prevent drunkenness on the premises. That indicates very clearly that the drunkenness is the drunkenness not of the publican himself, which is indeed struck at in another clause of his certificate, and not the drunkenness of those employed by him, but the drunkenness of customers frequenting the public-house, in which case the statutory presumption may be relied upon by the prosecutor.

I am confirmed in that opinion by an examination of the facts in the present case. Plainly the 98th section contemplates a case in which it is possible to prove that all reasonable steps were taken for preventing drunkenness, but here it is impossible to indicate anything which the publican could have done to have prevented the drunkenness on this occasion. The magistrate apparently came to the conclusion that all steps had not been taken, because no outside inquiry was made into the employee's character, although the appellant was satisfied with his servant's conduct during the two months that he had been with him—during which he had promoted him for good conduct apparently—and was satisfied with the certificate which he had obtained at the date when he took him into his service.

No outside inquiry and no other precaution could have prevented the act of drunkenness on 5th May. They could have no relation whatsoever to that act, and accordingly the view which the magistrate took made it incumbent upon the accused to prove what was utterly impossible for him to prove. All that the appellant could say was that he had employed a man whose conduct was apparently unimpeachable during the considerable period that he was with him, and who is not said to have failed in any other duty. Accordingly in my view the presumption raised by the 98th section of the statute does not apply in a case where the drunkenness is that of a publican's servant; but if it did apply I should be of opinion in this case that the evidence upon which the magistrate came to the conclusion that the publican had not taken all reasonable steps for preventing drunkenness was quite inadequate. I am therefore for answering the question put to us in the negative.

LORD MACKENZIE — I am of the same opinion. The complaint against the licensee here is that on the 5th of May "you did knowingly permit drunkenness within the premises libelled contrary to your certificate and the Licensing (Scotland) Act 1903, section 53." In my opinion there is not only no evidence adequate in law to support a conviction upon that charge, but there is no evidence at all, and that I think is what the prosecutor had to prove.

The argument submitted by Mr Constable upon the construction of section 98 would lead to this extraordinary result, that if a licensee engaged a servant who was beyond all suspicion and reproach as regarded his past life, with an excellent certificate from his last employer coming down to the day before he entered the licensee's employment, and if that servant in his master's presence entered on his duties in the public-house in a state of complete sobriety, yet if that servant was found drunk one hour or two hours after his master's departure the master would be guilty of a breach of his certificate, and nothing that he could prove or show would avail him anything. I think the case I have figured is sufficient to show that section 98 was really not intended to apply to such a case as the present, but was, as your Lordship has already said, intended to make proper provision for the prevention of drunkenness on the part of customers resorting to public-houses.

If, however, it had been necessary to go into the question whether the licensee took all reasonable steps to prevent drunkenness, I think it only fair to him to say that for my part I should have been of opinion that there was no legal evidence upon which the magistrate was entitled to take the view that the licensee had not taken all reasonable steps. I am unable for my part to hold that he was bound to be on his guard against the character of the certificate which was presented to him. It was suggested that he was not entitled to accept a copy, and that without making further inquiries he was not entitled to accept the certificate as genuine. I do not think that there is evidence in the case which entitled the magistrate to take that view of the case.

LORD ANDERSON—I agree entirely with what your Lordships have said.

The Court answered the question of law in the negative.

Counsel for the Appellant — Dean of Faculty (Clyde, K.C.) — W. J. Robertson. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Respondent — Constable, K.C.—Lippe. Agents—Miller, Mathieson, & Miller, S.S.C.

COURT OF SESSION.

Tuesday, November 9.

FIRST DIVISION.

[Sheriff Court at Ayr.

GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY *v.* POLQUHAIRN COAL COMPANY, LIMITED.

