verse interest between the first parties and the second party; there is an adverse interest between the first parties and the third parties, and also between the second party and the third parties.

The effect of a Special Case, which is a contract between the parties, is to bind these parties to a certain statement of facts. We cannot entertain a case of contract between parties who cannot in law contract. If the point must be settled now, the parties must have recourse to the usual method of settling it, by raising an action of declarator in the ordinary form.

Lords Deas, Ardmillan, and Mure concurred, and the case was dismissed.

Counsel for First Parties—Kinnear. Agents—H. & H. Tod, W.S.

Counsel for Second Party—Adam. Agents—Tawse & Bonar, W.S.

Counsel for Third Parties—Lorimer. Agents—H. & H. Tod, W.S.

Friday, June 16.

FIRST DIVISION.

[Sheriff of Inverness-shire.

THE HIGHLAND RAILWAY COMPANY *v.* JACKSON (NICOL & COMPANY'S TRUSTEE).

Railway—Lien—Common Carrier—Railways Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 33) *sec.* 90—"*Tolls.*"

The word "tolls" in the 90th section of the Railways Clauses Consolidation (Scotland) Act 1845, does not mean charges for the conveyance of goods by the railway company in their carriages, but only charges for the use of the company's line by persons conveying their goods over the line in their own carriages; and therefore the railway company has no lien over, or right to sell, goods on their premises for delivery, in satisfaction of charges previously incurred by the owner, for the conveyance by the company of other goods for him, and has no greater right than that of a common carrier.

Observations upon the cases of the *North British Railway Company* v. *Carter,* 8 Macph. 998, and the *Caledonian Railway Company* v. *Guild,* 1 Rettie 198; Railways Clauses Consolidation (Scotland) Act 1845—"tolls."

Opinion (*per* Lord President) upon the construction of the word "tolls" in the Railways Clauses Consolidation (Scotland) Act 1845, secs. 79-100.

Opinion (*per* Lord Ardmillan) that the lien given under section 90 of the Act is incident to the contract of hiring rather than to the contract of carriage.

This was an appeal from the Sheriff Court of Inverness-shire, in a petition at the instance of the Highland Railway Company, petitioners, against Thomas Jackson, trustee on the sequestrated estate of Nicol & Company, manufacturers, Holm Mills, Inverness, respondent.

Nicol & Company had incurred to the petitioners an account of £26, 17s. 1d. for railway carriages performed between 1st July and 9th September 1874. On that date Nicol & Company were sequestrated, and the account being still unpaid, and the goods for the carriage of which the charges were made having been removed from the petitioners' premises, the railway company detained certain articles, consisting of three bags wool, one truss tweeds, and three bundles of empty sheets, which were in their possession at the time for delivery to Nicol & Company. They did this in the exercise of a right of lien which they claimed for such accounts for carriage in virtue of the Railways Clauses Consolidation (Scotland) Act 1845. They thereafter presented the petition praying for warrant for the sale of the goods, "and for the application of the proceeds thereof in payment of the expenses connected with their detention and storage."

In their condescendence the petitioners averred—"By section 90 of 'The Railways Clauses Consolidation (Scotland) Act 1845' (8 and 9 Vict. cap. 33), it is enacted, that 'If on demand any person fail to pay the tolls due in respect of any carriage or goods, it shall be lawful for the company to detain and sell such carriage, or all or any part of such goods, or if the same shall have been removed from the premises of the company, to detain and sell any other carriages or goods within such premises belonging to the party liable to pay such tolls, and out of the monies arising from such sale to retain the tolls payable as aforesaid, and all charges and expenses of such detention and sale, rendering the overplus, if any, of the monies arising by such sale, and such of the carriages and goods as shall remain unsold, to the person entitled thereto, or it shall be lawful for the company to recover any such tolls by action at law.' By the interpretation clause of the said Act (§ 3) the word 'tolls' is declared to include 'any rate or charge or other payment under the special Act for any passenger, animal, carriage, goods, merchandise, articles, matters, or things conveyed on the railway,' and the charges or rates in the account produced are made under and in virtue of the petitioners' Special Act for the carriage of goods and merchandise."

They pleaded, *inter alia*—"(1) The petitioners have a lien over the goods in question for payment of the carriages charged in the account produced, and it is competent and expedient for them to have their lien realised and made effectual under warrant of the Court."

