the board meetings. Of course if a director is sent anywhere on a delegated duty it is equally clear that he has to be paid his expenses, because I do not think that his colleagues would be able to secure the services of one of their number to go upon a distant journey except under the condition that he should be relieved of the expenses that he incurred in the interests of the company.

LORD KINNEAR—I concur.

LORD PEARSON was absent.

The Court recalled the Lord Ordinary's interlocutor in so far as it decerned against the defender for payment to the pursuers of the sum of £279, 6s., and in lieu thereof found that he was bound to make payment of the said sum, and *quoad ultra* adhered.

Counsel for Pursuers (Respondents) — Scott Dickson, K.C.—J. G. Jameson. Agents —Boyd, Jameson, & Young, W.S.

Counsel for Defender (Reclaimer)—Hunter, K.C.—R. S. Horne. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Friday, November 15.

SECOND DIVISION.

[Lord Johnston, Ordinary.

POLWARTH *v.* NORHT BRITISH RAILWAY COMPANY AND OTHERS.

Contract — Carriage — Railway — Breach of Contract—Deviation from Route—Effect of Request for Carriage Back by Same Route as on Outward Journey when that was a Condition of Half Rates—Stipulation Solely in Interest of One Party to the Contract.

A railway company agreed to charge only half rates for the return journey of stock not sold at a show at A., on condition that the exhibitor consigned them "on the return journey by the same route as they were sent." An exhibitor signed a form supplied by the company requesting them to carry back to M. three unsold cattle "by the same route as on the journey here" at their reduced rate, and in consideration thereof he undertook to relieve the company of all liability for loss or damage unless caused by wilful misconduct on the part of their servants. The cattle on the outward journey had been consigned from M. to A. *via* K., no route being specified between K. and A. From K. there were two routes to A., with little difference as regarded distance and convenience. The company had carried the cattle by the one route on the outward journey, and were carrying them by the other on the return journey, when the truck containing the cattle went on fire, from the effects of which they died.

Held (1) that the stipulation for carriage back "by the same route as on the journey here" was not a condition of the contract which the company could waive as having been made solely in its own interest; and (2) that the company had broken the contract.

Carriage—Railway—Contract for Carriage of Cattle at Owner's Risk—Cattle Carried by Route not that Specified in Contract—Liability of Railway Company for Loss—Limitation of Liability—Railway and Canal Traffic Act 1854 (17 *and* 18 *Vict. cap.* 31), *sec.* 7.

A railway company in carrying cattle to their destination carried them by a route, deliberately adopted, different from that specified in the contract of carriage. The cattle were injured owing to the truck taking fire.

Held that the company's breach of contract precluded them from founding on a clause therein which indemnified them from loss, but that the breach did not put them outside the Railway and Canal Traffic Act 1854, sec. 7, which consequently limited their liability.

The Railway and Canal Traffic Act 1854 (17 and 18 Vict. cap. 31), enacts—Sec. 2— "Every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic" (which term by section 1 includes animals) "upon and from the several railways and canals belonging to or worked by such companies respectively. . . ."

Section 7—"Every such company as aforesaid shall be liable for the loss of or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void: . . . Provided always, that no greater damages shall be recovered for the loss of or for any injury done to any of such animals beyond the sums hereinafter mentioned; (that is to say) . . . for any neat cattle, per head fifteen pounds; . . . unless the person sending or delivering the same to such company shall, at the time of such delivery, have declared them to be respectively of higher value than as above mentioned. . . ."

On 1st February 1905 Lord Polwarth, Mertoun House, St Boswells, brought an action against the North British and the North-Eastern Railway Companies to recover, jointly and severally, £800 with interest.

The following narrative of the *facts* is taken from the opinion of the Lord Ordinary (JOHNSTON)—"This action is raised by Lord Polwarth to establish liability against the North British Railway Company and the North-Eastern Railway Com-

pany jointly, or jointly and severally, for the loss of three head of cattle destroyed at Tweedmouth Junction on their way back to Maxton, the station for Lord Polwarth's estate of Mertoun, from the Northumberland Agricultural Society's show at Alnwick on 13th July 1904.

"The cattle were despatched from Maxton on the morning of 12th July *via* Kelso, and travelled by the short route by Coldstream and Wooler to Alnwick. They were returned on the afternoon of the 13th from Alnwick, *via* Alnmouth Junction, to Berwick, and thence back to Tweedmouth, with the intention of sending them from Tweedmouth, *via* Coldstream and Kelso, to Maxton. While standing at Tweedmouth Junction the truck in which the cattle were caught fire and they were destroyed.

"The cattle being prize animals, the sum of £800 is claimed as their value.

"The question raised or intended to be raised depends first upon the special contract made by Lord Polwarth, through his factor Mr Campbell, with the company or companies for the transit of the cattle, and second upon the fact that the North-Eastern Company returned the cattle *via* Berwick and not *via* Wooler, and the effect thereof. . . .

"The admitted situation is that Maxton Station is on the North British Railway between St Boswell's Junction and Kelso; that from Kelso to Sprouston is part of the North British line, but is worked by the North-Eastern, and the traffic between the two companies is exchanged at Kelso, so that practically the North-Eastern line may be said to begin at Kelso; that from Kelso Alnwick can be reached by two routes of the North-Eastern—one, the shorter, *via* Coldstream and Wooler, the other, the longer, *via* Coldstream, Tweedmouth, and Alnmouth; that the route *via* Tweedmouth frequently involves the traffic being taken to Berwick and back to Tweedmouth; that besides the routes above mentioned, traffic between Maxton and Alnwick could be taken by a third but a very roundabout route, *via* Duns and Reston, to Berwick, on the North British, and thence *via* Tweedmouth and Alnmouth, on the North-Eastern, to Alnwick.

