power covers a lease of minerals, and that accordingly in granting such a lease the trustees are well within the powers of the trust deed taken as a whole. On the other questions I agree with your Lordship. The case of *Campbell* v. *Wardlaw* (10 R. (H.L.) 65), which was quoted to us, does not, I think, rule this case as regards the power to grant a lease; for in that case, in the first place the powers of administration were not so wide as here, and in the next place there was no power to sell in the trust deed which was there under consideration. Now with regard to the other matter, namely, the distribution of the rents and lordships between liferenters and fiars, I think the case of *Campbell* and the case of *Ranken's Trustees* v. *Ranken* (1908 S.C. 3), are the ruling authorities, and we must decide this present case in conformity with these as proposed by my brother Lord Low. I further agree that any revenue derived from wayleaves forms just part of the ordinary rent of the estate, and is in quite a different category from rents and lordships, and falls to be paid to the liferenter, and also that, following *Dick's Trustees* v. *Robertson* (3 F. 1021), any lordships which may become payable in respect of the small portion of minerals under South Whitelaw Park let to Messrs Addie & Sons fall to be paid to the liferenter.

The LORD JUSTICE-CLERK concurred.

LORD DUNDAS was sitting in the First Division.

The Court answered the first question in the affirmative; the second, branch (*a*), in the affirmative, branch (*b*) in the negative; the third, branch (*a*), in the negative, branch (*b*) in the affirmative; the fourth in the negative; and the fifth in the affirmative.

Counsel for the First, Second, and Third Parties—D. P. Fleming. Agents—H. B. & F. J. Dewar, W.S.

Counsel for the Fourth Parties—Wark. Agents—Laing & Motherwell, W.S.

Tuesday, June 15.

FIRST DIVISION.

[Sheriff Court at Edinburgh.

LYONS & COMPANY *v.* CALEDONIAN RAILWAY COMPANY.

Deposit—Railway—Left Luggage Office—Ticket—Reference to Conditions Endorsed on Back of Ticket—Condition of No Liability where Goods over Certain Value unless Declared—Liability where Goods Stolen.

L., a traveller for L. & Co., deposited with a railway company at their left luggage office at a station three hampers containing ladies' clothing, and received a ticket bearing in legible type a statement that the company only received the articles "upon the conditions expressed upon the back of this ticket." One of these conditions was—"The company will not be responsible for the loss of any parcel, package, or other article when the value . . . exceeds £5 unless at the time of delivery . . . its true value is declared to exceed £5," and a further percentage charge paid in addition to the ordinary charges. L. read and understood the statements printed on the face of the ticket, but did not read the conditions printed on the back thereof. He did not declare the value of any of the hampers to exceed £5, and made no additional payment, although the value of each was over £5. On presentation of the ticket for delivery, one of the hampers was found to have been stolen. L. & Co. brought an action against the railway company for £84, the value of the hamper.

Held (1) that the pursuers were bound by the conduct of L. as their agent, and were precluded from denying that the goods in question were deposited with the defenders on the terms contained in the ticket; and (2) that the defenders accepted the goods on deposit on the conditions specified, and were not responsible for any loss or damage suffered by the pursuers from their loss.

Authorities reviewed.

Lyons & Company, wholesale merchants, Watling Street, London, raised an action in the Sheriff Court at Edinburgh against the Caledonian Railway Company for payment of the sum of £84, 19s.

The following narrative of the facts and circumstances which gave rise to the action is taken from the interlocutor of the First Division, who found in fact:—"(1) That on 15th February 1907 the pursuers' traveller, Mr R. H. Lyons, deposited with the defenders at their left luggage office at Buchanan Street Station, Glasgow, three hampers, or skips, containing ladies' clothing, and received from defenders a ticket specifying the articles deposited, being No. 10 of process; (2) that on the face of the said ticket there was printed in legible type a statement in the following terms, viz., 'The company only receive the herein-mentioned articles upon the conditions expressed on the back of this Ticket'; and that on the back of the same there were printed certain conditions, one of which, being the fourth, was a condition to the following effect, viz., 'The company will not be responsible for the loss of . . . any parcel, package, or other article when the value of such parcel, package, or other article exceeds £5 . . . unless at the time of the delivery of such parcel &c. to them, its true value is declared to exceed £5 on a form to be supplied by the company, and signed by the party delivering such parcel &c.,' and further, that payment at the rate of one penny per £ in respect of such value should be made in addition to the ordinary charges; (3) that the said R. H. Lyons read and understood the statements printed on the face of the ticket, but did not read the conditions printed on the back thereof, or otherwise

inform himself of their terms; (4) that the said R. H. Lyons did not at the time of delivery of the aforesaid hampers or skips to the defenders declare that their value or the value of any one of them exceeded £5, or make any additional payment in terms of said fourth condition; (5) that when application was made on pursuers' behalf on Monday, 18th February 1907, by presentation of said ticket for return of said three skips, the defenders were only able to return two skips, the third having been stolen; and (6) that each of said three skips was over £5 in value, the skip which was not returned being worth £84, 19s. 5d."

The pursuers pleaded, *inter alia*:—"(1) The pursuers having deposited the said skip in question and its contents with the defenders, and received their acknowledgment therefor in the usual course observed by defenders in their traffic with railway travellers, they are bound to make good the damage sustained by the pursuers through the loss of said skip and contents. (2) The pursuers having contracted with the defenders that defenders should keep in safe custody the said skip and contents, and the said skip and contents having been lost through the negligence of the defenders, or those for whom they are responsible, the defenders are liable to the pursuers in damages. (4) The defenders having broken their contract with the pursuers, are not entitled to the benefit of conditions of the contract."