The respondent lodged defences, and pleaded, *inter alia*—"(1) The petitioners, as common carriers, have not a general lien at common law. (2) Nor have the petitioners any such lien in virtue of the Railways Clauses Act of 1845, the right of lien thereby conferred being confined to goods undelivered; and the petitioners having ceded possession of the goods mentioned in their account other than those stated in the petition, their right of lien over the former was relinquished, and cannot now be revived. (3) The petitioners having waived any lien they might have had over the goods mentioned in the petition, they are not now entitled to insist therein."

The following minute was put in for the parties:—"(1) That the petitioners were in the habit of keeping a monthly or periodical account

with Nicol & Company. (2) That the petitioners gave credit to the said Nicol & Company for the carriages mentioned in the account, other than the carriages of the goods mentioned in the petition, and that they voluntarily ceded possession of the goods in respect of which the former carriages were incurred without demand for the tolls, and that payment of these tolls was postponed. (3) That the said goods were taken away in the ordinary way of business, and without any special necessity for their removal; and with the above admissions both parties agree to renounce further probation."

The Sheriff-Substitute (BLAIR) pronounced the following interlocutor:—

"The Sheriff-Substitute having resumed consideration of the petition, productions, and closed record, and heard parties' procurators thereon, finds it admitted that the firm of Nicol & Company, now represented by the respondent as trustee on their sequestrated estate, employed the petitioners in the carriage of goods, and that a sum of £26, 17s. 1d. is now due to the petitioners by the said Nicol & Company for the carriage of goods between the 1st day of July and 9th day of September 1874, both inclusive: Finds it also admitted that a demand by the petitioners has been made for payment of the sum due in respect of the said goods, under section 90 of the Railways Clauses Act 1845: Finds it also admitted that the goods mentioned in the petition as goods now in the petitioners' possession are the property of the petitioners' debtors, Nicol & Company, and that the petitioners detain the said goods for payment of the sum claimed by the petitioners for carriage as aforesaid: Finds in law that the provisions of the said 90th section of the said Act apply to charges for the carriages of goods, and are not limited to the tolls for the use of the road, and that when the petitioners have within their premises goods belonging to their debtor, they may detain and sell the same for the payment of the tolls due for the carriage of other goods which have been removed without payment: Therefore repels the defences stated for the respondent, sustains the pleas in law stated for the petitioners, and grants warrant as craved in the petition: Finds the petitioners entitled to expenses, allows an account thereof to be given in, and remits the same when lodged to the Auditor to tax and to report, and decerns."

"*Note.*—In this case the material facts are admitted.

"The goods in question are detained by the petitioners in security of a general balance of £26, 17s. 1d. due to them by Nicol & Company for carriages in July, August, and September of last year, and the question is whether they are entitled to do so against the respondent (who is the trustee on Nicol & Company's sequestrated estate), under section 90 of the Railways Clauses Act 1845.

"The question is important, and from the ambiguity in the clause itself, as well as from the conflicting decision on the interpretation of the word 'tolls,' it cannot be said to be free from difficulty. But coinciding as he does with the opinion of Lord Shand in the case of *The Caledonian Railway Company* v. *Guild*, 20th November 1873, 1 Rettie 198, and in the forcible exposition of his views by Lord Young in the recent case of *Peebles* v. *The Caledonian Railway Company*, 20th January 1875, 12 Scot. Law Rep. 250, the Sheriff-Substitute holds that the petitioners have under the 90th section a right of retention and sale of goods in their possession belonging to the bankrupts Nicol & Company in security of the said sum of £26, 17s. 1d., and that the petitioners are entitled to the warrant craved."

The Sheriff (IVORY), on appeal, refused the prayer of the petition, on the ground that upon 23d November 1874, when the petition was presented, the goods for the sale of which a warrant was craved "had ceased to be the property of Nicol & Company, and then belonged in property to the respondent, as trustee on the bankrupt estate."

The petitioners appealed to the First Division of the Court of Session, and argued—(1) "Tolls," in section 90 of the statute, covered goods carried by railway companies as common carriers. The interpretation clause went that length, and provided that such was the meaning of the word, unless there was something repugnant in the context. Section 90 was so independent that it should be looked at by itself; but if it could not be regarded without reference to the other clauses, it nevertheless was there used in its unrestricted sense. The probabilities were that the Legislature intended it should bear the larger meaning. (2) The word "remove" was quite capable of construction if their argument was right. It applied to surreptitious removal. (3) The lien could not be defeated by a transfer of the property if the goods remained in possession; still less could it be defeated by bankruptcy.