"An arrangement exists, as was not denied, though the details of the arrangement and the precise relations of the companies were not before me, between the North-Eastern and the North British Railway Companies (and I gather that the agreement is a general one among all railway companies in the Kingdom) for the transit of cattle for *bona fide* show purposes to and from agricultural meetings at freight and a-half, *i.e.*, freight for going and half freight for returning. But in order to obtain the benefit of such reduction of freight a somewhat elaborate system of documents requires to pass, the precise terms of which are essential to the contract between Lord Polwarth and the Railway Companies.

"In the first place, before the cattle start on the outward and return journeys respectively declarations are required, Nos. 13 and 16 of process, to be handed to the station agents at the point of shipment for the outward and homeward journeys. These declarations are each of them headed North-Eastern Railway. What the precise relation between the North British and the North-Eastern Railway Companies in the matter is, as I have already said, not disclosed, but the terms preclude the North-Eastern from denying that the North British was at least their agent, except on the footing of denying authority and disclaiming the transaction altogether. But without detailed information there is practically no doubt, having regard to the known relations of the two lines, that as between themselves there exist arrangements for through traffic which cover the occasion in question.

"No. 13 of process [*headed* "*Agricultural Show Traffic*" — "*To the Show*"] commences with a certificate by the Secretary to the Agricultural Society that the stock had been entered by Lord Polwarth for exhibition. The rest of the document is titled a certificate . . . In consideration of the North British receiving and forwarding the stock under the conditions applicable to agricultural show traffic, Lord Polwarth, through his factor, undertook to relieve the North British Company and all other companies over whose lines the animals might pass from all liability for loss, &c., except upon proof that such loss, &c., arose from wilful misconduct on the part of the servants of such companies. Endorsed upon this document are 'General Conditions of Conveyance,' which I understand to be the conditions applicable to agricultural show traffic, as none others are referred to. Of these the important articles are that the stock is conveyed—(8) to the show at ordinary rates. (9) From the show, if sold, at ordinary rates. (10) From the show, if unsold, at half rates back to the station whence sent. (1) The live stock can only be conveyed at the owner's risk. (6) On returning, if the animals remain unsold, the exhibitors must produce a certificate of the fact, issued by the secretary of the society and signed by the exhibitor, in order to be entitled to the privilege of having the stock charged at half rates. (7) In order to secure the return of the live stock at half rates if unsold, the exhibitors must in every case take care to consign them on the return journey by the same route as they were sent to the meeting, otherwise full rates will be charged.

"On delivery of this document to the station agent at Maxton on 12th July 1904 the usual owner's risk consignment note was prepared by the agent and signed by W. Henderson, the man in charge of the cattle, whose authority from Lord Palwarth was not disputed. It bore simply that the cattle were consigned from Maxton to Alnwick *via* Kelso. . . .

"What Henderson signed was a request that the cattle 'be carried at the special or reduced rate, in consideration whereof he agreed to relieve the North British Company and all other companies over whose lines the stock might pass from all liability

for loss, &c., except upon proof that such loss, &c., arose from wilful misconduct on the part of the company's servants.' . . .

"On the return journey the document No. 16 of process, also signed by Mr Campbell, Lord Polwarth's factor, was handed to the station agent at Alnwick, similar in terms with the document No. 13 of process, and having the same general conditions of conveyance endorsed, except that it bore the word 'returned' as part of the heading 'Agricultural Show Traffic,' and 'from the show' instead of 'to the show,' and also bore a certificate by the Agricultural Society's secretary that the stock had been exhibited instead of had been entered for exhibition, and was addressed, not to the North British, but to the North-Eastern and North British Companies. But then the document No. 16 of process was supplemented by the document No. 15 signed by Henderson, the man in charge, and admittedly representing Lord Polwarth. This bore a declaration, first of all, that the stock had been exhibited and had not been sold, and was still the *bona fide* property of the exhibitor; and in the second place a request . . . in terms very similar to that which is embodied in the North British consignment note No. 12. In fact No. 15, with the North-Eastern consignment note No. 14, are the North-Eastern's counterpart of the North British consignment note No. 12.

"But though the terms are very similar generally, and have the same object, viz., to relieve the Railway Companies from loss except for wilful misconduct on the part of their servants, and the contract is to be deemed to be made separately with all companies parties to any through rate under which the stock is carried, there is this important difference, that the consignment is expressly for carriage *back* to the station 'named' in the schedule endorsed, which station is Maxton, North British '(from which station such *animals or goods were consigned here for the above-mentioned show*) *by the same route as on the journey here* at the reduced rate below your ordinary rate, and in consideration of your charging such reduced rate,' &c. The italics are the company's. Neither in this nor in the consignment note No. 14 is any route otherwise mentioned, but merely the station of destination, viz., Maxton."

The pursuer pleaded—"(1) The pursuer having contracted with the defenders, the North British Railway Company, for the carriage, by themselves or their agents, of the said animals to and from the said show, and the said company having failed to carry them safely, they are liable in damages as concluded for, both at common law and under the Mercantile Law Amendment Act 1856, section 17. (2) Assuming that the defenders, the North British Railway Company, contracted with the defenders, the North Eastern Railway Company, as agents for the pursuer, or that the North British Company acted throughout as agents for the North Eastern Company, or that otherwise the pursuer's claim is against the North Eastern Company, the said latter company is similarly liable to the pursuer in damages as concluded for. (3) Assuming any limitation of the liability of either company under said schedule or otherwise, such limitation is excluded (1st) by reason of the said unauthorised deviation in the return journey; (2nd) by reason of the said loss and damage having been caused by fire."

The defenders, *inter alia*, pleaded—"(1) The pursuer's averments are irrelevant and insufficient to support the conclusion of the summons. (3) The defenders should be assoilzied from the conclusions of the action in respect that the animals were at the time of the fire being carried under an owner's risk special contract. (4) The pursuer's loss not having been caused by the negligence or default of the defenders or their servants, the defenders are entitled to decree of absolvitor. (6) No declaration having been made by or on behalf of the pursuer in terms of the Railway and Canal Traffic Act 1854, section 7, the defenders are not in any event liable in excess of £15 for each animal."