The defenders pleaded, *inter alia*:—"(3) The value of the skips and their contents having exceeded £5, and the value not having been declared at the time of delivery to defenders, the defenders are, in terms of the contract, free from liability for the loss of the skip and its contents, and they ought to be assoilzied. (4) The pursuers not having sustained any loss or damage owing to defenders' fault or neglect, the defenders ought to be assoilzied."

On 16th March 1908 the Sheriff-Substitute (MILLAR), before answer, allowed both parties a proof of their averments, and to the pursuers a conjunct probation.

Note—[*After narrating the nature of the action and quoting condition* 4]—"Mr Lyons admits he knew of this condition when he received the ticket. The pursuers maintain that the defenders are not in a position to enforce this condition as they failed to take such reasonable care as is required of them in terms of their contract, they having left the skip on the platform of the station without any guardianship at all. This is denied by the defenders, and in view of the case of *Handon* v. *Caledonian Railway Company*, 7 R. 966, I think I must allow a proof before answer."

The defenders appealed to the Sheriff (MACONOCHIE), who, on 24th March 1908, pronounced this interlocutor—". . . Adheres to the interlocutor of the Sheriff-Substitute now appealed against, and dismisses the appeal: Finds the defenders liable to the pursuers in the expenses of the appeal, and remits to the Auditor of Court to tax the same and to report: *Quoad ultra* remits the cause to the Sheriff-Substitute to proceed."

Note.—"I have, though with much difficulty, arrived at the same conclusion as the Sheriff-Substitute, but hardly, I think, on the same grounds. The question as raised here has never so far as I can ascertain been decided in the Court of Session, the case of *Handon* v. *Caledonian Ralway Company*, 7 R. 966, having been decided on the specialties of the conditions appearing on the ticket or note, conditions which have been altered for the express purpose, as I am told, of meeting the difficulty raised in *Handon's* case.

"Here it is admitted that the pursuers were aware of the conditions on the back of the ticket, and did not declare the value of their goods or pay a special rate for them, their value being above £5. It is also admitted that the Railway Company accepted their payment, which was at the special rate for commercial travellers. The pursuers aver that the company's servant into whose charge the package was given left it unwatched on the station platform from which it was stolen. This the defenders deny, and maintain that the averment of want of care on their part is irrelevant, looking to the terms of the contract. The question at this stage, then, is whether the pursuers are entitled to prove their averments, which for present purposes I must assume to be true. They practically amount to this, that the company after accepting the pursuers' money took no care whatever of their luggage.

"The case of *Handon* decided that under the terms of the ticket the Railway Company undertook to put Mr Handon's luggage into a warehouse or cloak-room, and it was held that the company 'having failed to perform their part of the obligation under the contract of deposit . . . cannot be heard to say that a condition of the contract has been violated by the pursuer'—L.P. Inglis, p. 970. Now condition 4 in this case cannot be said to imply any such special condition on the part of the company, the words 'deposited in their cloak-room or warehouses' being left out. The question, then, is whether by leaving out these words, or rather these words not being present, the company are absolved from taking any care whatever of articles exceeding £5 in value, in respect of the receipt of which they have accepted a money payment. That they should be so absolved seems to me so inequitable that I should have had no difficulty in coming to the conclusion that they were not had it not been for the leading English case of *Harris* v. *Great Western Railway Company*, 1876, 1 Q.B.D. 515, and one or two other decisions which followed on it. Before considering that case I should like to mention that at the hearing I was referred to the case of *Rusk* v. *Caledonian Railway Company*, which I decided in 1904 in favour of the Railway Company, though the conditions of the contract were there the same as they are here. But in that case it must be noticed that the articles were

deposited in the company's cloak-room, which is the recognised place for keeping passengers' luggage. It may well, I think, be held that the company when they placed the articles in the cloak-room were exercising that reasonable care which an ordinary person would be expected to exercise in his own affairs, but that cannot be said of their conduct here when they left the package unwatched on the public platform.

"Now, in *Handon's* case Lord President Inglis said that the contract must be looked at as a whole, and (p. 970) 'taking the contract as a whole, it is one of deposit and custody, but for a payment of money. A proper contract of deposit is gratuitous. But this is not so. . . . It is a combination of the two contracts of deposit and *locatio operarum*, and the measure of the liability of the depository is that he shall take all due and reasonable care of the articles deposited. That is clear law.' I do not think that because the pursuers assented to condition 4 as a term of the contract they assented to this, that the company were to be clear of their common law duty as laid down in the sentence I have quoted.

