is it necessary to determine what the nature of that claim would have been. It is, as your Lordship has said, the practice of banks—and a very commendable practice—to give retiring allowances. In that way they can supersede a man who may have spent the best part of his life in their service without any of those hardships which otherwise might have led them not to dispense with his services at all. That is an advantage to the bank, and it encourages the officers of the bank to continue as long as possible in its service, thereby giving it the benefit of their great experience. In short, in that system of giving retiring allowances there are various advantages of very great value to the bank, and that would require to be taken into consideration if the question were whether a retiring allowance was binding. But in this case I agree with your Lordship that it is not necessary to enter into any question of that kind at all, because supposing we assume that previous to the stoppage of the bank this gentleman would have had a claim which he could have enforced in a court of law, I think with your Lordship that it is quite clear that when a bank comes to an end and can no longer carry on business so as to yield profit, but, on the contrary, when it has suffered great loss, such a claim cannot be held to subsist, and that ground alone is in my opinion sufficient for the disposal of this case.

Lord Mure—I am of the same opinion. The action is founded upon this statement, that at the date when this gentleman retired from the bank he entered into an arrangement with the manager and directors by which he resigned his appointment upon the condition of his receiving an annuity of £150 a-year for the rest of his life. Now, I am unable to see in the correspondence which then took place that the directors of the bank entered into any such obligation, or that any such condition was stipulated for. The pursuer after some communication with the inspector of bank agencies resigns his situation on the score of his health, but he submits that he has some claim on the indulgence and sympathy of the directors, and on these grounds they offer him this retiring allowance. I see nothing in the correspondence or in the minute following upon it which amounts to a legal obligation on their part to pay that retiring allowance for the rest of his life; and I think it very unlikely that they should have entered into such an arrangement, having regard to the 22d section of the contract, by which power is given to suspend or dismiss any of the officers at pleasure, with a positive provision that the officers should have no claim against the company for any retiring allowance in such circumstances. That being so, I think it would have been a strong step on the part of the directors to enter into any such binding and positive obligation as is here alleged, for I think the clear implication of the 22d section is that when the bank came to an end the salaries of all the officials were to come to an end also. Therefore I agree with your Lordships that the pursuer has failed to instruct that there was any such obligation undertaken by the directors as he alleges, viz., an obligation to pay him £150 a-year during his life in any event.

Lord Shand—I am of opinion with your Lordships that the pursuer has failed to show that the sum here sued for constitutes a debt or obligation against the bank which can be ranked upon the assets in the liquidation. It is not stated precisely on record what the salary was which the pursuer had as bank agent, but we were informed by both parties that it was £160 a-year. He had no permanent right to that salary; the bank might have ceased to pay it by dismissing him at any time; but on his resigning office he says the directors arranged to give him £150 a-year. That is, I think, very much as your Lordship has stated, that he was to get his salary without giving any services in return for it. The arrangement, even as he stated it, is one by which he gave no consideration whatever. What the bank gave him, therefore, was of the nature of a gratuitous gift. In these circumstances, and looking to the correspondence and the minutes which we have here, I am of opinion with your Lordships that this cannot be regarded as a debt or obligation, and that the payment which he received was not given him under any onerous or enforceable contract. It is no doubt in many cases only just and reasonable that banks and other public bodies should reward their officials for past services by giving them allowances of this kind, and that is often recognised by the shareholders as a desirable and proper thing, but in a case of this kind I certainly cannot hold that such a payment could be enforced by action on the ground that a permanent legal obligation had been created. Apart, however, from that view, and even supposing that an action could be maintained on the footing that there was here an undertaking for the payment of an annual sum, I agree with your Lordship and Lord Deas that it must be taken as an inherent condition of the arrangement that the company should be a going company, that the business should be a continuing one, and that if the company came to an end by bankruptcy as in this case, or ceased in any other way, there can be no continuing obligation on its partners to pay a sum of this kind. On both grounds I am of opinion that this action cannot be maintained.

The Court adhered.

Counsel for Pursuer — Macdonald, Q.C. — M'Kechnie—Lang. Agents—Macbrair & Keith, S.S.C.

Counsel for Defenders — Solicitor-General (Balfour, Q.C.) — Kinnear — Low. Agents — Davidson & Syme, W.S.