On 20th July 1905 the Lord Ordinary continued the cause till the first sederunt day in October to give the pursuer an opportunity of lodging a minute of amendment if so advised.

Opinion. — [*After the narrative above quoted*] — "It is maintained in the first place for the defenders that their liability is, in any event, limited to £15 per animal, in respect that no declaration of an excess value was made on behalf of Lord Polwarth in terms of the Railway and Canal Traffic Act 1854, section 7; and in the second place that the stock was, at the time of the fire, being carried under an owner's risk special contract, which exempted them from liability, in respect that no wilful misconduct on the part of their servants was alleged.

"Lord Polwarth's answer is, that assuming that both or either of these defences might, under other circumstances, have been available to the defenders, they cannot in the actual circumstances be pleaded, in respect that the companies had broken their contract with him by diverting the traffic round by Berwick and Tweedmouth instead of sending it back by the route by which it came.

"This answer requires, first, a consideration of the contract, and, second, of certain English authorities bearing upon the point.

"I am of opinion, in the first place, that it is not open to the Railway Company to plead that the condition endorsed on the documents Nos. 13 and 16, to the effect that the traffic must be consigned on the return journey by the same route as that by which they were sent, is one entirely in their favour, and which may be waived by them if they find it convenient—*Bidoulac*, 17 R. 144. I do not need to determine absolutely whether this might or might not have been so on the documents Nos. 13 and 16 of process, for the matter does not rest on these documents alone; it rests also on the document No. 15 of process, which having been

accepted and the cattle delivered for carriage on the faith of it, becomes a mutual contract for the return journey '*by the same route as on the journey here.*'

"But the Railway Companies maintain further that the word 'route' is elastic, and that they were not confined to transmitting the stock by the same line of rails by which it had come, but were entitled to return it by any combination of their lines, for though they did not put their argument precisely in these words, I cannot find any other which accurately defines it. I think they limit their contention to this, that so long as they send back by Kelso, it is open to them to send either by Wooler or Tweedmouth. But it appears to me that if their contention is good at all, it would warrant their returning the traffic by Reston and St Boswells, or by any other possible route on their combined systems—say Edinburgh and St Boswells. I cannot hold that the word 'route' has this extended meaning, even with the limitation which the company indicates. I think that 'route,' particularly in the phrase 'the same route,' as 'on the journey here,' imports a definite line within the system of a company, or within the combined system of two companies, and not merely the system or systems of one or both as a whole. I do not suggest that this view could be pressed to the extreme point, as for instance to involve a breach of contract if traffic which was taken through Carstairs station were returned by the Carstairs loop line without entering the station; but without pressing the argument to such an extreme, I cannot hold that the route from Alnwick, by Alnmouth and Tweedmouth or Berwick, was not an entirely different route from that by Wooler, and one to which pursuer might reasonably have objected had it been proposed to him as sufficient implement of the company's contract.

"I think it is not unfair to test this point by putting the converse proposition. Suppose at Alnwick the pursuer for his own advantage or convenience had booked his cattle back to Maxton *via* Tweedmouth or Berwick, could he have had any answer to the company's demand for full freight on the return journey? In my opinion he would not.

"But I am bound, in the second place, to consider the English authorities founded upon, as they appear to bear very closely on the question.

"I do not think that the case of *Great Western Railway Company* v. *M'Carthy*, 1887, L.R., 12 App. C. 218, goes further than to determine that the clause in the owner's risk contract note of both the companies concerned imported quite a legal condition exempting from liability under the Railway and Canal Traffic Act, 1854, section 7, provided a proper alternative was given, and in the present case no question is apparently raised on this score, but the three cases—*Morritt* v. *North-Eastern Railway Company*, (1876) L.R., 1 Q.B.D. 302; *Mallet* v. *Great Eastern Railway Company*, L.R. (1899) 1 Q.B. 309; and *Foster* v. *Great Western Railway Company*, L.R. (1904) 2 K.B. 306—are more apposite, and the latter was founded upon as the ruling case and as deciding the present question in favour of the Railway Companies.

"I pass over *Morritt's* case as it may be referred to the same principle as *Foster's* case.

"The real question is between *Mallet's* case and *Foster's* case, and whether *Mallet's* case is a sound judgment and applicable to the present, or is substantially overruled by *Foster's*. In *Mallet's* case the contract was to carry from Lowestoft to Jersey *via* London, the Great Western Railway, and Plymouth, whereas the receiving company transmitted goods from London *via* the the London and South-Western Railway and Southampton. This was done by mistake of their servants, who misread the direction, which was not very distinctly written. There was delay in the transmission and consequent loss. It was held that the delay was delay in the performance of the contract, and arose in consequence of the defendants' doing something which was wholly at variance with the contract.

"But in *Foster's* case the circumstances were different. The goods were being carried also to Jersey, and they ought to have been transmitted from Exeter *via* London and South-Western to Southampton. But they were accidentally carried past Exeter, and when the mistake was discovered it was too late to send them back to Exeter to catch the Southampton boat, and the Railway Company did what was best in the circumstances by sending them *via* Weymouth, which was a totally different route from that by which they had undertaken to carry them. The decision was that the breach of their contract was at Exeter, but that it was occasioned by their servants' negligence but not wilful misconduct, and that they were therefore protected by the relieving clause in their contract, that after Exeter they were no longer obliged to have recourse to that clause, because they were no longer carrying under the contract, but as baillees of the goods were doing their best in the circumstances. And the case was carefully distinguished from that of *Mallet*. It is quite true that in the opinions of the Judges who gave judgment in the case, and particularly of Lord Alverstone, there is an undercurrent of dissatisfaction with the case of *Mallet*, but it goes no further. It may be that it is justified, if it be held that in *Mallet's* case at London a similar mistake was made to that made in *Foster's* case at Exeter, but even if this be so, neither *Foster's* case nor *Mallet's* case, assuming it to be corrected by the judgment in *Foster's*, is like the present. Here there was no mistake in transit. There was a deliberate diversion of the route from the beginning, and I do not think that the doubts indicated in *Foster's* case strike at the grounds of judgment in *Mallet's* case, but merely their application in the circumstances. But whether these grounds of judgment properly applied in *Mallet's* case or not, they apply, in my opinion, here, and I cannot hold them displaced by *Foster's* case.

