action, and at the time when I heard the appeal, the question whether the defender was entitled to obtain from the Land Court a renewal of his tenancy as a statutory small tenant was still under the adjudication of the Land Court; the defender could not therefore be said to have no title of possession, and an action of ejection was not competent."

As to whether under recent legislation ejection by summary process is competent, or whether an ordinary action of removal is not still necessary, I desire to express no opinion; and I also express no opinion on the question of whether it was competent for the tenant to say, even after the Land Court had refused his application, that he was entitled to retain possession of the farm on the ground of tacit relocation, in respect that no notice of termination had been given by the landlord six months prior to the expiry of the lease.

I am of opinion that the appeal should be refused.

LORD GUTHRIE and LORD HUNTER concurred.

LORD DUNDAS and LORD SALVESEN were not present.

The Court dismissed the appeal.

Counsel for the Pursuer (Appellant)—Moncrieff, K.C.—MacRobert. Agents—Bonar, Hunter, & Johnstone, W.S.

Counsel for the Defender (Respondent)—Blackburn, K.C.—Dykes. Agents—Wilson & Matthew, S.S.C.

Friday, November 24.

FIRST DIVISION.

[Lord Hunter, Ordinary.

CALEDONIAN RAILWAY COMPANY *v.* CLYDE SHIPPING COMPANY, LIMITED.

NORTH BRITISH RAILWAY COMPANY *v.* CLYDE SHIPPING COMPANY, LIMITED.

Railway—Arbitration—Jurisdiction—Demurrage of Trucks—Statutory Reference to Arbiter—Railway Rates and Charges No. 19 (*Caledonian Railway, &c.*) *Order Confirmation Act* 1892 (55 *and* 56 *Vict. cap. lvii*), *Schedule of Maximum Rates and Charges, &c., sec.* 5—*Railway Rates and Charges No.* 25 (*North British Railway, &c.*) *Order Confirmation Act* 1892 (55 *and* 56 *Vict. cap. lxiii*), *Schedule of Maximum Rates and Charges, &c., sec.* 5.

By the Railway Rates and Charges No. 19 (Caledonian Railway, &c.) Order Confirmation Act 1892, schedule, section 5, and the corresponding schedule and section of the Railway Rates and Charges No. 25 (North British Railway &c.) Order Confirmation Act 1892, the Caledonian and North British Railways were entitled to charge in addition to the tonnage rate a reasonable sum for certain services "when rendered to a trader at his request or for his convenience," and it is enacted that "any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade." The railways sued a firm of shippers, who acted solely as carriers of goods for others, for amounts alleged to be due in respect of detention of waggons and sheets. The defenders repudiated liability, and pleaded that the question being a difference arising under section 5 of the schedule referred to, it fell to be determined by an arbitrator, and maintained that the action should be dismissed. The pursuers maintained that the only points for an arbitrator under the section were the reasonableness of the charge and of the free time, any other matter in dispute having to be settled before the arbitration clause could come into force. *Held* (1) that a difference had arisen under section 5; (2) that the difference fell to be determined by an arbitrator appointed under that section; and (3) (*rev.* Lord Hunter) that the action should be sisted pending the arbitration.

The Railway Rates and Charges No. 19 (Caledonian Railway, &c.) Order Confirmation Act 1892 (55 and 56 Vict. cap. lvii), Schedule of Maximum Rates and Charges, &c., enacts—Section 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 reasonable sum by way of addition to the tonnage rate. Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party: 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. (i) Services rendered by the company at or in connection with sidings not belonging to the company. (ii) The collection or delivery of merchandise outside the terminal station. (iii) Weighing merchandise. (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; or, in cases in which the merchandise is consigned to an address other than the terminal station, beyond a reasonable period from the time when notice has been delivered at such address that the merchandise has arrived at the terminal station for delivery; and services rendered in connection with such use and occupation. (v) Loading or unloading, covering or uncovering merchandise. . . ." Section 25—"In this schedule, unless the context otherwise requires, . . . the term 'trader' includes

any person sending or receiving or desiring to send merchandise by the railway. . . ."

The Railway Rates and Charges No. 25 (North British Railway, &c.) Order Confirmation Act 1892 (55 and 56 Vict. cap. lxiii), Schedule of Maximum Rates and Charges, &c., makes similar enactments.

