*Tramways Company, Limited* (1896, 12 T.L.R. 611).

It certainly lends no support to defenders' theory that the Court ought to lay down as matter of law that a passenger by tramway must sit still until the car stops, or to their notion that actions arising out of tramway accidents should be decided by the application of a few popular and inaccurate formulæ.

In the view which I have taken of the facts the defenders' liability to the pursuers does not depend upon the latter proving that the speed of the car was excessive and dangerous. If, however, that were necessary for the judgment, I should hold that no good reason had been shown for disturbing the finding of the Lord Ordinary on this point, which was in favour of the pursuers.

As this action was tried by a judge acting in place of a jury his decision has not the same sanctity as the verdict of a jury, but it was in my opinion a sound judgment upon a question of pure fact.

LORD CULLEN was sitting in the Valuation Appeal Court.

The Court adhered.

Counsel for the Pursuers (Respondents)—Morton, K.C.—J. A. Christie. Agents—Manson & Turner Macfarlane, W.S.

Counsel for the Defenders (Reclaimers)—The Lord Advocate (Clyde, K.C.)—M. P. Fraser. Agents—Simpson & Marwick, W.S.

---

*Thursday, January* 16.

## FIRST DIVISION.

[Lord Blackburn, Ordinary.

## CALEDONIAN RAILWAY COMPANY *v.* JOHN G. STEIN & COMPANY, LIMITED.

*Railway — Jurisdiction — Traffic and Carriage — Increase of Rates for Services at Private Sidings — Railway Rates and Charges, No.* 19 (*Caledonian Railway, &c.*) *Order Confirmation Act* 1892 (55 *and* 56 *Vict. cap. lvii*), *Schedule, sec.* 4, *and Schedule of Maximum Rates and Charges, Tit. I, sec.* 5 (1) — *Railway and Canal Traffic Act* 1894 (57 *and* 58 *Vict. cap.* 54), *sec.* 1 (1) *and* (3) — *Railway and Canal Traffic Act* 1888 (51 *and* 52 *Vict. cap.* 25), *secs.* 31 (1) *and* 55.

A manufacturer was in the habit of getting a railway company to move merchandise within his works upon his lines of rails from place to place for the purposes of manufacture, but not incidental to transit of the goods upon the lines of the railway company. The locomotives, servants, and waggons of the company were used. The manufacturer sent and received goods by the railway company, but the goods with reference to which the foregoing services were performed were not handled as an immediate preliminary to or consequent on transit on the railway line, and when the services were performed there was no current contract for the conveyance of the goods in question. The railway company intimated an increase in the charges for those services, which the manufacturer refused to pay, and the railway company thereupon brought an action for the amount due. The defender pleaded that the jurisdiction of the Court was excluded by I, section 5, of the Schedule of Maximum Rates and Charges appended to the Railway Rates and Charges, No. 19 (Caledonian Railway, &c.) Order Confirmation Act 1892, or by section 1 (1) of the Railway and Canal Traffic Act 1894. *Held* (*rev.* judgment of Lord Blackburn, Ordinary) (1) that section 1 (1) of the Act of 1894, referring any complaint as to the reasonableness of an increase in any rate or charge to the Railway and Canal Commissioners, did not apply, as it was a condition-precedent to the application of that section that a complaint should have been made to the Board of Trade under section 31 (1) of the Railway and Canal Traffic Act 1888, which section was only available to traders in the sense of that section and section 55 of that Act, and that the defenders were not with reference to the services in question traders in the sense of the Act of 1888; (2), *per* Lord Mackenzie (concurred in by Lord Skerrington and Lord Cullen) that section 5 (1) of the Schedule of Maximum Rates and Charges had no application, as the services in question were not incidental or ancillary to conveyance.

*Railway — Ultra vires — Services Rendered by Railway Company at Private Sidings.*

A railway company by means of its locomotives, waggons, and servants rendered certain services to a manufacturer on his private sidings by moving merchandise from place to place within his works for the purposes of manufacture. These services were not ancillary or incidental to the conveyance of the merchandise over the company's lines. *Held* that the services in question were not *ultra vires* of the railway company.

*Contract—Personal Bar—Contract for Services—Increase of Charge—Acceptance of Services after Increase.*

A railway company which rendered certain services to a manufacturer on private sidings within his works intimated to him an increase in their charges for those services. The manufacturer while continuing to accept the services tendered payment at the old rate and refused to pay the increase. The railway company accepted the old rate as a payment to account and brought an action for the balance. *Held* that the defenders having continued to accept the services after intimation of the increase in the charge were liable for the sum sued for.

The Railway and Canal Traffic Act 1888 (51 and 52 Vict. cap. 25) enacts—Section 31—"(1) Whenever any person receiving or sending or desiring to send goods by any railway is of opinion that the railway company is charging him an unfair or unreasonable rate

of charge, or is in any other respect treating him in an oppressive or unreasonable manner, such person may complain to the Board of Trade." Section 55—". . . The term 'trader' includes any person sending, receiving, or desiring to send, merchandise by railway or canal."

The Railway Rates and Charges, No. 19 (Caledonian Railway, &c.) Order Confirmation Act 1892 (55 and 56 Vict. cap. lvii) confirms by section 2 a Provisional Order set out in the schedule to that Act.

The Provisional Order confirmed provides —Section 3—"This Order is to be read and construed subject in all respects to the provisions of the Railway and Canal Traffic Acts 1873 and 1888, and of any other Acts or parts of Acts incorporated therewith." Section 4 — "From and after the commencement of this Order the maximum rates and charges which the Caledonian Railway Company, and the railway companies connected therewith specified in the appendix to the schedule to this Order in respect of railways specified in the said appendix, shall be entitled to charge and make in respect of merchandise traffic on the railways of the said companies, shall be the rates and charges specified in the schedule to this Order annexed, and shall be subject to the classification, regulations, and provisions set forth in the said schedule."

The Schedule of Maximum Rates and Charges appended to the Provisional Order provides—I, section 5—"The company may charge for the services hereunder mentioned, or any of them, when rendered to a trader at his request or for his convenience, a reasonable sum by way of addition to the tonnage rate. Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party. . . . (i) Services rendered by the company at or in connection with sidings not belonging to the company." II, section 10 — "Where merchandise is conveyed for an entire distance which does not exceed . . . in the case of merchandise in respect of which no station terminal is chargeable six miles, the company may make the charges for conveyance authorised by this schedule as for . . . six miles. . . ." III, section 25—"In this schedule, unless the context otherwise requires— . . . . . The term 'trader' includes any person sending or receiving, or desiring to send, merchandise by the railway. The term 'siding' includes branch railways not belonging to a railway company. . . ."