"I speak of the above cases with the respect due to them as decisions pronounced by the English Courts in *pari materia* though not binding on me, but I should myself have adopted the ground of judgment in *Mallet's* case in the circumstances of the present.

"On the documents therefore upon which the case must ultimately depend, and on which it was argued by the pursuer, I should be prepared to hold that he might have a good case to recover untrammelled by the owner's risk contract embodied in the special agreement for carriage to and from the show. But then the documents are not his record, but are only embodied in it, and that insufficiently by reference, and while Mr Mackintosh presented a very able argument upon the documents and authorities, he failed to my mind to connect them with his record. . . . I shall therefore continue the case to give him an opportunity of considering his position."

The pursuer having lodged a minute of amendment, the Lord Ordinary on 25th November 1905 repelled the first, third, and sixth pleas-in-law for the defenders and allowed the parties a proof of their averments as to, *inter alia*, the value of the cattle in question.

Opinion.—"The record in this case has been amended in terms of my interlocutor of 27th October, and the defenders admitted at the bar that the pursuer had complied with the requirements of the opinion expressed by me on 19th July, and stated that they did not propose to raise further the question of relevancy. But they contended that, though it might be implied from the form of my opinion that the question raised in their sixth plea-in-law had been disposed of, that was not really the case. That plea-in-law—the sixth—is to the effect that 'no declaration having been made by or on behalf of the pursuer in terms of the Railway and Canal Traffic Act, section 7, the defenders are not in any event liable in excess of £15 for each animal.'

"It is true that I did not expressly consider or dispose of that plea, though I stated that the point raised was the first point maintained for the defenders. My recollection is, however, that I thought it unnecessary to deal with it separately, and considered it covered by the opinion which I expressed with reference to what was maintained in the second place in support of the defenders' third plea-in-law, which was that 'the defenders should be assoilzied from the conclusions of the action, in respect that the animals were at the time of the fire being carried under an "owner's risk" special contract.'

"The defenders having asked to be reheard on their sixth plea-in-law, I have now heard a full argument, and have reconsidered the question, with the result that I shall now repel the plea.

"Prior to the passing of the Carriers Act 1830 (11 Geo. IV and 1 Will. IV, cap. 68) common carriers were practically in the position of guaranteeing the safe delivery of goods which they accepted for carriage. And all goods which they accepted for carriage for one person, they were bound to carry for all the lieges. The law, however, allowed them to relieve themselves, by notice published with the intent to limit such heavy responsibility. But in respect of the practice of persons tendering for carriage, parcels, the value of which was grossly disproportionate to the bulk, without notifying to the carrier the value and nature of the contents, and of the difficulty of fixing parties with knowledge of such limiting notices, the Legislature thought fit, by section 1 of the above Act of 1830, to enact that no common carrier by land for hire should 'be liable for the loss of or injury to any article or articles of property of the descriptions following'—[and there followed an enumeration of bullion, gold and silver plate, jewellery, bank-notes, paintings, china, silks, furs, lace, and other articles of similar nature of value disproportionate to bulk]—contained in any parcel or package delivered for carriage 'when the value of such article or articles or property aforesaid, contained in such parcel or package, shall exceed the sum of £10, unless at the time of the delivery thereof . . . the value and nature of such article or articles or property shall have been declared by the person sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same be accepted by the person receiving such parcel or package.' By this provision therefore the carrier was entirely relieved for the loss of or injury to any such article, unless it was declared, and what was practically a premium of insurance paid.

"But when railways and canals came practically to supersede the common carriers of 1830, while the Act of 1830 still continued to regulate the carriers' liability where it applied, a further limitation was found necessary, and was introduced by the Railway and Canal Traffic Act 1854, sec. 7, but the relief given was not absolute, but qualified and limited. [*His Lordship here quoted the section, supra.*]

"It was maintained that this provision limited the defenders' liability for the loss of the pursuer's cattle to the sum of £15 per head, in respect that he had not declared them to be of higher value and paid the consequent increased freight. But I think that the grounds on which I have already disposed of the defenders' third plea-in-law apply to the plea founded upon this provision and warrants my rejecting it. I think that it is an implied condition of the Railway Company taking benefit by the limitation of liability provided, that they shall carry on the contract on which the cattle were delivered.

"I have again considered the English authorities to which I was referred at the first debate and certain further authorities which were quoted, but I have not changed my view of their bearing.

"The former authorities quoted were *Morritt* v. *North-Eastern Railway*, 1 Q.B.D. 302; *Mallet* v. *Great Eastern Railway* (1899), 1 Q.B. 309; and *Foster* v. *Great Western Railway Company* (1904), 2 K.B. 306. I am

prepared on further perusal to admit that *Mallet's* case was wrongly decided, and that it was in reality not distinguished but disapproved by the Court of King's Bench in *Foster's* case. But that does not alter my view of the bearing of the two other cases. They determine that a mistake even negligently made by a railway company in the course of executing the contract of carriage, which resulted in goods being diverted from the route by which they were contracted to be carried, did not deprive the companies in the one case of the benefit of the provision of section 1 of the Carriers Act 1830, and in the other case of the benefit of a special condition just and reasonable, and therefore permissible to be made, under section 7 of the Railway and Canal Traffic Act 1854. But they leave open the question what is to happen when the mistake or the neglect or the default occurs, not in course of executing the contract, but where the contract is never even commenced to be executed.

"The distinction between these cases and certain others to which I will immediately refer, was, I think, correctly noted by Lord Blackburn, then Mr Justice Blackburn, when he says in *Morritt's* case at 1 Q.B.D. 304—'In each of these (that is, the latter cases) there was an intentional act on the part of the defendants in sending on or misdelivering the goods; here there was only negligence.'