"It is necessary now to turn to *Harris's* case. There the ticket bore 'luggage and cloakroom' on its face, and on the back, after a statement of 'sums to be paid for warehousing passengers' luggage,' there was a notice that the company were not to be liable for the loss of any package beyond the value of £5, unless the value was declared and an extra payment made 'in addition to the before-mentioned warehouse charges.' The luggage was left unwatched in a vestibule adjoining the cloak-room to which the public had access, and was stolen from thence. The value, which was over £5, had not been declared, and no additional payment had been made. The Court, by a majority of one, decided that the Railway Company were not liable, and from that judgment Lush, J., dissented. I think that the ground of the judgment of the majority may be found in two sentences at the end of Mr Justice Blackburn's opinion—'they would, if these parcels were under the value of £5, be in my opinion liable, not because they placed them in the vestibule, but because they took no care of them when there. I read the contract as being to take reasonable care of the luggage, and to be responsible for any loss occasioned by that want of care, with, in effect, a proviso that inasmuch as the remuneration is very small, and the loss may be very great, the defendants shall not be responsible for loss if the goods exceed £5 in value, unless the value is declared and paid for.' In that view Mellor, J., concurred 'with considerable hesitation,' and Lush, J., the only remaining judge, expressly dissented from it. His view is summarised on page 518, and it comes to this, that by assenting to the condition, the depositor 'who does not insure, takes upon himself a warehouse risk, the risk of his goods being stolen, burnt, or damaged while there. The argument on the part of the company casts on him a risk which no one contemplates when he pays for warehousing, and which would excuse the company not merely for want of care in the keeping, but for actual exposure in the open air, not only to every passing thief, but to damage by rain or breakage or otherwise, if this was done by their servants in neglect of their duty—in fact, they would be irresponsible though no precautions whatever were taken to secure the safety of the goods.' That is precisely the argument now advanced by the defenders, but it must be distinctly remembered that Mr Justice Lush's view is the view only of the minority of the Court. Had it not been for certain observations made by Lord Shand in *Handon's* case, I should probably have felt myself bound, contrary to my own opinion, to follow the decision in *Harris*; but taking these observations and Mr Justice Lush's dissent together, I think that there is sufficient to entitle me to decide this preliminary question in favour of the pursuers. Referring to *Harris's* case, Lord Shand said (7 R. at p. 971)—'It was a case in which there was a decided difference of opinion among the judges, and for my own part I can only say that the reasoning of Mr Justice Lush most commends itself to my mind as the sound view of the case. 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.' His Lordship then notes two distinctions in fact between the cases as accounting for the judgment of the Queen's Bench Division. The first specialty is that 'the articles were left in a vestibule which seems to have been an attachment of the luggage room, and not as here on the open platform itself.' Here according to the averments that specialty does not exist. The second is this, that 'the terms of the contract were different from those 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 did here.' The terms of the contract in this case are also different to those in *Harris's* case, and that fact may, I hope, furnish an additional excuse for my coming to a decision which I rather fear is not altogether consistent with the view stated by Mr Justice Blackburn in the dicta which I have quoted.

"On these grounds I have with much difficulty come to the conclusion that I ought to adhere to the interlocutor of the Sheriff-Substitute."

On 10th August 1908 the Sheriff-Substitute after a proof pronounced an interlocutor which after making findings in fact to the effect (1) that three hampers had been deposited, (2) that on presentation of the ticket two only were delivered, and (3) that the defenders had failed to recover and deliver the third hamper, proceeded, "Finds in law that by the contract contained in the said receipt the defenders undertook to receive and keep in safe

custody the articles then delivered to them, and redeliver them on demand; and this undertaking was subject to the further condition, the fourth condition, that the company are not to be responsible for the loss of, injury to, or detention of any parcel, package, or other article, when the value of such parcel, package, or other article exceeds £5, unless the value is declared and an additional payment is made at the rate of one penny per pound of the declared value: Finds in fact (4) that the defenders did not deposit the articles in a safe place, but left them on a platform to which the public had access, and that they failed to take due care of them: Finds in law that the defenders thus committed a breach of contract, and that the said fourth condition does not apply, as the skip in question was not deposited in a safe place, nor was any care taken of it: Therefore finds the defenders liable to the pursuers in the sum of £84, 19s. sued for, and grants decree against the defenders in terms of the prayer of the petition: Finds the defenders liable to the pursuers in expenses," &c.

Note.—[*After narrating the circumstances*]—"In these circumstances, what was the contract between the parties? I think the contract is contained in the ticket which was given by the defenders to the depositor. On the front of the ticket reference is made to the conditions on the back of the ticket. There the company says that they shall only receive articles of luggage, or other articles left for custody, 'subject to the following conditions.' Accordingly the contract between the parties is one for safe custody. I do not think the fact that Mr Lyons requested the articles to be taken inside the left luggage office affects the terms of the contract at all. The contract is contained in the ticket, and must be construed strictly by the terms of the ticket itself. But there arises the question, what is the effect of a contract in which one party undertakes to receive the property of another for safe custody? I think it is described accurately by the Lord President in the case of *Handon*, to which I shall afterwards refer. 'It is one of deposit and custody but for payment of money. A proper contract of deposit is gratuitous, but this is not so. It partakes somewhat of a contract of *locatio operarum*, or rather it is a combination of the two contracts of deposit and of *locatio operarum*, and the measure of the liability of the depository is that he should take all due and necessary care of the articles deposited. That is clear law.' Now, what is due and reasonable care in circumstances such as the present? This is further explained in Bell's Principles (10th edn.), sec. 155, where he says—'This is the contract which regulates the duties of depositories for hire, wharfingers, &c. The engagement is for safe keeping, and this implies a secure place of custody, a warehouse water-tight, secure from attacks without and fire within,' &c. In this case the defenders left the skips lying upon a platform, and I do not think it proved that any special care was taken of the property there lying. The place was open to the free access of the public during the day, and even at night, through a side gate which was left open, any one could get to the place where these skips were lying. I think it proved from the evidence of the detective M'Gimpsey, and also from the evidence of Cameron, the boots, as to the practice in other stations, that this was a very careless manner in which to treat the baggage of their passengers. I cannot hold that the defenders either placed the skips in a safe place or took reasonable care of them when they placed them on the platform as they did. This view I think is corroborated in three ways. In the first place, we have the company's own view of their duty by turning to the time-table which is referred to in the conditions on the back of the ticket. At p. 141, in dealing with commercial travellers' luggage, they speak of it as 'when left in any of the company's left luggage offices.' That seems to me to imply the view that the articles were to be taken inside the office and not left on an open platform. Secondly, since the date when the pursuers' skips were deposited the defenders have erected a high iron railing around a considerable space at the door of the left luggage office, obviously for the safeguarding of goods left on the platform in the same way as the pursuers' skips were left. That seems to show that they were dissatisfied with the previous treatment of commercial travellers' luggage; thirdly, in the case of *Handon* Lord Shand says—'I think it has been shown that they left this trunk' (which was left very much in the same way as the pursuers' baggage here) 'exposed on the platform where it was not in a reasonably safe place.' In these circumstances I think the defenders failed to carry out what was an essential condition of the contract, viz., to keep these skips in a safe place and to exercise reasonable care with regard to them.

