mode they think most advantageous. But the obligation remains untouched, that whatever mode they adopt that mode must be worked "fairly and properly." Now, the pursuers aver, I think, quite sufficiently, that the defenders have failed to fulfil that obligation—that they did adopt a certain mode of working, but that they did not work it fairly and properly, and that the improper way of working which they adopted resulted in damage to the pursuers, for which they seek reparation. I am therefore of opinion that the pursuers have stated a relevant case. The defence of acquiescence which was urged upon us may be a complete answer to the pursuers' case, but at the present stage we cannot determine that question. That defence is entirely reserved to the defenders.

LORD MONCREIFF — I am of the same opinion. The case must be decided on the terms of the clause of the lease which is quoted in condescendence 3, the true meaning of which your Lordships have stated. I do not think the case is touched by the decisions in the cases of *Houldsworth* and *Guild*.

The Court recalled the interlocutor of the Lord Ordinary and remitted to him to allow a proof.

Counsel for the Pursuers and Reclaimers —W. Campbell, K.C.—Deas. Agents—Carmichael & Miller, W.S.

Counsel for the Defenders and Respondents—Salvesen, K.C.—Hunter. Agents—W. & J. Burness, W.S.

Saturday, May 18.

FIRST DIVISION.

[Railway and Canal Commission.

JOHN WATSON, LIMITED *v.* CALEDONIAN RAILWAY COMPANY.

Railway—Railway and Canal Commission—Rates—Increase of Rates—Diligence to Recover Documents—Documents to show Extent and Profits of Applicant's Business—Railway and Canal Traffic Act 1894 (57 *and* 58 *Vict. cap.* 54), *sec.* 1 (1).

Section 1, sub-section (1), of the Railway and Canal Traffic Act 1894 enacts that "Where a railway company have . . . since the last day of December 1892 directly or indirectly increased, or hereafter increase directly or indirectly, any rate or charge, it shall lie on the company to prove that the increase of the rate or charge is reasonable.

Held, in an application by certain coalmasters to the Railway and Canal Commission for an order declaring certain "increased rates" on coal to be unreasonable, that the respondent Railway Companies were not entitled to a diligence to recover the business-books and accounts of the applicants in order that excerpts might be taken therefrom to show the amount of coal sold by the applicants, the cost of working it, and the profits made.

John Watson, Limited, coalmasters, made an application to the Railway and Canal Commission, *inter alia*, for an order declaring that certain "increased rates" on coal charged by the Caledonian Railway Company and the other Scottish railways were unreasonable. Similar applications were made by certain other coalmasters.

In the application at the instance of John Watson & Company, Limited, the Railway Companies applied to the *ex officio* Commissioner (LORD STORMONTH DARLING) for a diligence to recover certain business books and other documents. The specification contained the following articles, besides certain other articles which were ultimately withdrawn — "(1) All books, accounts, abstracts, statements, reports, returns, and other documents or writings made or kept by or on behalf of the applicants or their predecessors in business from 1871, that excerpts may be taken therefrom for each of the years from 1871 to 1900 both inclusive, of all entries showing or tending to show—(*a*) The quantities of coal, coal nuts, coke, culm, gum, duff, peas, beans, dross nuts, or other descriptions of small coal or dross, and the different descriptions and qualities thereof, sold by the applicants or their said predecessors from each of their collieries and pits, and the prices (pit and otherwise) charged and received by the applicants and their said predecessors for such minerals. (*b*) The quantities and prices of such minerals despatched from said collieries by the railways of the respondents, or any of them, as distinguished from the remainder of such minerals, and by whom the railway rates and charges were borne and paid. (*c*) The quantities and prices of such minerals despatched to the stations and places set forth in the schedules to the application, as distinguished from the remainder of such minerals, and by whom the railway rates and charges were borne and paid; and (*d*) The quantities and prices of such minerals despatched for shipment, as distinguished from the remainder of such minerals, and by whom the railway rates and charges were borne and paid. (2) All books, accounts, abstracts, statements, reports, returns, balance-sheets, and other documents or writings made or kept by or on behalf of the applicants or their predecessors in business from 1871, that excerpts may be taken therefrom for each of the years from 1871 to 1900, both inclusive, of all entries showing, or tending to show, the total expenditure, including lordships, royalties, wayleaves, oncost, and cost of working and raising the minerals incurred by the applicants or their said predecessors in carrying on their business as coalmasters at or from the collieries mentioned in the application, and in working, winning, and marketing their foresaid coal and other minerals. (3) All books, accounts, abstracts,

statements, reports, returns, balance-sheets, and other documents or writings made or kept by or on behalf of the applicants or their predecessors in business from 1871, that excerpts may be taken therefrom for each of the years from 1871 to 1890, both inclusive, of all entries showing, or tending to show, the gross and net profits or losses of the applicants or their said predecessors accruing from their business as coalmasters carried on at or from their collieries mentioned in the application, and the appropriation of such profits."