Friday, June 18.

FIRST DIVISION.

[Sheriff of Lanarkshire.

HANDON *v.* CALEDONIAN RAILWAY COMPANY.

Railway—Deposit for Safe Custody—Conditions on Back of Left-Luggage Ticket—Condition Exempting from Responsibility—"Cloak-room or Warehouse."

A passenger deposited two articles of luggage for custody with the officials of a railway company, one of which—a very large

trunk—was not taken within the left-luggage office, but was left outside on the station platform, at a part of the platform which, it was averred by the company, was frequently used for such a purpose, being within the view of the official in charge of the left-luggage office. The passenger received a ticket with certain conditions limiting the liability of the company for the loss of any article so deposited. The large trunk left outside was lost. In an action for its value, *question*—whether the passenger had sufficient notice of the conditions limiting the liability of the company? but *held* that the company having undertaken to deposit the trunk in their cloak-room or warehouse, and having failed to do so, were not themselves entitled to stand on the conditions as against the pursuer.

On the 26th August 1878 the pursuer Robert Handon along with his wife and two children arrived at the Caledonian Railway Company's station in Buchanan Street, Glasgow, on their way from America, reaching the station at about eight at night. As they required to find lodgings for the night they deposited certain of their luggage at the "Left-Luggage Office" of the station. This luggage consisted of two trunks—one of ordinary size, and the other very large and standing on four castors. In return for this luggage the pursuer received from the railway clerk a note or ticket containing a statement of the articles deposited. On the front of this ticket there was printed the following:—"The company only receive the within-mentioned articles upon the conditions expressed on the back of this ticket." On the back of the ticket it was declared that the Caledonian Railway Company give notice that they will only warehouse articles of luggage and other articles subject to the following conditions, viz.:—"(2) That the articles enumerated hereon will be given up to the party producing this ticket, after which all responsibility on the part of the company will cease. (3) That the company will not be responsible for the loss of, injury to, or detention of any parcel, package, or other article deposited in their cloak-rooms or warehouses, when the value of such parcel, package, or other article exceeds five pounds—that is to say, when any parcel, package, or other article deposited in the company's cloak-room or warehouse, exceeding the value of five pounds, is lost, damaged, or detained, the said company will not be liable in any sum whatever unless at the time of the delivery of such package to them its true value is declared to exceed five pounds, on a form to be supplied by the company, and signed by the party depositing such parcel, package, or other article at the time of such deposit, and a charge at the rate of one penny per pound sterling upon the declared value is paid at the time of declaration and delivery to the company for each day or part of a day for which the same shall be left, in addition to the ordinary deposit charges."

For the articles deposited by him the pursuer paid the ordinary charge of 2d. each, as for articles under the value of £5. He did not comply with the requirements of the third of the above conditions.

The larger of the two trunks was never returned to the pursuer, having been lost while in the possession of the railway company. He, in consequence, raised this action for the value of the trunk and its contents, which he estimated at £100.

He pleaded—"(1) The pursuer having deposited the trunk in question with its contents with the defenders, and received their acknowledgment therefor, in the usual course observed by them in their traffic with railway travellers, they are bound to make good the loss to the pursuer. (2) The attention of the defenders' servant having been called to the trunk in question being valuable, he was bound in like manner to have called the pursuer's attention to the print on the back of the ticket, and not having done so, neither having made any additional demand on the pursuer, the defenders are bound to make good the pursuer's loss. (3) The defenders, by their own actings, having admitted gross carelessness, decree as libelled will fall to be pronounced against them, with costs."

The defenders pleaded—"(1) The value of the trunk in question not having been declared, and the extra deposit charges paid in terms of the conditions and of the contract between the parties, no liability attaches to the defenders. (2) Under the conditions referred to, which were just and reasonable, the missing trunk having been deposited by pursuer at his own risk, the defenders are not liable for the alleged loss thereof. (3) The defenders having taken the usual and ordinary precautions to protect the left-luggage at their station, where the pursuer's trunk lay, with the pursuer's knowledge and acquiescence, they are entitled to absolvitor."