The maximum rates and charges are classified under various headings which are arranged in four parts, of which the following is Part IV :—

*Maximum Rates and Charges.*

PART IV.—EXCEPTIONAL CLASS.

| Description. | Charge. |
|---|---|
| . . . . . | |
| For any accommodation or services provided or rendered by the company within the scope of their undertaking by the desire of a trader, and in respect of which no provisions are made by this schedule. | Such reasonable sum as the company may think fit in each case. |

The Railway and Canal Traffic Act 1894 (57 and 58 Vict. cap. 54) enacts—Section 1 (1)—"Where a railway company have, either alone or jointly with any other railway company or companies, since the last day of December one thousand eight hundred and ninety-two, directly or indirectly increased, or hereafter increase directly or indirectly, any rate or charge, then if any complaint is made that the rate or charge is unreasonable, it shall lie on the company to prove that the increase of the rate or charge is reasonable, and for that purpose it shall not be sufficient to show that the rate or charge is within any limit fixed by an Act of Parliament or by any Provisional Order confirmed by Act of Parliament. . . . (3) The Railway and Canal Commissioners shall have jurisdiction to hear and determine any complaint with respect to any such increase of rate or charge, but not until a complaint with respect thereto has been made to and considered by the Board of Trade under section 31 of the Railway and Canal Traffic Act 1888."

The Caledonian Railway Company, *pursuers*, brought an action against John G. Stein & Company, silica and firebrick manufacturers, Castlecary Works, Bonnybridge, *defenders*, concluding for decree for £462, 5s. 9d. being the balance of an account alleged to be for work done and services rendered to the defenders by the pursuers.

The pursuers *pleaded*—"1. The charges contained in the account sued upon being in accordance with the scale intimated to the defenders, and being reasonable charges for the work done and services rendered for and by pursuers on the employment of the defenders, and the balance sued for, £462, 5s. 9d., being due and resting-owing by the defenders in respect thereof, the pursuers are entitled to decree in terms of the conclusions of the summons. 2. The pursuers having been employed by the defenders to do the work and render the services libelled in the condescendence, in the full knowledge on the part of the defenders of the pursuers' scale of charges therefor, are barred from disputing liability for the account thereby incurred. 3. The work done and services rendered in respect of which the account sued upon was incurred by defenders not being the subject of statutory regulation or restriction, and the pursuers' charges therefor being reasonable, the pursuers are entitled to decree as craved."

The defenders pleaded—"1. The action is incompetent *in respect that the jurisdiction of the Court of Session is excluded by section 5 of the Railway Rates and Charges, No. 19 (Caledonian Railway, &c.), Order Confirmation Act* 1892, *and separatim by section* 1 *of the Railway and Canal Traffic Act* 1894. 3. There being no agreement and no *consensus in idem* to tender and accept the same services after November 1915 as had been accepted for many years prior thereto but at increased rates, the defenders should be assoilzied. 7. The present process should be sisted till a determination of the questions by the competent tribunal or tribunals *under the aforesaid Acts* is obtained, (1) whether the pursuers can justify the in-

crease of rates and charges in question as a reasonable increase, and (2) what is a reasonable charge or reasonable charges for the said services."

The words printed in italics were added by amendment in the Inner House.

On 28th November 1918 the Lord Ordinary (BLACKBURN) pronounced this interlocutor —"Finds that the dispute between the parties falls to be dealt with under the Railway and Canal Traffic Act of 1888, and continues the cause for a fortnight to allow the defenders, if so advised, to make a complaint to the Board of Trade in terms of the said Act," and on 6th December 1918 he granted leave to reclaim.

*Opinion*, from which the *facts* of the case appear—"The defenders in this action are the proprietors of brick-works at Bonnybridge, which contain a private siding connected with the pursuers' railway system. For some years prior to the end of 1917 they have employed the pursuers to render them certain services on the siding, which are described in condescendence 3. These consisted in the moving of material belonging to the defenders, such as bricks or ashes, from one point to another within the siding, and for this purpose they have been accustomed to use the pursuers' waggons, which had either been first emptied of other goods brought to and delivered at the siding, or which had been brought to the siding empty to be loaded with goods for dispatch elsewhere. The waggons when filled with bricks or ashes were hauled by the pursuers' locomotives.

"Down to October 1915 the pursuers charged for these services at a fixed maximum rate, which the defenders say that they considered reasonable, and which they accordingly paid without protest. On 26th October 1915 the pursuers informed the defenders that they proposed to increase their charges, and intimated a new scale to come into operation on 1st November of that year. To these increased charges the defenders at once objected as being unreasonable, and they disputed the right of the pursuers to impose them. From the 1st November 1915 down to the end of December 1917 they have refused to pay the accounts on the increased scale rendered to them by the pursuers, but from time to time have made payments on the old scale, which the pursuers have accepted as payments to account, qualified receipts being granted accordingly. The sum sued for in the present action represents the difference between the accounts rendered by the pursuers on the increased scale from 1st November 1915 to the end of December 1917 and the payments actually made by the defenders on the lower scale.

"The defenders dispute the jurisdiction of the Court to entertain the action, and maintain that the only competent tribunal to determine the question is either an arbiter appointed by the Board of Trade in terms of section 5 of the Schedule of Maximum Rates and Charges in the Caledonian Railway (Rates and Charges) Order Confirmation Act 1892, or the Railway and Canal Commissioners in terms of section 1 of the Railway and Canal Traffic Act of 1894.

"The former section authorises a railway company to charge for services rendered 'at or in connection with sidings not belonging to the company . . . a reasonable sum by way of addition to the tonnage rate,' and provides for any difference arising under the section being submitted to an arbiter to be appointed by the Board of Trade.

"The latter section provides that where after the year 1892 a railway company increases any rate or charge, and a complaint is made that the charge is unreasonable, it shall lie on the company to prove that the increase is reasonable, and the Railway and Canal Commissioners shall have jurisdiction to hear the complaint, but not until a complaint with respect thereto has been made and considered by the Board of Trade under section 31 of the Railway and Canal Traffic Act 1888.

"Section 31 of the last mentioned Act provides that, 'whenever any person receiving or sending or desiring to send goods by any railway is of opinion that the railway company is charging . . . an unreasonable rate of charge . . . such person may complain to the Board of Trade.'

"The defenders maintained that unless the pursuers can justify their charges under one or other of these sections, in which case the jurisdiction of the Court is excluded, they were acting *ultra vires* in making a charge at all, and in either event, they say, they are entitled to be assoilzied. I have no doubt that it was within the powers of the pursuers to render the services they did, and unless their charges were controlled by the statutory provisions above referred to I know of nothing to prevent them fixing their own price. If I thought the statutory restrictions did not apply I should accordingly hold that the defenders, having accepted the services under full notice of the charges to be made, were liable therefor, without any further enquiry as to whether the charges were or were not reasonable.

