stances I think the exemption from demurrage on account of "strike" came into operation, and that for the period during which the strike continued no demurrage is due by the defenders. The pursuers argued that the exemption from liability to which I have referred did not apply when no use had been made of the lay-days, and that if the defenders had used their lay-days the cargo would have been loaded before the strike began. But I cannot accede to that view. Days stipulated for by the merchant, *on demurrage*, are just lay-days, but lay-days that have to be paid for. If a charter-party provides that the charterer shall have ten days to load cargo, and ten days further on demurrage at a certain rate per day, the shipper has twenty days to load although he pays something extra for the last ten. Loading within twenty days is fulfilment of the obligation to load. Here the lay-days proper were limited to sixty hours, but any time beyond that which was occupied in loading the cargo was to be paid for at the rate of 12s. 6d. per hour. The pursuer said that this would amount to a lease of his vessel for any length of time the defenders were pleased, provided they paid the stipulated rate. Even if it had been so, I rather think it would have been a good enough bargain for the ship. But it is not so. Where the days on demurrage are not limited by contract, they will be limited by law to what is reasonable in the circumstances, as circumstances may happen to exist or emerge. But there is no such limitation of the application of the demurrage clause in the charter-party before us as that which the pursuer maintains there is, nor can any such limitation be fairly implied. The defenders were entitled to keep the vessel on demurrage, but was to pay no demurrage if the detention was caused by a strike. The defenders maintained that the exemption clause I have been considering applied also to any detention by non-loading in the course of the lay-days. I am not prepared to adopt that view, but it is not necessary to offer any opinion upon it. It is enough for this case that the exemption clause applies to the period during which the vessel is on demurrage, and that the detention now being considered (that is, during the continuance of the strike) occurred during that period.

The result of my opinion is to affirm the interlocutor of the Lord Ordinary, except as regards the demurrage allowed for the time the colliery was on strike. The demurrage for that period will fall to be deducted from the sum decerned for, and the pursuers found entitled only to the balance after that deduction has been made.

LORD JUSTICE-CLERK—That is the opinion of the Court.

The Court recalled the interlocutor of the Lord Ordinary, and decerned against the defenders for the sum of £136, 5s.

Counsel for the Pursuers—Ure—Aitken. Agents—Beveridge, Sutherland & Smith, S.S.C.

Counsel for the Defenders—C. S. Dickson—Salvesen. Agents—Boyd, Jameson, & Kelly, W.S.

Wednesday, January 23.

FIRST DIVISION.

[Sheriff-Substitute at Elgin.

SCOTT *v.* GREAT NORTH OF SCOTLAND RAILWAY COMPANY.

Reparation—Breach of Contract—Carrier—Railway Company—Right to Assign Particular Seats to Passengers.

A railway company finding that the straps of the carriage windows were being cut, and suspecting that the mischief was being done by someone holding a third-class composition season ticket, gave orders that the holders of such tickets should be restricted to certain particular compartments. One of these ticket-holders, after having taken his seat unnoticed in the compartment in which he had usually travelled previously, was ordered by an official of the company to move. He complied under protest, but, being unwilling to occupy the compartment assigned to him, he did not travel by the train, and brought an action of damages for breach of contract against the railway company.

The Court assoilzied the defenders, *holding* that a railway company had a right to assign the compartments and seats which passengers should occupy, and that the defenders were not barred from exercising this right, as they had not acquiesced in the pursuer choosing a seat for himself.

Opinions reserved as to whether, if a passenger has taken his seat with the acquiescence of the servants of the railway company, he can afterwards be removed without a good reason.

John Scott was the holder of a third-class composition ticket of the Great North of Scotland Railway Company, which entitled him to travel between Lossiemouth and Elgin up to 29th January 1894. On the 22nd January he went to the station at Lossiemouth and entered the carriage on the 8·30 a.m. train in which he usually travelled to Elgin. After he had taken his seat one of the railway company's porters named James Gerrie came and told him to remove into another carriage. Scott asked why he should do so, but, upon the porter repeating the order, he came out of the carriage under protest. As, however, he did not wish to enter the compartment which the porter pointed out to him, he walked to Elgin, a distance of six miles. Scott returned from Elgin by the 7·15 p.m. train. He was again asked to leave the compartment in which he had taken his seat, but refused, and was allowed to remain. Thereafter Scott raised an action

of damages in the Sheriff Court at Elgin against the Great North of Scotland Railway Company for breach of contract. He stated that his ticket "constituted a contract betwixt him and the defenders, entitling him to travel in any third-class carriage in which there was room by all ordinary trains betwixt Lossiemouth and Elgin up to 29th January 1894." He also stated that "the defenders, through their porter James Gerrie and other officials, for whom they are responsible, have acted illegally and unwarrantably towards the pursuer, and have subjected him to gross public insult and unnecessary annoyance, for which the pursuer is entitled to reparation, which he estimates at £100 sterling."

