it might be put otherwise, and it would be sufficient to say that by virtue of the Act the Crown is entitled to charge the higher rate of stamp but that it cannot charge both rates upon the same document; and if the Crown does claim a right to have the document stamped at the higher rate within one part of the Act, it is no answer to such claim to say that there is another part of the Act under which the same document might be stamped at a lower rate. For that reason, in my opinion, this appeal fails and ought to be dismissed with costs.

LORD MACNAGHTEN—I entirely agree.

LORD ROBERTSON—If a plain man conversant with business were asked to describe this instrument I think that he would call it a "foreign government security." It is found as a matter of fact that the thing is marketable, it is therefore a "marketable security." Now, it is true that from the point of view of legal analysis it contains a promise to pay, and is therefore in legal phraseology a promissory note. The result is that the instrument falls within both of the categories in this taxing Act. There is nothing legally impossible in this; it often occurs; and the result is that it may be assessed under either class at the option of the Government.

LORD ATKINSON—I concur.

Appeal dismissed.

Counsel for the Appellants—Danckwerts, K.C.—Vaughan Hawkins. Agents—Bircham & Company, Solicitors.

Counsel for the Respondents—The Solicitor-General (Sir W. Robson, K.C.)—Sir R. Finlay, K.C. — W. Finlay. Agent—Sir F. C. Gore, Solicitor of Inland Revenue.

HOUSE OF LORDS.

Tuesday, February 4.

(Before the Lord Chancellor (Loreburn), Lords Macnaghten, Robertson, Atkinson, and Collins.)

GREAT WESTERN RAILWAY COMPANY *v.* PHILLIPS & COMPANY, LIMITED.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Railway — Regulation — Demurrage of Trucks — Disputes as to Demurrage to be Settled by Arbitration—Hire of Trucks in Place of those Delayed—Arbitration or Action.

A Railway Act, after providing that when merchandise is conveyed in trucks not belonging to the company the trader shall be entitled to recover from the company a reasonable sum by way of demurrage for any detention of his trucks beyond a reasonable time, enacted that "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."

A claim by a trader for damages sustained by him in hiring a truck in the place of one delayed by the railway company *held* to be in respect of a "difference arising under this section," and to be accordingly a question for an arbitrator and not for a court of law.

Appeal from a judgment of the Court of Appeal (VAUGHAN WILLIAMS and BUCKLEY, L.JJ., MOULTON, L.J., dissenting), reported (1907) 2 K.B. 664, affirming a judgment of the King's Bench Division (LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.), reported (1906) 2 K.B. 426, making absolute a rule *nisi* for a *mandamus* to the County Court Judge of the Marylebone County Court to hear and determine the matter of the action.

The facts of the case and the section of the statute under consideration sufficiently appear in their Lordships' judgments, *infra*.

LORD CHANCELLOR (LOREBURN)—In this case there was a difference of opinion in the Court of Appeal. The Great Western Railway Act 1891 by its sixth section makes provision for the case of detention by the company of trucks belonging to traders as follows:—"Where merchandise is conveyed in trucks not belonging to the company the trader shall be entitled to recover from the company a reasonable sum by way of demurrage for any detention of his trucks beyond a reasonable period either by the company or any other company over whose railway the trucks have been conveyed under a through rate or contract. 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"; and the question before your Lordships is whether a difference that has arisen between the company and Messrs Phillips & Company, Limited, comes within that section. If so, admittedly the jurisdiction of the County Court is ousted. If, on the other hand, the difference is not within the section, then this action, commenced in the County Court, may proceed. The action was brought in the Marylebone County Court to recover the sum of 8s. 8d. "for damages occasioned to plaintiffs (Messrs Phillips & Company, Limited) by undue detention of their waggon and cost of hire of other waggon in place thereof." In fact, Messrs Phillips had sent on the company's line a truck of their own which was delayed for a few days on its way to Wales, and say that they had to pay 8s. 8d. for the hire of another truck to take its place. This sum the Railway Company refused to pay, and offered 6d. a day instead, which represented the earning power of the truck per day less depreciation. Thus the question really narrows itself to this—Does the Act mean that an arbitrator shall