"I am, however, of opinion that the pursuers' charges for such services are controlled by the statutory provisions, although I do not think the question is free from difficulty. I have no hesitation in rejecting an argument for the pursuers to the effect that neither of the sections founded on by the defenders apply to services rendered by a Railway Company voluntarily, as the services in the present case undoubtedly were. There are numerous instances in the Schedule to the Caledonian Railway (Rates and Charges) Confirmation Order 1892, in which rates for voluntary services are dealt with and their amount limited (*per* L.J. Fletcher Moulton in *Midland Railway* v. *Myers*, 1908, 2 K.B., 356 at pp. 362 and 363—and see Lord President Balfour's Opinion in *Cowan & Sons* v. *North British Railway*, 3 F., 677, at p. 693 39 S.L.R. 240); while section 1 of the Railway and Canal Traffic Act 1894 merely deals with increased charges, and there is nothing in the Act to suggest that it does not apply to increased charges for voluntary as well as for compellable services.

"But the pursuers submitted another argument which I think deserves careful consideration. They say that the statutory

limitations in the sections founded upon by the defenders apply only to charges for services rendered either preliminary to or subsequent to the conveyance of goods, and that charges for services rendered in a private siding, unconnected with the conveyance of goods on the Railway's own lines to or from the siding, are outside the restrictions altogether. I think that it may be conceded that primarily at all events the restrictions do relate to charges for services rendered at a siding which are connected with the conveyance of goods to or from the siding. The bulk of the services rendered at a private siding by a Railway Company must be in this connection, and services of a different character are probably exceptional. But I see no reason why the statutory restrictions should be confined to charges connected with the conveyance of goods on the Railway's own lines; and looking to the practical monopoly which a Railway Company enjoys of the traffic on a siding, unless the trader supplies his own rolling stock, I should expect to find that the charges for such exceptional services were also regulated by statute. Although the services in this case were unconnected with conveyance on the Company's own lines they were services for the conveyance of goods by rail on lines connected with the Company's own system—in short, carrier work on a railway; and if the language used in section 5 of the Schedule in the Rates and Charges Confirmation Order can be construed so as to include the charges for these services I see no reason for excluding them from its provisions. Different considerations might have arisen had the Railway Company undertaken to cart the bricks and ashes from one point on the siding to another. The services would still be rendered at or in connection with the siding, but the work would not be confined to the railway, and the Company would not be in the position of possessing a monoply. I think the pursuers' argument on the section comes to this, that it only applies to charges which can be made according to the words of the section 'by way of addition to the tonnage rate' and consequently cannot apply to a case like the present, where there is no tonnage rate for conveyance to which the charge for services can be added. I think it is admis-ible to construe these words as meaning no more than that services only can be charged for which are not included in a tonnage rate, if such rate has been already charged, and that the true purpose of the section is to control the charges for all services 'at or in connection with sidings,' irre-spective of whether they are connected with goods on which a tonnage rate has been charged or not. The pursuers' argument is supported to some ex ent by a dictum of Lord President Balfour in *Cowan & Sons* v. *North British Railway* (*cit.*) at p. 693, where his Lordship, in dealing with the services referred to in section 5 of the Schedule says: 'These are all services either prior to or subsequent to conveyance'; but the question under consideration in *Cowan's* case was an entirely different one, and the point of the Lord President's dictum was directed to show that the Schedule applied to many services which were voluntary, and which the Company could not be compelled to render.

"The pursuers further supported their argument by suggesting that if the services rendered by them in this case come under the Schedule at all they fall under the last of the exceptional cases dealt with under Part IV. of the Schedule. These are services 'rendered by the Company within the scope of their undertaking . . . in respect of which no provisions are made by this Schedule.' While the charges under Part IV. are restricted to 'reasonable sums' there is no reference clause, and accordingly if the services rendered here fall under this part of the Schedule the jurisdiction of the Court is not excluded, but a proof would be required to ascertain whether the charges were reasonable. But I think there is a clear distinction between services rendered 'at a private siding' dealt with by section 5 and services rendered 'within the scope of the Company's undertaking,' dealt with under Part IV. of the Schedule. I take the latter services to be services rendered on the Company's own lines, and in the only case to which I was referred (*Midland Railway* v. *Myers*, (*cit.*) 1909, A.C. 13) arising under Part IV. of the Schedule, the services were of this nature.

"When they came to the Railway and Canal Traffic Act of 1894 the pursuers could not but admit that so far as the language of the Act itself is concerned there is nothing to indicate that the increase of charges regulated by the Act is confined to charges for services connected with the conveyance of goods on a Railway Company's own system, but they argued that this was a necessary inference from the reference in the third sub-section of section 1 of the Act to the 31st section of the Railway and Canal Traffic Act of 1888. The 31st section of the Act of 1888 provides for a complaint to the Board of Trade by 'any person receiving or sending' goods by any railway. The pursuers say that if a complaint under the Act of 1894 has to be 'made to and considered by the Board of Trade' under section 31 of the Act of 1888, it can only be made by a person 'receiving or sending goods' by the railway, and that this necessarily restricts the increase of charges dealt with by the 1894 Act which can be the subject of complaint to charges for services connected with the conveyance of goods. I do not think that this inference is sound, or that the wide and general words of the Act of 1894 can be held to be restricted by a sub-section which merely deals with the procedure preliminary to approaching the Railway and Canal Commissioners. I am accordingly of opinion that the pursuers' contention that charges for services such as they have rendered in this case are free from statutory limitation is unsound.

"The pursuers, however, submitted an alternative argument in support of their action, in the event of its being held that the statutory limitations apply to their charges. They say, and I think say justly, that the whole question arises here out of a proposed increase of charges. It does not

appear to me to matter whether the charges paid prior to October 1915 were fixed by agreement or otherwise. They were accepted by the defenders as reasonable and paid without demur, and the only complaint arises out of the increase. Now that is a matter which in my opinion falls to be dealt with under the Railway and Canal Traffic Act 1888, and to put that Act into operation a complaint must be made. The pursuers say, with reason as it appears to me, that they could not complain of their own charges, and that as the defenders declined or delayed to invoke the Act there was no alternative left to them but to raise an action at common law. I think they are justified in so doing, and I propose to continue the cause for a fortnight to enable the defenders to make a complaint to the Board of Trade, and on that being done I shall follow the course adopted in the case of *Caledonian Railway Company* v. *Clyde Shipping Company*, 1917 S.C. 107, 54 S.L.R. 104, and sist the action pending a decision by the competent tribunal."