Railway — Carrier — Demurrage — Undue Detention of Trucks — Railway Rates and Charges, No. 22 (*Glasgow and South-Western Railway*), *Order Confirmation Act* 1892 (55 *and* 56 *Vict. cap. lx*) — "*At the Request or for the Convenience of*" *a Trader.*

The Railway Rates and Charges, No. 22 (Glasgow and South-Western Railway), Order Confirmation Act 1892, Schedule, section 5, enacts — "5. The company may charge for the services hereunder mentioned or any of them, when rendered to a trader at his request or for his convenience, a reason-

able sum by way of addition to the tonnage rate. . . . (iv) The detention of trucks, or the use or occupation of any accommodation before or after conveyance beyond such period as shall be reasonably necessary for enabling the company to deal with the merchandise as carriers thereof, or the consignor or consignee to give or take delivery thereof. . . ."

A trader ordered trucks from a railway company to convey coal to a consignee to whom after appropriation the coal belonged. The consignee advised the railway company to send on the coal, but failed to take delivery within the free days allowed therefor. *Held* that the undue detention of the trucks was a service at the request and for the convenience of the consignor, and that he was primarily liable to pay demurrage therefor.

The Glasgow and South-Western Railway Company, *pursuers*, brought an action in the Sheriff Court at Ayr against the Polquhairn Coal Company, Limited, *defenders*, for payment of £48, 4s. 6d., being demurrage for the undue detention of trucks.

The pursuers, *inter alia*, pleaded—"(2) The waggons in question having been supplied by the pursuers to the defenders at their request, and the same not having been discharged within the time allowed for discharge, the defenders are liable to pay demurrage in respect of such detention."

The defenders pleaded, *inter alia*—"(3) The waggons mentioned in the account sued on not having been detained at the defenders' request or for their convenience, the defenders should be assoilzied. (4) The waggons referred to not having been detained by the defenders, nor by anyone for whom they are responsible, they are entitled to absolvitor."

The *facts* are given by the Sheriff-Substitute (BROUN), who on 17th March 1914, after a proof, pronounced the following interlocutor:—"*Finds in fact* (1) that by circular, dated 1st August 1908, the pursuers, along with the Caledonian and the North British Railway Companies, gave notice that on and after 1st February 1909 demurrage charges in respect of undue detention of waggons would be enforced against traders, and that the persons giving the orders for the waggons would be held primarily responsible for the due loading and discharge of waggons and for payment of demurrage charges; (2) that a test case was raised between the Railway Companies and the coalmasters by arbitration before the Board of Trade, and was referred to the Court of the Railway and Canal Commission; (3) that the said Court on 26th June 1911 pronounced an order allowing the charges in the circular but imposing certain conditions as to free days for loading and giving delivery before conveyance and taking delivery and unloading after conveyance; (4) that on various occasions between 1st June 1910 and 31st July 1911 the defenders gave orders to the pursuers for the supply of empty waggons for the carriage of coal, that these waggons were supplied by the pursuers to the defenders and loaded with coal by the defenders and handed over by them to the pursuers for the carriage of coal over the line of the pursuers and for delivery at the harbours of Troon and Irvine to the defenders' consignee J. K. Campbell; (5) that the waggons were conveyed by the pursuers to the destinations ordered by the defenders and were there placed for discharge at the disposal of the said J. K. Campbell; (6) that on said occasions the waggons were detained at said ports before discharge for periods beyond the free periods allowed by said order of 26th June 1911, and demurrage accounts were thereby incurred amounting in all to £48, 4s. 6d.; . . . and (10) that the defenders refuse to pay the said accounts and that these accounts still remain unpaid: *Finds in law* that the circular in so far as it provides that the person giving the order for the waggons is primarily responsible for the due loading and discharge of the waggons is not in excess of the powers conferred on the pursuers by section 5 of the Schedule attached to the Railway Rates and Charges, No. 22 (Glasgow and South-Western Railway, &c.), Order Confirmation Act 1892, and that the defenders are liable in payment to the pursuers of the sum of £48, 4s. 6d., being the amount of the said accounts . . . : Therefore decerns against the defenders for payment to the pursuers of £48, 4s. 6d., with interest at 5 per cent. from the date of citation: Finds the defenders liable to the pursuers in 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 is an action brought by the Glasgow and South-Western Railway Company for the amount of an account for demurrage on waggons which were supplied to the defenders, and after being loaded with coal at the Polquhairn and Mansfield Collieries belonging to the defenders were sent by them over the pursuers' lines to Troon and Irvine harbours addressed to their consignee J. K. Campbell, colliery agent, Troon, and which after being placed by the pursuers at the disposal of the consignee were detained beyond the free days allowed for taking delivery and unloading. The defenders admit that for the purposes of the action the amount of the account is correct.