decide what damages (general, special, or of any kind) must be paid by the Railway Company for the detention of a trader's truck? Or does it mean that he can only determine the net earning power of the truck to its owner, and award that? In the end I thought that the respondents' arguments virtually amounted to maintaining the latter condition. Before scanning the actual words of the section itself, two considerations ought to be noticed. The first is that this same Act deals also with the kindred case of a trader detaining a railway truck. When this occurs it is clear, upon the authority of *London and North-Western Railway Company* v. *Donnellan*, that under the 5th section an arbitrator alone can determine any difference, and has power to award such sum as he thinks fit, if the case is one of difference within the 5th section. It may be, of course, that Parliament has prescribed a different course where the truck detained is that of the trader, though no reason for such a distinction can be suggested. The second consideration is that if the true construction of this Act be that an arbitrator has not jurisdiction to determine a claim like the present, very great inconvenience and the concurrence of two jurisdictions (difficult to separate by any clear line) in determining the consequences of one and the same act follow inevitably. A hundred trucks are detained by the railway company, and, I will suppose, notice given to the company that they are required by the trader who owns them to carry out a contract which he has made. The company detains them an unreasonable time and causes special damage to their owner. Upon this the owner claims (rightly or wrongly) that he shall be indemnified from his loss. "No," says Mr Evans, "that is a claim for damages and must be tried by a court of law. All that the arbitrator can ascertain is a claim for a sum in the nature of demurrage—that is to say, a fixed sum per day for what in the ordinary course the truck would earn day in and day out during its life." Can the trader in that case bring both an action and a claim for arbitration so as to recover in both? If not, what is the precise distinction by which he must be guided in selecting the right tribunal? I do not know, and I have not been able to discover a convincing answer to either question after hearing an able argument. Yet these difficulties surely must make your Lordships cautious in accepting a construction which leads directly towards them. But it may be that these considerations cannot be entertained in face of the precise language of the statute, which must prevail. Accordingly I turn now to the precise words of section 6. The arbitrator is to determine "any difference arising under this section," and the section entitles the trader to recover from the company "a reasonable sum by way of demurrage for any detention of his trucks beyond a reasonable period." Now, if it were not for the reference to demurrage it could hardly be denied that the words "a reasonable sum for any detention" (of the trucks, be it noted) would include whatever damages were appropriate to the case. I cannot think that any other meaning is intended. What is demurrage? Primarily it is a term applicable to shipping, and originally meant, in strictness, the money payable to the shipowner for detaining his vessel during certain days, usually at a fixed rate. It cannot mean that here, nor need we search for its extended meaning in shipping contracts, for it is very properly not argued that shipping terminology applies at all. In truth the word has no conventional meaning at all such as attaches to a term of art. I have had the advantage of reading in print Lord Macnaghten's opinion, and I agree in the interpretation which he places on this clause. Special damage is not excluded. I cannot agree with the argument that these words limit the sum recoverable to a fixed rate per day in the nature of rent or an equivalent of the earning power of the truck less allowance for depreciation. The arbitrator must say what is the reasonable sum in each case, judging for himself. In the result I am of opinion that the conclusion of Moulton, L.J., was right, and that an arbitrator appointed under the Act alone had jurisdiction to determine the subject-matter of this action. Whether he will think in this case that the cost of hiring another waggon should be allowed I do not know, and I express no opinion on that subject. But he is the person to determine that point.

LORD MACNAGHTEN—I am entirely of the same opinion. And I cannot help saying that I am rather surprised to find that so much difficulty has been made over the enactment which your Lordships are called upon to construe. It was not disputed that before the railway legislation of 1891 it was the practice of railway companies to convey their customers' empty coal trucks free of charge on the homeward journey, and on the outward journey too when forwarded for the purpose of being loaded. And, moreover, it was not disputed that, so long as these services were performed gratuitously, such a thing as an action at law for undue detention of empty coal trucks was never heard of. Then came the legislation of 1891. The enactment with which the appellants are concerned is the Great Western Railway Company (Rates and Charges) Order Confirmation Act 1891 (54 and 55 Vict. c. ccxxii). By sec. 5 of that Act, where merchandise is conveyed in trucks belonging to the company, the company is authorised to charge "a reasonable sum by way of addition to the tonnage rate" for certain services, including the detention of trucks for the accommodation of customers. On the other hand, by sec. 6, in the case of merchandise conveyed in trucks not belonging to the company, traders are given the right of recovering "a reasonable sum by way of demurrage" for undue detention of their trucks. Any difference arising under either of these two provisions is to be determined by an arbitrator to be appointed by