"The new cases to which I have been referred are *Sleat* v. *Fagg*, 5 Barn. & Ald. 342, and 25 R.R. 407, and *Garnet* v. *Willan*, 5 Barn & Ald. 53, and 24 R. R. 276, in both of which carriers were held responsible for loss notwithstanding notice equivalent to the provisions of the Carriers Act 1830, brought home to the knowledge of their customer, because they were not carrying under their contract but outwith their contract, and these decisions seem to me to support the view which I have already expressed. I was also referred to *Hearn* v. *L. & S. W. Railway*, 24 L.J. Ex. 180; *Millen* v. *Brasch*, 10 Q.B.D. 142; and *Handon* v. *Caledonian Railway Company*, 7 R. 966. The first two are illustrative of the general question; the latter, like the cases of *Sleat* and *Garnet*, are more directly in line with the present.

"In fact I remain of the opinion which I formerly held that the question at issue in the case depends upon whether Lord Polwarth's cattle were returned 'by the same route as on the journey' out. I have already expressed my reason for the opinion that they were not so returned. If so, they were not carried on the contract, but contrary to the contract of carriage." [*His Lordship then dealt with another point which was not argued in the Inner House.*]

A joint minute of admission for the parties was then lodged, in which they agreed —(1) That the value of the animals in question should be held to be £550. (2) That the animals died in consequence of the injuries caused by fire while in the waggon. And (3) that certain generalnotices (in which defenders declared they were not common carriers of cattle) had been publicly exhibited by the defenders; and *quoad ultra* renouncing further probation.

On 22nd February 1907 the Lord Ordinary pronounced this interlocutor — "Having considered the cause along with the joint-minute of admissions, *inter alia*, assessing the value of the cattle in question at £550 sterling, and renouncing further probation, decerns against the defenders, conjunctly and severally, for the agreed-on sum of £550 sterling, with interest thereon, as concluded for in the summons."

Opinion.—[*After referring to the minute of admissions finding that the defenders were not common carriers and pointing out that there was no proof of either fault or negligence, his Lordship proceeded*]—"But the case has been taken throughout on the footing that the pursuer founded entirely on breach of contract, and though I think that their record might have deduced this more pointedly, I think that it is their real case on record. If so, then the contract was broken; the cattle were not carried on it, but in contravention of it. It was no mere negligence or fault of the defenders' employees diverting the cattle in transit. They never were carried on the contract at all, and this was done intentionally. Whether for the defenders' convenience, or whether it was assumed that the pursuer would thereby get better expedition, does not appear to me to affect the question. Under their contract the defenders, whether they were common carriers or carrying on a special contract, were bound to deliver the cattle at Maxton, and they could not do so. They cannot, therefore, plead any of the conditions of the contract to excuse their breach. Nor can they so plead the statutory limitation of liability, for the statute subsumes a contract of carriage, and that the carriage proceeds under that contract. I cannot distinguish from *Handon* v. *Caledonian Railway Company*, 1880, 7 R. 966, in Scotland, and from *Sleat* v. *Fagg*, 1822, 24 R.R. 407; *Lilley* v. *Doubleday*, 1881, L.R., 7 Q.B.D. 510, and *Royal Exchange Shipping Company* v. *Dixon*, 1886, L.R., 12 A.C. 11, in England. The damage then is the value of the cattle. 'The question is whether the defendant was responsible for the goods, and if so the damage must be their value' (*per* Lindley, J., in *Lilley* v. *Doubleday*, *supra*, and *cf. Ellis* v. *Turner*, 1800, 5 R.R. 441), unless indeed the damage was too remote. But this I cannot hold in face of the English cases of *Davis* v. *Garett*, 1830, 31 R.R. 524; *Scaramanga* v. *Stamp*, 1880, L.R., 5 C.P.D. 295, to which I have referred. I do not think that even a *damnum fatale* would have excused the defenders, but the defenders do not attempt to show that the accident was occasioned by the agency of nature, and could not reasonably have been avoided. *Nugent* v. *Smith*, 1876, L.R., 1 C.P.D. 423.

"I shall, therefore, decern against the defenders for the agreed-on sum of £550 with expenses. I do not think that there should be any modification in respect of the amendment of record, for if the

defenders did not add to their statement in defence, they brought forward for the first time the important plea last disposed of, and occasioned the third hearing."