"The defenders, however, rely mainly upon the fourth condition on the back of the ticket, which says—'. . . [*The Sheriff-Substitute quoted the fourth condition*] . . .' Mr Lyons says that he had never read this condition, but he is a commercial traveller and has been in the habit of receiving these tickets at various places, and although he never read the condition he admits that he has heard such a condition referred to in conversation with others. In these circumstances I think it must be held that he knew of this condition and that he is bound by it. But the answer of the pursuers is that the company not having carried out the essential conditions of their contract, cannot rely upon this condition in their favour. The only case so far as this question is concerned which has been decided in the Supreme Court of Scotland is *Handon* v. *Caledonian Railway Company*, 7 R. 966. I think that case lays down the law upon two points. The first is that where the Railway Company has failed to perform their part of the obligation under the contract of deposit, they cannot be heard to say that a condition of the contract has not been observed

by the pursuer. That is laid down by the Lord President at p. 970; and Lord Shand on p. 971 says—'That being so, the second observation is that if the company failed to bring themselves within what is thus of the very essence of the contract, and did not deposit the articles in their cloak-room or warehouse, they cannot take any benefit from this condition.' The second point in the case is that the company failed to carry out the essential conditions of the contract in that case, but as the words on the ticket which constituted the contract differ in this case from those on the ticket in *Handon's* case I do not think the second ground of the judgment applies to this case. The first point that I have adverted to in *Handon's* case I think applies directly to this, and that is the reason why, relying upon *Handon's* case, I allowed a proof before answer. Before the Railway Company can enforce such a condition as the fourth condition on the ticket in this case they must show that they have carried out the essential conditions of the contract that they entered into. Now, as I have already said, the essential conditions of the contract in my view are that they shall place the articles received by them in deposit in a safe place, and that they shall take reasonable care of them. If they have so failed, I think *Handon's* case lays down directly that they cannot plead any condition in their favour. It is quite true that the contract in *Handon's* case differs in terms from this. Nevertheless the principle to be applied in the two cases is the same, and therefore in this case, as in *Handon's* case, I think the defenders are barred from pleading the fourth condition on the back of the ticket to exclude the pursuers' claim.

"The defenders relied mainly on a case of *Harris* v. *Great Western Railway Company*, (1876) 1 Q.B.D. 515. There the Court held, in circumstances somewhat similar to this, that the condition on the back of the railway ticket prevented the pursuer having a right to recover. I do not wish to say more about that case than this. The circumstances are slightly different, as the Railway Company in that case placed the article in the vestibule leading to the cloak-room and not out on the open platform. Moreover, Lord Shand in *Handon's* case refers to *Harris's* case in these terms—'It was a case in which there was a decided difference of opinion among the Judges, and for my own part I can only say that the reasoning of Mr Justice Lush most commends itself to my mind as a sound view of the case. 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 coming to the decision he did.' Coming from a Judge of Lord Shand's eminence in the Scottish Court of Appeal, such an expression of opinion deprives the case of *Harris* of much of its authority, and accordingly I do not feel bound to follow the decision in that case, as otherwise I would. There is another case to which I was referred, viz., *Meldrum* v. *North British Railway Company*, 23 S.C.R. 135, in which in very similar circumstances Sheriff Davidson, and on appeal Sheriff Guthrie, held that the Railway Company was not liable on the ground of a similar condition on the back of the ticket as the fourth condition on the back of the ticket in this case. I differ with the greatest reluctance from the opinions of these learned Sheriffs, but for the reasons I have already given I think the Railway Company are barred from enforcing that condition in any case where it can be shown that they have failed to carry out their own obligation with regard to the essential conditions of the contract. . . ."

The defenders appealed to the Court of Session, and argued—The goods were worth more than £5, and had not been declared to be worth more than £5, and consequently under condition 4 the defenders were not liable for its loss, even assuming they had been negligent—*Van Toll* v. *South-Eastern Railway Company*, 1862, 12 C.B. (N.S.) 75, 31 L.J. C.P. 241; *Harris* v. *Great Western Railway Company*, 1876, 1 Q.B.D. 515. The case of *Harris* should be followed. The decision in *Handon* v. *Caledonian Railway Company*, June 18, 1880, 7 R. 966, 17 S.L.R. 664, did not take away from the authority of *Harris*. The doubt expressed by Lord Shand was *obiter*, and he himself had pointed out that the cases were different. The distinction was that in *Handon* there was an express obligation to deposit the article in the cloak-room or warehouse; neither in *Harris* nor in the present case was there any such undertaking. The pursuers' traveller knew, or must be held to have known, that there were conditions on the back of the ticket, and he was bound by them even though he had not read them—*Parker* v. *South-Eastern Railway Company*, 1877, 2 C.P.D 416; *Acton* v. *The Castle Mail Packets Company, Limited*, 1895, 73 L.T. 158. Reference was also made to *Skipwith* v. *Great-Western Railway Company*, 1888, 58 L.T. 520, and *Pratt* v. *South-Eastern Railway Company* [1897], 1 Q.B, 718, and *Meldrum* v. *The North British Railway Company*, 23 S.C.R. 135. (2) The company were not negligent, but had taken reasonable care.