On a proof it appeared that the trunk which was lost had not been deposited within the left-luggage office, but had been left outside on the platform of the station, on a spot which, as the railway officials swore, was quite within the view of the left-luggage clerk, and where the company were in the daily practice of leaving articles of large bulk especially during a pressure of traffic. It did not appear when or how the trunk was taken away.

The Sheriff-Substitute (LEES) decerned against the defenders for payment to the pursuer of £60, adding this note:—

"*Note.* . . . . . But, in the last place, though the condition be binding on the pursuer, does the case fall within it? The pursuer never agreed to let his box be left on the platform. He made no such contract, and the Court has no power to make it for him. It is not necessary to say he entrusted his luggage to the defenders on the faith they would put it into their cloak-room. That is not the way to view the case. The point is, he entrusted it to them; they must give it back to him. They then plead the condition; they plead that this case is, just because of that condition, an exception to the general rule that a depositary must restore the article deposited with him. But does the case come within the exception? The exception only applies to luggage 'deposited' in their 'cloak-room or warehouses,'—only to 'warehoused' articles,—and it is proved that this article was not so deposited, and was not warehoused at all. The defenders stipulate for immunity only where they give protection. The articles to which the conditions apply are expressly said to be 'warehoused' articles. Suppose they had put the trunk on the roof of the left-luggage office, or on a barrow, or some place

outside the office, could it be said they would be protected by the condition. If the condition covers such a case as that, the depositor might well say in that event—I should have preferred to pay for my luggage on the higher scale. It is only fair that if the company ask a higher rate where their risk is greater, the depositor should have the opportunity of judging whether he will pay a higher rate where his risk is greater than on the face of the condition it appears to be. If the election is left to the defenders, they will, when room is scarce, naturally for their own sake put the more valuable articles outside the office, and the articles under £5 inside it. I am quite unable to assent to the view that the luggage is as safe outside the luggage office as inside it. If that is so, why do the defenders specify on the receipt so particularly where the luggage is to be put? If that is so, why do they construct a left-luggage office at all? It is shown that it is a valuable department for them. Even in slack times of the year they draw £5 to £6 a-day. Indeed, I am aware from my experience in the criminal court that luggage left outside the office is not, in fact, as safe as luggage received into it. I think the difference of risk was material, and in this case it must be held either that the defenders infringed their contract with the pursuer, or that the condition they found on is inapplicable to the case. I would only remark in conclusion on this point, that there is no evidence whatever to show that it was impracticable for the defenders to take the box into their left-luggage office. No doubt the trunk was large, and therefore less likely to be carried off. But still there was risk; and their box, through being on castors, could be the more easily moved, and would run the greater risk.

"Though I thus arrive at the result that the defenders must be viewed as not under the protection of the condition, it is right to own that I am aware that the recent case of *Harris* above mentioned, decided by the Queen's Bench Division in England, favours a different result. But I point to these considerations. It is plain the Judges in that case viewed it as one of circumstances, and I am not aware what the position of the vestibule of the office where the luggage was left in that case was, and whether it caused a material change in the amount of the risk. In the second place, the Judges differed in opinion. Justice Lush took one view; Justice Blackburn, now Lord Blackburn, another; and Justice Mellor, only with hesitation, agreed with Lord Blackburn. Apparently, too, Baron Pollock had in trying the case taken the same view as Justice Lush. In the next place, the words of the condition were not the same, nor as explicit as they are in this case, and the decision is one of an English Court, which, though I cannot but respect, I am not bound to follow, but to look for guidance to the Supreme Court of this country or of the kingdom." . . . . .

The Sheriff (CLARK) adhered, adding this note—

"*Note.*—The questions here raised are of a kind in which the laws of England and Scotland in no respect differ. I should therefore hold myself bound by the decision in the English case—*Harris* v. *The Great Western Railway Co.*—until I was otherwise directed by the Supreme Court, if I thought that the facts in that case and in the present were substantially alike. But it appears to me that these facts differ in a very important element, viz., that whereas in the English case the goods were deposited in a vestibule in such a manner as to satisfy the condition of being kept with reasonable and proper care, in the present case it is proved that the trunk was taken by the defenders out of their cloak-room or warehouse and left on the platform of the station outside the luggage office, and that without the consent of the pursuer. Such conduct cannot be described as giving reasonable or proper care, but must be characterised as an instance of the grossest negligence. Now, this is just an element which, if it had been present in the English case, would, in so far as I understand the opinions of the Judges, have turned the decision the other way. Blackburn, J., says—'The condition relieving them (the company) from liability for a loss applied to a loss occurring whilst they are carrying out the contract, not to one incurred when acting in violation of it.' Now, here the loss plainly occurred while the defenders were acting in direct violation of their contract with the pursuer, and was the direct consequence of such violation."