"The questions to be dealt with are two —(1) Are the defenders responsible for the demurrage of the waggons by their consignee? (2) [*His Lordship dealt with a contention which was abandoned by the defenders on appeal.*] I shall deal with these questions separately.

"*Question* 1. On 1st August 1908 the Caledonian, Glasgow and South-Western, and North British Railway Companies issued a circular giving notice 'that on and after 1st February 1909 demurrage charges in respect of undue detention of waggons and sheets, and siding rent in respect of undue detention of traders' waggons on the sidings and lines of the companies, will be enforced.' The circular also stated—'The person who gives the order

for waggons will be held primarily responsible for the due loading and discharge of the waggons, and the companies reserve right in any or all cases to require a written order by the person by whom the waggons are ordered undertaking responsibility for their due loading and discharge and for payment of demurrage charges.' There were appended as part of the circular a table of charges, and also certain conditions of supply of waggons and sheets, including the following: — '2. The person (including a company or partnership) by whom or on whose account the order for waggons or sheets is given shall be primarily responsible for their due loading and discharge, and if the waggons or sheets are unduly detained before or after conveyance the person by whom or on whose account the waggons or sheets are ordered shall be primarily liable to pay all demurrage charges incurred.'

"The statutory authority under which the railway companies proposed to make these charges was section 5 of the Railway Rates and Charges Acts of 1892. These Acts are identical in terms for the three railway companies. The Act applying to the pursuers is called the Railway Rates and Charges, No. 22 (Glasgow and South-Western Railway, &c.), Order Confirmation Act 1892 (55 and 56 Vict. cap. lx). Section 2 of the schedule attached to that Act provides — 'The maximum rate for conveyance is the maximum rate which the company may charge for the conveyance of merchandise by merchandise train, and includes the provision of locomotive power and trucks by the company, and every other expense incidental to such conveyance not otherwise herein provided for.' Section 5 provides — 'The company may charge for the services hereunder mentioned, or any of them, when rendered to a trader at his request or for his convenience, a reasonable sum by way of addition to the tonnage rate: Provided that where before any service is rendered to a trader he has given notice in writing to the company that he does not require it, the service shall not be deemed to have been rendered at the trader's request or for his convenience. . . . (iv) The detention of trucks, or the use or occupation of any accommodation before or after conveyance beyond such period as shall be reasonably necessary for enabling the company to deal with the merchandise as carriers thereof, or the consignor or consignee to give or take delivery thereof.'

"The coalmasters and other traders objected to the demurrage charges, and a test case was raised between the railway companies and the coalmasters, and was referred by the Board of Trade under section 5 of the schedule and section 6 of the Board of Trade Arbitration Act 1874 to the Court of the Railway and Canal Commission. The case is reported, being *Caledonian Railway Company* v. *Coltness Iron Company*, Jan. 23, 1911, 48 S.L.R. 1065. On 26th June 1911 the Commissioners issued an order allowing the demurrage charges in the circular, but imposing certain conditions as to free days for loading and giving delivery before conveyance and taking delivery and unloading after conveyance. Where the conveyance is to a port no notice of the arrival of the waggons at the port requires to be given by the Railway Company.

"Now it seems to be clear that if the terms of the circular are to be given effect to, the defenders, being the persons who gave the orders for the waggons, are the persons primarily liable to pay the demurrage charges occasioned by detention after conveyance. The defenders, indeed, did attempt to argue that they did not order the waggons, and that the pursuers sent the waggons into the collieries without orders. But I think the proof plainly shows that the empty waggons were never sent into the collieries without the orders of the defenders, these orders either being directly given, or there being an arrangement or standing order that empty waggons were to be supplied according to the output in the absence of directions to the contrary.