The Caledonian Railway Company, *pursuers*, brought an action against the Clyde Shipping Company, Limited, *defenders*, concluding for payment of £51, 15s. 9d. demurrage in respect of detention of waggons and sheets. The North British Railway Company, *pursuers*, brought a similar action for payment of £92, 15s. 3d. The averments and pleas-in-law of the parties in both actions, which were dealt with together, were substantially identical.

The *averments* in the action by the Caledonian Railway Company were as follows:—"(Cond. 1) . . . The pursuers have railways to General Terminus Station, thence to the General Terminus Quay belonging to them situated on the south side of the river Clyde and near to said General Terminus Station, and carry traffic over the said railways. (Cond. 2) The defenders are a Shipping Company, and in the course of their business, traffic consigned to them is carried over the railways of the pursuers and delivered to the defenders. The defenders, also in the course of their business, themselves consign traffic to be carried over the railways of the pursuers. In particular, the defenders have traffic consigned and sent to them to the General Terminus Station of the pursuers for shipment at General Terminus Quay. Said traffic is conveyed to the said General Terminus by the pursuers over their railways, and is there delivered by the pursuers to the defenders as the consignees thereof. The defenders also consign and send traffic by the pursuers' railway from the said General Terminus to the Partick Station of the pursuers. The defenders' explanation in answer is denied so far as not coinciding herewith. (Ans. 2) Admitted that the defenders are a shipping company, and that traffic carried over the pursuers' system of railways is handed over to them for transport by sea, while traffic already carried by the defenders is handed over to the pursuers for carriage by land. Admitted that the transfer of said traffic takes place at the said General Terminus Quay. *Quoad ultra* denied. Explained that the defenders are not traders, but are simply carriers like the pursuers, and handle the traffic as carriers on its way from the consignor to the consignee as ordered by the owners or merchants of the goods. Further explained that in all the cases of traffic hereinafter referred to with one exception, the goods carried by the pursuers and defenders were first carried by the pursuers and thereafter by defenders. (Cond. 3) By virtue of the Railway Rates and Charges No. 19 (Caledonian Railway, &c.) Order Confirmation Act 1892 (55 and 56 Vict. cap. lvii), and the Schedule of Maximum Rates and Charges contained therein, the pursuers are authorised to charge, *inter alia*, a reasonable sum by way of addition to the tonnage rate for the detention of trucks 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. . . . (Ans. 3) The said Confirmation Act and table of charges are referred to. . . . *Quoad ultra* denied. It is explained that the provisions of the said Act give the pursuers no authority to charge against the defenders the accounts sued upon in the present action. (Cond. 4) Between 27th May 1910 and 23rd June 1914 the defenders, for their own convenience, detained waggons and sheets belonging to the pursuers beyond the free time before mentioned, and in consequence thereof incurred demurrage amounting to £51, 15s. 9d. The amount of the demurrage incurred in respect of each waggon, the number of each waggon, and the period of detention were set forth in detail in accounts which have been rendered by the pursuers to and are in the possession of the defenders. These accounts are referred to and copies will be produced. The traffic in said waggons was in the case of traffic sent to the General Terminus aforesaid consigned and delivered to the defenders as aforesaid, and in the case of traffic sent to Partick Station aforesaid it was consigned by the defenders and delivered to consignees named by them. With reference to the defenders' explanations and averments in answer, it is admitted that the defenders run a line of coasting steamers from Glasgow to various ports. . . . (Ans. 4) Admitted that certain accounts for demurrage have been rendered by the pursuers to the defenders to the amount stated. It is explained that liability for said accounts was in all cases repudiated by the defenders when the accounts were rendered and was not attempted to be enforced by the pursuers, who have delayed from June 1910 until now in seeking to establish a claim against the defenders. The dispute between the pursuers and defenders as to said charges constituted a difference arising under section 5 of the Schedule of Maximum Rates and Charges of the Confirmation Act founded on, and fell to be settled by an arbitrator appointed under said section. *Quoad ultra* denied under reference to answer 2 hereof. Explained that the defenders run a regular line of coasting steamers from Glasgow to London, Waterford, Cork, Limerick, Plymouth, Southampton, and Dover, and they advertise for the carriage of passengers, goods, and live stock by regular sailings on certain advertised days and at certain hours each week. . . ."