The defenders appealed, and argued—Although the contract was with a railway company, it was a contract of deposit, not of carriage, and consequently all the defenders were under an obligation to do was to use reasonable care. They had done so here, for they had placed the trunk which was lost in a perfectly safe part of the station where it was under the eye of their officials. The place in fact was safer than the vestibule in the case of *Harris* v. *The Great Western Railway Company*, May 30, 1876, L.R. 1 Q.B. Div. 515, for any passenger might enter that vestibule and leave his luggage there without putting it in charge of the railway officials, although he might also, as Mrs Harris did, leave it in charge of the officials and get a ticket like the present. But if anyone might leave his luggage in the vestibule without asking for the company's permission, anyone might also walk away with it, as a thief did with Mrs Harris', pretending that it was his own. But no one could easily go away with a heavy trunk like the present, which was placed where only luggage under the charge of the company was put. The case on this branch therefore was *a fortiori* of the case of *Harris*. On the other branch, as to notice of the conditions, *Harris* was also a direct authority—See also *Parker* v. *South-Eastern Railway*, April 25, 1877, L.R. 2 C.P. Div. 416. *Henderson* v. *Stevenson*, June 1, 1875, 2 R. (H.L.) 71, did not apply, for that was a contract of carriage, and secondly, there was no printed reference there, as there was here, on the front of the ticket to the conditions on the back.

Argued for pursuer—(1) Assuming the conditions to be binding, whether the company had used reasonable care or not was not here the question. The company had chosen to stand on certain conditions as part of the contract, and they must therefore fulfil their part of these conditions before they could enforce them against the pursuer. Now, they had not fulfilled their part of the contract, for they had undertaken to warehouse this trunk, and they had not done so. In *Harris'* case the obligation was not so plainly one to warehouse—at anyrate, the majority of the Court there thought that the particular vestibule in question came up to the description of a ware-

house; here there was no such vestibule, merely the open platform. But (2) the conditions were not binding, as the company had not given due notice of them to the pursuer. The company officials ought orally to have directed the pursuer's attention to the condition limiting their responsibility when they were receiving a piece of goods plainly over £5 value. For if the pursuer had known of the condition he either would have paid the additional charge or would not have deposited the luggage at all. What he wanted was safe custody. But if the conditions did not apply, then the question was one of common law, and the company had not fulfilled their common law obligation of due and reasonable care; for it could not be contended that the open platform was as safe as the luggage office, or even as the vestibule in the case of *Harris*, or that it was as safe a place as the company were bound to provide. The company were therefore liable.

At advising—

Lord President—This action is brought to recover the value of a large trunk and its contents which was left in the hands of the Caledonian Railway Company, and the ground of action is breach of contract.

The pursuer and his wife, it appears, arrived at the Buchanan Street Station of the Caledonian Railway in Glasgow on the 26th August 1878, and it also appears that they had a good deal of heavy luggage, having just arrived from America, some of which they desired to deposit at the left-luggage office of the station. Accordingly, two packages—one a very large and heavy trunk (the trunk that was lost), and another smaller one—were delivered to the person in charge of the left-luggage office. In return for delivery of these articles the pursuer received a certain note or ticket, as it is called, which contains the terms of the contract between the parties. These facts are not disputed, nor is it disputed that the large trunk was lost while in the custody of the railway company. But the defence is this, that it was part of the contract between the railway company and the pursuer, that if any article was deposited with the company exceeding the value of £5, and that value was not declared, and a corresponding premium paid, the company were not to be liable for the value of the article.