The railway company explained "that ten lads, such as the pursuer, held composition tickets between Lossiemouth and Elgin, and were frequently in the habit of travelling together. At times they travelled in separate carriages, and on such occasions some damage was done to the carriage window straps. In particular, this occurred on three occasions in the month of December 1893. On the guard of the train observing the damage, he resolved, for the protection of the railway property, and for the convenience of the ordinary passengers, that the said composition ticket-holders should be asked to travel by themselves. He accordingly instructed the stationmaster at Lossiemouth to arrange for said ticket-holders so travelling, and upon these instructions James Gerrie, porter at Lossiemouth, asked the pursuer on the morning of 22nd January to travel in the carriage set apart for said ticket-holders. Gerrie did so reasonably, and without insolence as averred, and the pursuer could not have been in any apprehension of personal violence, which was never threatened to him. The defenders are unaware that the pursuer had any reason for refusing to travel in the special carriage."

Upon 1st March 1894 the Sheriff-Substitute (RAMPINI) allowed a proof.

The defenders appealed to the Court of Session for jury trial, and the case was thereafter sent to proof.

In addition to the facts already narrated, it appeared from the evidence that on several occasions prior to 22nd January the window straps of third-class carriages running between Lossiemouth and Elgin had been cut. It was suspected by the officials of the company that the damage had been done by one or other of ten boys holding scholar's third-class composition tickets between Lossiemouth and Elgin, and orders were accordingly given to put them into a particular apartment next the guard's van. On the morning of 22nd January the pursuer entered the station, and took his seat in the compartment in which he usually travelled unnoticed by the servants of the company. He was afterwards ordered to remove by one of the defenders' porters, as already narrated. No violence was used to him, but he stated that he left the carriage because he feared personal violence if he refused.

Argued for the pursuer—The defenders had committed a breach of their contract in forcing him to leave the carriage he had entered. No violence, it was true, was used, but the pursuer was justified in supposing that violence would have been used if he had refused. He was therefore justified in considering himself expelled—*Georgia Railway and Banking Company* v. *Eskew*, 22 Am. State Rep. 490. Now, provided there was room for ordinary ticket holders—as there was—the defenders had no right to force the pursuer to leave the carriage he had chosen. Even supposing the railway company were within their right in selecting the carriage in which the composition ticket-holders were to travel, they had no right to order the pursuer to leave—*Butler* v. *Manchester, Sheffield, and Lincolnshire Railway Company*, 21 Q.B.D. 207. The Statute 8 and 9 Vict. cap. 33, secs. 101 and 102, which gave power to make regulations, gave no such power, unless the Act complained of was attended with danger to the public or hindered the company. A ticket gave a right to travel, and if the holder was prevented an action lay—*Long* v. *Horne*, 1 Car. & Payne 610. Even if the railway company had a right to select the carriage for the passenger they must be held to have waived this right, where, as here, they had allowed him to take his seat. The damages that a passenger wrongfully ejected was entitled to included a sum in name of necessary expense to which he had been put, and also a sum for injury to his feelings—*Southern Kansas Railway Company* v. *Rice*, 5 Am. State Rep. 766.

Argued for the defenders—The pursuer must fail, as he had failed to prove that his contract with the defenders entitled him to travel in any carriage he chose. Besides, the pursuer's contract was a special one, and one which did not give him all the rights of an ordinary ticket-holder. A passenger's common law right was to be conveyed subject to reasonable regulations on the part of the carrier—Story on Bailments, 589. The defenders' contract was to carry the pursuer to Elgin in any third-class carriage they might select. There was no question in this case as to the right of a railway company to remove a passenger, for the pursuer was not removed, and as the railway company's contract with him was not broken he could not recover damages.