Argued for the pursuers and respondents —The case was ruled by *Handon* (*cit. sup.*). The time-table of the Caledonian Railway stated—"Commercial travellers' luggage . . . when left in any of the company's left-luggage offices is charged one-half of the ordinary rate." That must be read along with condition 4, and was an undertaking to warehouse. The defenders had not fulfilled that undertaking, and accordingly were not in a position to enforce the condition as to value. Apart from contract, there was a statutory duty on them to afford all reasonable facilities for receiving "traffic"—Railway and Local Traffic Act 1854 (17 and 18 Vict., cap. 31), section 2—and traffic was defined, section 1, as including passengers' luggage. It followed from this,

and was so assumed in *Singer Manufacturing Company* v. *London and South-Western Railway Company* [1894], 1 Q.B. 833, by Matthew, J., at 836, that it was the duty of a railway company to provide cloak-rooms for passengers' luggage. The defenders were, in return for the payment of 3d., bound to exercise reasonable care even if the goods were over £5 and not declared—*Harris* (*cit. sup.*), Lush, J., at 518. Reasonable care necessitated putting them in the cloak-room, or at any rate watching them in an adequate manner.

At advising—

LORD KINNEAR—This is an action against the Caledonian Railway Company in which the pursuers, who are merchants in London, sue for payment of the sum of £84, 19s. as the value of a certain case, or what is called a skip, containing goods, which they say was deposited with the defenders' company at their left luggage office, and which has been lost in the hands of the company, and accordingly has not been duly delivered to them.

The facts are that the pursuers' traveller, a Mr Lyons, brought with him three of those skips to Glasgow, that he proposed to deposit them at the Buchanan Street Station, that he received a ticket on payment of certain charges, and on receipt of the ticket handed over the goods to the company's servants, and that when he demanded the re-delivery of the goods on production of the ticket it appeared that one of the skips had been lost—and in all probability had been stolen. Accordingly, the pursuers bring their action upon the ground that the Railway Company failed to take due and reasonable care of the goods committed to their charge, which the pursuers say it was their duty to do. The answer is that the company undertook to accept the custody of the goods in question on the express condition that they would not be liable in any sum whatever, unless at the time of the delivery of the parcel, if it exceeded £5 in value, its true value was declared to exceed that amount, the declaration being made on a form to be supplied by the company and signed by the party, and a charge paid of one penny per £ sterling upon the declared value. So that their defence is that they did not undertake to be responsible for goods above the value of £5 except upon this express condition.

The questions we have to consider are, in the first place, whether that condition was binding upon the pursuers; and, in the second place, if it is, what is its true meaning and effect in law. Upon the first of these two questions I confess that I cannot see that there is any reasonable room for doubt, and I do not understand that the learned Sheriffs, who have decided against the Railway Company, put their judgments upon that ground. The pursuers' traveller who delivered the goods says that he knew that there were conditions on the back of the ticket which was delivered to him, but he did not read them. The ticket bears a notice upon its face in red ink, in perfectly clear terms which nobody could misunderstand—"The company only receives the herein mentioned articles upon the conditions expressed on the back of this ticket." And one of these conditions—the fourth—is that to which I have already adverted, "that the company will not be responsible for the loss of or injury to any parcel, package, or other article when the value of such article exceeds £5"; and then it goes on to make the condition more specific by saying "that is to say, when any parcel exceeding that value is lost, damaged, or detained, the company will not be liable in any sum whatever unless a declaration of value has been made," and a stipulated price paid on delivery of the parcel.

Now it appears to me to be quite clear in law that the pursuers' traveller bound them by the acceptance of the ticket under that express condition. The general rule of law is laid down by Mr Justice Stephen in the case of *Watkins* v. *Rymill*, 10 Q.B.D. 178, in a judgment in which he gives a very interesting review of previous decisions upon the same point. He says—"A great number of contracts are in the present state of society made by the delivery by one of the contracting parties to the other of a document in a common form stating the terms by which the person delivering it will enter into the proposed contract. Such a form constitutes the offer of the party who tenders it. If the form is accepted without objection by the person to whom it is tendered, this person is as a general rule bound by its contents, and his act amounts to an acceptance of the offer made to him, whether he reads the document or otherwise informs himself of its contents or not." Two exceptions have been allowed to this rule. In *Henderson* v. *Stevenson*, 1 R. 215, 2 R. (H.L.) 71, 11 S.L.R. 98, the offer on the face of the ticket was ostensibly complete—that is to say, on the face of a railway ticket there was a complete contract, and a passenger who did not know that there was writing on the back of the ticket was held not to be bound by an additional term printed on the back. The ground of the judgment was that there was ostensibly a complete contract, and that he neither knew nor was bound to know that some additional term was offered to him which was not ostensibly connected with the contract he was making. In *Parker* v. *South-Eastern Railway Company*, 2 C.P.D. 416, luggage was deposited in a cloak-room on terms contained in a ticket. Conditions limiting the liability of the company were printed on the back. The passenger, while he admitted that there was writing on the ticket, denied all knowledge that the writing contained conditions. The Court of Appeal held, Lord Bramwell dissenting, that it was a question of fact for a jury whether the ticket amounted to reasonable notice of the existence of the conditions. If it did, the plaintiff would be bound by it but not otherwise. Lord Bramwell held that it was a question of law, and that the plaintiff was absolutely bound. But the other

Judges held that a question of fact might arise as to whether he had notice or not of the conditions by which he was supposed to be bound. But neither of these decisions will aid the pursuers in this case, because in the first place it was made apparent on the face of the ticket that it did contain conditions, and I do not think for myself that any passenger receiving a ticket in these terms could be allowed to say that he did not know that there were conditions on the back; and in the second place because the pursuers' traveller admits that he knew that it had printed in red ink on the front of the ticket "The company only receive the herein-mentioned articles on the conditions expressed on the back of this ticket;" and he says, "I read that, but I did not take the trouble to read the other side."