"But the defenders further contended that even if it be assumed that they ordered the waggons, and were therefore the persons liable in terms of the circular, the circular in so far as it makes them liable for the due discharge of the waggons was outwith the powers of the pursuers under their Act of Parliament, because the detention of the waggons at the port of shipment was not a service rendered at their request or for their convenience, but was caused by their consignee Mr Campbell, over whom they had no control. Looked at superficially this argument appears to have some force in it. But when the matter is given consideration I think the argument is found to be unsound. It seems to me the fallacy of the argument is apparent when it is recognised that there was no contractual relationship of any kind between Mr Campbell and the pursuers. Mr Campbell was the consignee chosen by the defenders. The pursuers had no say in the matter. They had no knowledge as to whether Mr Campbell bought the coal from the defenders f.o.b., or f.a.s. as Mr Campbell states he did, or whether the coal was sold by the defenders to Mr Campbell at pit-head prices, as Mr Newton the defenders' salesman states was the case. The pursuers had to convey the coal to Mr Campbell on the orders of the defenders, and in a question with the pursuers the defenders are the parties responsible for any detention at the shipping port occasioned by their consignee. It will not do for the defenders to say that when the detention took place they had no control over the waggons. It was by their orders that their control was passed on to Mr Campbell, and the detention must be held to be services rendered by their orders and for their convenience. The contract all through was between the pursuers and defenders. The defenders ordered the empty waggons from the pursuers; the defenders filled the waggons with their coal; they ticketed the waggons with the name of the consignee chosen by them; they handed them over to the pursuers for carriage over their lines to be placed at the disposal of the consignee at the port of ship-

ment. Until the defenders' consignee had taken delivery and unloaded the waggons after the conveyance was over and the pursuers had got back the empty waggons, the contract between the pursuers and defenders lasted. It was argued by the defenders that the notice given by Mr Campbell to the pursuers opening up the traffic constituted a contract between him and the pursuers. I think the proof clearly rebuts this proposition. The opening up of the traffic had nothing to do with the contract. It was an intimation sent from the port of shipment that the ship on which coals were to be placed was expected to be ready for coaling in a short time, and this intimation was sent to the pursuers for the purpose of preventing congestion at the harbour. Receipt of the intimation before sending on the coal was required by the pursuers in the interest of both the defenders and themselves. The intimation was given by the agents for the defenders if they had one at the port of shipment, and if there was no agent, as at Troon and Irvine, it was given by the coal merchant to whom the coal had been consigned by the defenders. The defenders argued that their contract with the pursuers ceased when they had delivered the loaded waggons to the pursuers with the consignment note, and that thereafter the contract was between the pursuers and the consignee. As I have already indicated, I think the argument not consistent with the facts. Mr Campbell did not employ the pursuers to bring the coal from the defenders' pits to him; it was the defenders who employed the pursuers to send them the empty waggons, and after these had been filled at the colliery to forward the loaded waggons to the shipping agent or the consignee chosen by the defenders. The defenders point out that in some of the consignment notes produced it is provided that the carriage is payable by the consignee. But this was a matter of arrangement between the pursuers and defenders, and in the printed conditions attached to the notes it is definitely stated (par. 18) that in all cases where charges are not prepaid the sender remains liable for the amount due for carriage.

"It is further noted that when the terms of the Order of 26th June 1911 fixing the amount of the demurrage charges were being discussed before the Commissioners the provision in the circular note that the person giving the order for the waggons was to be responsible for the due loading and discharge of the waggons was under the notice of the Court. This part of the circular is quoted by Lord Mackenzie, who gave the leading opinion, 48 S.L.R. 1066. At p. 1068 he also refers to outward shipment and states—'In this connection it must be kept in view that the circular makes the consignor liable at both ends'; and at p. 1069 he says, under the head of short shipment—'If from one cause or another the coal arriving at the port in the railway waggons cannot be loaded into the ship, the result is that the Railway Company is left with loaded trucks on its hands. The period of conveyance is, however, ended, and the trader cannot maintain successfully that the detention thence arising is chargeable against the Railway Company. The effect of the decisions by this Court is that whatever relates to the exigencies of trade the trader must bear the cost of.' Applying this last sentence to the present case, I hold that the traders are the persons with whom the pursuers have contractual relations, viz., the defenders, and that the detention of the waggons by the defenders' consignee is something relating to the exigencies of trade for which the defenders are responsible in a question with the pursuers, and of which the defenders must bear the cost."