At advising—

LORD ADAM—This is a question between the Great North of Scotland Railway Company and the pursuer, a lad, who held what is called a third-class composition ticket. It appears that on the morning of 22nd January 1893 he went as usual to the train by which he was in use to travel between Lossiemouth and Elgin. On that occasion most of the other lads, if not all of them, who had these composition tickets, were desired by the guard, for certain reasons of the railway company, to go into a particular compartment of a third-class carriage. On this particular occasion the pursuer Scott seems to have been unobserved

by the railway officials, and he succeeded in taking a seat in a particular compartment of a third-class carriage other than that in which the railway company desired that composition ticket-holders like himself should go. He was then asked by the porter, Gerrie, under orders of the guard, to remove from that compartment and go to another compartment of a third-class carriage. That he refused to do, but, after being asked again by the porter Gerrie to remove, he came out, and having come out he did not go to the compartment to which the other lads holding composition tickets had been sent, but remained at the station, and subsequently walked to Elgin, a distance of some six miles. There were some other incidents which happened on the evening of the same day at Elgin, and next morning, the 23rd, at Lossiemouth again, but nothing was put by Mr Murray, in the very able speech which he addressed to us, in support of his client's case on these other two occasions. He seemed to be satisfied that if he was not to win on the first, he could not successfully contend against the company with reference to the two other occasions.

Now, the particulars of the contract which the pursuer states on record he entered into with the railway company are constituted by ticket—that is to say, by a payment for a ticket made by the pursuer, and by his receiving a ticket from the company. They are set forth in article 2 of the condescendence. He says—"This ticket constitutes a contract between the pursuer and the defenders entitling him to travel in any third-class carriage in which there is room by all ordinary trains between Lossiemouth and Elgin up to 29th January 1894." Mr Murray did not maintain that his position in that respect was sound to the extent to which it was there stated, but he said that having been allowed on this particular occasion on 22nd January actually to take his seat in the particular compartment of the particular third-class carriage of this train, the railway company were not entitled to remove him without good reason, and that they had no good reason for so removing him. That was the law for which he contended. Now, my view of the law in such a case is this—that there is on the part of the company an inherent right, just as there is in the owner of a stage-coach or of any carrier, to regulate the traffic, and to allot or assign particular seats (always conforming with the contract into which they have entered with the particular persons)—to appoint certain seats if they think right in the regulation of their traffic—particular seats for first-class, particular seats for second-class, and particular seats for third-class passengers; and I do not understand that that observation was very much disputed, if disputed at all, by the pursuer in this case, because he does not maintain that, apart from his having on this particular occasion actually got into a particular carriage, the company would not have had the right to select for him a particular seat. Now, if that is so—and I think it is so—what difference does it make that without observation on the part of the railway officials—the guard or the porter—he did take a seat in that particular compartment? If the company has right to regulate the traffic and appoint seats for their passengers, why should the fact that he evaded or was not observed by the railway officials, and happened to take a seat and succeeded in getting into this particular carriage, why should that deprive the company of the right of regulating the traffic and apportioning seats? I cannot see why it should. It would be quite a different case if a company assigned a particular seat to a particular individual, or if they saw him sitting in a particular carriage and examined his ticket, and allowed him to remain, then it might be—and I am not deciding that point at all—that with the acquiescence of the company he might have acquired the right to sit in that seat and not to be removed from it without good reason on the part of the company. I could quite understand that there might be a question as to that. But that is not the case we have to deal with here. The case here is that this lad, not being observed by the officials at the time, succeeded in placing himself in a particular seat. I cannot say, for myself, that that implied any acquiescence on the part of the company, or contract with the company entitling him to remain in that seat and no other, and disentitling them to remove him from that seat if they thought fit so to do. On these grounds I think the company were within their powers on this occasion, and that they broke no contract which they had entered into with the pursuer. If that be so, that is an end of the case, because Mr Murray admitted—he could not avoid making the admission—that, if they were within their right, the company did no wrong, for they used no violence more than was necessary—indeed no violence at all—to remove the lad. That would have made a different case as to damages, but there is no such case here. The whole thing turns on whether or not on this particular morning, 22nd January, the company in desiring this lad to change his seat were guilty of breach of contract. I think they were not, and that the company are entitled to succeed in this case.