The application of the general rule is therefore obvious. The Railway Company offered to accept the custody of the goods on certain conditions. The traveller accepted without objection the ticket tendered to him on which the conditions were clearly expressed and deposited his goods with the Railway Company, knowing perfectly well that the Railway Company had agreed to receive them upon conditions only. He must therefore be held to have accepted the conditions, and it is of no consequence that he did not read them. He cannot force different terms upon the Railway Company because he did not choose to inform himself of the terms upon which they had agreed to receive the goods. By accepting the ticket without objection and thereupon depositing his goods he represented to the company that he agreed to their conditions and so induced them to enter into the contract. I am of opinion that he is thus precluded from disputing the conditions upon which the Railway Company relied. They put a printed offer into his hands, and he accepted it, and must be held either to have been satisfied with the terms, or if he did not choose to make himself acquainted with them, to have accepted them whatever they might be.

The next question therefore is, what is the true construction of the condition upon which the defenders rely; and that does not appear to me to be open as a mere matter of construction to any reasonable doubt. I of course accept the general rule of law laid down by Lord President Inglis in the case of *Handon* v. *The Caledonian Railway Company*, 7 R. 966, as to the legal effect of the obligation undertaken by the Railway Company. His Lordship says that in a contract of this kind the measure of the liability of the depositary is that he shall take due and reasonable care of the article deposited. That is exactly in harmony with the law of England as it is stated by Mr Justice Blackburn in *Harris* v. *The Great Western Railway Company*, 1876, 1 Q.B.D. 515—"On the deposit of goods with a bailee who receives reward, so as to bring the case within the fifth head of bailments mentioned by Lord Holt in *Coggs* v. *Bernard*, the bailee (unless he is one who has the responsibilities of a public carrier or innkeeper) undertakes no further obligation than to take proper care that the goods are safely kept from loss or injury; the deposit and receipt by the bailee for reward proves, as a matter of law, that the bailee received them on the terms that he undertakes this, and is responsible for any loss or injury occasioned by any neglect of the duty which he has thus undertaken."

All this, as the Lord President says, is clear law. But then the obligation as stated by these learned Judges is the obligation which the law implies from the mere fact of deposit for payment, in the absence of any express stipulation defining the liabilities undertaken by the depositary. But if, instead of leaving their rights to the implication of the law, the parties think proper to express them in a written contract, there is nothing to prevent their enlarging or limiting the liabilities of the depositary as they may think fit. It is just as clear in law that the responsibility of the depositary must be measured by the terms upon which the parties have agreed if they have made an express contract on the subject and put it in writing, as it is that if there is no special contract it will be measured by the general rule.

Now I think that in this case the meaning of what the Railway Company stipulates is reasonably clear. As regards the goods which they undertake to receive, they make no special stipulation with reference to those that are not above the value of £5; but they give distinct notice that they will only receive articles left for custody subject to the following conditions, and then there follow conditions as to payment. But there is no express stipulation as to the liability until we come to the fourth condition. So far as regards the general liability they undertake, it appears to me—applying the doctrine laid down by Lord President Inglis, and Mr Justice Blackburn in England—that they undertake that they will take due and reasonable care of goods left with them for custody, and that is the limit of their obligation. But then, when they come to make a specific stipulation with reference to particular goods of a particular value, they say they will not be responsible for the loss of such goods and will not be liable in any sum whatever for loss or damage to them, except upon the condition that the owner of the goods who deposits them shall declare that their value exceeds £5 and shall make the stipulated payment. That is a very clear stipulation for the limitation of their responsibility. Well, then, what is the responsibility which they undertook in this way? The condition must be supposed to be intended to qualify the liability which would otherwise attach to them, and as to that there is no dispute. I therefore take this to be a condition that the company will accept the custody of goods at their station, that they undertake without limit to take due and sufficient care of such goods as do not exceed £5 in value; but

they undertake no responsibility for goods which exceed that amount unless the person depositing them gives them notice by declaration of their value and makes a certain payment. If that is the meaning of the condition, and if, as I think, it is binding, there is an end of the case, and I think there is a direct decision of great authority to this effect in the case of *Harris* v. *The Great Western Railway Company*, 1 Q.B.D. 515, to which I have already referred. I refer especially to the judgment of Mr Justice Blackburn, afterwards Lord Blackburn, not only because of his eminent authority but because it is a reasoned judgment in which the grounds and limits of responsibility are fully explained.

The learned Sheriffs consider that they are required to disregard this decision in consequence of a contrary decision in this Court in the case of *Handon* v. *The Caledonian Railway Company*, 7 R. 966. That was a totally different case from that of *Harris* or that with which we are now dealing, because the judgment proceeded solely, as I read it, upon the construction of certain specific terms of obligation which are not to be found in the contract now in question, and were not to be found in the contract in question in the case of *Harris* either. In that case the ticket delivered by the company contained a stipulation that they gave notice that they would only warehouse articles of luggage and other articles subject to certain conditions. The Lord President says—"I think that 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 there was this obligation upon the Railway Company that when articles of the description here specified were handed over to the left luggage office official they would warehouse them upon the conditions thereafter specified." And therefore his Lordship read the contract as meaning this—The company undertakes an absolute obligation to warehouse the goods. Having warehoused them, they necessarily and by implication of law undertook an obligation to take due care of them; but that obligation is subject to the qualification expressed in their obligation that they will not be liable for want of care if the goods exceed a certain value. And that is brought out with extreme clearness in the interlocutor of the Court, because, after deciding the facts, the interlocutor finds—"That the defenders (that is, the company) did not deposit the trunk in question in a cloak-room or warehouse, but without the consent of pursuer left the same on a platform to which the public had access: Find in law that the defenders thus committed a breach of contract and that the said third condition does not apply, as the trunk in question was not deposited in a cloak-room or warehouse."

