occasion or purpose, and the ground of the call for subscriptions was one common to all clergymen with insufficient stipends, urged by the bishop on behalf of all alike. What you choose to call it matters little. The point is, what was it in reality? It was natural, and in no way wrong, that all concerned should make this gift appear as like a mere present as they could. But they acted straightforwardly, as one would expect, and the real character of what was done appears clearly enough from the papers in which contributions were solicited.

LORD ASHBOURNE—The question in this case is a short one, and naturally it is of much interest to the clergy and to many who are interested in their welfare. Are Easter offerings assessable to income tax as profits accruing by reason of the office of vicar? The Court of Appeal unanimously held in the affirmative, being of opinion that they were made to the vicar as vicar. These offerings had been made for several years to the appellant, the vicar of East Grinstead. They were made in response to a systematic appeal, initiated by the bishop and supported by the churchwardens, to induce collections to eke out slender stipends. People were urged, it is true, to subscribe as a personal freewill gift, the contributions were wholly voluntary, and the amount given was regulated entirely by the discretion of the subscribers. But in what character did the appellant receive them? It was suggested that the offerings were made as personal gifts to the vicar, as marks of esteem and respect. Such reasons no doubt played their part in obtaining and increasing the amount of the offerings, but I cannot doubt that they were given to the vicar as vicar, and that they formed part of the profits accruing by reason of his office. The bishop was naturally anxious to increase the scanty stipends of ill-paid vicars. The whole machinery was ecclesiastical — bishop, churchwardens, church collections—and I am unable to see room for doubt that they were made for the vicar because he was the vicar, and became, within the statute, part of the profits which accrued to him by reason of his office. I can sympathise with the Lord Chief-Justice in arriving at this conclusion, but I think that the appeal should be dismissed.

LORD ROBERTSON—I am clearly of opinion that this judgment is right. When the broader facts of the case are remembered, I confess that to my mind it savours of paradox to say that this money did not accrue to the appellant by reason of his office of vicar of East Grinstead. The reason for the collection of the money was to supplement the legal income of the vicar, and while this is the ordinary history of Easter offerings, in the present instance the thing is set out in black and white in the bishop's letter and the subsequent notices. The money is collected in church, the offertory being part of the service, and it is placed on the altar, the contributions of those unable to attend being handed to the vicar or the churchwardens. As I have said, the bishop's letter makes quite manifest what was sufficiently plain without it. It is, be it observed, a circular letter, and it applies not only to the appellant, but to each and every incumbent in the diocese. Its avowed object is to make up to the clergy the fall in their official incomes. It bases the appeal on the Christian duty incumbent on the people. While written with every desire to protrude the personal element, with a view to the present question, the letter does not conceal, but, on the contrary, demonstrates, that it is in virtue of his office that each clergyman is to take the offering which it was written to advocate.

LORD COLLINS—I am of the same opinion.

Appeal dismissed.

Counsel for Appellant — Danckwerts, K.C.—Austen—Cartmell. Agents—Hare & Company, Solicitors.

Counsel for Respondent — Attorney-General (Sir W. Robson, K.C.)—Solicitor-General (Sir S. T. Evans, K.C.)—W. Finlay. Agent—Sir F. C. Gore, Solicitor of Inland Revenue.

HOUSE OF LORDS.

Monday, December 14, 1908.

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

GREAT EASTERN RAILWAY COMPANY *v.* LORD'S TRUSTEE.

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

Right in Security — Lien — Possession — General Lien—Railway Company—Goods of Third Party in Portion of Railway Premises Leased to him—Right of Retention by Railway Company.

A railway company contracted by "ledger agreement" with a coal merchant to allow credit for the carriage of coal. Certain allotments of space within the premises of the railway company were leased by it to the coal merchant. The ledger agreement provided that the railway company should have a continual lien for the balance of freight over the coal in course of being carried and also over coal stored upon the allotments. The allotments were situated within the company's yard, which was regularly locked by the company at night. The coal merchant's account being in arrear, the company locked the gates leading to the allotments and held possession of coal stored there, excluding the coal merchant.

Held (*diss.* Lords Robertson and Collins) that the railway company were in

possession of the coal in the allotments and that they had a valid lien.

[Had the coal in the allotments not been held to be in the railway company's possession, the ledger agreement would have been a "licence to take possession" under the Bills of Sale (England and Wales) Act 1878 (41 and 42 Vict. c. 31), sec. 4, and consequently void as not registered in terms of the Act.]