The defenders pleaded—"1. In respect that the claim of the pursuers to make, and the refusal of the defenders to acknowledge liability for, the said charges raised a difference between the parties under section 5 of the Schedule of Maximum Rates and Charges attached to the Railway Rates and Charges Act founded upon, the matter fell to be determined by an arbitrator appointed under said section, and the Court has no jurisdiction to deal with the question in the present action. 2. The pursuers' averments being irrelevant and insufficient to support

the conclusions of the summons, the action should be dismissed. 4. The pursuers having no power under the Railway Rates and Charges Order Confirmation Act or otherwise to impose on the defenders the charges sued for, the defenders ought to be assoilzied from the conclusions of the summons."

On 9th December 1915 the Lord Ordinary (HUNTER) pronounced an interlocutor sustaining the first plea-in-law for the defenders and dismissing the action.

Opinion.—"This action is based entirely upon certain charges made under the Railway Rates and Charges Order Confirmation Act 1892 for demurrage claims which it is maintained that the defenders are liable to pay. The defenders dispute liability, and plead that the jurisdiction of the Court is excluded in respect of the provision in the 5th section of the schedule to the Act of 1892. That section provides that any difference arising shall be determined by an arbiter to be appointed by the Board of Trade at the instance of either party. One of the differences, as appears from the 4th sub-section of the section, is a claim with reference to the detention of waggons, which is the present case. The matter has been before the Court in England on more than one occasion, and quite recently the Divisional Court in England had occasion to consider the question in the *London and North-Western Railway Company* v. *Jones*, reported in [1915], 2 K.B., at p. 35. From the head-note in that case it appears that 'the only case in which an action can be brought to recover charges for detention of trucks under an enactment in the above terms,' that is to say, the terms of the section of the schedule which I have already read, 'is where the defendant has agreed to pay the sum demanded and has failed to do so. If there is a refusal to pay and no agreement to pay can be proved, the case must be treated as one in which a "difference" has arisen within section 5, which must therefore be determined by an arbitrator and not by an action.'

"This statement of the law, which is in entire accordance with the opinions expressed by Mr Justice Rowlatt and Mr Justice Shearman, is, to my mind, conclusive of the present question. It was, however, maintained that I ought to keep the action alive and sist it, because it might conceivably be used for some purposes. One of the purposes was that if the defenders here successfully pled before the Commissioners that they were not traders the jurisdiction of the Commissioners might then be ousted. If such a situation as that arose an action might be a method of expiscating the difficulties between the parties; but such an action would not be the present action, which has no declaratory conclusion but an entirely different action. I might, by amendment, allow the pleadings to be altered so as to raise the question, but it does not appear to me that in view of such a remote contingency I should allow the action to remain in Court, especially when there is statute law interpreted by decisions of the Court to the contrary effect.

"I shall therefore sustain the plea to the jurisdiction and dismiss the action with expenses."

The pursuers reclaimed, and argued—The Lord Ordinary was wrong, and should have repelled the first and second pleas for the defenders. At common law the jurisdiction of the Courts was universal unless expressly excluded, and the *onus* was upon the defenders to show that jurisdiction was excluded in this case. It was a condition-precedent to arbitration (which was admittedly the only other possible method of dealing with the matter in dispute) that a difference in the sense of section 5 of the Schedule of the Maximum Rates and Charges of the Railway Rates and Charges No. 19 (Caledonian Railway, &c.) Order Confirmation Act 1892 (55 and 56 Vict. cap. lvii), and the corresponding schedule to the Railway Rates and Charges No. 25 (North British Railway, &c.) Order Confirmation Act 1892 (55 and 56 Vict. cap. lxiii), should have arisen between the parties—*Great Western Railway* v. *Phillips & Co.*, [1908] A.C. 101, *per* Lord Loreburn, L.C., at p. 103, [1907], 2 K.B. 664. But no such difference had arisen. The only question which was a difference under that section was the question of reasonableness, *i.e.*, the reasonableness of the charges made and of the free time allowed, and that was not a question of fact or law but of railway management—a question properly withdrawn by the Railway Statutes from the jurisdiction of the Courts. Further, the difference must be between a company and a trader in the sense of the schedule. Here the only questions were of fact and law, *i.e.*, were the defenders traders or not, was the detention at their request and for their convenience or not, &c., while the reasonableness of the charges was not challenged and could not be now challenged—*North British Railway Company* v. *North British Grain Storage and Transit Company*, 1897, 24 R. 687, 34 S.L.R. 563. Such questions as these might, no doubt, be competently decided incidentally by an arbitrator properly seised with a reference—*Ransohoff & Wissler* v. *Burrell*, 1897, 25 R. 284, 35 S.L.R. 229; *Caledonian Railway Company* v. *Greenock and Wemyss Bay Railway Company*, 1873, 10 Macph. 892, *per* Lord Kinloch, at p. 898, 8 S.L.R. 634; but upon those questions he was not final, and as in this case these were the only questions in dispute, arbitration was out of the question, for the parties were at issue upon the very conditions that must be fulfilled to open the door to arbitration. It was not for the arbiter to decide as the sole question before him whether the conditions, upon which the reference to him became competent, were in existence—*Sinclair* v. *Clyne's Trustees*, 1887, 15 R. 185, 25 S.L.R. 172. Further, no question had arisen under this section. The section was one giving power to charge; if the circumstances were such that the power to charge was not or could not be exercised, then the section never applied and no question arose under it. But the defenders' case was that the detention was not in terms of the section, and that they were not persons chargeable under the section, *i.e.*, that the power in the