The pursuers reclaimed, and argued—The Lord Ordinary was wrong, and the Court had jurisdiction to try the question in issue between the parties. The services in question consisted entirely in moving goods from point to point within the defenders' works upon his lines and for the purposes of his business. They could perfectly well have been performed by a locomotive kept and run by him. Their character was entirely domestic and internal, and they had no connection with transit over the pursuers' railway. If the defenders' works were disconnected from the pursuers' railway the work in question would still be required. Further the defenders in arranging for the work did not do so as persons about to receive or send goods on the pursuers' railway. The result was that those services fell outwith the legislation regulating the rates to be charged by railways and appointing special tribunals to determine questions as to such rates. Thus the services in question did not come within the terms of the Railway Rates and Charges, No. 19 (Caledonian Railway, &c.), Order Confirmation Act 1892 (55 and 56 Vict. cap. lvii), which Act properly construed applied to traffic on the railways scheduled *primo loco* and, in so far as it applied to services not on those railways, it only applied to services incidental to traffic on those railways and rendered to traders. Section 3 of the Schedule to that Act, which was the Provisional Order confirmed of that Act, provided that that Order was to be read and construed along with the earlier Railway Acts, and section 4 determined the whole scope of the provisions which followed, and it was limited to merchandise traffic on the scheduled railways. The Schedule of Maximum Rates and Charges appended to that Act—I, section 5—applied only to traders, which the defenders were not, for a trader was one sending or receiving or desiring to send merchandise by the railway—III, section 25. Further section 5 assumed a tonnage rate payable and made the charge for the services an addition thereto. Then if there was any tonnage rate at all it must be as for six miles—II, section 10—for there was no terminal station. In point of fact there was no tonnage rate. The lines in question were not sidings in the sense of that Act—III, section 25—for a siding was a branch railway and that implied a main line. *Quoad* the traffic here in question, there never was any main line for it was purely domestic. If the Act of 1892 had applied to matters arising on private sidings there would have been no need for section 4 of the Railway and Canal Traffic Act 1894 (57 and 58 Vict. cap. 54) dealing with rebates or for the Railways (Private Sidings) Act 1904 (4 Edw. VII, cap. 19). But in any event services on sidings must come under the terms of section 5 which did not apply. Further, Part IV of that Schedule dealing with exceptional and unclassified cases did not apply, for that was limited in its application by section 4 to traffic on the railways, and was really another heading added to the classified services under section 5 of the Schedule of Maximum Rates and Charges which only applied to traders and implied a tonnage rate. Further, section 1 of the Act of 1894 did not apply. The title of that Act showed it was of the same series as the Act of 1892, and section 1 only applied to an increase of a rate which entered the rate book—sub-section 2—and only after a competent complaint had been made under section 31 of the Railway and Canal Traffic Act 1888 (51 and 52 Vict. cap. 25). But that Act again applied to traffic on a railway and services incidental thereto and to traders—sections 8-16, 24, 27, and 55. Indeed there was always that limitation where the legislature interfered with the railway companies' freedom to charge what they chose—Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33), section 83); Railway and Canal Traffic Act 1854 (17 and 18 Vict. cap. 31), section 2; Regulation of Railways Act 1873 (36 and 37 Vict. cap. 48) sections 14 and 15. Indeed the whole series of those Acts were to be regarded as a code whose main object was to impose compulsory obligations to give conveyance, &c., for reasonable rates. Compulsion was the key note of the whole series, though the actual legislation was not limited to what could be compulsorily enforced—*Dickson* v. *Great Northern Railway Company*, 1886, 18 Q.B.D. 176, *per* Lindley, L.J., at p. 182. The earlier Acts had to be considered to enable a true construction to be placed upon the later Acts. The earlier Acts admittedly were limited to traffic on railways and services incident thereto. In those circumstances the provisions of the Act of 1894, couched in wide, ambiguous and undefined language, could not be held as extending to topics that did not fall under the earlier Acts. The Acts of 1892 and 1894 were limited to some extent in their application, *e.g.*, they did not apply to the railway hotel breakfast, and it was for the defenders to show that they were not limited in the same way as the earlier Acts of the same code. The defenders were not in a position to argue that the services in question were *ultra vires*. A shareholder or a person injured by illegal competition could have so argued, but the defenders

having accepted the services could not do so. Further, the class of matters regulated by the Railway Acts was not co-extensive with what was *intra vires* of the railway. There were matters *intra vires* of the railway but not within the scope of those Acts—*Watson, Todd, & Company* v. *Midland Railway Company and London and North-Western Railway Company*, 1895 and 1896, 9 R. & C.T. Cas. 90; *East and West India Dock Company* v. *Shaw, Savill, & Albion Company*, 1888, 39 Ch. D. 524, *per* Chitty, J., at p. 531; *Midland Railway Company* v. *Myers, Rose, & Company, Limited*, [1908] 2 K.B. 356, *per* Fletcher-Moulton, L.J., at p. 362. As to those matters, the Railway Company was quite free, and no amount of protest was of any avail—*Watson's* case (*cit.*), *per* Collins, J., and Esher, M.R.; *Stone & Company* v. *Midland Railway Company*, [1903] 1 K.B. 741, *per* Lord Alverstone, C.J., at p. 745, [1904] 1 K.B. 669, *per* Collins, M.R., at p. 672. If so, then neither of the statutory bodies had jurisdiction, and the Court's jurisdiction was not excluded. If the Court had jurisdiction the pursuers were entitled to decree *de plano*, for the defenders had taken advantage of the services in full knowledge of the increase in rates, and could not now plead no *consensus in idem*—*Macfarlane* v. *Mitchell*, 1900, 2 F. 901, 37 S.L.R. 705. In any event their only ground for withholding payment had been cut away. Alternatively, if the services did come within the statutes they could only fall under Part IV of the Schedule of Maximum Rates and Charges of the Act of 1892 with regard to the charges for which no statutory tribunal was set up. If so the courts had jurisdiction—*Midland Railway Company* v. *Myers, Rose, & Company, Limited* (*cit.*), [1909] A.C. 13, *per* Lord Loreburn, L.C. If the services fell under section 1 of the Act of 1894, then the defenders had sought the wrong tribunal—*Mansion-House Association on Railway Traffic* v. *London and North-Western Railway Company*, [1896] 1 Q.B. 273. *Glasgow and South-Western Railway Company* v. *Polquhairn Coal Company, Limited*, 1916 S.C. 36, 53 S.L.R. 73, was referred to.