LORD M'LAREN—The case as now presented to us on behalf of the pursuer is, that he is entitled to damages for breach of contract, because, having taken his seat at Lossiemouth under the contract of carriage he was desired to remove into another carriage of the same class, and only yielded to this request or order under protest. I am willing to take the facts of the case as represented by the pursuer himself where he says—"While I was sitting in the compartment a railway porter, named James Gerrie, opened the door of the carriage and ordered me out, snapping his fingers. He did not tell me why I was to come out. He did not ask Denoon"—that was a fellow-passenger—"to come out. I asked what I was being turned out

for. He said nothing. He made me come out at once, snapping his fingers as before. I left the carriage at once." I do not need to read further, and I assume that this is substantially a correct statement, that the pursuer was desired to leave the carriage, at first refused, but on the demand being repeated he took this as a peremptory order to quit the carriage, and not wishing to make a scene, or to invite the use of force, he left the carriage and left it under circumstances which made it clear to the porter as representing the railway company that he did not leave voluntarily, but under reservation of his rights. And so the question comes to be whether the railway company was within its rights in desiring the pursuer to vacate the seat of which he had taken possession, and to go into another. Now, I agree with the statement of the law as put by your Lordship in the chair. When a railway company undertakes to give a passage to a particular place it fulfils its contract with the passenger by assigning to him a seat of the class for which he has paid his fare, because their obligation is to give him a seat, and to carry him safely. I do not think that because a train is drawn up at a station, and the doors are left open, and passengers may be in the habit of taking seats that please them, that this amounts to an abandonment by the company of its right to regulate its traffic by assigning seats to passengers in the way which they find to be convenient. It is not like the case of selling seats at a theatre, where, as Mr Dickson puts it, the seats are of an unequal value, and it is an implied term of the contract that whoever first gets possession of a seat is entitled to keep it during the performance. The contract of carriage makes it necessary that the railway company should regulate the seats of the passengers, and we know that it is quite common to reserve particular carriages for particular classes of passengers, for ladies travelling alone, or for invalids, or even for no special reason, but as a matter of convenience to passengers who ask to have a compartment reserved for them. According to the facts of the case, as stated by the pursuer himself, he took his seat as he had been in the habit of doing on previous journeys, but nothing had occurred on the part of the railway company's officials to imply that they acquiesced in his choice of that particular seat. He had not had his ticket checked, or held any communication with the stationmaster or his assistants, and directly after he had taken his seat the porter came up and asked him to change. Now, in these circumstances I agree with your Lordship that the company had done nothing to abandon its right to assign a seat to the pursuer, and therefore that no breach of contract was committed in desiring him to leave—in speaking in such terms that he felt bound to leave.

We have no question here of the use of force, and I should desire to reserve my opinion as to any question that may arise as to the circumstances in which the company may use force in order to exercise their rights in reference to the disposal of their carriages. We know it has been decided that if a passenger gets into a carriage without any contract at all, or any contract for the particular class, he may be removed, but it is a different question where he has a contract, and the question is simply one of regulation. But we do not need to consider that question, because it is admitted that no force was used. All that was done was that the pursuer left the carriage under circumstances which entitled him to claim damages for breach of contract if a breach had been committed. But as in the view which we take there was no breach of contract, it does not appear to me that there was anything in the conduct of the porter, who represented the railway company, which would entitle the pursuer to claim damages under the second head of claim and second plea-in-law. My opinion therefore is, that the railway company are entitled to be assoilzied from the conclusions of this action.

LORD KINNEAR—I concur with your Lordships. Mr Murray has said everything that could be said in favour of the pursuer's case, and said it with great clearness and ingenuity, but he conceded at the outset, and indeed he could not, I think, have withheld the concession, that he could not maintain the view of the contract between the pursuer and the railway company which is alleged on record, because he could not maintain that the pursuer's ticket constituted a contract by which he was entitled to travel in any third-class carriage in which there was room between Lossiemouth and Elgin. Now, if that be not the contract, then it must be, as your Lordships have said, a contract to allow the pursuer to travel in a third-class carriage between these stations, subject to the ordinary regulations for the convenience of the railway company in the management of their traffic, which they as carriers and the owners of the carriages are entitled to make. If that be so, it appears to me to be perfectly clear that there was no breach of contract between the pursuer and defenders at all. There is certainly no breach of contract—and I think this was virtually admitted by the pursuer's counsel—in assigning to him a seat in a particular compartment and declining to give him the seat in some other compartment which he would have preferred. But then it is said that though the original contract would not have given him the right to insist upon occupying a seat in any particular compartment, notwithstanding the regulations of the company to the contrary, he had acquired such a right by the conduct of the company in allowing him to take his seat in a carriage without opposition. The regulation of which he complains seems to me to have been a reasonable arrangement for the company to make in the circumstances in which they say it was made. But, however that may