The defenders reclaimed, and argued—(1) They were not liable at all for the loss of the cattle. (*a*) The cattle were carried to Alnwick by the route agreed upon. They were consigned to Alnwick *via* Kelso; they were sent to Alnwick *via* Kelso—*via* Kelso being the only prescribed route, they had the option of sending them either *via* Wooler or *via* Tweedmouth. As to the return journey, it was true the special contract contained a request "for carriage back" "by the same route as on the journey here." That meant by the same route before stipulated for—*i.e.*, *via* Kelso. It did not mean by the same set of rails. Their sending the cattle by Wooler on the outward journey in the exercise of their option did not preclude them from sending them by Tweedmouth on the return journey. (*b*) Even assuming "by the same route as on the journey here" meant by Wooler, it was a condition inserted solely for the company's benefit, and which they could waive—*Bidoulac* v. *Sinclair's Trustees*, November 29, 1889, 17 R. 144, 27 S.L.R. 93. (*c*) Assuming that the obligation was to carry by Wooler, yet in sending them by Tweedmouth they were executing the contract to the best of their ability with the view of getting them to their destination as speedily as possible, and there being no proof of wilful misconduct, they were protected by their special agreement and risk clause—*Morritt* v. *North-Eastern Railway Company*, 1876, L.R., 1 Q.B.D. 302; *Foster* v. *Great Western Railway Company*, [1904] 2 K.B. 306, which disapproved of *Mallet* v. *Great Eastern Railway Company*, [1899] 1 Q.B. 309. Deviation from the strict route might be justifiable, as in the case of a ship—*Scaramanga* v. *Stamp*, 1880, L.R., 5 C.P.D. 295. (2) Assuming there was a breach of contract which put them outside the benefit of their special contract, then while the Railway and Canal Traffic Act, section 7, made them liable for the loss of cattle "in the receiving, forwarding, or delivery thereof," it limited that liability to £15 per head, there being no prior declaration of higher value. They received the cattle at Alnwick as carriers, and as such their liability then commenced—*Hill* v. *London & North-Western Railway Company*, 1882, 42 L.T. 513. They were "forwarding them" as carriers when the loss occurred, and consequently the limitation applied—*Great Western Railway Company* v. *M'Carthy*, 1887, L.R., 12 App. Cas. 218; *Hodgman* v. *West Midland Railway Company*, 1865, 35 L.J. Q.B. 85; *Foster* v. *Great Western Railway Company* (*cit. supra*). This conclusion was supported also by *Hinton* v. *Dibbin*, 1842, 2 Q.B. (A. and E.) 646; *Baxendale* v. *Hart*, 1852, 21 L.J. Ex. 123; and *Morritt* v. *North-Eastern Railway Company* (*cit. supra*), which were decided under the Carriers Act 1830 (11 Geo IV and 1 Will. IV, cap. 68, section 1); and also by the cases of *London & South-Western Railway Company* v. *James*, 1872, L.R., 8 Ch. App. 241; *Wahlberg* v. *Young*, 1876, 4 Asp. Mar. Cas. 27—reported in a footnote to *Dyer* v. *The National Steamship Company*—which were decided under the Merchant Shipping Act 1854 (17 and 18 Vict. cap. 104), section 514. The cases of *Sleat* v. *Fagg*, 1822, 5 Barn. and Ald. 342, 24 R.R. 407, and *Garnet* v. *Willan*, 1821, 5 Barn. and Ald. 52, 24 R.R. 276 (referred to by the Lord Ordinary) were decided on the old law of carriers prior to the Carriers Act, and there was no question as to the application or otherwise of a statutory limitation. In *Hearn* v. *London & South-Western Railway Company*, 1855, 24 L.J. Ex. 180, 10 Ex. (H. and G.) 793, the goods were detained not lost, and it was so distinguished in *Millen* v. *Brasch*, 1882, L.R., 10 Q.B.D. 142.

Argued for the respondent (pursuer)—The defenders had broken their contract and were liable for the loss of the cattle. Even on the outward journey the company had no option as to route, because the time at which the cattle were sent to Maxton Station showed that they were intended go by Wooler. But in any case, as the cattle were in fact carried by Wooler on the outward journey, the company were bound to return them "by the same route as they were sent"—*i.e.*, by Wooler—for "route" did not mean "system," nor did "sent" mean "consigned." The condition as to route was not made solely in the interest of the Railway Company, and *Bidoulac* v. *Sinclair's Trustees* (*cit. supra*) had no bearing. By intentionally sending the cattle by a route not that stipulated for in the contract the defenders had put themselves outside the contract, and lost both the benefit of the limitation of liability therein, and also the benefit of the statutory limitation of liability under the Railway and Canal Traffic Act. They relied on the general principle of contract law stated in Just. Inst. iii., 14, 2; Ersk. Inst. iii., 1, 22; and in Jones on Bailments, pp. 68 and 69, and illustrated in *Davis* v. *Garret*, 1830, 6 Bing. 716; *Royal Exchange Shipping Company* v. *Dixon*, 1886, L.R., 12 App. Cas. 11; *Scaramanga* v. *Stamp* (*cit. supra*); *Ellis* v. *Turner*, 1800, 8 Term Rep. 531; *Garnet* v. *Willan* (*cit. supra*); *Sleat* v. *Fagg* (*cit. supra*); *Lilley* v. *Doubleday*, 1881, L.R., 7 Q.B.D. 510; *Handon* v. *Caledonian Railway Company*, June 18, 1880, 7 R. 966, 17 S.L.R. 664; *Mallet* v. *Great Eastern Company* (*cit. supra*). The ground of judgment in *Mallet* was not questioned in *Foster* v. *Great Western Railway Company*, but its application to the circumstances. The intentional breach of contract in the present case distinguished it from *Morritt* v. *North-Eastern Railway Company*, *Foster* v. *Great Western Railway Company*, *Great Western Railway Company* v. *M'Carthy*, *Baxendale* v. *Hart*, *Hinton* v. *Dibbin*, *Hodgman* v. *West Midland Railway Company*, *London & South Western Company* v. *James*, *Wahlberg* v. *Young* (*omnes cit. supra*), all of which were cases of negligence in carrying out the contract, and not, as here, an intentional acting outwith the contract.

No distinction was to be drawn between the special limitation of liability in the risk clause and the general limitation given by the Railway and Canal Traffic Act.

At advising—

LORD LOW—The instructions which the pursuer gave to the defenders to convey his cattle from Maxton to the Agricultural Show at Alnwick were to convey them *via* Kelso. Those instructions were indefinite to this extent, that beyond Kelso there were two routes—one by Wooler and the other by Tweedmouth, both upon the defenders' system, by either of which the cattle might have been sent to Alnwick, and between which there was little difference either as regarded distances or convenience. It was stated by the pursuer's counsel that the intention was that the cattle should be sent by the Wooler route, because it was arranged that the cattle truck should be taken from Maxton by a train which ran in connection with a Wooler train. If that had been admitted or proved it might have been sufficient to show that "*via* Kelso" meant in this particular case *via* Kelso and Wooler, but there is neither admission nor evidence on the point. All that we know is that the cattle were consigned to Alnwick *via* Kelso, and if that was all that the defenders were requested and agreed to do, I am inclined to think (although in the view which I take of the case it is unnecessary to decide the point) that it was open to take the cattle *via* Tweedmouth.

The cattle were in fact conveyed by the Wooler route. They were safely delivered at Alnwick, and no question arises in regard to the journey thither.