The respondent argued—Upon a construction of the statute "tolls" was used in a limited sense in section 90. It was similarly used in the Turnpike Acts. No lien for a general balance was given in them. If "goods or carriage" went off the line without paying toll, that was removal.

Authorities cited—*North British Railway Company* v. *Carter*, July 15, 1870, 8 Macph. 998; *Caledonian Railway Company* v. *Guild*, Nov. 20 1873, 1 R. 198; *Wallis* v. *London and South-Western Railway Company*, Jan. 17, 1870, L. R., 5 Exch. 62, 39 L. J., Exch. 57; *Scottish North-Eastern Railway Company* v. *Anderson*, July 8, 1863, 1 Macph. 1056, 35 Jurist 603; *Peebles* v. *Caledonian Railway Company*, Jan. 28, 1875, 2 R. 346; *Scottish Central Railway Company* v. *Ferguson, Rennie, & Company*, Feb. 27, 1864, 2 Macph. 781.

At advising—

LORD PRESIDENT—When Nicol & Company, manufacturers in Inverness, became bankrupt, on 9th September 1874, they were owing to the Highland Railway Company, the appellants, an account of £26, 17s. 1d., for the carriage of goods by the Railway Company as public carriers between the 1st of July of that year and the date of the bankruptcy, and the Railway Company were at that time in possession of three bags of wool, one truss tweeds, and three bundles of empty sheets, forming part of the bankrupt estate. They presented a petition to the Sheriff for warrant to sell these goods, under the authority of the 90th section of the Railways Clauses Act 1845, for the purpose of imputing the proceeds of the sale in extinction *pro tanto* of the account due to them. The demand was resisted by the trustee of Nicol & Company, upon the

ground that the 90th section of the Railways Clauses Act did not apply to such a case. The Sheriff-Substitute was of opinion that it did apply, and granted the remedy asked by the Railway Company. The Sheriff altered that judgment, but upon a ground which was plainly untenable, that the lien claimed by the railway company was not available, because the goods in their hands were no longer part of the estate of Nicol & Company but part of the property of the trustee—that being the very situation of matters which makes the lien available. But the question which is raised under this petition is one of great importance and of very general application, and it depends upon a consideration of the meaning of the 90th section of the statute, taken along with various other sections connected with it.

The state of the case is this—that the Railway Company were in the habit of carrying goods for the bankrupts as common carriers, and they allowed Nicol & Company to run up an account—in short, they gave them credit for the amount of the charges for the carriage of their goods, and settled the account apparently quarterly, or at some other period. The consequence was that this sum was due when Nicol & Company became bankrupt, for the carriage of goods by the Railway Company, and they proposed to detain and sell, under the authority of the 90th section, the goods remaining in their hands, for payment not only of the carriage of those particular goods, but also for the carriage of all the other goods contained in the account. Now, the contention of the trustee is that the 90th section does not apply to charges for the carriage of goods by the Railway Company as common carriers, but applies only to tolls in the proper and limited sense of that word. There are other and subordinate questions raised by this record, but that is undoubtedly the most important. A great deal undoubtedly depends on the meaning of the word "tolls" in the statute, but I think it is quite clear that tolls is throughout it a word of varying meaning. It sometimes means one thing and sometimes another. It sometimes means tolls in the proper sense of the word, that is to say, tolls levied from persons using the railway with their own carriages; and it sometimes means or comprehends charges for carriage by the Railway Company as common carriers. The definition of the word in the interpretation clause is undoubtedly comprehensive enough to embrace both of these things. But, certainly, the word "tolls" itself is not always used in this statute in a comprehensive sense.