Argued for the defenders—The Railway Statutes applied to the services here in question, and as a result the provisions for arbitration also applied and the jurisdiction of the Court was ousted. The services were voluntary and not compulsory, but that was immaterial, because the Railway Statutes had been held to apply to non-compulsory services—*Cowan & Sons, Limited* v. *North British Railway Company*, 1901, 3 F. 677, *per* Lord President Balfour at p. 692-3, 39 S.L.R. 240; *Midland Railway Company* v. *Myers, Rose, & Company, Limited* (*cit.*), *per* Fletcher-Moulton, L.J., at p. 362. It was most difficult, if not impossible, to figure a service which was *intra vires* of the Railway Company and yet not regulated by the Railway Acts, and unless the Railway Acts authorised the Railway Company to do those services they were *ultra vires*. If so, their interpretation should be in favour of the application of those Acts rather than the reverse. There was nothing in section 4 of the schedule to the Act of 1892 which prevented its application to the services in question here. Its scope was shown by section 5 of the Schedule of Rates and Charges. The different classes of rates and charges classified under that section were not all bound up with conveyance on the railway. There were charges for items not on the railways. Consequently the services need not be incidental to traffic on the railway in the sense in which the pursuers construed the word 'railway'. But in any event the traffic here in question ultimately came and went on the railway in that sense, and hence was incidental to conveyance on the railway. Further, the words "on the railway" were not to be construed strictly or literally as imposing a limitation. The mere fact that work was done on a private siding did not cause it to be non-railway work. Siding was widely defined in section 25, and "railway" must be regarded as the railway system, including private sidings in connection with the railway—*Myers'* case (*cit.*), *per* Fletcher-Moulton, L.J., at p. 363, commenting on *Watson's* case (*cit.*). Further, the services here in question fell within the terms of I, section 5, of the Schedule of Rates and Charges. The words "by way of addition to the tonnage rate" caused no difficulty. Those words did not mean that a tonnage rate must be charged before a siding services rate could be charged, but merely meant that the tonnage rate, if any, ceased at the siding, and thereafter the charge was for siding services, *i.e.*, there was to be no overlapping. Further, the defenders were "traders" in the sense of the Railway Acts. The definition of trader was not limitative. It included others than those sending or desiring to send or receiving goods. But if it was limited to that class it was not limited to those sending or desiring to send or receiving the goods on which the services were rendered. A trader did not lose his character as such merely because he did not for the time desire to send goods, nor had goods in transit, nor was receiving goods. His character was not dependent on the actual state of his business with the Railway Company from time to time and did not change with it. A trader stood in a particular relation to the Railway Company, giving him a reasonably permanent character. Part IV of the Schedule of Rates and Charges was not in point, for if section 4 of the schedule did not apply neither did Part IV, which was governed by it. *Myers'* case (*cit.*) was not in point. Accordingly, as a difference had arisen under I, section 5, the question was appropriate for an arbiter appointed by the Board of Trade. Alternatively, section 1 of the Act of 1894 applied. The present question was of a kind which was dealt with by the Railway and Canal Commissioners. It involved a question of undue preference, for while the same services had been rendered to many traders the increased charge had been made on the defenders alone. The words used in that section were perfectly general and were meant to apply universally. They were contrasted with the words of the Act of 1894. It was not conceded that they would not apply to the hotel breakfast. But while the words were general the section was limited

in actual operation by the question of *locus standi* or interest. Thus it was only where a rate had been raised that the section could be invoked. The reference in sub-section 3 of that section to a complaint under section 31 of the Act of 1888 was merely for the purpose of procedure, and did not limit the right to complain to those who could qualify under that section. But in any event, even if that sub-section was limitative, the defenders were traders in the sense of section 55 of the Act of 1888, and could competently proceed under section 31. Both the Railway and Canal Commissioners and a Board of Trade arbitration were open to the defenders. The former had frequently exercised jurisdiction in disputes such as had given rise to the present question—*Furness Railway Company* v. *Vickers, Sons, & Maxim, Limited*, 1904, 12 R. & C. T. Cas. 81, *per* Sir Frederick Peel at p. 84; *North British Railway Company* v. *Coltness Iron Company, Limited, and Others*, 1910 and 1911, 14 R. & C.T. Cas. 246. In any event it was for the arbiter to determine whether this case fell under his jurisdiction or not—*Caledonian Railway Company* v. *Clyde Shipping Company*, 1917 S.C. 107, 54 S.L.R. 104. [LORD MACKENZIE referred to the case of *Pidcock & Company* v. *Manchester, Sheffield, and Lincolnshire Railway Company*, 1895, 9 R. & C.T. Cas. 45, *per* Sir F. Peel at p. 54.]

At advising—

LORD PRESIDENT—In the form in which this case was finally presented to us only one question was raised for decision—Does section 1 of the Railway and Canal Traffic Act 1894 apply or not? If it does not apply then it was not argued that any other statutory enactment does apply, and it was conceded that the pursuers ought to have decree. Differing from the Lord Ordinary, I am of opinion that the statute I have mentioned has no application to the case. The defenders own brick works which are connected by rail with the pursuers' main line. Within the brickworks are lines of railway sidings belonging to the defenders. In the course of their business the defenders have occasion to move material from one point to another within their works. For that purpose they used the pursuers' waggons drawn by the pursuers' locomotives. The services so rendered by the pursuers were confined exclusively to the moving of material within the works, and had no connection whatever with the conveyance of the defenders' traffic over the pursuers' railway. Prior to 1st November 1915 certain charges were regularly made by the pursuers and paid by the defenders for the services I have mentioned. On 26th October 1915 the pursuers intimated to the defenders that they proposed to increase these charges. The defenders have taken the services but refuse to pay for them on the basis of the increased scale of charges, which they allege is unreasonable. Hence this action, which they plead is incompetent on the ground that jurisdiction to decide the controversy belongs not to this Court but to the Railway and Canal Commission. Now it is common ground that the language of the 1st section of the 1894 Act is wide enough to cover these disputed charges; but it is argued (and indeed this was not controverted) that although this is so, the statute I have mentioned forms part of a code of legislation relating to railway "rates and charges," which when examined will be found to be confined to charges for conveyance of goods on the railway or for services incidental to the conveyance of merchandise on the company's railways. Such are all the charges mentioned in the Act of 1894. Nothing could demonstrate this more clearly than the reference made in sub-section (3) of section 1 of the statute to the Railway and Canal Traffic Act of 1888. The words of that sub-section are as follows—"(3) The Railway and Canal Commissioners shall have jurisdiction to hear and determine any complaint with respect to any such increase of rate or charge, but not until a complaint with respect thereto has been made to and considered by the Board of Trade under section 31 of the Railway and Canal Traffic Act 1888." These words carry us back to the 31st section of the Act of 1888, which in express terms applies exclusively to complainers who may be described as persons "sending, receiving, or desiring to send," goods by any railway. In other words, the complaint must be made, and can only be made, by a "trader" within the meaning of the Railway and Canal Traffic Acts, as defined by section 55 of the 1888 Act. Now the defenders here do not answer to that description. For their dispute with the company relates solely to charges for services altogether extraneous to the railway—charges for services performed within their own brickworks and nowhere else. The material moved about in the works may never, so far as appears, be carried on the railway at all. I am unable to see, therefore, how the Board of Trade can competently entertain the defenders' complaint under section 31 of the Act of 1888. But until that complaint has been made to and considered by the Board of Trade the jurisdiction of the Railway and Canal Commissioners does not emerge. The Lord Ordinary says he does not think "that the wide and general words of the Act of 1894 can be held to be restricted by a sub-section which merely deals with the procedure preliminary to approaching the Railway and Canal Commissioners." The sub-section in question, however, does not deal with procedure merely. It is a clear and unmistakable indication that, despite the generality of the language used in the 1st section of the Act, it certainly forms part of the code to which I have referred. The Lord Ordinary fails, I think, to observe that the complaint to the Board of Trade is a preliminary absolutely essential to the exercise of jurisdiction on the part of the Railway and Canal Commissioners. And if that essential step cannot be taken by the defenders, inasmuch as they do not answer to the description of persons who alone are authorised to take it, then the Railway and Canal Commissioners can never be reached. This is just another way of saying that, notwithstanding its generality, the language used in the Act of 1894 must be interpreted as I have already

indicated. I come, therefore, to the conclusion that the charges here in dispute not being charges incidental to conveyance of goods on the railway do not fall within the Act of 1894. If so, they are not, to use the words of the pursuers' third plea-in-law, "the subject of statutory regulation or restriction." It was not maintained by the defenders that if they failed in their argument on jurisdiction there was any need for inquiry as to the reasonableness of the charges. Accordingly I propose that we should recal the interlocutor of the Lord Ordinary and grant decree in terms of the conclusions of the summons.