section had not been and could not be the basis upon which they could be charged. Assuming that the section did apply, the only question for the arbiter was that of reasonableness, which was not raised in the case. The question of trader or not turned upon the interpretation of section 25 of the schedule, and the other questions were of fact. In *London and North-Western Railway* v. *Jones*, [1915], 2 K.B. 35, the Court never considered whether a question of pure fact or law was a difference arising under section 5; the only question was whether a trader was overcharged. In the *Lancashire and Yorkshire Railway* v. *Swann*, [1916], 1 K.B. 263, the question of the reasonableness of the free time was considered by the Court but no objection was stated. In the *Glasgow and South-Western Railway Company* v. *Polquhairn Coal Company*, 1916 S.C. 36, 53 S.L.R. 73, the present defence was available but was not stated. In the *London and North-Western Railway* v. *Billington, Limited*, [1899], A.C. 79, [1898], 2 Q.B. 7, the jurisdiction of the Court was sustained as there was no difference under the section. In the *Midland Railway* v. *Loseby and Carnley*, [1899], A.C. 133 (*per* Lord Macnaghten at p. 137, and Lord Shand at p. 139), the arbiter was held competent to deal with questions incidental to the question of reasonableness. Even questions of reasonableness were still open to the Court unless its jurisdiction was expressly excluded—*Midland Railway Company* v. *Myers, Rose, & Company*, [1909] A.C. 13, [1908] 2 K.B. 356. Further, the English cases did not form a safe guide, as in England at common law a clause of reference did not absolutely exclude the jurisdiction of the Courts, which still had a discretion to entertain the case or not, and considered whether the matter should be dealt with as a whole by themselves or by the arbitrator. The Scots Courts, on the other hand, entertained such parts of the case as were not excluded from their jurisdiction, and held themselves bound not to trench on what was appropriated to the arbitrator. Consequently, in England, when the jurisdiction of the Courts was excluded by statute, the tendency was to send the whole controversy to the arbitrator, and this explained the breadth of the dicta, particularly in the *London and North-Western Railway Company* v. *Donellan*, and v. *Billington*, [1898] 2 Q.B. 7. Further, even if the whole controversy was for the arbitrator, the case ought to be kept in Court for executorial purposes. The Court had power to enforce the findings of an arbiter in railway cases—Railway and Canal Traffic Act 1854 (17 and 18 Vict. cap. 31), sec. 3; Regulation of Railways Act 1873 (36 and 37 Vict. cap. 48), secs. 6 and 26.