At the close of the show the cattle not having been sold required to be returned to Maxton. The defenders give special terms to persons sending live stock to agricultural shows upon certain conditions. They, *inter alia*, charge only half rates for the return journey of stock which is not sold, but only upon the condition that "the exhibitor must in every case take care to consign them on the return journey by the same route as they were sent to the meeting, otherwise full rates will be charged."

The pursuer was naturally desirous to have his cattle returned at half-rates, and accordingly his servant, who had charge of the cattle, filled up and signed the form supplied by the defenders of a special contract for the return of unsold cattle from a show at half rates. The document runs thus—"You are requested by the undersigned to receive the cattle in question for carriage back" to Maxton "by the same route as on the journey here, at the reduced rate below your ordinary rate, and in consideration of your charging such reduced rate for the carriage thereof the undersigned hereby undertakes to free and relieve you" of all liability for loss or damage, unless caused by wilful misconduct on the part of the company's servants.

Although these were the terms of the contract for the return journey the defenders did not send the cattle *via* Wooler but *via* Tweedmouth. During the journey the truck in which the cattle were being conveyed took fire, to the effects of which they all ultimately succumbed. The question to be determined in this case is, whether the defenders are liable in damages to the pursuer for the loss which he has sustained, and if so, what is the measure of their liability?

The defenders maintain (1) that they are not liable to any extent, in respect that by the contract the pursuer relieved them of all liability for loss, unless the loss was occasioned by the wilful misconduct of their servants, which is not alleged; and (2) that in any view they were not liable in a larger sum than £15 for each animal in terms of the 7th section of the Railway and Canal Traffic Act 1854.

In support of their contention that they are liable to no extent the defenders argued, in the first place, that the words in the contract, "by the same route as on the journey here," meant the route by which the cattle were consigned when sent to the show, namely, *via* Kelso, and that as they (the defenders) had the option of taking the cattle either by Wooler or Tweedmouth on the outward journey, they had the same option on the return journey. I am of opinion that that argument is not well founded. The words in the contract for the return journey which I have quoted seem to me, according to their natural and ordinary signification, to mean the route by which the journey to Alnwick was as matter of fact made, and I do not think that it is competent to read them as meaning something else, by reference to a prior and entirely separate contract.

The defenders further argued that the stipulation in regard to the route was inserted solely for their benefit, because they only agreed to carry the cattle at half rates on the return journey upon the condition that the pursuer should consent to the cattle being sent back by the same route as that by which they had come. The stipulation, therefore (the defenders argued), although binding upon the pursuer was not binding on them, and that so long as they only charged half rates as for the Wooler route they could send the cattle by another route if they found it more convenient to do so.

Here again I am unable to accept the defenders' argument. If the argument be sound the defenders were entitled to convey the cattle by any route they chose, and would not be bound to consider whether it was equally convenient and safe for the pursuer as the specified route. To say that the defenders had such power seems to me to be out of the question, seeing that the pursuer had agreed that the cattle should be conveyed at his risk. No doubt he took the risk in consideration of the reduced rate which was charged for the carriage, but he also took the risk for the rate which was specified, and for no other.

I am therefore of opinion that the defenders were in breach of their contract in taking the cattle by Tweedmouth, and that

they cannot found upon the indemnity clause in the contract.

The question remains whether the defenders' liability is limited in amount by the Railway and Canal Traffic Act 1854? The Lord Ordinary has answered that question in the negative, holding that the Act applies only where a railway company is carrying cattle under a contract, and that in this case the route adopted by the defenders having from its commencement been a different route from that specified, they were altogether outside of their contract. Whether that view be sound or not appears to me to depend upon the construction of the statute.

By the second section it is enacted that every railway company shall "afford all reasonable facilities for the receiving and forwarding and delivering of traffic," and traffic is defined as including animals. A railway company therefore is bound to carry cattle.

By the seventh section it is enacted that every railway company "shall be liable for the loss of or for any injury done to any horses, cattle, or other animals . . . in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants . . . provided always that no greater damages shall be recovered for the loss of or for any injury done to any of such animals beyond the sums hereinafter mentioned (that is to say) . . . for any neat cattle per head fifteen pounds," unless the person sending the animals shall have declared them to be of a higher value, in which case the company is authorised to demand a reasonable percentage upon the excess of value so declared.

In this case the pursuer made no declaration of value, and accordingly, if the statute applies, he cannot recover from the defenders more than £15 for each of the cattle.

What, therefore, the Railway Company is by the statute made liable for is the loss of or injury to cattle "in the receiving, forwarding, or delivering thereof." Now, unquestionably, the defenders received the cattle from the pursuer's servant for the purpose of forwarding them to Maxton, and they were in fact forwarding them to Maxton when the fire occurred. *Prima facie*, therefore, the Act applies. But it was said that the defenders cannot be regarded as having been acting as carriers for the pursuer at all, because they intentionally and deliberately adopted a route which was wholly different from that by which alone the pursuer had agreed that the cattle should be conveyed.

The force of that argument lies in the fact that the defenders intentionally adopted a different route from that stipulated, and that fact differentiates this case from those in which the contract has been departed from by mere mistake or carelessness, as, for example, when goods have been despatched upon the contract route but have afterwards been negligently shunted on to the wrong line or put into the wrong train at a junction, or where goods have been carried on beyond the station at which they ought to have been delivered. It seems to me, however, that the fact that there has been intentional departure from the contract route does not of itself solve the question. Suppose that cattle were being sent to an agricultural show, or to be sold at a market to be held on a particular day, and that after they had been carried a certain distance along the contract route it was found that the line ahead was blocked,—I cannot doubt that railway officials could send the cattle on by another route by which they could arrive at their destination in time for the show or market, without losing the benefit of the statute in the event of the cattle being killed or injured after they had been diverted from the contract route.