The defenders appealed to the Sheriff (W. LYON MACKENZIE), who on 14th July 1914 pronounced the following interlocutor:—"Refuses the appeal: Adheres to the interlocutor of the Sheriff-Substitute of 17th March 1914 complained of, and decerns: Finds the defender liable to the pursuers in their expenses of the appeal, sanctions the employment of counsel, and remits the case to the Sheriff-Substitute."

Note.—"This case has caused me great difficulty, due to the very able and ingenious argument submitted to me on behalf of the defenders and appellants by Mr Horne, which at first sight appeared convincing.

"After anxious consideration I am satisfied that the contention of the defenders and appellants is untenable, and that the interlocutor of 17th March 1914 by the learned Sheriff-Substitute, as explained in the able and exhaustive note by him thereto, is one with which, if reluctantly, I am compelled to agree.

"It appears to me unnecessary to repeat the circumstances under which the case arises or the procedure relating thereto, as I do not think it could be more lucidly expressed or the several Acts of Parliament referred to better than has been done by the learned Sheriff-Substitute.

"I shall deal with the questions at issue in the case in the order in which they have been considered by the Sheriff-Substitute.

"As the Sheriff-Substitute remarks, the first question to consider is, *Are the defenders responsible for the demurrage of the waggons by their consignee?*

"An ingenious and twofold argument was submitted by Mr Horne on this question.

"He contended, first, that any claim for demurrage in respect of the detention of waggons at the port of loading by the consignees was, in a question with the defenders and appellants, *ultra vires* of the pursuers and respondents.

"He argued that the liability of the defenders and appellants was contained in the traffic receive note, and condition 18 thereof, viz.—'In all cases where the company's charges are not prepaid, the goods are accepted for carriage only upon the condition that the sender remains liable for the payment of the amonnt due to the company for the carriage of such goods, without prejudice to the company's rights, *if any*, against the consignee or any other person'; that a claim for demurrage only arose after the contract for service had ended, and con-

sequently it was beyond the scope of the liability undertaken by his clients under the traffic receive note, and accordingly that if the claim were made thereunder it must fail.

"He further contended that if the claim for demurrage was founded on the conditions set forth in the circular of 1st August 1908 it must equally fail in respect that there is no statutory warrant for the conditions regarding demurrage imposed by that circular.

"I am unable to accept either of these contentions.

"The Railway Rates and Charges No. 22 (Glasgow and South-Western Railway, &c.), Order Confirmation Act 1892 (55 and 56 Vict. cap. lx) provides in the schedule under '1. Maximum rates and charges as follows:—(5). . . . [*quotes, v. supra in rubric*]. . . .

"If I had to determine whether the circular was *ultra vires*, I should be prepared to hold that the same is authorised by the terms of the Act just quoted. But I agree with the learned Sheriff-Substitute that the validity thereof is foreclosed so far as I am concerned by the decision in *Glasgow and South-Western Railway Company, and William Baird & Company, Limited, and Others*, 1910, 14 R. and C.T. Ca. 246, 48 S.L.R. 1065.

"I am therefore of opinion that Mr Horne's second contention on this part of his argument fails. I have somewhat illogically disposed of it first, as it seems to me that it is really a material consideration in dealing with his first contention.

"From the evidence and documents before me I consider it proved that in every case the defenders and appellants ordered the waggons from the pursuers and respondents to be sent to their collieries to be loaded, and that in any case, whether they or the consignees were to pay the freight, the traffic receive note was in the terms given.

"There is further no evidence that the defenders and appellants ever gave any notice to the pursuers and respondents before they took the further use of their waggons after the lay-days had expired, and with them the contract of service, that they did not require such service.