Now, it is necessary to attend to the precise terms of the contract, which is in writing, and is contained in the note or ticket I have already referred to. On the face of the ticket there is a note or specification of the articles delivered by the pursuer to the official at the luggage office; and there is this also—very distinctly certainly—on the face of the ticket—"The company only receive the within-mentioned articles upon the conditions expressed on the back of the ticket." The pursuer has argued that this was not sufficient notice to him of the condition now sought to be enforced against him. I do not think it necessary to consider this question, because on another ground I think the pursuer is entitled to prevail. I shall only say in regard to this matter that this seems to me to be a more favourable case for the railway company than some that have occurred, because of the very distinct reference that appears on the face of the ticket.

But the contract itself is a contract of deposit, and the conditions of that deposit are very clearly expressed. The argument of the railway company is founded upon one of these conditions only, but the contract must be read as a whole and all of its conditions considered for the purpose of disposing of the pursuer's plea of breach of contract. Now, on the back of the ticket there is this statement—"The Caledonian Railway Company hereby give notice that they will only warehouse articles subject to the following conditions." That, I think, means not only that they will not warehouse articles except upon these conditions, but also that they will warehouse articles upon these conditions; and therefore I think that there is an obligation on the company when articles are handed over to them to receive them upon the following conditions, viz.—[*His Lordship here quoted the conditions as above*].

Now, taking this contract as a whole, it is a contract of deposit and custody, but for a payment of money. The proper contract of deposit is a gratuitous contract, the depositary receiving nothing for his services rendered. This is not a contract of that nature. It partakes rather of the nature of a contract of *locatio operarum*, or rather it is a combination of the two contracts of deposit and *locatio operarum*, and in that contract the measure of the depositary's liability is, I apprehend, that he must take all due and reasonable care of the articles he has received. All that is clear in law. Now, what was the obligation that the railway company here undertook. They undertook to warehouse the articles delivered to them. Such are the express words of their obligation, which occur not merely in the leading clause of the contract, in which they say that they will only warehouse articles subject to the conditions following, but it is repeated in the conditions themselves. The very condition on which the defenders found applies only to articles which are deposited in their cloak-room or warehouse. There cannot be any doubt, therefore, about the nature of the obligation undertaken by the company. It is an obligation to warehouse these articles.

Now, what did they do here? They received into their possession those two packages—one a very large one, and one a small one. The small one they put into the cloak-room or left-luggage office, and the larger one they left outside on the platform. No doubt they say that it was upon the part of the platform which was adjacent to the door of the left-luggage office, and within the sight of the person in charge of the office; and they further say that it was just as safe there as if it had been put inside the left-luggage office, and that in consequence it is their every-day practice to deal with large articles in the same way as they dealt with this particular trunk. Now, if it were necessary to go into the question whether trunks left on the platform, even though adjacent to the door of the left-luggage office, are as safe as if they were under the protection of the left-luggage office itself, I do not think there would be much doubt. On the evidence it appears to me that that question is at once set at rest by considering what took place in this case. One trunk was taken inside and was safe; the other was left outside and was lost. That I should think is conclusive of the comparative safety of the two ways of dealing with the luggage. But the pursuer contends—and I think contends with conclusive force—that there was here, on the part

of the company, a distinct breach of contract. It seems to be somewhat doubtful upon the evidence whether this large trunk was ever within the left-luggage office at all. The pursuer and his wife are under the impression that it was taken into the office and put out afterwards; the railway company officials say that it never was within their office. But it is enough that it was taken by the porter to the left-luggage office and placed outside of it; and it does not appear to me to affect the result which of the parties is right in this matter of fact, for that the trunk was left upon the platform is perfectly plain, and therefore in my opinion there was no warehousing within the meaning of the contract. Now, if the defenders fail to perform their written obligation under this contract of deposit, it is perfectly plain that they can never be heard to say that some other condition of the contract has been violated by the pursuer. But, in truth, the pursuer has violated no condition of the contract, because that third condition on which the railway company found applies only to goods deposited in the cloak-room or warehouse, and this article or trunk never was deposited by the company in their cloak-room or warehouse. I am therefore clearly of opinion that the Sheriff-Substitute and the Sheriff have come to the sound conclusion in this matter, and that the defenders are liable for the value of this trunk.

Lord Deas concurred.