The sections of the statute which are connected with the 90th begin with the 79th, and the preface (if it may be so called) of the 79th section is expressed in these words—"and with respect to the carrying of passengers and goods upon the railway, and tolls to be taken thereon, be it enacted as follows." This general introduction shows that the sections which follow, from the 79th down to and including the 100th, relate to these two subjects, viz.—the carrying of passengers and goods upon the railway, and the tolls to be taken thereon, that is, on the railway. Now, the interpretation clause provides that "tolls" is to be held to include "any rate or charge, or other payment payable under the special Act for any passenger, animal, carriage, goods, merchandise, articles, matters, or things conveyed on the railway." That, as I said before, is very comprehensive, and would, in my opinion, embrace both tolls in the proper sense of the word and also charges for carriage. But, then, the word is to have that meaning only, unless there be something in the subject or context repugnant to such construction, and the true question for consideration, therefore, is whether in the subject and context of the 90th section we find anything repugnant to the comprehensive construction of the word. Reverting again to the class of sections beginning with the 79th, I may observe that in that section, referring undoubtedly to the carriage and conveyance of goods and passengers by the Railway Company in their carriages, the meaning of the word "tolls" is really charges for the carriage of passengers and goods. But in the 80th section, which immediately follows, it is just as clear that it is used in the other sense, and means tolls proper only—that is, tolls for the use of the railway by the carriages of other people. The 81st and 82nd sections are not important in connection with this question, because they relate to special contracts with other railway companies; but in the 83d section, and also in the 84th, it appears to me that the word is used in its most comprehensive sense, that is to say, that it includes both tolls proper and charges for carriage. But then, when we come to the 85th section we have another illustration of the varying use of this word, because this section provides that "it shall not be lawful for the Company at any time to demand or take a greater amount of toll, or make any greater charge for the carriage of passengers and goods than they are by this and the Special Act authorised to demand." There the word is used in contrast or contradistinction to the term "charge for the carriage of passengers and goods," and of course accordingly in its most limited sense. Now, if one were to suppose an illustration of a repugnancy such as is contemplated in the interpretation clause, we could not find it better than in this 85th section. There is an absolute repugnance there in the context and subject-matter of the clause. You could not by possibility construe "toll" there as meaning anything but toll proper. I am not desirous to say much as to the meaning of secs. 86 and 88, for this reason, that while in the case of *Anderson* v. *Scottish North-Eastern Railway Co.*, this Court decided that under the 88th section the term is used in its most restricted sense, as meaning tolls for the use of the railway by the carriages of other persons, they did not extend that interpretation to the 86th section, which is very intimately connected with the 88th; and as a question may perhaps hereafter be raised upon the meaning of the 86th section, distinct from the 88th, I desire to offer no opinion on the matter at present. But at least one thing is clear, as settled by *Anderson* v. *The S. N. E. Railway Co.*, that section 88 is confined to tolls in the proper sense of the word, that is to say, for the use of the railway by the carriages of other persons; and the 89th section, following up that meaning, provides "that the tolls shall be paid to such persons and at such places upon or near to the railway, and in such manner, and under such regulations as the company shall by notice to be annexed to the list of tolls appoint. Now, here I do not think there can be any doubt that the

word is used in the same sense as in the immediately preceding section—the 88th—because a payment for the carriage of goods is not a kind of thing that is to be "paid to such persons and at such places upon or near the railway as the company may appoint. The carriage of goods is paid upon their delivery. In the case of common carriers the delivery of the goods and the payment of the charge for carriage are simultaneous, and that is not a thing to be paid upon the railway, or to persons stationed upon the railway at all, but is to be paid at the place of delivery. The two sections, therefore, immediately preceding section 90, undoubtedly use the word tolls in its more restricted and proper sense.

Now comes section 90 itself—[*reads section* 90.] The construction which the Railway Company put upon this clause is, that "tolls" here means not only tolls for the use of the railway by the carriages of other persons, but also charges for carriage, the result of which is that the section, according to their construction, is an extension of the common law lien of common carriers to goods other than those for which the charges are due; and I rather think that in the present case they go somewhat further, looking to the way in which they run up an account for charges, and must hold that this introduces into the law of common carriers, so far as railway companies are concerned—a lien for a general balance of account.