"When the lay-days at the port of loading expired the position of traders cannot, in my opinion, be better expressed than by referring to the case of *Manchester and Northern Counties Federation of Coal Traders' Association* v. *Lancashire and Yorkshire Railway Company* (1910), 10 Railway and Canal Traffic Cases 127, and, quoting the Master of the Rolls, Collins, when he says at p. 136—'Now there is a certain point of time up to which the goods are in the possession of the carrier as much for the carrier's convenience as for that of his customers. That time is decided by the considerations which I have already dealt with, namely, how long would it take for an ordinary trader to effect the operation of taking delivery under the particular circumstances of the place where the delivery was to be had, and so on? Up to that time the goods are in the carrier's possession and under the carrier's liability for the convenience of the carrier as well as the trader. When that time has expired they are there simply for the convenience of the trader, and if they are there, and if and when they begin to be there, for the convenience of the trader only, then the liability of the carrier is at an end and that of the bailee begins,' *i.e.*, the owner of the goods, the trader.

"If, therefore, I am right in the construction of condition 18 endorsed in the traffic receive note, as the defenders and appellants throughout remained the trader as in a question with the pursuers and respondents, they are liable for all claims of demurrage.

"But if I am wrong in this view, then it appears to me that the defenders and appellants cannot escape liability.

"They admittedly ordered the waggons from the pursuers and respondents with due notice of the terms laid down in the circular of 1st August 1908. A contract was thereby entered into between the pursuers and defenders which the defenders have failed to implement, and for the loss and damage arising therefrom they are liable.

"I am therefore of opinion that in any view the contention of the defenders and appellants on this branch of the case fails." [*His Lordship dealt with a contention abandoned on appeal.*]

Having obtained the leave of the Sheriff the defenders appealed to the First Division of the Court of Session.

Argued for the appellants—The respondents had no right under contract or under statute to charge the appellants for demurrage. 1. *Under Contract.*—The only contract between the parties was the receive note. The circular was not part of the contract. It had been repudiated by the appellants, and the respondents knowing of the repudiation had supplied waggons to the appellants, and must be held to have accepted the repudiation. The contract was of conveyance, and differed from charter-party and bills of lading, for the trucks were not hired, nor was notice to the consignee of their arrival necessary. If the respondents' contention was right there was no need to bring in the consignor expressly in the circular, for he was already liable. The consignor was not bound to provide a deliveree. The contract terminated when a reasonable time to take delivery had elapsed—*Chapman* v. *Great Western Railway Company*, 1880, 5 Q.B.D. 278; *Manchester and Northern Counties Federation of Coal Traders' Association* v. *Lancashire and Yorkshire Railway Company*, 1910, 10 R. & C.T. Ca. 12; *Glasgow and South-Western Railway Company* v. *Orr*, 1879, 24 S.L.R. 437. (2) *Under Statute.*—The Railway Rates and Charges, No. 22 (Glasgow and South-Western Railway), Order Confirmation Act (55 and 56 Vict. cap. lx) was the respondents' warrant to make charges, and the circular was binding on the appellants only so far as in terms of the said Act. The statute put the liability for undue detention on the person benefited. He might not be a party to the contract but the consignee. Railways had accepted a third party as liable—*Scottish Central Railway Company* v. *Ferguson*,

Rennie, & Company, 1863, 1 Macph. 750. The Act was no warrant for charging the consignor irrespective of whether the delay was at his request or for his convenience, and in so far as it did it was *ultra vires*. In any event, the detention of the trucks was not at the request or for the convenience of the appellants, and they were not liable therefor. The circular could only fix what were reasonable charges, but could not decide who was liable for them. The question in this case was not decided by the Railway and Canal Commissioners in the *North British Railway Company and Others* v. *Coltness Iron Company and Others*, 1911, 14 R. & C.T. Ca. 246, 48 S.L.R. 1065.