Argued for the defenders (respondents)—The Lord Ordinary was right, and should be adhered to. The difference between the parties was a difference arising under section 5 of the schedule, for the pursuers were suing for payment of sums due under that section, which, moreover, could not be claimed except in virtue of that section, for it alone was the warrant to charge—section 2. The language of the section was very wide, and was certainly co-extensive with the widest contractual clause that could be framed. Further, the Court never had jurisdiction in the present question, because section 5 first gave the right to make the charge and at the same time set up a special tribunal to deal with questions under it. The terms of the section were not limited to the question of reasonableness, and further, the section had been construed to cover cases such as the present where the questions were of fact and of law—*Donellan's* case (*cit.*) (*per* A. L. Smith, L.J., at p. 12, and *per* Chitty, L.J., at p. 17); *Midland Railway Company* v. *Haigh*, 1896, 13 T.L.R, 135 (*per* Wills, J., at p. 136); *Loseby's* case (*cit.*); *London and North-Western Railway Company* v. *Jones* (*cit.*). In *Spillers & Bakers, Limited* v. *The Great Western Railway Company*, [1909] 1 K.B. 604, [1910] 1 K.B. 778, a similar question to that raised here was sent to the Railway and Canal Commissioners. *John Watson, Limited* v. *The Caledonian Railway Company*, 1910 S.C. 1066 (*per* Lord President Dunedin at p. 1071), 47 S.L.R. 848, showed that the Railway and Canal Commissioners might go into a question of legal right. In the *North British Railway Company* v. *Newburgh and North Fife Railway Company*, 1911, S.C. 710 (*per* Lord President Dunedin at p. 719), 48 S.L.R. 450, it was held that a question of law might go to the arbitrator if the reference was wide enough. In *Charrington, Sells, Dale, & Company* v. *London and North-Western Railway Company*, [1905] 2 K.B. 437 (*per* Bigham, J., at p. 441), a question of law was decided. In the *Polquhairn Coal Company's* case (*cit.*) the present defence was not stated. In *Swann's* case (*cit.*) no objection was taken to the arbiter's jurisdiction to decide such a case as the present. *Myer's* case (*cit.*) was not in point, for the question was expressly one for the Court. *Billington's* case (*cit.*) was not in point, for there was no dispute under the section till after the case had come into Court. The Court would have to hold *Jones's* case (*cit.*) was wrongly decided if they were to recal the Lord Ordinary. *Phillips* v. *The Great Western Railway*, [1906], 2 K.B. 426 (*per* Lord Alverstone, C.-J., at p. 428, and Channell, J., at p. 431), [1907], 2 K.B. 664 (*per* Fletcher Moulton, L.J., at p. 674), [1908] A.C. 101, did not decide the present question, but the dicta were to the effect that if the claim was under the section and it was resisted, then a dispute had arisen under the section. The same principle was laid down in the *Caledonian Railway Company* v. *The Greenock and Wemyss Bay Railway Company*, 1874 1 R. (H.L.) 8 (*per* Lord Chancellor Cairns at p. 11 and p. 13), 11 S.L.R. 494, commented on in *Crossfield & Sons, Limited* v. *Manchester Ship Canal Company*, [1904] 2 Ch. 123 (*per* Vaughan Williams, L.J., at p. 135), [1905] A.C. 421. The difference between the English and Scots law as to jurisdiction in questions of arbitration was not of the essence, and was insufficient to invalidate the authority of the cases cited. Further,

the case ought to be dismissed. The arbitration clause was statutory, and the tribunal to which the question was referred had power to enforce its findings. *Hamlyn & Company* v. *Talisker Distillery*, 1894, 21 R. (H.L.) 21, 31 S.L.R. 642, was not in point, for the clause in that case was a matter of contract, and the arbiter had no power to enforce his findings. *The North British Railway Company* v. *The North British Grain Storage, &c., Company* (*cit.*) should be followed.

At advising—

LORD PRESIDENT—The Lord Ordinary has held that the controversy here raised constitutes a difference arising under section 5 of the Schedule of Maximum Rates and Charges of the North British Railway Company, &c., Order Confirmation Act of 1892 (55 and 56 Vict. cap. lxiii), and falls therefore to be settled by an arbitrator appointed under that section. With that view I agree. But in order to test its soundness it is essential to ascertain with precision the nature of the controversy raised.

The Railway Company in an ordinary petitory action seeks to recover the charges for alleged undue detention of waggons by the Shipping Company. The action rests exclusively on the Order Confirmation Act of 1892, which empowers the Railway Company to charge a trader a reasonable sum by way of addition to the tonnage rate for, among other things, the detention of trucks.