Now, it appears to me that it would be very remarkable if any such change upon the law of common carriers were introduced in this form, and under cover of such words, for I do not think—reading this section even by itself and without reference to the other sections which surround it both before and after—that that is the natural meaning of the words at all. The thing which is spoken of—the subject of the clause, if it may be so called,—is the refusal of persons to pay tolls due in respect of any carriage or goods. Now, it is somewhat remarkable that that phrase "carriage or goods"—"tolls due in respect of any carriage or goods"—appears in this clause for the first time. It is not used in any of these clauses previously, but it is used in some of the subsequent sections, and I think it is used throughout in the same manner. The power of the Railway Company is not to retain the goods. The power is to detain and sell. If the common law right of a carrier to retain goods till his charge for carriage is paid were the thing in contemplation here, and if it was the purpose to extend that lien, I think the word "detain" would not have been used, but the word "retain," which is more properly descriptive of that right which a carrier has at common law, and of the mode of enforcing that right. Then it provides, that if the carriage or goods shall have been removed from the premises of the Company, they are to be entitled to detain or sell any other carriages or goods. Here again there is a phrase very well worthy of attention. The carriage or goods must have been removed from the premises, that is, from the railway, in order to entitle the Company to detain and sell other carriages or goods for the unpaid tolls. If this was intended to apply to goods carried by the Company, and retained in security of unpaid charges, I think the phrase would not have been "if the same shall have been removed," and I cannot think that in the present case the goods in question have been removed within the meaning of this clause; because what was done with the goods in the present instance was simply that the Railway Company delivered them, as they were bound to do as common carriers, but delivered them without exacting payment of their charges for the carriage. It appears to me, therefore, that the language of this section itself creates a repugnancy to the larger use of the word "tolls" permitted by the interpretation clause of the statute under certain circumstances.

But I beg attention further, particularly to sections 91, 92, and 94, where I think the language employed is very instructive in helping the construction of section 90. I suppose no one can dispute that the carriage and goods spoken of in section 91 refer to the carriage of a person using the railway with his own carriage and carrying goods in it, and it is very important to observe that the same phrase, "any carriage or goods" is repeated here just as it was used in the 90th section itself. It is applied entirely to this class—to a carriage or goods using the railway, but not being carried by the Railway Company as common carriers. Then, in the 92d section it is quite plain that the subject of this clause is carriages and goods belonging to the persons using the railway with their own carriages and paying tolls therefor, and that the language here is throughout quite in accordance with the language of the 90th section. The 93d section, I may mention in passing, clearly applies to tolls in the proper sense, and refers disputes concerning these tolls to the Sheriff or Justices. So, too, in the 94th section. Now, taking all these clauses together, from the 88th to the 94th inclusive, I am of opinion that they all without exception refer to carriages and goods passing along the railway being the property of other persons than the Railway Company, and that the word "tolls" in all these clauses is used in its restricted sense, as a toll taken for the passage of the carriage and goods along the railway.

The remedy given in the 90th section itself is a very intelligible and suitable remedy for an attempted evasion of the tolls. If persons passing along a road contrive to get off the road before the toll is paid, and so evade the toll-collector, the necessity for some summary remedy at once suggests itself. They ought to have paid the toll at the proper place appointed for its payment, and to the person placed there in charge to receive it, and we are reminded, not inappropriately, that there are remedies of the same kind for evading tolls on turnpike roads, and therefore it is quite intelligible that a clause of this kind should be introduced to give a summary and very stringent remedy for such an evasion of tolls. And it seems to me that the whole language of the 90th section is in harmony with that idea, and that none of the words used in that section can be applied, or naturally applied, to a lien for the carriage of goods by the Railway Company acting as common carriers.

I have thus stated my view of the construction of the Act of Parliament without referring to any of the authorities which have been cited; but it would be improper to conclude my observations without mentioning those authorities. There was a case in this Division of the Court which was referred to by the Sheriff-Substitute—the

case of the *N. B. Railway Co.* v. *Carter*,—in which it was assumed that the 90th section does apply to charges for the carriage of goods by the Railway Co. as common carriers, and there was no objection made on the part of the opposite party, the trustee in the sequestration, to such a construction of the section. Accordingly we assumed, in giving our judgment, that the 90th section would cover the case of charges for carriage. We did not give any effect to the lien claimed because we thought it objectionable on other grounds, but we undoubtedly assumed in that case, without any argument or objection, that such was the construction of the 90th section. I need hardly say that we had not on that occasion sufficiently considered either the words of the 90th section itself, or the other aids to its interpretation to which I have now adverted, and therefore that cannot be taken to be a judgment on the question which is now before us. In the case of the *Caledonian Railway Co.* v. *Guild* there is a judgment by Lord Shand on the construction of this clause, where he arrives at a result the opposite of that which I have stated, and I regret that I cannot concur with his Lordship in the very elaborate opinion which he there expresses. I see also there are some *obiter dicta* in the case of *Peebles* v. *The Caledonian Co.*, which give some countenance to the larger construction contended for by the Railway Co. here, but these are *obiter dicta* only, and are certainly not binding upon us as authority.

