences with the other directors.

The Court *refused* the petition, holding that after receiving the circular the petitioners could not have relied on E and C being directors, and that there was no fraud on the part of the other directors, or such misrepresentation as to entitle the petitioners to have their names removed from the register.

This was an application by certain shareholders of the Edinburgh and Glasgow Aerated Bread Company, Limited, to have their names removed from the register of the company in consequence of their having been induced to take shares by misrepresentation as to the parties who were to form the board of directors. The company was formed in July 1888. The second clause of the memorandum of association bore that the registered office of the company would be situated in England. The prospectus, which was issued in December 1885, stated, *inter alia*, that the following gentlemen were to be the chairman and directors of the said company, viz.—(1) Peter Esslemont, Esq., M.P., Aberdeen (chairman); (2) G. B. Clark, Esq., M.P.; (3) William M'G. Burns, Esq., M.D.; (4) John M. Bryce, Esq., Glasgow; (5) John Crawford, Esq., Glasgow; and (6) James M'Cankie, Esq., Edinburgh. In the copy of the memorandum of association printed on the back of the prospectus it was stated that the registered office of the company would be situated in Scotland. The petitioners applied for shares in the company. On the above discrepancy being observed by the solicitors of the company they advised the Glasgow directors of the company that they were not in safety to proceed to allotment, and it was arranged that the company should be wound up and a new company formed, to be registered in Scotland. The English company was accordingly wound up. On 31st December 1888 a circular was issued to the petitioners and others who had applied for shares by Mr Andrew Barr, interim secretary of the said company, stating, *inter alia*, that owing to an error in the memorandum of association to the effect that the registered office of the company would be situated in England, instead of in Scotland, it had been found necessary to register the company in Scotland, and to manage the business in Glasgow, that the company had accordingly been registered in Scotland, and that, "as the company will now fall to be managed in Glasgow, Messrs Esslemont and Clark, the two members of Parliament (whose Parliamentary duties will prevent their attendance at the board), and Mr M'Cankie have retired, but the remaining directors