the Board of Trade at the instance of either party. Sec. 23 prohibits the company from making any charge for the return of empty trucks, or for forwarding empty trucks for the purpose of being loaded. Thus the services in relation to these matters, which were formerly gratuitous, are now by force of the statute included in the contract of carriage. In the present case the Railway Company admits that a coal truck belonging to Messrs Phillips & Company was unduly detained on the railway, and that in consequence Messrs Phillips & Company hired an emergency truck for which they had to pay. Messrs Phillips & Company brought an action in the County Court to recover the sum so paid from the company. The company having offered a smaller sum, which was refused, contends that the difference that has arisen must be determined by arbitration, and that Messrs Phillips & Company have no other way of enforcing their claim. Messrs Phillips & Company say that what they are claiming is special damage, and that a claim for special damage does not fall under sec. 6, even if a claim for breach of contract be within it. The first question, and in my opinion the only real question, is, Has the claim of Messrs Phillips & Company arisen under the section. At first sight it would seem that the answer must be in the affirmative. But for the section the claim could not have arisen at all. The claim is for undue detention. The substance of the claim is not affected by the measure of damages which the claimant seeks to apply. The claim must therefore, as it seems to me, come under sec. 6, unless there is something in the section itself to exclude it. It was argued that a claim for special damage is excluded by force of the words "by way of demurrage." The appellants contend that these words cannot have that effect. As I understood their argument, their view was that these words add little or nothing to the meaning of the provision. I agree that they do not exclude special damage if there be a case for it. But I hesitate to say that the words are superfluous. It seems to me that they have a definite meaning and a definite purpose. What does "demurrage" mean. I am content to take the meaning from the considered judgment of the Court of Exchequer in *Lockhart* v. *Falk* (33 L.T. Rep. 96, L.R. 10 Ex. 135). The question there turned on the construction of a charter-party. The judgment was delivered by Cleasby, B. "The word 'demurrage,'" said the learned Judge, "no doubt properly signifies the agreed additional payment (generally per day) for an allowed detention beyond a period either specified or to be collected from the instrument; but it has also a popular or more general meaning of compensation for undue detention." Here it cannot have its proper signification. It must mean compensation for undue detention. But it imports, I think, or connotes something more. Considering the source from which the word is borrowed and the subject to which it is commonly applied, I think that it denotes that a truck unduly detained is to be regarded (just like a ship under charter) as a profit-earning chattel—as a vehicle running for profit and unduly detained in the course of its journey without any fault on the part of its owner. If this be the true explanation of the use of the word "demurrage" in sec. 6, the enactment is plain enough, and it must be competent for the arbitrator in case of difference to award a reasonable sum for detention, whether the sum claimed would in an action at law fall under the head of ordinary or special damage. It was not seriously argued that the action could be maintained if the difference between the parties is one arising under sec. 6. I am therefore of opinion that the County Court Judge was right in holding that he had no jurisdiction, and that his order should be restored, with costs here and below.

LORDS ROBERTSON, ATKINSON, and COLLINS concurred.

Appeal sustained.

Counsel for the Appellants—Cripps, K.C. —Lush, K.C. —Schiller. Agent—R. R. Nelson, Solicitor.

Counsel for the Respondents—S. T. Evans, K.C.—Bailhache. Agents—Burn & Beveridge, Solicitors.

HOUSE OF LORDS.

Thursday, February 6.

(Before the Lord Chancellor (Loreburn), the Earl of Halsbury, Lords Macnaghten and Atkinson.)

JAMES NELSON & SONS, LIMITED *v.* NELSON LINE, LIMITED.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Ship—Charter-Party—Lay Days—Computation—Exception of Holidays—Work in Fact Done on Holidays.

A charter-party provided "seven weather working days (Sundays and holidays excepted) to be allowed by owners to charterers for loading."

Loading took place on two holidays, but there was no evidence of any express agreement under which the work was carried on, or at whose instigation it took place.

Held (*rev.* judgment of Court of Appeal) that the two days in question were not to be counted as lay days.

Ship—Charter-Party—Lay Days—Computation—Charter-Party Providing for Fortnightly Sailings—Agreement as to Commencement of Lay Days.

A more or less obscure agreement of the nature of a charter-party entered into between the owners of a line of steamships and charterers was made with respect to a fortnightly service of steamers between A and B. The agree-