Lord Mure—I am of the same opinion. It appears to me that upon the evidence the facts of this case are very simple. The trunk in question was taken to the left-luggage office by the pursuer with the view of having it deposited there; and it is proved by the parties who were examined for the railway company that it was not put into that office. Your Lordship has remarked that it is not clear that the trunk was taken into the office at all; but whether that was so or not, it is not I think necessary to inquire, as the witnesses who were present seem to be agreed that it was placed outside the office upon the platform. And the reason given by the officials of the company for doing this is, that there was not room for the trunk inside. That is the view I take of the evidence; and it is further proved by the inspector (Beaton) and the superintendent (Curror) that the parties in charge at the luggage office are only allowed to place large trunks outside upon the platform when there is no room inside the luggage office. The trunk in question was accordingly left on the arrival platform, where the passengers are passing to and fro and removing their luggage; and when the pursuer applied for it on the following day it was found to be amissing, and has been lost. So standing the facts, I think the Sheriffs were right in holding that the defenders are liable for not depositing the trunk in a cloak-room, or left-luggage office, in terms of the undertaking contained in the conditions marked upon the ticket or receipt. By that receipt the company come under an obligation to "warehouse articles" on certain conditions, which substantially amount to this, that a certain sum is to be paid for each article deposited, and for which a ticket or receipt will be given; that the articles are to be deposited in a "cloak-room or warehouse," which certainly implies that they are to be warehoused in a place sufficiently secure for their safe keeping; and that they will be given up to the party on production of the ticket. In the present case the pursuer paid the deposit-money and received the usual ticket; but the whole articles were not put into the left-luggage office or into a cloak-room or warehouse, as one was placed on the platform outside the door of that office. Now, I do not think that was sufficient warehousing in terms of the company's undertaking, and as the trunk was, in my opinion, lost owing to its having been placed upon the open platform, and not put inside the luggage office, I agree with your Lordships in holding that the railway company is liable to make good the value of the trunk and its contents to the pursuers.

Lord Shand—The respondent in this case maintained two points before your Lordships. In the first place, he argued that he was not bound by the condition on the back of the ticket, because it had not been properly brought under his notice and so made part of the contract; and, in the next place, assuming that he was so bound, he nevertheless maintained that the railway company were not entitled to enforce the condition inasmuch as they had not fulfilled their part of the contract.

On the first of these points I refrain from expressing any opinion, for it is not necessary for the decision of the case. I shall only say this, that although undoubtedly on the face of this ticket there were the following words—"The company only receive the within-mentioned articles upon the conditions expressed on the back of this ticket"—yet looking to the circumstances in which these persons received this ticket—that it was late at night, and that they had just arrived from America—I do not think that it is likely they would notice particularly or at all what was on the ticket. I think there is very considerable room for the argument that if the company were to receive goods as warehousemen in this way, and were to affix conditions of this kind limiting their responsibility, they ought at least to draw the attention of depositors to these specialties. But, as I have said, it is not necessary to determine this point, for assuming that the condition was effectually made known to the pursuer, I am nevertheless of opinion with your Lordships that the railway company are liable for the value of this missing trunk.

The question is, What was the contract between the parties? What was the pursuer, or any person who left luggage with this company, entitled to assume on handing the luggage over to the company? I am of opinion that he would be entitled to assume that it would be placed in a position of safe custody, and so secured as to be beyond the access of unauthorised persons who were passing through the station. Apart from the special terms of the special contract here, it appears to me that the contract to warehouse implies the condition of placing the articles received in a suitable and reasonably safe place, where they will not be exposed to the risk of being carried away or to the risk of being injured. And accordingly it cannot be doubted, I suppose, that if this article had been under the value of £5 the company would have had no answer to the pursuer's demand. I think it has been shown that

they left this trunk exposed on the platform where it was not in a reasonably safe place, and therefore I think they would clearly be bound to make good its value supposing it to be worth less than £5. But then they refer to this special condition, and on this condition I make these two observations:—In the first place, I think we are entitled to look at the entire document, so as to understand the nature of the contract as a whole, and when we do that it is very clear to my mind what the word "warehouse" means, for it is the leading provision of the contract that the company are not to be responsible, except to a certain extent and under certain conditions, for articles deposited in their cloak-rooms or warehouses; and the use of this expression necessarily conveyed to the mind of a person depositing articles that the company intended that they should be deposited in their cloak-rooms or warehouses, and there only. That being so, the second observation is this, that if the company fail to bring themselves within what is thus of the very essence of the contract, and do not deposit the articles in their cloak-room or warehouse, I am of opinion that they cannot take the benefit of this condition.