On 21st March 1901 the *ex officio* Commissioner refused the diligence.

Opinion.—"I have here to deal with a call for documents which confessedly raises a question of principle, and one of considerable importance to the proper working of section 1 of the Traffic Act of 1894. That section throws upon railway companies the onus of proving to the satisfaction of this Commission that the increase of any rate made by them since 31st December 1892 is reasonable, and there are certain well ascertained methods of doing so.

"But I think it has never been recognised as among these methods for the railway company complained against to inquire into the business affairs of the trader complaining, into the volume of his trade, the cost at which he carries it on, or the profit which he makes on it. It would be very strange if considerations of that kind were held to be relevant, because railway rates are not fixed with reference to the poverty or riches of individual traders, but in order to yield a fair remuneration to the companies themselves for the services which they render. That is entirely consistent with Lord Selborne's view in *The Canada Southern Railway* case (8 App. Ca. 723), because when he speaks of examining a rate 'with reference to the service rendered and the benefit to the person receiving that service,' he is arguing against the notion of testing the reasonableness of a rate by the profits of the railway company, and assuredly he gives no countenance to the notion of testing it by the profits of the trader. I agree with Mr Justice (now Lord Justice) Collins, that 'the reasonableness of the rate is not to be tried by its effect upon the trade of the persons who have to pay it, (*Rickett, Smith, & Company's* case, 9 B. & M. at p. 114). Certainly if the condition of the trade in any particular class of goods is to any extent a legitimate subject of inquiry, that inquiry must be directed to the condition of the trade in general, and not to the profits or losses of any particular applicant.

"It is of course a mere accident that these applicants produce an article which forms a large item in the expenditure of every railway company. An increase in the price of coal may form a most important consideration in judging whether an increase in a railway rate is justifiable. But the companies have in their own possession the proper means of proving that, and the proof of it will not be helped by the books of the applicants.

"What the specification really does is to propose a searching examination, extending over years, into every detail of the business carried on by the applicants and their predecessors—their output, their prices, their cost of working, their capital expenditure, their profits or losses, and many other things. If such a process were applied to each of the applicants in this congeries of cases, I do not know when the inquiry would end. Even if relevant, such a call would be objectionable as being altogether out of proportion to the question in dispute. But it seems to me to be wholly irrelevant, and I therefore disallow the entire specification."

The Railway Companies appealed, and limited their diligence to the years 1897–1900.

Argued for the appellants — It was admitted that under section 1 of the Railway and Canal Traffic Act 1894 (quoted in rubric) the onus of proving that an increase in rates was reasonable lay on the railway companies, but there were two elements in deciding what was reasonable. These were (1) Did the railway require the increase? and (2) Could the trade bear it? To determine this last element the diligence was necessary. If the applicant could prove that the increase of rates would crush the industry, that would be a strong ground for declaring it unreasonable—*Per* Lord Selborne in *Canada Southern Railway Company* v. *International Bridge Company*, 1883, 8 App. Ca. 723, at p. 731. Conversely, it was an important point to show that the trade was earning large profits, and could easily pay the increased rates. No precedent could be shown for the diligence asked for, but the reason was, that such cases had hitherto arisen in England, and the English procedure as to discovery differed from the Scotch diligence. The decision in *Reckitt, Smith, & Company* v. *Midland Railway Company*, 1893, 9 Browne & Macnamara 107, was no authority against the proposed diligence.

Argued for the respondents — The diligence should not be granted, because the evidence sought to be obtained thereby would be irrelevant. If it was a question of profits, the books of all colliery owners would have to be examined, not those of one or two individual firms. It was not disputed that the trade could bear the rates, but that was not a relevant consideration in deciding whether the increase was reasonable—*Reckitt, Smith, & Company* v. *Midland Railway Company*, *cit. supra*; *Smith & Forrest* v. *London and North Western Railway Company*, May 18, 1900 (not yet reported). The principle laid down in these cases was, that it was for the railways to show that they could not afford the service without the increase of rates. If they failed to do that, no amount of profit in the trade would make the increase reasonable.