LORD MACKENZIE—This case raises a question of general interest, involving as it does the consideration of the extent to which the jurisdiction of the ordinary courts of law is excluded by the railway statutes.

The Caledonian Railway Company sue the defenders, who are brick manufacturers, for £462, 5s. 9., the balance of an account for work done by them on the defenders' employment. The work consisted in the haulage in railway waggons of material from one point to another within the brickworks upon sidings which are the property of the defenders. The moving of the waggons had no connection with the conveyance of the defenders' traffic over the pursuers' railway. For fifteen years prior to 1915 the pursuers had done the work at rates the defenders were willing to pay. In that year the pursuers intimated that a new scale of charges would come into operation on 1st November. This scale involved an increase of the rates and charges. The defenders objected to pay the increased scale, but continued to accept the services in question from the pursuers. Accounts were regularly rendered on the new scale down to December 1917. The payments by the defenders were on the old scale, which the pursuers accepted as payments to account. The sum sued for is the balance of the pursuers' claim. The position taken up in defence by the defenders is that the new scale was not legal or reasonable. What the defenders mean by this was not explained in the record as originally framed, but was defined in the course of the discussion in the Inner House by an amendment of their first and seventh pleas-in-law, which now read—(1) "The action is incompetent in respect that the jurisdiction of the Court of Session is excluded by section 5 of the Railway Rates and Charges, No. 19 (Caledonian Railway, etc.), Order Confirmation Act 1892, and *separatim* by section 1 of the Railway and Canal Traffic Act 1894"; and (7) "The present process should be sisted till a determination of the questions by the competent tribunal or tribunals under the aforesaid Acts is obtained (1) whether the pursuers can justify the increase of rates and charges in question as a reasonable increase, and (2) what is a reasonable charge or reasonable charges for the said services."

If the first branch of plea (1) is well founded, then the dispute should be decided by an arbiter appointed by the Board of Trade; if the second branch is sound, then the matter is one for the Railway and Canal Commission.

In my opinion these pleas are unsound in both branches, and ought to be repelled. Section 5 of the Schedule of Maximum Rates and Charges annexed to the Railway Rates and Charges, No. 19 (Caledonian Railway, etc.), Order Confirmation Act 1892 provides that—"The company may charge for the services hereunder mentioned, or any of them, when rendered to a trader at his request or for his convenience, a reasonable sum by way of addition to the tonnage rate. Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party. . . . (i) Services rendered by the company at or in connection with sidings not belonging to the company."

The rival contentions of parties in this case are as follows—The defenders say, and the Lord Ordinary has given effect to their contention, that the true purpose of section 5 is to control the charges for all services "at or in connection with sidings," irrespective of whether they are connected with goods on which a tonnage rate is chargeable or not. The pursuers maintain, in my opinion rightly, that the section is in a statute which forms part of a code for the regulation only of charges for conveyance and for services rendered to a trader either before or after conveyance, incidental to or ancillary to conveyance; services which are not of this character, they contend, are not subject to the regulations contained in the code, and may be the subject-matter of a contract which the parties are free to make as they like.

The Caledonian Rates and Charges Order Confirmation Act 1892 formed one of a series applicable to the different railways throughout the country. It is entituled, "An Act to confirm a Provisional Order made by the Board of Trade under the Railway and Canal Traffic Act 1888, containing the Classification of Merchandise Traffic, and the Schedule of Maximum Rates and Charges applicable thereto, of the Caledonian Railway Company, and certain other Railway Companies." By section 3 of the order it is provided—"This Order is to be read and construed subject in all respects to the provisions of the Railway and Canal Traffic Acts 1873 and 1888 and of any other Acts or parts of Acts incorporated therewith."

The history of these Rates and Charges Order Confirmation Acts is that the Regulation of Railways Act 1873 was the outcome of the report of a Parliamentary Committee appointed in 1872. By sections 4 and 10 of the 1873 Act the Railway Commissioners were appointed and their duties defined. The result of the report of another Parliamentary Committee appointed in 1881 was the Railway and Canal Traffic Act of 1888, under which the Railway Commission was reconstituted. By section 24 it was enacted that a revised classification of merchandise traffic and schedule of rates was to be submitted to the Board of Trade by every railway company, and detailed provisions were enacted in the sub-sections of section 24 for embodying the same in a Provisional

Order to be confirmed by Act of Parliament. The Caledonian Rates and Charges Act 1892 accordingly confirmed the Order of the Board of Trade, which, as therein set out, was made "under the Railway and Canal Traffic Act 1888, embodying the Classification of Merchandise Traffic and the Schedule of Maximum Rates and Charges, including all terminal charges applicable to the said classification of the Caledonian Railway Company, and certain other railway companies connected therewith."

The Schedule of Maximum Rates and Charges is headed—"Schedule of Maximum Rates and Charges, and Classification of Merchandise Traffic applicable to the Caledonian Railway Company and certain other railway companies connected therewith." Section 2 enacts—"The maximum rate for conveyance is the maximum rate which the company may charge for the conveyance of merchandise by merchandise train. . . ." These are the statutory provisions which lead up to the enactment contained in section 5.

Section 5 postulates that the service must be rendered to a trader. The definition of trader in section 25 is this—"The term 'trader' includes any person sending or receiving, or desiring to send, merchandise by the railway." This, in my opinion, is an exhaustive definition of what is meant by the term "trader." No one can be a trader within the meaning of the railway code unless he sends, or receives, or desires to send, merchandise by the railway. This fits in with the words in section 5, "by way of addition to the tonnage rate." The tonnage rate can only be charged for the conveyance of merchandise by merchandise train, and any person on whom such a charge is made is a trader as defined by the Act. Unless the services are rendered in respect of merchandise traffic, upon which the company's rate, authorised by the schedule, is charged, then the language of section 5 is not satisfied, because the charge for the service is to be in addition to the tonnage rate. Internal traffic, which is confined to the ambit of the defenders' brickworks, cannot be said to be merchandise traffic on the pursuers' railway. It is said, however, that the haulage of this internal traffic satisfies the language of section 5 (i), because it is service in connection with sidings not belonging to the company. According to the definition of "siding" in section 25 it includes "branch railways not belonging to a railway company." The word "branch" suggests that there must be a trunk, and if on an examination of the particular use of the private siding it is found there is no relation to the use of the trunk line, the consequence is that the private siding is being used as an independent entity and not as a branch railway.