The counsel for the railway company very properly pressed upon us the authority of the case of *Harris* v. *The Great Western Railway Company*, recently decided by the Queen's Bench Division of the High Court in England; and I may say in common with your Lordships that I have given very full consideration to that case. It was a case in which there was a very decided difference of opinion among the Judges, and for my own part I can only say that the reasoning of Mr Justice Lush most recommends itself to my mind as the sound view of the case, and if I were dealing with a case of that kind I should be inclined to come to the same conclusion as Mr Justice Lush, rather than to that of Lord Blackburn and Mr Justice Mellor, the latter of whom spoke with great hesitation in giving the decision he did. But that case is not in the same position as the one we have here; for there was in the first place this specialty, that the articles in question were left in a vestibule, which seems to have been an attachment of the platform, and not, as here, on the open platform itself. And, in the next place, I think the conditions of the contract in the case of *Harris* were different from what we have here. The condition relating to the warehousing of articles did not occur on the ticket of the *Great Western Company* in the same terms as it does here. Accordingly, on the whole matter I am of opinion with your Lordships that the judgments of the Sheriff-Substitute and the Sheriff should be adhered to.

The Court adhered.

Counsel for Pursuer (Respondent)—Guthrie Smith—Keir. Agents—Adamson & Gulland, W.S.

Counsel for Defenders (Reclaimers)—R. Johnstone—Pearson. Agents—Hope, Mann, & Kirk, W.S.

Friday, June 18.

SECOND DIVISION.

[Lord Craighill, Ordinary.

HAY *v.* DUFOURCET & COMPANY.

Arrestment jurisdictionis fundandæ causa—*Partnership—Company—Debt.*

Held that arrestment in the hands of an individual partner of a debt due by his firm is not a good arrestment so as to found jurisdiction against a creditor of the firm.

This was an action of damages raised by the pursuer Alexander Hay, a merchant in Leith, against Charles Dufourcet & Company, merchants, 18 Billiter Street, London. The damages were claimed for breach of a contract made on the 4th November 1879 between them, by which defenders were to deliver at Ayr a cargo of bone-shavings. On arrival the cargo was found to be not according to contract, and was therefore rejected by the pursuer.

On the 3d of June 1880 the defenders sold this cargo to Messrs Alexander Weir & Co., merchants, Ayr, which firm consisted of two partners, Mr Alexander Weir and Mr M'Geachy, and had an office in the town of Ayr, their business being carried on under the company name of Alexander Weir & Company.

The pursuer, desirous of being recouped for the loss sustained by the breach of his contract with the defenders, and in order to make them subject to the jurisdiction of the Court, on 7th January 1880 used an arrestment *ad fundandam jurisdictionem* in the hands of Mr Alexander Weir as an individual for the balance of the sum of £300 remaining unpaid. The arrestment was left with a servant in the private dwelling-house of the said Alexander Weir, at Newton Head near Ayr. The said arrestment was not served personally upon Alexander Weir, nor at the office of the firm in Ayr.

The defenders pleaded—"(1) No jurisdiction. (2) No funds belonging to the defenders having been competently arrested in the hands of Alexander Weir & Company, the arrestment used is inept to found jurisdiction against the defenders."

The Lord Ordinary (CRAIGHILL) repelled these pleas-in-law, holding that (1), failing payment by the said Alexander Weir & Company, the said Alexander Weir was individually liable to the defenders for their debt; (2) that the defenders' claim against the said Alexander Weir, and the sum covered by it, were open to arrestment by creditors of the defenders; (3) that the said arrestment was apt to attach, and did attach, this fund; and (4) that jurisdiction against the defenders had been thereby created.

The defenders reclaimed, and argued—(1) An arrestment of a company debt must be made in the same way as an intimation to a company of an assignation of debt, that is, to each individual partner unless a manager be formally appointed—arrestment in the hands of one who is *de facto* managing partner being not sufficient — Bell's Princ. 2276, Note G, and cases; 1464, Note A, and cases. (2) Action must be first maintained against the company for a company debt. Here