LORD PRESIDENT — The proceeding in which this question arises has been instituted under the Railway and Canal Traffic Act of 1894, section 1 of which in effect provides that in the event of railway com-

panies raising the rates which have been authorised for carriage on their lines, the onus shall rest upon them of proving to the satisfaction of the Commission that any increase of rates made by them since 31st December 1892 is reasonable. The railway companies must therefore in this proceeding justify the raising of their rates, or, in other words, must prove that the rates which they are claiming from the traders are reasonable. As the initial onus is thus laid upon them, it will be for them to adduce such evidence as they think fit in support of the proposition that the raising of the rates is reasonable, and if they tender no such evidence, the traders may possibly lead no proof, and say that as no attempt has been made to prove that an increase is reasonable, the Commission should refuse to sanction it. On the other hand, if the railway companies establish a *prima facie* case for the increase of the rates, it will be for the traders to adduce such evidence as they think fit to disprove the reasonableness of the increased rates which the railway companies propose to charge. Now, what the railway companies ask is a diligence of a very comprehensive character, although it has been greatly restricted to-day. The first call was for excerpts of documents of certain kinds for each of the years from 1871 to 1900, both inclusive. That, I understand, is now limited to the period from 1897 to 1900, and besides that, the last three articles of the specification are withdrawn. But four articles remain, subject to the limitation as regards time to which I have just referred, and these articles are certainly very wide. The first calls for "all books, accounts, abstracts," and so on, "kept by or on behalf of the applicants or their predecessors in business" for the period from 1897 to 1900, which would show the whole particulars and details of the business of every one of the applicants. The production of the documents called for would not only reveal their profits but everything connected with their business. Now, that is *prima facie* a kind of discovery for which authority should not be granted unless some very cogent reason is adduced for giving access to the most private documents of the applicants.

The issue in the case, as I have already stated, is, whether the increase of the rates is reasonable. Now, that, as I have also pointed out, has to be proved by the railway companies who have raised the rates, and in the course of that inquiry the companies will doubtless lead evidence on all the matters which they say make an increase of the rates reasonable. Among other things, the cost of giving the service will no doubt be gone into, and that seems to me to be a proper element to take into account. The cost of giving the service will involve a consideration of the prices which the companies pay for the things which they require and use, and also of the wages which they pay to the servants whom they employ in giving it. The prices which the companies now require to pay for coal, for example, which are said to be about double what they paid when the rates were fixed, will be a perfectly legitimate element for consideration. The companies say further that the cost of the service otherwise is greater, and in particular that their men work shorter hours, and that larger numbers of them are now required to do the same work than when the rates were fixed. All these things may be very pertinent to the question whether the increase in the rates is or is not reasonable. But the companies have in their own books all the materials for such lines of inquiry, and they now claim to be admitted into the full knowledge of all that relates to the business of their customers the applicants—the most secret things which traders keep to themselves—the conditions of their businesses, whether it is profitable, and if so, the amount of the profit, and if it is unprofitable, the amount of the loss. While the value or benefit of the service, as well as its cost, may be a proper matter for consideration, we have not been referred to any authority for granting such an application, and it seems to me that we should not give any countenance to the idea that such an application should be granted, seeing that it could be allowed only upon the view that all the particulars of the trade of each particular coalmaster or trader who had carriage done for him by the companies were material or relevant to the question of the reasonableness of the rate. Such an inquiry would doubtless reveal very different conditions in the businesses of the different traders, and the granting of the inquiry would suggest that the rates should vary according to the amount of profit that was being earned by the traders, or, to take an extreme case, that if a trader was not making any profit he should get his goods carried at a rate lower than that charged to a successful trader. The fact that the particulars asked must differ in each case seems to show the inapplicability of the inquiry to what must be a general standard rate fixed by the companies in exercise of the power to increase their rates on proving justification for doing so. One can see that when the companies have proved their grounds for increasing the rate, it will be open to the traders to put forward their evidence, and in proposing that we should refuse this diligence I do not in the least suggest that there may not be ample scope for cross-examination of the traders when they say that the increased rates are not reasonable. It is not necessary for us now to decide what questions may be put in cross-examination, but if part of the case of the traders is to be that the trade cannot bear the particular rates, as it has sometimes been expressed, one can see that considerable latitude in cross-examination may be allowed to the companies. But by granting this diligence we would seem to assume that it was or might be a material element in the justification of a particular rate that some traders were making large profits, and that is an idea to which I do not think we should give countenance. The real issue being whether the rate is reasonable, it appears to me that

the trading history, even for four years, of each particular trader is not legitimate matter for inquiry, although, as I have already said, if the traders come and give evidence that their trade cannot bear the rates, very considerable latitude in cross-examination of them may be allowed to the companies, and possibly the companies may also be permitted to adduce rebutting evidence.