The appellants were a Railway Company which, under the circumstances stated *supra* in rubric, had exercised an alleged lien over coal belonging to their debtor, who then became bankrupt. The trustee in bankruptcy, the respondent, raised an action of damages in which judgment was pronounced in favour of the appellants by PHILLIMORE, J. This was reversed by the Court of Appeal (COZENS-HARDY, M.R., and BUCKLEY, L.J., *diss.* MOULTON, L.J.)

The Railway Company appealed.

Their Lordships gave considered judgment as follows:—

LORD CHANCELLOR (LOREBURN)—There has been an even division of opinion among the Judges who have heard this case. In my view the judgment of Phillimore, J., ought to be restored. I think that the Railway Company were in possession of this coal. The whole object of the arrangement made between them and Lord was that they should retain a lien and a physical control, secured by retaining the coal within their yard, of which they could lock the gates if Lord was in arrear. It is perfectly consistent with this that Lord also should have the right to remove the coal when the Railway Company opened their gates for him, as they were bound to do when he was not in arrear. I have heard no answer to the observations of Moulton, L.J., when he points out how an innkeeper has an effective lien over the luggage of his guest though the guest is allowed to take out of it or put into it his articles of clothing while in the inn. True, there was a demise to Lord of an allotment in the yard whereon this coal was stacked. That entitled him to occupy the allotment. But did that occupation confer upon him the exclusive possession of everything which he placed on the allotment? I cannot see why it should. An officer may be in possession of goods whether the debtor has a lease or even the freehold of the house in which the goods are placed. I cannot perceive any necessary dependency between the occupation of a piece of land and the exclusive possession of chattels which lie on it. Nor, in my opinion, can it signify for this purpose whether the occupation of the land is under a demise or merely by licence. How can the quality of the tenure of the land determine the possession of the chattels? If this be so, the Bills of Sale Act does not apply. There is here no right in equity, nor charge, nor any licence to take possession of goods. There is already possession and at law. The agreement merely gives a right to retain it. I should have been very sorry had I felt obliged to hold that an arrangement so convenient and so harmless was frustrated by an Act designed to defeat very different transactions.

LORD MACNAGHTEN—Before his bankruptcy Frederick Lord carried on business at Norwich as a coal merchant under the style or firm of Lord Brothers. The supplies of coal required for the purposes of his business came by the Great Eastern Railway under consignment to Lord at Norwich. Everybody knows what the rights of carriers are in the absence of special agreement. On payment of what may be due for freight the carrier is bound to deliver to the consignee. The presumption is that payment and delivery are meant to be concurrent. Unless payment is forthcoming the carrier has a right to withhold delivery and to detain the goods. At the same time, in the case of railway companies and their regular customers, it would be most inconvenient if the carrying company were to stand on its strict rights and insist upon ready money on the delivery of each consignment. It would be inconvenient to the customer and even more so to the company. What was done in this case is, I believe, in accordance with common practice. At Lord's request the appellants agreed to open a monthly credit account in their ledgers for the carriage of his coal. Among the conditions on which the account was opened were these—The appellants were to have a general lien for the balance of the account, and they were to be at liberty from time to time, and in such manner as they should think fit, to sell the goods subjected to their lien. It was further provided that they might close the account on one day's notice, and, as part of the same arrangement, but by separate contracts, the appellants agreed to let to Lord certain spaces or allotments within their own yard which were to be used for the purpose only of stacking and dealing with coal and coke passing over their railway. Lord fell into arrear. Over and over again he promised to discharge his liability. He failed to perform his promises. Ultimately the appellants closed the account. They then shut the gates of their yards, and so prevented Lord from removing the coal which happened to be lying on his allotments at the time. Were the appellants within their rights in taking this step? That must depend upon the answer to another question. Was there an absolute and unconditional delivery of the coal, or was it intended that the company should keep a hold over the coal so long as their account remained open, and if so, were sufficient precautions taken to give effect to that purpose if the company chose to exercise the right of stoppage for which they bargained? There is a question of intention and a question of fact. That seems a short and simple point. Now, in the first place, it appears to me absurd to suppose that the parties had in view any equitable right such as a charge on future property to be enforced by proceedings in Chancery. The company, I suppose, wanted