Now in the present case there is, so far as I can see, no undertaking whatever to deposit the goods in a warehouse or to take care of them in any special manner. The contract is simply—reading into it the implication of law as I think we are bound to do—that the company will in general take care of goods in what manner seems to them best. And then with regard to goods of the character mentioned, they stipulate that there shall be no liability whatever. I am therefore unable to see that there is anything like what was found in the case of *Handon*, 7 R. 966, viz., first an absolute obligation to do some specific thing for the purpose of taking care of goods, and then, secondly, a qualified obligation to take due care of them after the first obligation had been performed. There is only one obligation under this contract. It is an obligation to take care of goods but subject to this very distinct proviso.

I confess I am not able to follow the proposition which the learned Sheriffs appear to have extracted from the judgment in the case of *Handon*, to the effect that as the defenders had not brought themselves within the essential conditions of the contract they cannot rely upon the special condition upon which their defence is founded. I have great difficulty in seeing what that means. The pursuers bring their action. They sue upon this contract for damages in respect of non-performance of the contract obligation to re-deliver the goods. That is their whole case, and it seems to me a perfectly relevant answer to say—"The contract was not absolute, it was qualified; and you did not fulfil the condition upon which alone our obligation to re-deliver the goods arises." The learned Sheriffs say, and the observation is correct, that in the case of *Handon*, Lord Shand expressed some doubt as to the soundness of Lord Justice Blackburn's judgment. But then Lord Shand takes care in the first place to distinguish between the two cases, and to point out that the judgment in *Harris*, 1 Q.B.D. 515, was inapplicable to the case he was considering, and it follows that his Lordship's criticism of the judgment is a mere *obiter dictum*. And I confess, with all the respect I have for anything that fell from him, I do not find myself justified in rejecting the authority of a formal decision, and particularly of so eminent an authority as Lord Blackburn, upon a point in which the laws of England and Scotland are the same. I observe also that the decision in the case of *Harris* was expressly approved by Lord Justice Mellish, another very eminent authority, in the case of *Parker* v. *The South-Eastern Railway Company*. I am therefore prepared to follow the judgment in the case of *Harris*, and I may only add that, apart from previous decision, I cannot myself see that it would be consistent with legal principle to arrive at any other conclusion.

I must say also that I am unable to agree with the learned Sheriffs in thinking that there is anything inequitable in the Railway Company's defence, or that there is any equity in the pursuers' claim. The pursuers' traveller says—"I knew that the company made a condition, but I did not take the trouble to read it." If he had

read it, and if he had performed the condition upon which the liability of re-delivery was to arise, it can hardly be assumed that the goods would have been lost at all. The defence is that there was at the time a great crowd of luggage at the Buchanan Street Station, that there was not sufficient room to put everything in the cloak-room, and therefore that some things were left on the platform, but subject to a certain amount of protection by the watchfulness of porters. Notwithstanding this degree of protection the particular article was stolen; but it is to be presumed that when the company stipulate for notice that goods exceed a certain specified value they do so in order that when they are to be exposed to a greater than usual amount of risk they may take a corresponding amount of care. However that may be, he would, at all events, have satisfied the condition on which the company undertook liability. He must either have declared the value of the goods, or, if he did not declare them knowing that that was the condition upon which he was allowed to deposit, he could not honestly have made any claim against the company, because he must then have been held to have taken his risk of the non-performance of a condition which it was in his own power to perform, and which he knew was stipulated by the other party to the contract. I cannot see any equity in allowing a passenger in the position of the pursuers' traveller to throw upon the Railway Company the consequences of his own carelessness or indifference to his own business. It was his business to see what the conditions were on which he was allowed to deposit goods, and if he did not, as he says, take the trouble to ascertain them, then he must be held to have taken the risk of the consequences of non-performance. He cannot make a claim on the ground of his own failure to inform himself which he could not have made if he had read the contract.

LORD PRESIDENT—I agree on all points with the opinion which has been delivered by my brother Lord Kinnear, and I have very little to add. In particular, I agree entirely upon the distinction that he has shown to exist between this case and *Harris's* case (1 Q.B.D. 515) on the one hand, and *Handon's* case (7 R. 966) on the other. I see no ground in the contract which is before us for, so to speak, cutting negligent acts into two categories — one anterior to absolute taking into the cloak-room and one posterior. If this package was not, after reception by the clerk and the handing over of the ticket, put into the cloak-room, that was just an act of negligence, and does not seem to me to differ in legal quality from negligence which might have been committed after it got into the cloak-room.

As regards what Lord Kinnear has said about the equity of the case I entirely concur; but I should like to add this. The pursuers seemed to think that it helped their case that having a cloak-room is a "reasonable facility" under the Traffic Acts. Well, if that is so, and if as a matter of fact they consider that the adjection of the condition of paying a penny per £ on articles above £5 in order to ensure their reception is an unreasonable condition, then, of course, they have a remedy. Not, however, by altering the contract before this Court, but by calling the Railway Company before the Railway Commission and forcing the Railway Company to accept parcels above £5 on easier terms. Whether the Railway Commission would pronounce such an order or not I do not know. I am not the judge of that; the Railway Commissioners are; and until they have forced the company to remodel their contract, we, as a court of law, must give effect to the contract as it stands.

The only other observation I have to make is to say that I concur with Lord Kinnear in not agreeing with Lord Shand's *obiter dictum* on Mr Justice Blackburn's judgment. Lord Shand was afterwards in the House of Lords—they both were there. I do not think I am bound to go into any comparisons, but I am entitled simply to say that on this occasion I agree with Lord Blackburn—if indeed there is a true difference of opinion. At any rate, it is certain Lord Shand was never compelled to carry that difference of opinion into action, because, so far as his judgment in *Handon's* case was concerned, he really rested his judgment upon the other and distinguishing ground.