There is thus, I think, no direct authority upon this question in Scotland; but there is a case of *Wallis* v. *The London & N. W. Co.*, decided in the Court of Exchequer in England, which is a direct authority in support of the view I have just expressed. The case, as reported in the ordinary Law Reports, appears a case of much less authority than it really is, because upon that report the impression conveyed to one's mind is that the point was suggested by the Court in the course of the argument, and very summarily dealt with. But on looking at the much fuller report of the case in the Law Journal Reports, it appears quite clear that the question as to the construction of the 97th section of the English Act, which corresponds to the 90th section of the Scotch Act, was raised and pleaded, and formed the subject of a distinct argument by counsel, and of a deliberate consideration by the Court; and there was there a unanimous judgment affirming that more limited construction of the word "tolls" in the 90th section which I think is the due construction. I feel, therefore, much satisfaction in finding myself, in forming the opinion I have formed, supported by this direct and weighty authority.

I am of opinion, therefore, upon these grounds, and without going further, that this petition ought to have been refused by the Sheriff.

Lord Deas—At the date of the sequestration of Nicol & Co., upon 9th September 1874, certain goods addressed to them were in the hands of the Highland Railway Co. in the course of transit to the proper place of delivery. In place of delivering these goods the Railway Co. upon 23d November, applied for warrant to sell them for payment of an account for the carriage of other goods which had been delivered without exacting payment of the carriage, between 1st July and 9th September 1874. The Sheriff refused the petition solely upon the ground that the goods sought to be sold had ceased by that time to be the property of Nicol & Co., and belonged to the trustee under the sequestration which had been awarded on 9th September previously. It was at once admitted at the bar, and necessarily admitted, that that judgment could not be supported, and according to the old, and still more the recent, practice of this Court, we are all familiar with the principle that in a question of this kind the trustee is in no better situation than the bankrupt himself, and I think the Sheriff must have been under some disadvantage in not being acquainted with the recent opinions and practice of this Court; otherwise he would not have pronounced that judgment.

Upon the question itself your Lordship has very fully and accurately gone over the different clauses of the statute which bring out the question whether the right which is given to the Railway Co. in respect of tolls includes the whole goods transmitted by the railway and to be delivered by them in their capacity of common carriers. There can be no doubt that the Legislature might have conferred upon the Railway Co. that privilege and advantage over all other common carriers in the kingdom; but upon the grounds stated by your Lordship I am of opinion that such an unusual and unlikely right as that has not been conferred upon the Railway Co., and that the right is confined to tolls in the more restricted sense which your Lordship has indicated. Your Lordship has pointed out to my mind quite clearly and satisfactorily the bearing of the different sections and of the authorities, and I quite concur in the judgment of your Lordship and in the grounds of it.

Lord Ardmillan—I concur so entirely in your Lordship's explanation of the law in this case that I have scarcely a word to add. I think the case is one of very considerable importance. The lien which a carrier has is undoubtedly at common law limited to a right of retaining the goods carried till the payment for the carriage of these goods is made. This statutory lien given by the 90th section would, if read as the company read it, be a very great extension of that right. Now, so singular an innovation upon a common law right, extending it and altering it in this manner, is not to be made by implication. It must be plain and determinate. I also think there is a still further difficulty in the way of extending it, arising from this, that there is here an attempt to use this right in relation to carriage due by running an account, not merely for the goods last carried, but extending over months upon goods which the company have already delivered. Now, the case turns on the construction of the 90th section, not entirely on the definition of the single word "tolls," which is involved in it, and the construction of the whole of sec. 90, in the view of its position in the statute, must be faced. The interpretation clause defines the word "tolls," but that interpretation is to be given only where there is no repugnancy in the particular section which is construed, and we must therefore ascertain the true meaning of sec. 90 in its contextual relation to all the other sections in the statute immediately preceding and immediately following, before we can say

whether there is repugnancy in the admission of the general meaning of the word "tolls" under the 90th section.