Argued for the respondents—The only contract here was between the parties. There was none with the consignee. The circular was notice to the appellants that charges were to be enforced for demurrage which was due at common law, and that liability to pay was primarily on the appellants, who ordered the trucks. The appellants must be held to have acquiesced in the circular, for knowing its terms they ordered trucks. The contract between the parties did not terminate after a reasonable time to take delivery, for there was an obligation on the appellants to return the empty trucks. The case was on all fours with charter-party, and the liability was on the consignor—*Erichsen* v. *Barkworth and Another*, 1858, 27 L.J. Ex. 472, 1858, 28 L.J. Ex. 95; *Gardner* v. *Macfarlane, M'Crindell, & Company*, 1893, 20 R. 144, 30 S.L.R. 541. If the trucks were not returned, their detention was at the request and for the convenience of the appellants. There was no hardship on the appellants, because they could contract with the consignee as to the payment of demurrage. The receive note was explicit that obligations might remain on the appellants after the obligations on the respondents were at an end. The question in this case was decided by the Railway and Canal Commissioners—*North British Railway Company* v. *Coltness Iron Company, Limited*, 1911, 14 R. & C.T. Ca. 246, Lord Mackenzie at pp. 255 and 259, 48 S.L.R. 1065, at pp. 1066 and 1068.

At advising—

LORD MACKENZIE—In this action the Glasgow and South-Western Railway Company sue the Polquhairn Coal Company for demurrage on wagons they ordered between 1st June 1910 and 31st July 1911. The detention was after conveyance, and the Polquhairn Coal Company were consignors. They maintain that the consignee is liable.

The Railway Rates and Charges, No. 22 (Glasgow and South-Western Railway), Order Confirmation Act 1892, section 5, provides that the Railway Company "may charge for the services hereunder mentioned, or any of them, when rendered to a trader at his request or for his convenience, a reasonable sum by way of addition to the tonnage rate," and includes in the list of services mentioned (iv) "The detention of trucks, or the use or occupation of any accommodation before or after conveyance beyond such period as shall be reasonably necessary for enabling the company to deal with the merchandise as carriers thereof or the consignor or consignee to give or take delivery thereof."

On 1st August 1908 a circular letter was issued to traders by the Caledonian Railway, the Glasgow and South-Western Railway, and the North British Railway. It set out that on and after 1st February 1909 "demurrage charges in respect of undue detention of wagons and sheets, and siding rent in respect of undue detention of traders' wagons on the sidings and lines of the company, will be enforced. . . . The person who gives the order for wagons will be held primarily responsible for the due loading and discharge of the wagons, and the companies reserve right in any or all cases to require a written order by the person by whom the wagons are ordered undertaking responsibility for their due loading and discharge and for payment of demurrage charges."

Then followed a table of demurrage charges and the following conditions applicable to the supply of wagons—"(2) The person (including a company or partnership) by whom or on whose account the order for wagons or sheets is given shall be primarily responsible for their due loading and discharge, and if the wagons or sheets are unduly detained before or after conveyance the person by whom or on whose account the wagons or sheets are ordered shall be primarily liable to pay all demurrage charges incurred." This circular formed the subject of correspondence between the Glasgow and South-Western Railway and the agent representing the Ayrshire Coalowners Association, in the course of which the latter declined to accept as binding any of the terms and conditions contained in it. In 1910 there was an arbitration before the Railway Commissioners as to the charges to be made and the days to be allowed, and the points raised in the pleadings were disposed of by the Order dated 26th June 1911, the terms of which are set out in *The North British Railway Company* v. *The Coltness Iron Company, Limited and Others*, 1911, 14 R. & C.T. Ca. 246, 48 S.L.R. 1065. No reference is made in the order to the question whether the consignor can be made liable for demurrage after conveyance. The question raised in the present case is whether the Railway Company were within their statutory right in imposing this condition upon a consignor who orders wagons from them. This point, which is as to the legality of the condition, was not determined by the Railway Commissioners. Any reference in those proceedings to the conditions now in question only arose incidentally in an arbitration to fix what were fair and reasonable charges.