LORD GUTHRIE—I also agree. The defenders have to do with luggage ordinarily of small value, and also with other luggage which may amount in value to a very large sum. Naturally they make a distinction, and make only a small charge on goods not above £5. In regard to goods above that amount they might either have said "We accept responsibility, but not for a larger amount than £5"; or they might have said, as they have said here, "We wont accept any responsibility whatever in regard to these unless the value is declared and a proper amount is paid corresponding to the value." It seems to me that that is a perfectly fair contract to enter into; but whether it is fair or not it was duly brought home to the pursuers. That being so, it comes to this, that *quoad* the goods which the traveller chose to leave there, so far as the defenders' responsibility was concerned, there was no contract at all. Suppose the question had arisen, not about goods of a particular value but about goods of a particular class, say bicycles, and they had intimated "We accept no responsibility in regard to bicycles unless they are specially declared and specially paid for." If, notwithstanding, a bicycle in a case which concealed its contents had been left with the defenders under a contract, with the condition above stated, it seems to me that the defenders would have incurred no responsibility.

The pursuers here tried to assimilate this case to *Handon* (7 R. 966) by founding

on the regulations printed in the appendix taken from the Railway Company's time-table. But in the case of *Handon* the special stipulation was part of the contract itself. Here the mere reference to a scale of rates shown in the company's time-tables and indicated in the conditions printed on the back of the ticket cannot be held to make them part of the contract. The case does not fall under the case of *Handon*, but, as your Lordships have said, under the case of *Harris* (1 Q.B.D. 515).

LORD M'LAREN and LORD PEARSON were sitting in the Extra Division.

The Court pronounced this interlocutor—

"Sustain the appeal: Recal the interlocutor of the Sheriff-Substitute dated 10th August 1908: Also recal the interlocutor of the Sheriff dated 24th March 1908, in so far as it finds the defenders liable in expenses: Find in fact [*in terms of the findings in fact quoted supra*]: Find in law (1) that the pursuers are bound by the conduct of the said R. H. Lyons as their agent and are precluded from denying that the goods in question were deposited with the defenders on the terms contained on the ticket delivered to him; and (2), that the defenders accepted the said goods on deposit subject to the conditions above specified and are not responsible for any loss or damage suffered by the pursuer from the loss of the same: Therefore assoilzie the defenders from the conclusions of the action, and decern."

Counsel for the Pursuers (Respondents) — Morton — Kirkland. Agent — Norman M. Macpherson, S.S.C.

Counsel for the Defenders (Appellants)— Morison, K.C. — Wark. Agents — Hope, Todd, & Kirk, W.S.

Friday, June 18.

FIRST DIVISION.

[Court of Exchequer.

DUNCAN'S EXECUTORS *v.* INLAND REVENUE.

Revenue — Income Tax—Annuity — Profit Accruing by Reason of Office—Grant of Annuity by Aged and Infirm Ministers' Fund—Income Tax Act 1842 (5 *and* 6 *Vict. cap.* 35), *secs.* 102 *and* 105—*Income Tax Act* 1853 (16 *and* 17 *Vict. cap.* 34), *Schedules D and E, and sec.* 5.

The Income Tax Act 1853 enacts that income tax shall be paid, Schedule (D) ". . . For and in respect of all interest of money, annuities, and other annual profits and gains not charged by virtue of any of the other schedules in this Act. . . ." Schedule (E)—"For and in respect of every public office or employment of profit, and upon every annuity, pension, or stipend payable by Her Majesty or out of the public revenue of the United Kingdom, except annuities charged to the duties under the said schedule (C) . . ." Section 5 enacts that the regulations of the Income Tax Act 1842 shall apply. The Income Tax Act 1842, sections 102 and 105, exempts charitable institutions from the duties on annual payments chargeable under Schedule D.

The minister of a parish tendered his resignation, and at the same time applied to the committee on the Aged and Infirm Ministers' Fund of the Church of Scotland for a grant. The committee voted him an annuity of £100 a-year, a condition of the grant being his complete resignation of the parish. During his lifetime thereafter he paid income tax upon the £100, but at the date of his death there was £60 due to him for the current year, and his executors maintained that this sum was not chargeable either under Schedule E or Schedule D. The Aged and Infirm Ministers' Fund was admittedly a charitable institution in the sense of section 105 of the Act of 1842, and as a matter of fact was in the habit of having returned to it the income tax deducted from its investments.

Held (1) that income tax was not chargeable under Schedule E, but (2) that it was chargeable under Schedule D.

Turner v. *Cuxon*, 22 Q.B.D. 150, *distinguished.*

The Income Tax Act 1842 (5 and 6 Vict. cap. 35), section 88, gives the rules for assessing under Schedule C, and these rules contain an exemption to "Third—The stock or dividends of any corporation, fraternity, or society of persons, or of any trust established for charitable purposes only, or which, according to the rules or regulations established by Act of Parliament, charter, decree, deed of trust or will, shall be applicable by the said corporation, fraternity, or society, or by any trustee, to charitable purposes only, and in so far as the same shall be applied to charitable purposes only. . . ."

Section 105—"Provided always and be it enacted that any corporation, fraternity, or society of persons, and any trustee for charitable purposes only, shall be entitled to the same exemption in respect of any yearly interest or other annual payment chargeable under Schedule D of this Act, in so far as the same shall be applied to charitable purposes only, as is hereinbefore granted to such corporation, fraternity, society, and trustee respectively, in respect of any stock or dividends chargeable under Schedule C of this Act, and applied to the like purposes; and such exemption shall be allowed by the commissioners for special purposes, on due proof before them; and the amount of the duties which shall have been paid by such corporation, fraternity, society, or trustee, in respect of such interest or yearly payment, either by deduction from the same or otherwise, shall be repaid under the