The Shipping Company reply that they are not traders, that if they are they have not detained the trucks, that if the trucks were detained it was due to no fault of theirs, and further, that the accounts sued for are erroneous in their particulars, and the accuracy of the individual items is denied. Accordingly they say—Here is a difference arising under the 5th section which falls to be decided not by this Court but by an arbitrator to be appointed by the Board of Trade.

The Railway Company answer that the section confines the powers of the arbitrator exclusively to the determination of questions relative to the reasonableness of the charges, including therein the length of time which a trader may detain the waggons without payment. I am unable to find in the terms of the 5th section any justification for so limiting the powers of the arbitrator. Nor can I conceive of any reason for imposing a limitation which would have the result of remitting to the adjudication of two tribunals an ordinary difference which the section remits to one. No wider or more comprehensive language could be used than we find in the fifth section, and I am not disposed to put upon it an interpretation which would not only alter its meaning but seriously impair its value.

My view of the just interpretation of the section coincides with that taken by the learned Lords Justices in the case of the *London and North-Western Railway Company* v. *Donellan*, and v. *Billington, Limited*, [1898] 2 Q.B. 7. I refer particularly to the opinion of Lord Justice A. L. Smith, but I adopt without any reservation the summary which Lord Justice Chitty makes of the just meaning and interpretation of this 5th section in the following words:—"There is no limit in those words to a difference as to the reasonableness of the sum. The difference must be a difference arising under the section. It appears to me to include the whole section, and . . . it would necessarily include all that is material in reference to the seven sub-sections that follow. . . . It appears to me that all the matters which are material for the decision of a difference arising under the section, whatever the difference may be, are within the competence of an arbitrator appointed by the Board of Trade to decide."

Now the views expressed in that case by the Lords Justices were distinctly affirmed and approved of in the case of the *Midland Railway Company* v. *Loseby & Carnley*, [1899] A.C. 133. I refer particularly there to the opinions of Lord Shand and Lord Macnaghten. In the course of his speech the latter observed—"In coming to his determination it must be open to the arbitrator to investigate and to determine any question incidental to that referred to him—any question which must be determined in order to determine finally the point in difference."

Applying these words to the case before us, I consider that if the arbitrator finds it necessary to decide whether or not the defenders are traders he may do so as incidental to his determination of the question whether the Railway Company ought to have its charges for detention paid by the Clyde Shipping Company.

Whilst I come therefore to the same conclusion as the Lord Ordinary, I am not disposed to follow the course he has taken and to dismiss this action. I prefer rather to sustain the first plea-in-law for the defenders, and to continue the case to await the decision of the arbitrator, because it is apparent that questions may subsequently arise at a later stage of the case which may require the aid of this Court to extricate them.

LORD MACKENZIE—I am of opinion that the difference between the parties in this case is one which has arisen under section 5 of the Rates and Charges Order Act. The first plea-in-law for the pursuers is laid expressly on the Act. The defenders are defending themselves from the claim so made. The pursuers say this case falls within section 5 in respect the defenders come within the definition in section 25 of the term "trader," being persons who send or receive merchandise by the railway. The contention of the defenders is that they are not traders but carriers. To what extent this involves a question of fact and to what extent a question of law it is not necessary now to say. It does not, however, in my opinion necessarily involve a question of jurisdiction any more than the questions raised in the cases of *Spillers & Bakers* v. *Great Western Railway Company*, [1909] 1 K.B. 604, [1910] 1 K.B. 778, or *Dumbarton Water Commissioners*, 1884, 12 R. 115, 22 S.L.R. 80. If in the course of the arbitra-

tion it is found that questions of law arise on the facts ascertained it may be competent to ask the arbiter to make alternative findings in fact. If the reference is to the Railway and Canal Commission the statutory provisions regulating procedure before that tribunal will be applicable. As regards the other questions raised, including the point whether the services were rendered at the request or for the convenience of a trader, these are for the arbiter to determine. It is only necessary to refer to what was said in the cases of the *London and North-Western Railway Company* v. *Donellan*, [1898] 2 Q.B. 7; *The Midland Railway Company* v. *Loseby & Carnley*, [1899] A.C. 133; and *ex parte Phillips & Company*, [1907] 2 K.B. 664, [1908] A.C. 101.

I think the action should be kept in Court meantime.