At one stage of the argument reference was made to Part IV of the schedule, which deals with exceptional cases, and provides, with regard to the charge—"For any accommodation or services provided or rendered by the company within the scope of their undertaking by the desire of a trader, and in respect of which no provisions are made by this schedule" "such reasonable sum as the company may think fit in each case." This dropped out of the case. Senior counsel for the defenders did not refer to it, and it is not covered by the pleas. Here also the services are to be by desire of a "trader," and the considerations already adverted to exclude the application of Part IV to the case in hand.

It was contended by the defenders that if the charges for these services are *intra vires* then they must be subject to regulation under the statutes, and that if they are not subject to regulation then they must be *ultra vires*. It is doubtful whether a plea of *ultra vires* could be effectually stated by the defenders who have accepted the services. But this point as argued to us is bad upon the authorities. In *Stone & Company* v. *Midland Railway*, [1903] 1 K.B. 741, [1904], 1 K.B. 669, the question was raised under the equality of charges sections in the 1854 Act and a Special Act of the company in regard to carriage of non-perishable goods by passenger train. The case is summed up in the judgment of Wills, J., in the Divisional Court, quoted by Collins, M.R., in the Court of Appeal—"Two principles which cannot I think be contested apply here, and the combined effect of them is to make the case perfectly clear. One is, that there is no statutory obligation to carry these goods by passenger train; the other, that it is not *ultra vires* for the company to carry them if they so choose. The combined effect is that, so far as concerns the carriage of articles of this kind by passenger train, the company are on exactly the same footing as a private individual." In the case of *Watson, Todd & Company* v. *Midland Railway and London and North-Western Railway*, 9 R. & C.T.Cas. 90, it was held that the charges for certain services were outside the language of section 4 and Part IV of the Order. That case related to charges for services which included matters outside the scope of the undertaking of the company, namely, acts performed neither on their railways nor on sidings of those railways belonging to other persons. These services consisted in making provision for the conveyance of merchandise upon railways not belonging to the company and its delivery at stations not on their lines, and the Court naturally held that the railway company were entitled to charge for those wholly extraneous services rendered by them through their agents off their system at such prices as they thought fit. All this is made plain in the judgment of Fletcher Moulton, L.J., in *Midland Railway* v. *Myers, Rose, & Company, Limited*, [1908] 2 K.B. 356, at p. 362. It is there pointed out, however, that neither *Stone's* case nor that of *Myers, Rose, & Company* justifies the contention that where services are rendered on the system of the Railway Company itself but are voluntary there is entire freedom to contract. The schedule is not confined to services which are obligatory, and a reference to Part IV shows this, for there is a special exemption from obligation to carry "dangerous goods."

If carried, the Railway Company are entitled to charge "such reasonable sum as the company may think fit." The effect of the judgment in the case of *Myers, Rose, & Company* was to negative the contention of the Railway Company that the reasonableness of the charge was for the company to decide. The charge there in question was so much per day per waggon in respect of all waggons remaining on the Railway Company's wait order sidings beyond a specified time. It was held that the subject-matter of the action was within Part IV of the schedule, and that the question of the reasonableness of the charge was for the jury. This was affirmed by the House of Lords ([1909] A.C. 13), and Lord Loreburn, L.C., after quoting from Part IV, explains why this charge fell within the schedule. "Is it accommodation provided within the scope of the company's undertaking? It is a convenience provided in the course of transit on the line to enable delivery to be made at suitable times and in suitable circumstances to the trader. It is not part of the conveyance—indeed, it is an interruption of the conveyance. It is not a terminal charge, but is in my opinion a charge 'within the scope of their undertaking' as being ancillary to conveyance and delivery." In *Cowan & Sons* v. *North British Railway*, 3 F. 677, 39 S.L.R. 240, the Lord President (Balfour) recognises that service by a railway company which is in its origin voluntary may, so long as the company continues to give it, be subject to regulation by the Railway Commissioners. The opinion shows that the services there referred to were services either prior or subsequent to conveyance.

The result is, in my opinion, that unless it can be shown that the services rendered under section 5 are incidental to or ancillary to conveyance, the charge for them is not subject to regulation, but may be made matter of independent contract.

The second branch of the defenders' first plea-in-law and the seventh plea-in-law are founded on section 1 of the 1894 Act. That is an Act to amend the Railway and Canal Traffic Act 1888, and is to be read with the Railway and Canal Traffic Acts 1873 to 1888. Section 1 is in these terms—"(1) Where a railway company have, either alone or jointly with any other railway company or companies, since the last day of December One thousand eight hundred and ninety-two directly or indirectly increased, or hereafter increase directly or indirectly, any rate or charge, then if any complaint is made that the rate or charge is unreasonable, it shall lie on the company to prove that the increase of the rate or charge is reasonable, and for that purpose it shall not be sufficient to show that the rate or charge is within any limit fixed by an Act of Parliament or by any Provisional Order confirmed by an Act of Parliament."

The argument for the defenders is that section 1 (1) is couched in the widest possible terms, and is not subject to any limitation. I think these words do require construction and that they mean rates and charges within the meaning of the code of which the Act of 1894 forms part. It was conceded that in order to test the title of a person to complain to the Railway and Canal Commission under sub-section (3) of section 1, recourse must be had to section 31 of the 1888 Act.

Sub-section (3) of section 1 provides—"The Railway and Canal Commissioners shall have jurisdiction to hear and determine any complaint with respect to any such increase of rate or charge, but not until a complaint with respect thereto has been made to and considered by the Board of Trade under section 31 of the Railway and Canal Traffic Act 1888."

The terms of section 31 of the 1888 Act show that the words "any rate or charge" in section 1 of the 1894 Act must be construed as meaning any rate or charge which comes within the purview of the code contained in the Railway and Canal Traffic Acts 1873 to 1888. Section 31 provides—"(1) Whenever any person receiving or sending or desiring to send goods by any railway is of opinion that the railway company is charging him an unfair or an unreasonable rate of charge, or is in any other respect treating him in an oppressive or unreasonable manner, such person may complain to the Board of Trade." Now "any person receiving or sending or desiring to send goods" is just the definition of trader in section 55 of the 1888 Act, which is the same as that contained in section 25 of the Caledonian Rates and Charges Act of 1892. The defenders are not traders within the meaning of the statutes. It was suggested that they were traders potentially. That will not do. In order to make them traders within the meaning of the statutes they must be so in regard to the actual merchandise in question. It follows that as the defenders cannot qualify the only title which would justify their complaining under section 31 of the 1888 Act, they cannot successfully maintain that they have satisfied the condition-precedent to the exercise by the Railway and Canal Commissioners of the jurisdiction conferred on them by sub-section (3).