In this case we do not know the reasons which led the defenders to send the cattle *via* Tweedmouth, because there is neither admission nor evidence upon the point, and probation has been renounced. It is not averred, however, that there was anything of the nature of wilful misconduct, in the ordinary sense of these words, on the defenders' part, or that they took the cattle *via* Tweedmouth for any other purpose than to deliver them to the pursuer at Maxton. The Dean of Faculty gave an illustration intended to enforce his argument that the defenders having intentionally departed from the contract could not found upon the statute. The case which he supposed was that the pursuer had been in debt to the defenders, and that they had resolved to hold the cattle against the debt, and for that purpose had carried them off to York. I agree that in that case the statute would not have applied, because the defenders would not have been engaged as carriers in receiving, forwarding, or delivering the cattle. In the case which happened, however, they were acting as carriers and in no other capacity. When the accident occurred they were carrying the pursuer's cattle to the appointed destination, and there was nothing in the nature of appropriation of the cattle to their own use, or of handing them over to another carrier, or of sending them to the wrong destination or the wrong person. It therefore appears to me that the defenders did not by their breach of contract put themselves outside of the statute, and I am confirmed in that view by the highly authoritative judgment which was given in regard to a similar question under the Carriers Act in *Morritt* v. *North Eastern Railway Company*, 1 Q.B.D. 302.

I am accordingly of opinion that the pursuer is not entitled to recover more than £45, being the statutory maximum amount allowed when no declaration of value is made.

The LORD JUSTICE-CLERK and LORD STORMONTH DARLING concurred.

LORD ARDWALL was sitting in the Extra Division.

The Court recalled the Lord Ordinary's

interlocutor of 22nd February 1907 and decerned for payment by the defenders conjunctly and severally to the pursuer of the sum of £45 with interest.

Counsel for the Pursuer (Respondent)—The Dean of Faculty (Campbell, K.C.)—W. Æ. Mackintosh. Agents—Guild & Guild, W.S.

Counsel for the Defenders (Appellants)—The Solicitor-General (Ure, K.C.)—Cooper, K.C.—Grierson. Agent—James Watson, S.S.C.

Saturday, November 16.

SECOND DIVISION.

THE WALKER STEAM TRAWL FISHING COMPANY, LIMITED, PETITIONERS.

Company—Capital—Reduction of Capital—Confirmation—Readjustment of Capital not a Reduction—Competency—Companies Act 1867 (30 *and* 31 *Vict. cap.* 131), *sec.* 9—*Companies Act* 1877 (40 *and* 41 *Vict. cap.* 26), *sec.* 3.

The shareholders of a company which had power under its memorandum and articles of association to reduce its capital, unanimously passed alternative special resolutions, assented to by all its creditors—"(1) That the capital of the company be converted from 50,000 shares of the value of £1 each, whereof 12s. 6d. has been paid upon each share, a total of £31,250, into 50,000 shares also of the value of £1 each, upon 31,250 of which the full amount shall have been paid up, leaving 18,750 shares to be issued at the discretion of the directors for the time being, and that such conversion be effected by re-allocating the share capital among the shareholders, crediting to each shareholder one £1 share in respect of every pound sterling with which he or she is credited in the share capital account of the company . . . alternatively, (3) That the capital of the company be reduced from £50,000, divided into 50,000 shares of £1 each, on which 12s. 6d. each has been called and paid up, to £31,250, divided into 50,000 shares of 12s. 6d. each fully paid, and that such reduction be effected by extinguishing the liability in respect of uncalled capital on the said shares to the extent of 7s. 6d. per share." A petition was presented asking confirmation, preferably of the first alternative resolution.

The Court, *holding* that the first resolution was not a reduction of capital, *confirmed* the second resolution.

The Companies Act 1867 (30 and 31 Vict. cap. 131), sec. 9, enacts—"Any company limited by shares may, by special resolution, so far modify the conditions contained in its memorandum of association, if authorised so to do by its regulations as originally framed or as altered by special resolution, as to reduce its capital; but no such resolution for reducing the capital of any company shall come into operation until an order of the Court is registered by the registrar of joint-stock companies as is hereinafter mentioned."

The Companies Act 1877 (40 and 41 Vict. cap. 26), sec. 3, enacts—"The word 'capital,' as used in the Companies Act 1867, shall include paid-up capital; and the power to reduce capital conferred by that Act shall include a power to cancel any lost capital, or any capital unrepresented by available assets, or to pay off any capital which may be in excess of the wants of the company; and paid-up capital may be reduced either with or without extinguishing or reducing the liability (if any) remaining on the shares of the company, and to the extent to which such liability is not extinguished or reduced it shall be deemed to be preserved, notwithstanding anything contained in the Companies Act 1867."

The Walker Steam Trawl Fishing Company, Limited, a company limited by shares, incorporated on 29th November 1901 under the Companies Acts 1862-1900, and having its registered office at Commercial Road, Aberdeen, presented a petition to the Court for, *inter alia*, "an order confirming the reduction of capital resolved on by one or other of the special resolutions set forth in the petition."

The petition stated—"Clause fifth of the memorandum of association is in the following terms—'The capital of the company is £50,000, divided into 50,000 shares of £1 each, with power to increase or reduce the capital in conformity with the law in force at the time and with this memorandum and articles of association of the company, as originally framed or as duly and competently altered, and to attach to any additional capital such preferential, deferred, or special rights, privileges, or conditions as the company may determine.'

"By clause 52 of the articles of association it is provided that 'The company may by a special resolution reduce its capital by reducing the number or the value or both the number and the value of the shares into which it is divided, and may consolidate or subdivide its shares, and may cancel any shares that have not been taken or agreed to be taken by any person in the manner and with all or any of the incidents prescribed by the statute'; and by clause 148, that 'If the company shall be wound up, the surplus assets shall belong to the holders of the shares in proportion to the amount paid up or deemed to be paid up thereon, but this article shall be without prejudice to the rights of the holders of any shares to be issued on special terms.'

"The whole of the original share capital was issued as ordinary shares, and 12s. 6d. has been paid up on each share. Since its incorporation the company has been uniformly prosperous. For the first two years the dividends were at the rate of 7½ and 5 per cent. respectively on the subscribed capital, and during the last three years