I do not intend to go through these sections. I quite concur in the remarks your Lordship has made, but I wish to make this observation:—A party who sends his goods to be carried by the railway company has employed that railway company as a public carrier, but a party who runs his own waggons upon the railway belonging to the company, whether with or without goods in them, is hiring the railway for toll, and I humbly think that the lien given by sec. 90 is incident rather to the contract of hiring than to the contract of carriage. If a railway company running waggons on another line were to undertake to carry my goods along that other line—where you have at once two companies, the one the carrying company and the other the company whose line is hired by the carrying company—it does not appear to me that the company which carries my goods would have any benefit from this extended lien. The company in the meaning of the 90th section is the company who hold the line, and the relation between that company and those who run waggons upon their line is the relation between the hired and the hirer, but the company which carries my goods on that other line is to me the public carrier, and I do not think that it would be entitled to plead the benefit of this section. This, I think, goes deeply into the meaning of the 90th section.

Upon the authorities, I have nothing to add. I think there has been a misunderstanding upon the part of Lord Shand in regard to the authority of the case of *Wallis*. In the Law Journal, where the pleadings and opinions are given at greater length, it appears very clearly that the case was fully argued, that this particular point was raised, and that it was carefully considered and authoritatively decided. Lord Shand has undoubtedly expressed an opinion different from that given by your Lordship, and I cannot concur in his opinion, though it is very ably and fully expressed. I think there is an indication by Lord Young in the case of *Peebles* in the same direction, but the judgment in that case turned on another point; and on the whole matter, I feel, as your Lordship does, considerable satisfaction in finding that the judgment in these reports upon the 97th section of the English Act is in entire conformity with the view which, apart from any authority, I would be disposed to take without much hesitation on the construction of sec. 90 of the Scotch Act.

Lord Mure—I have come to the same conclusion. I shall simply add that it appears to me that, looking at the matter in a general point of view, the principle which seems to run through those sections in relation to railway companies acting as common carriers is to place them substantially in the same position as that in which common carriers stood at that time. Looking at sec. 90, the question is, whether by that section it was intended, as is here contended by the company, to give railway companies advantages in the matter of a general lien far beyond any which common carriers enjoyed then or enjoy now. That is what we are asked to hold as the meaning of the section in the circumstances of this case. Now, putting aside the words used, I think the presumptions are very strong against there being any such intention on the part of the Legislature. I think, therefore, it would require some more express and unequivocal declaration to that effect to warrant us in coming to such a conclusion, and I can find no such warrant in the 90th section.

But, on the other hand, looking to the nature of the traffic to be carried by railway companies, and the use to be made of their lines, it was necessary to make provision by some new and special arrangement under this section for cases where parties were using their own carriages for the carriage of their own goods on payment of certain tolls for the use of the line belonging to the company. It was necessary to make provision for such goods, which are so completely in the power of the private party who is using the line, in the matter of removal, that they could be removed at any time without the consent or even knowledge of the railway company, and without payment of the tolls; and I think it is to the tolls of goods so removed, and tolls paid for the use of the line by a private party using his own carriages, that the words of section 90 are meant to apply.

I think the section is limited to that, and on that ground, without going into details as regards the other sections, I have come to the same conclusion with your Lordships, and I think that the judgment in the English case of *Wallis* is a sound construction of that clause.

The following interlocutor was pronounced:—

"Recall the interlocutors of the Sheriff-Substitute and the Sheriff, dated respectively 12th March and 30th November 1875: Refuse the prayer of the petition, and decern: Find the respondent entitled to expenses both in the Inferior Court and in this Court; allow accounts thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for the Petitioners (Appellants)—Dean of Faculty (Watson)—Mackintosh. Agents—H. & A. Inglis, W.S.

Counsel for the Respondent — Balfour — M'Kechnie. Agent—T. Carmichael, S.S.C.

Tuesday, June 20.

FIRST DIVISION.

THE INLAND REVENUE *v.* THE GLASGOW CORPORATION GAS COMMISSIONERS.

Assessment—Property and Income-Tax Act, 5 and 6 Vict. cap. 35—Profits.

The Glasgow Corporation Gas Commissioners were under a local Act empowered to manufacture and sell gas to the inhabitants of Glasgow and suburbs. It was provided that the balance of revenue, after certain payments of interest on debt and of annuities, was to be carried to the credit of the corporation for their general purposes.