The argument is that the detention of the wagons after conveyance was not at the request or for the convenience of the consignors. It is proved that the Railway Company's regulations, which contain the conditions above quoted, were published and posted at their stations and copies were delivered to all traders on the system,

including the Polquhairn Company. The wagons were supplied by the Railway Company to the Polquhairn Company at the request of the latter, and in accordance with the regulations. The practice is that after the wagons are loaded the coal company ticket them with the name of the consignee—in the present case J. K. Campbell, Irvine Harbour. The consignor's instructions are conveyed to the Railway Company in the shape of a consignment note. This consignment note is a request by the consigner to convey the traffic to its destination and the name of the consignee is given. The wagons are removed from the colliery by the Railway Company when the traffic is opened. The notice opening the traffic is generally given by the consignee. The only contract, however, is the one made between the consignor and the Railway Company. There is no contractual relation between the Railway Company and the consignee. The opening of traffic by the latter has nothing to do with the contract. Under his contract the consignor is bound to release the wagons at the discharge end on the expiry of the free days allowed as a reasonable period for enabling delivery to be made. It is only through the contract with the consignor that the Railway Company is brought into relation with the consignee at all. The question is one of service rendered under the statute. It is not a question of fault at all. The service was rendered in the present case at the request and for the convenience of the trader. The Railway Company was therefore within their legal rights under the statute in framing the regulations, upon which alone they supplied wagons so as to make the consignor primarily liable for demurrage at both ends. That is the only question the Court is called upon to decide in the present proceedings. It is proved that the wagons were ordered by the Polquhairn Company in the knowledge that this was one of the conditions on which the Railway Company supplied them. It therefore formed part of the contract between them. No repudiation in the correspondence can affect the Railway Company's right. As regards the consignment note, the conditions attached do not affect the Railway Company's rights in this respect. The order of the Railway Commissioners affects the amount to be charged. The other conditions, so far as not affected by that order, stand. The stipulation for a lien on the goods does not affect the Railway Company's right as against the consignor. I am therefore of opinion that the judgment appealed against is right. The grounds are very well stated by the Sheriff-Substitute in his note. For the reasons stated, however, I think that the second and third findings should be recalled. In lieu thereof there should be a finding (2) that at the date when the order for the wagons in question was given by the defenders it was one of the conditions upon which the Railway Company supplied them that the persons giving the order would be held primarily responsible for the due loading and discharge of wagons, and for payment of demurrage charges, and (3) that the defenders knew when they ordered the said wagons that this was the condition on which the Railway Company supplied them. *Quoad ultra* the interlocutors appealed against should be affirmed.

The LORD PRESIDENT and LORD SKERRINGTON concurred.

LORD JOHNSTON was absent.

The Court affirmed the interlocutors of the Sheriff-Substitute and of the Sheriff, dated respectively 17th March 1914 and 14th July 1914: Found in terms of the findings in fact Nos. 1, 4, 5, 6, 8, 9, and 10 of the Sheriff-Substitute's said interlocutor: Recalled the findings Nos. 2 and 3, and in lieu thereof found (2) that at the date when the order for the wagons in question was given by the defenders it was one of the conditions upon which the Railway Company supplied them that the persons giving the order would be held primarily responsible for the due loading and discharge of wagons and for payment of demurrage charges, and (3) that the defenders knew when they ordered the said wagons that this was the condition on which the Railway Company supplied them; and found also in terms of the finding-in-law contained in the Sheriff-Substitute's said interlocutor; and of new decerned against the defenders for payment in terms of said interlocutor.

Counsel for the Appellants — Watson, K.C.—Burnet. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—Sandeman, K.C. — D. Jamieson. Agents — John C. Brodie & Sons, W.S.

Friday, November 12.

SECOND DIVISION.

(SINGLE BILLS.)

[Lord Anderson, Ordinary.

MACKAY *v.* BOSWALL-PRESTON AND ANOTHER.

Expenses—Process—Caution for Expenses—Reclaiming Note—Sequestration of Successful Defender.

In an action for payment of £120 the defenders were assoilzied and the pursuer reclaimed The defenders' estates were thereafter sequestrated and their trustee declined to sist himself as a party to the action. The pursuer having moved the Court to ordain the defenders to find caution, the Court *refused* the motion.

James John Mackay, insurance manager, Harrow, Middlesex, *pursuer*, brought an action against George Houston Boswall-Preston and another, carrying on business as motor engineers at 10 Queensferry Street, Edinburgh, *defenders*, for payment of £120 sterling as commission due to him in procuring a loan of £12,000 for the defenders. The defenders pleaded, *inter alia* — "(2) The loan of £12,000 not having been ob-