The result is, in my opinion, that the pursuers are entitled to decree *de plano*. The defenders continued to accept the services rendered by the pursuers after due intimation that they were to be charged on the increased scale, and are liable on contract for the sum sued for. The case of *M'Farlane* v. *Mitchell*, 2 F. 901, 37 S.L.R. 705, resembles the present. There the tenant under an urban lease continued to occupy after he had received intimation that the rent was to be increased. It was held that it was not open to him to remain on without agreeing to the new terms. The same principle applies here. We were referred to the *Polquhairn* case, 1916 S.C. 36, 53 S.L.R. 73, in which a similar principle was applied in the case of services rendered under the statute. The only defence insisted in before us was that in answer 6 where it is stated "that the defenders refused to admit that the new scale was in operation or was legal or reasonable." This is the defence founded on section 5 of the schedule annexed to the 1892 Act and section 1 of the 1894 Act, which in my opinion ought to be repelled. I think the interlocutor of the

Lord Ordinary ought to be recalled, and decree granted for the sum sued for.

LORD SKERRINGTON—I have had the advantage of reading Lord Mackenzie's opinion. I agree with it, and have nothing to add.

LORD CULLEN—I also agree with your Lordships.

The Court recalled the interlocutor of the Lord Ordinary and decerned against the defenders in terms of the conclusions of the summons.

Counsel for the Pursuers — Constable, K.C.—Gentles Agents — Hope, Todd, & Kirk, W.S.

Counsel for the Defenders — Sandeman, K.C.—A. M. Mackay. Agents—Drummond & Reid, W.S.

---

## HIGH COURT OF JUSTICIARY.

*Friday, January* 31.

(Before the Lord Justice-Clerk, Lord Dundas, and Lord Salvesen.)

MACKENNA *v.* M'MILLAN.

*Justiciary Cases—Food Control—Maximum Prices—Wholesale Sale of Milk—Milk (Summer Prices) Order* 1918, *sec.* 3—*Milk (Summer Prices) Amendment Order* 1918, *sec.* 1.

A producer of milk, who was registered both as a wholesale and as a retail dealer under the Milk (Registration of Dealers) Order 1918, sold to a dairy-keeper for retail distribution among her customers a total amount of 161 gallons of milk in quantities of 12 gallons or less at a time, and to the manager of a lodging-house for retail sale by him 4 gallons of milk, at a price in excess of the maximum wholesale price of milk as fixed by the Milk (Summer Prices) Order 1918, Article 3, as amended by Article 1 of the Milk (Summer Prices) Amendment Order 1918. *Held* (*dub.* the Lord Justice-Clerk) that the sale being a sale to a retailer for re-sale was a sale by wholesale, and that therefore the producer of milk had been guilty of a contravention of the Milk (Summer Prices) Order 1918.

*Justiciary Cases—War—Defence of the Realm Regulations — Interpretation — "Wholesale"—Milk (Regulation of Dealers) Order* 1918, *as Amended—Milk (Summer Prices) Order* 1918, *sec.* 3—*Milk (Summer Prices) Amendment Order* 1918, *sec.* 1.

The Milk (Registration of Dealers) Order 1918, as amended, provides (section 19) that "for the purposes of this Order a sale of 17 imperial gallons or more to be delivered at any one time shall be deemed to be a dealing in milk by wholesale; and any other sale shall be deemed to be a dealing in milk by retail." The Milk (Summer Prices) Order 1918, as amended by the Milk (Summer Prices) Amendment Order 1918, fixes the price at which milk may be sold "wholesale" or "retail," but contains no definition of "wholesale" or "retail." In a prosecution for selling above the maximum price, *held* that the word "wholesale" as used in the latter Orders could not be interpreted by reference to the definition contained in the Milk (Registration of Dealers) Order 1918.

Christopher M'Millan, West Nerston Farm, East Kilbride, *respondent*, was charged in the Sheriff Court at Glasgow on a summary complaint at the instance of Peter Fraser Mackenna, Procurator-Fiscal, *appellant*.

The *complaint* was in the following terms —"Christopher M'Millan, West Nerston Farm, East Kilbride, you are charged at the instance of the complainer that you did (1) between 10th and 23rd June 1918, both dates inclusive, at the dairy occupied by Lizzie Strang at 272 Stonelaw Road, Rutherglen, sell by wholesale to the said Lizzie Strang 161 gallons of milk, of which you were the producer, at a price at the rate of 1s. 8½d. per gallon, and in excess of the rate of 1s. 4d. per gallon; and (2) on 1st July 1918, at the lodging-house at 127 King Street, Rutherglen, sell by wholesale to James Taylor, manager of said lodging-house, 4 gallons of milk, of which you were the producer, at a price at the rate of 1s. 8½d. per gallon, and in excess of the rate of 1s. 4d. per gallon, contrary to Article 3 of the Milk (Summer Prices) Order 1918, as amended by Article 1 of the Milk (Summer Prices) Amendment Order 1918."

On 13th August 1918 the Sheriff-Substitute (D. J. MACKENZIE) found the charges not proven, against which decision an appeal was taken by Stated Case.

The Case stated—"The following *facts* were admitted or proved:—1. That the respondent is a cow-feeder at West Nerston Farm, East Kilbride, and that he is a producer of milk in the sense of the Milk (Summer Prices) Order 1918, No. 296, dated 8th March 1918, and was registered both as a wholesale and retail dealer under the Milk (Registration of Dealers) Order 1918. 2. That (1) between 10th and 23rd June 1918, both dates inclusive, at the dairy occupied by Lizzie Strang at 272 Stonelaw Road, Rutherglen, the respondent sold to the said Lizzie Strang for sale by retail by her 161 gallons of milk of which he was the producer—that is to say, he sold to her on 10th June 12 gallons, on 11th June 11 gallons, on 12th June 12 gallons, on 13th June 11 gallons, on 14th June 11 gallons, on 15th June 12 gallons, on 16th June 12 gallons, on 17th June 12 gallons, on 18th June 12 gallons, on 19th June 11 gallons, on 20th June 11 gallons, on 21st June 11 gallons, on 22nd June 11 gallons, and on 23rd June 11 gallons, all at the price of 1s. 8½d. per gallon. 3. That (2) on 1st July 1918 at the lodging-house at 127 King Street, Rutherglen, the respondent sold to James Taylor, manager of said lodging-house, for re-sale by retail by him 4 gallons of milk of which the respondent was the producer at the price of 1s. 8½d. per gallon. . . . 5. That when milk is 'sold wholesale by or on behalf of the producer' the price to be paid or received is fixed by section 3 of the above-