For these reasons I think that we should refuse the specification *in toto.*

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court refused the appeal.

Counsel for the Appellants — Guthrie, K.C.—Cooper—Grierson. Agent—James Watson, S.S.C.

Counsel for the Respondents—Dundas, K.C.—Clyde—Strain. Agents—Drummond & Reid, S.S.C.

Friday, May 17.

SECOND DIVISION.

[Sheriff-Substitute at Aberdeen.

CRAN *v.* WATT.

Statute — Construction— Week — Advertisement in Newspaper "for Two Successive Weeks"—Police—Street—Paving—Assessment — Notice — Aberdeen Municipality Extension Act 1871 (34 *and* 35 *Vict. c. cxli.*) *sec.* 145.

The Aberdeen Municipality Extension Act 1871, which empowers the Town Council to pave certain streets with granite, and to recover the expense thereof from the frontagers in proportion to their frontage, by section 145 provides that the Town Council shall, three weeks before proceeding with the work, "cause a notice of their intention so to do to be inserted in at least one of the newspapers published in the city for two successive weeks, and such notice shall be and be deemed sufficient intimation to all the parties liable for the expense of such works."

Held that a notice, published in an Aberdeen daily newspaper on Friday in one week, and again on Wednesday in the following week, was sufficient notice in conformity with the requirements of the Act.

By the Aberdeen Municipality Extension Act 1871, the Town Council are empowered to cause the carriageway of any street to be paved with granite stones, and to recover the expense thereof from the frontagers in proportion to the frontage of their lands abutting on the street.

Section 145 provides—"The Town Council shall, three weeks before proceeding with the laying out, forming, paving, macadamising, or otherwise making good of any footways, channels, or gutters, or causeway or carriageway of any street at the expense of the owners of the lands before or opposite to which such works shall be executed, cause a notice of their intention so to do to be inserted in at least one of the newspapers published in the city for two successive weeks, and such notice shall be and be deemed sufficient intimation to all the parties liable for the expense of such works."

This was an action at the instance of Peter Macleod Cran, Chamberlain of the city of Aberdeen, against John Watt junior, as owner of heritable property in Berry Street, Aberdeen, to recover the sum of £35, 5s. 3d. as the proportion due by the defender of the expense incurred by the Town Council in paving the carriageway of the said street with granite stones in virtue of the powers contained in the foregoing Act.

The defender lodged defences, in which he maintained that the Town Council had not given due notice of their intention to execute the work in question in terms of the Act.

He averred — "(Ans. 7) The Town Council . . . inserted their notice twice only, and that within a period of five days, viz., in the daily *Aberdeen Journal* of Friday the 19th June 1896, and in the daily *Aberdeen Journal* of Wednesday the 24th June 1896. In point of fact the defender did not see the notice at all, and he was, from the failure of the Town Council to advertise in terms of the statute, not aware till after the work was executed that any resolution had been come to by them under which it was intended to fix liability upon him."

The defender further averred—"At the date of said resolution (*i.e.*, to execute the work in question) there were published in the city of Aberdeen two daily newspapers, viz., the *Aberdeen Journal* and the *Daily Free Press*, and at the date of the passing of the said Act the *Journal* was published weekly on Wednesdays and the *Free Press* bi-weekly on Tuesdays and Fridays. Explained and averred that on a sound construction of said section the Town Council was bound either to cause their notice to be inserted in one or other of the daily papers each day (Sundays excepted) for two successive periods of seven days, or to insert the notice in four successive bi-weekly issues of the *Free Press*, or in two successive weekly issues of the *Journal*, or in any event, in the case of only one weekly insertion, the Town Council was bound to insert the second notice not earlier than the seventh day—that is, a full week—after the first, so that notice for two full and completed successive weeks or periods of seven days each might precede the currency of the statutory period of three weeks which had to elapse subsequent to advertisement of the notice before the contemplated work could be proceeded with."

The pursuer admitted the defenders' averments with regard to the dates of the