some rough-and-ready means of enforcing an undisputed claim, not the protracted pleasure of a Chancery suit. It is, I think, equally absurd to suppose that they would have been content with an agreement plainly illusory. They were business people. They must have known what the effect of unconditional delivery would be. But then it is said, be that as it may, Lord had possession of the coal. So he had in a sense—in the sense in which the owner of dutiable goods has possession of them while they are stored in a bonded warehouse belonging to him as owner or tenant. It is said that Lord not only had possession of the coal, but also an estate in the land on which the coal was deposited. I cannot see what the tenure of the land has to do with the question. If the delivery was absolute and unconditional, it cannot matter where the goods were deposited or what Lord did with them. If the delivery was not unconditional, the question must be, Had the goods passed out of reach, or were they still in the grasp of the company? What was the real meaning of the arrangement between the company and Lord? It seems to me that the thing speaks for itself. The proper inference from the facts and circumstances of the case is, I think, that it was the intention of both parties that the company's right of detainer should be preserved and, if need be, enforced against the coal subjected to their lien so long as it remained in their yard. It is hardly conceivable that the company would have allowed this ledger account to be opened if Lord's depot for coal had been outside their precincts. I cannot help thinking that there has been some little confusion between the right of retainer in the case of a person's own goods sold, but not paid for, and the right of detainer in the case of work and labour bestowed on the goods of another person. The two rights are not perhaps quite the same. At any rate, they arise under different circumstances, and it is not, I think, every observation which you find applied to the one that is applicable to the other. It was argued that the ledger agreement was really a bill of sale, and void because it is not in the form prescribed by the Bills of Sale Act 1882. It can hardly be contended that the agreement is within the mischief at which the Act was aimed; nor is it, I think, within the definition of a bill of sale contained in the Act of 1878 and adopted in the later Act. It did not confer, or purport to confer, a right in equity to any personal chattels or to any charge or security thereon or any equitable interest of any sort. The right which was in the contemplation of the parties was a right to detain goods so long as the power of detention remained. The appellants were, I think, in a position to exercise that right, and they certainly did exercise it effectively. The trustee can have no higher right than Lord himself would have had if he had not become bankrupt. In the face of his agreement, how could he have said to the appellants, "You shall open your gates and let me take my goods away, though I promised that you should have the right of detaining them so long as I owed you money for freight?" Again, the agreement is not a licence to take possession of personal chattels. It is only a right to detain the chattels under certain circumstances coupled with an authority to sell. It seems to me that the company would have no difficulty in acting on that authority as soon as the tenancy came to an end, as it would in accordance with the ledger agreement on the bankruptcy of the lessee. I am, therefore, of opinion that the appeal must be allowed, and the decision of Phillimore, J., restored, with costs here and below.

LORD ROBERTSON — I agree with the judgment of Lord Collins. I find it impossible to affirm that these coals were in the possession of the appellants, or to deny that they were in the possession of Lord. The ground on which they were placed was demised to Lord for the purposes of his trade, to use the language of the agreement, for the purpose only of stacking and dealing with coal and coke passing over the appellants' railway. It is quite true that no exit existed except through the appellants' ground, and that this gave them a strategic advantage in compelling redelivery. But I have been unable to satisfy myself on principle or on authority that such considerations of intention or convenience can take the place of possession.

LORD ATKINSON—I concur in the judgments of the Lord Chancellor and Lord Macnaghten.

LORD COLLINS—I am of opinion that the decision of the Court of Appeal was right, and for the reasons given by the Master of the Rolls and Buckley, L.J. It seems to me, with deference, that underlying the differing judgment of Moulton, L.J., is the fallacy that juxtaposition giving facilities for exercising a contractual right of lien is equivalent to possession of the thing over which the right of lien is claimed. If the goods are so situate that the person asserting the lien can only justify it by virtue of an agreement in writing, then his legal position will fall to be determined by reference to the question whether the document comes within the statutory definition of a bill of sale. The law on this matter was settled more than twenty years ago by a series of decisions, of which *ex parte Parsons* (16 Q. B. Div. 532) and *ex parte Hubbard* (17 Q. B. Div. 690), one on each side of the line, are perhaps the most instructive. No doubt the Railway Company had possession of the goods for the purpose of carriage, and as long as they held such possession could have exercised their lien upon them, and it would have been immaterial that the terms on which their lien should be exercised had been reduced to writing (see *Charlesworth* v. *Mills*, (1902) A. C. 231, *per* Lord Herschell). But when the transit was over and the goods delivered the right of lien incident to the transaction itself was lost, and any further right to exercise a lien would have to be justified by virtue of