be, the plea is that the company was barred by its acquiescence in the pursuer's conduct in taking his seat from enforcing that regulation as against him, and therefore the pursuer's case ultimately came to rest upon what he described as a plea in bar. But then there are two indispensable conditions which must concur in order that acquiescence should create a personal bar, and both of them are absent in this case. In the first place, the conduct which is said to have been acquiesced in must have been known to the party who is alleged to have acquiesced; and in the second place, the party raising the plea must have altered his position to his prejudice. Neither of these things happened in the present case. The officials of the company knew nothing of the pursuer's having taken his seat in the carriage in question until the porter, Gerrie, challenged him, and asked him to come out, and how any plea of acquiescence can be founded upon the conduct of an official, who, as soon as he sees the pursuer in a carriage in which *ex hypothesi* he is not entitled to travel against the will of the company, tells him that he must come out, I am unable to see. But in the second place, if there were any ground for holding that the company had held out to the pursuer the carriage in question as one in which he was entitled to travel, he was not prejudiced in any way by being induced to act in that belief; all that he had done was to take his seat in the carriage, and when the company's officers told him he must go into another carriage, he suffered no more prejudice than if the same thing had been said to him on the platform before he had taken his seat. The plea in bar is therefore untenable. I agree that the pursuer's case here fails for the reasons your Lordships have stated. It is much to be regretted that a case of this very insignificant value should have been brought into this Court. That, however, does not appear to me to be the fault of the railway company, because if the pursuer had any good ground of action at all, it was a matter for the Small Debt Court rather than for the Sheriff Court with a consequent right of appeal.

The LORD PRESIDENT was absent.

The Court assoilzied the defenders.

Counsel for the Pursuer—C. D. Murray. Agent—Alexander Mustard, S.S.C.

Counsel for the Defenders—C. S. Dickson—Ferguson. Agents—Gordon & Falconer, W.S.

Thursday, January 24.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

CAMERON AND ANOTHER *v.* WILLIAMSON.

Property—Sale—Alleged Defective Title.

The proprietor of certain heritable subjects in 1833 granted a bond and disposition in security over them for £300. In 1856 the creditor in right of the bond assigned it to the extent of £200 by an assignation, duly recorded, which contained a declaration to the effect that the creditor acknowledged that the remaining £100 had been repaid, and that a discharge therefor had been granted. Ultimately the bond to the extent of £200 was discharged in 1888, the discharge, which was recorded, containing the declaration that the remaining £100 had been long ago repaid, extinguished, and discharged. But no discharge of the £100 was on record. The subjects were thereafter sold in 1894, but the purchaser refused to implement his bargain on the ground that the seller was bound to clear the record of burdens, and that the title tendered was bad, in respect that *ex facie* of the record the bond for £300 had only been discharged to the extent of £200. *Held* (*aff.* judgment of Lord Kyllachy) that the purchaser was not entitled to demand that a discharge should be put on record, and was bound to accept the title tendered.

Process — Expenses — Property — Sale of Heritage—Objection to Title.

Held (*aff.* judgment of Lord Kyllachy) that a party who had agreed to purchase certain heritable property, and had repudiated his bargain on the ground of an alleged defect in the title tendered, was liable in the expenses of an action by the seller for implement of the contract, in respect that he had stated no valid objection to the title, and the seller had offered to remedy the defect alleged to exist.

Howard & Wyndham v. *Richmond's Trustees*, June 20, 1890, 27 S.L.R. 800, and 17 R. 990, *distinguished.*

Isabella Cameron and Margaret Cameron were *pro indiviso* proprietors of certain heritable subjects situated at 94, 96, and 100 Nicolson Street, Edinburgh. George Williamson, by missive-offer dated 9th January 1894, offered to purchase the said subjects at the price of £1600 sterling. The offer, which contained, *inter alia*, the condition "a good, valid, and complete title to be given by the exposers, and at their expense, and also searches brought down to term of entry showing a clear record, excepting existing bond for £1100, and thereafter to be brought down by exposers to the said term of Whitsunday showing a clear record," was accepted by the proprietors on 11th January 1894. Thereafter the agents of the purchaser