LORD SKERRINGTON—The pursuers' counsel argued that the various matters which are mentioned in section 5 of the schedule as conditions of the Railway Company's right to charge for the several services therein enumerated, are also, on a just construction of the clause, created conditions-precedent to the right of a statutory arbitrator to determine any difference arising under the section. According to this argument, it is for the Court and not for the arbitrator to decide, in case of disagreement, whether the services charged for were in fact performed; whether, if so, they were rendered to a trader; whether they were so rendered at his request or for his convenience; whether such-and-such a siding does or does not belong to the Railway Company, and so on through each of the sub-sections in which the services for which a charge may be made are described. This argument leaves nothing to the arbitrator upon which he has power to decide finally and conclusively, except the fixing of a reasonable reward for the services, and of a reasonable time during which no charge shall be made by a railway company for the detention of its trucks. There is nothing in the language of the schedule to support this limited construction of the clause, which requires that any difference arising under section 5 shall be determined by an arbitrator, and the authorities are decidedly adverse to it. In addition to those cited in the course of the argument I may refer to a dictum of Lord Kinnear, when delivering his opinion (concurred in by the other judges) in the case of *Cowan & Sons* v. *North British Railway Company*, 1901, 4 F. 334 at p. 344, 39 S.L.R 514. The pursuer's counsel cited the case of *Sinclair* v. *Clyne's Trustees*, 1887, 15 R. 185, 25 S.L.R. 172, for the proposition that it is a condition-precedent to the jurisdiction of an arbitrator who is asked to assess compensation under the Agricultural Holdings Act, that the notices and consents in writing required by the statute should have been duly given. This decision might have been in point if the defenders had given to the pursuers, as permitted by section 5 of the schedule, notice in writing that they did not require a particular service, and if the pursuers had nevertheless proposed to ask the arbitrator not to construe, but rather to override, the section by holding that the service had been rendered at the request or for the convenience of the defenders. A decision more nearly in point is *North British Railway Company* v. *Lanarkshire and Dumbartonshire Railway Company*, 1895, 23 R. 76, 33 S.L.R. 56. It was there unsuccessfully argued that it was for the Court and not for a statutory arbiter to determine whether a ventilating shaft, which the defenders were prohibited from erecting on the pursuers' ground without the latter's previous consent, had been disclosed in plans approved of by the pursuer's engineer, and whether he had authority, express or implied, to consent to its erection. The Lord President (Robertson), who delivered the opinion of the Court, rejected the view which was pressed upon us in the present case, that a clause of reference expressed in very wide terms ought to be limited to matters in which an arbiter was peculiarly conversant by reason of his professional skill.

As an alternative to his wider argument the pursuer's counsel maintained that in any case section 5 of the schedule made it a condition-precedent to an arbitration that the person charged should be a "trader"—a term which the schedule defines as including any person sending or receiving merchandise by the railway. I see no distinction between the question whether certain services were rendered at the request or for the convenience of a particular person, and the question whether that person acted or contracted in a manner which precludes the Railway Company from charging him for these services as the principal in the transaction. According to my reading of the pleadings in the action, neither party proposes to ask the arbitrator to adjudicate upon any matter which does not *prima facie* at least fall within his statutory jurisdiction. If any such question should arise in the course of the reference, the decision of the arbitrator as to the limits of his jurisdiction would not be final, and the party aggrieved would have his remedy. It will not, however, be readily assumed *ab ante* that an arbiter will exceed his jurisdiction.

The defenders have a plea objecting to the relevancy of the pursuers' averments, but they are entitled to our judgment *in limine* on the question of jurisdiction. There is no inconsistency in our deciding that the dispute between the parties arises out of section 5 of the schedule, and at the same time indicating an opinion that if this case were to be litigated in this Court on its merits the pursuers might require to give fuller details as to the various items of their account, and also to state specifically the facts upon which they rely when they claim to treat a carrier as their debtor in respect of detention which may have been due entirely to the acts or omissions of the consignors or consignees. It will be for the arbiter to give such orders as he thinks

proper in order to ensure a fair disclosure by the pursuers of the case which they propose to establish.