some agreement sanctioning a retaking of possession. It seems to me that that is exactly what happened in this case. As soon as the goods were delivered to Lord on his own allotment, held by him as tenant under a demise, they ceased to be actually or constructively in the possession of the company, and mere juxtaposition, though it might give facilities, could give them no right to resume possession, though they might have, and in fact had, a contractual right to do so under what has been called the ledger agreement. If so, it is not, I think, disputed that they would come within the Bills of Sale Acts. It was, indeed, contended by Mr Scrutton that the document here in discussion was not in fact a bill of sale, and that it stood outside the mischief aimed at by the Legislature in those enactments. But this argument has been frequently adduced and as often overruled before. See the observations of Lord Halsbury, L.C., in *Charlesworth* v. *Mills* (*ubi sup.*), and of Lord Esher, M.R., in *ex parte Hubbard* (*ubi sup.*), and of Lindley, L.J., in *ex parte Parsons* (*ubi sup.*), where it is pointed out that the different Bills of Sale Acts were passed from quite different standpoints, and that honest transactions are hit by them as well as dishonest. The analogy of the innkeeper's lien does not seem to me to carry the case any further. It is not suggested that it extends to goods which have ceased to be in possession of the innkeeper, or that the latter by virtue of his lien could retake them when he had caused or suffered them to be passed off his premises on to those of his late guest. His defence to an action for doing so would have to be something outside the innkeeper's lien amounting at least to leave and licence.

Judgment appealed from reversed.

Counsel for Appellant—Scrutton, K.C.—Coller. Agent—E. Moore, Solicitor.

Counsel for Respondent—H. Reed, K.C.—F. Mellor. Agents—Tarry, Sherlock, & King, for E. E. Blyth, Norwich.

HOUSE OF LORDS.

Monday, March 1, 1909.

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

COOKE *v.* MIDLAND AND GREAT WESTERN RAILWAY COMPANY.

(On Appeal from the Court of Appeal in Ireland.)

Reparation — Negligence — Dangerous Machine — Child Trespasser — Act of Third Party.

A railway company possessed a turntable in an otherwise vacant field. The field adjoined a public road from which it was imperfectly fenced. The field was commonly frequented by trespassers, chiefly children, whom the railway company took no effective steps to exclude. The turntable, which was not locked, was made to revolve by children, and the plaintiff, a four year old child, was seriously injured thereby, and sought damages.

Held that in these circumstances there was sufficient evidence of negligence on the part of the railway company to support the jury's verdict for the plaintiff.

The plaintiff and appellant had obtained the verdict of a jury under the circumstances stated in rubric and in the judgment of Lord Macnaghten. The verdict was afterwards set aside by the Court of Appeal in Ireland (Walker, L.C., Fitzgibbon and Holmes, L.JJ.)

The plaintiff appealed *in forma pauperis*.

Their Lordships gave considered judgment as follows:—

Lord Macnaghten—The only question before your Lordships is this—Was there evidence of negligence on the part of the company fit to be submitted to the jury? If there was, the verdict must stand, although your Lordships might have come to a different conclusion on the same materials. I cannot help thinking that the issue has been somewhat obscured by the extravagant importance attached to the gap in the hedge, both in the arguments of counsel and in the judgments of some of the learned Judges who have had the case under consideration. That there was a gap there, that it was a good broad gap some 3 ft. wide, is I think proved beyond question. But of all the circumstances attending the case it seems to me that this gap taken by itself is the least important. I have some difficulty in believing that a gap in a roadside fence is a strange and unusual spectacle in any part of Ireland. But however that may be, I quite agree that the insufficiency of the fence, though the company were bound by Act of Parliament to maintain it, cannot be regarded as the effective cause of the accident. The question for the consideration of the jury may, I think, be stated thus: Would not a private individual of common sense and ordinary intelligence, placed in the position in which the company were placed, and possessing the knowledge which must be attributed to them, have seen that there was a likelihood of some injury happening to children resorting to the place and playing with the turntable, and would he not have thought it his plain duty either to put a stop to the practice altogether, or at least to take ordinary precautions to prevent such an accident as that which occurred. This, I think, was substantially the question which Lord O'Brien, C.J., presented to the jury. It seems to me to be in accordance with the view of the Court of Queen's Bench in *Lynch* v. *Nurdin* (1 Q.B. 29) and the opinion expressed by Romer and Stirling L.JJ., in *M'Dowall* v. *Great Western Railway* ([1903] 2 K.B. 331). Walker, L.C., puts *Lynch* v. *Nurdin* aside. He holds that it