I think that the Lord Ordinary was right both when he sustained the defenders' first plea-in-law, and also when, on the argument which seems to have been submitted to him, he dismissed the action. I am disposed, however, to think that the action ought to be kept in Court, if only in order that the defenders may move for absolvitor in the event of the pursuers unduly delaying to constitute their claim before the proper tribunal. Although section 5 of the schedule deprives us of any jurisdiction to determine the dispute which has arisen between the parties, it is not so expressed as to prohibit us from taking (if in our discretion we think fit to do so) a course which is both convenient and also supported by authority. I do not think that it is possible to construe the dicta of Lord Cairns *in Caledonian Railway Company* v. *Greenock and Wemyss Bay Railway Company*, 1874, 1 R. (H.L.) 8, 11 S.L.R. 494, as impliedly disapproving of the course taken by the First Division when it recalled the interlocutor of the Lord Ordinary dismissing the action. The same procedure was followed in the case already cited of *North British Railway Company* v. *Lanarkshire and Dumbartonshire Railway Company* (*cit.*).

LORD JOHNSTON was absent at the hearing and advising.

The Court pronounced this interlocutor—

"Recal said interlocutor [of 9th December 1915] in so far as it dismisses the action: *Quoad ultra* adhere thereto and sist the cause: Find the pursuers liable to the defenders in additional expenses since said 9th December 1915, and remit. . . ."

Counsel for the Pursuers the Caledonian Railway Company—Dean of Faculty (Clyde, K.C.)—Gentles. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Pursuers the North British Railway Company — Macmillan, K.C. — E. O. Inglis. Agent—James Watson, S.S.C.

Counsel for the Defenders—Horne, K.C. —Moncrieff, K.C.—W. T. Watson. Agents —Webster, Will, & Company, W.S.

Tuesday, November 28.

SECOND DIVISION.

BURNS' TRUSTEES *v.* BURNS.

Succession—Will—Construction—Bequest to Son's Children Born Prior to Death of Testator — Grandchildren Legitimated Subsequent to Testator's Death—Grandchild in utero at Testator's Death.

A man died leaving a trust-disposition and settlement whereby he bequeathed the residue of his estate to "such of the children then surviving of the said J. F. B." (his son) "who were born prior to the date of my death." At this date certain of the grandchildren were illegitimate, but were legitimised later *per subsequens matrimonium*. Further, at this date a grandchild was *in utero*. *Held* that neither the legitimised children nor the child *in utero* were included in the class of beneficiaries.

This was a Special Case presented for the opinion and judgment of the Court as to the disposal of the residue of the estate of David Burns, who died on 13th December 1904, and who left a *trust-disposition and settlement*, dated 11th August 1904, which ran as follows—" . . . In the third place, on the youngest, or the youngest survivor (as the case may be) of the children of my said son James Forsyth Burns, born prior to the date of my death, attaining the age of twenty-one years complete, I direct my trustees, subject to the declarations after written, to deal with the residue of my estate, and any interest which may have been added thereto and accumulated therewith, as follows, viz.—(*Primo*) In the event of my said son James Forsyth Burns being then in life, I direct my trustees to divide said residue into such a number of just and equal shares as will be two in excess of the number of children then surviving of the said James Forsyth Burns who were born prior to the date of my death, and to pay over said shares as follows—To my said son James Forsyth Burns two shares, and to each of his children then surviving who were born prior to my death as aforesaid, one share; or (*Secundo*) in the event of my said son James Forsyth Burns predeceasing said date of division, I direct my trustees to pay and make over said residue and interest in equal shares to such of the children then surviving of the said James Forsyth Burns who were born prior to the date of my death; declaring that should the whereabouts of one or more of my said beneficiaries be unknown to my trustees, my trustees shall not proceed to divide the estate until they have taken reasonable steps to discover the address of such missing beneficiary or beneficiaries, but should they fail to discover any trace of such beneficiary or beneficiaries within twelve months after the institution of such steps the right and interest of such missing beneficiary shall cease and determine and shall accresce to the remaining beneficiaries under this purpose according to their respective rights and interests, and my trustees shall be thereupon entitled to divide my estate accordingly: Declaring specially that in the event of any of the children of the said James Forsyth Burns who were born prior to the date of my death dying prior to said date of division and leaving issue who shall survive such date of division, such issue shall on no account receive the shares of my estate which their parents would have taken had they survived, it being my desire that only those children of the said James Forsyth Burns who are born prior to the date of my death and who survived said date of division shall be entitled to participate in my estate."