The counsel for the pursuer admitted that he could not support the Sheriff-Substitute's judgment on the grounds set forth in the Sheriff-Substitute's note. I agree with him. For the only ground put forward by the Sheriff-Substitute on which he has affirmed the defender's liability is that he is the owner of the horse and van that did the damage complained of. Now, no claim of damages can be based on ownership *per se*. There must be added some fault on the part of the owner —some fault arising from act or neglect on his part. This I say while recognising that in most cases where a person is run down in a public street in broad daylight the onus of showing that he was not at fault will be upon the owner of the horse. The presumption of fault is strong but may be rebutted.

In his condescendence the pursuer sets out various grounds of fault. He says that (1) the driver was inexperienced and incapable of controlling the horse, (2) that the horse was of a restive fiery nature, and (3) that the harness was of an inferior and flimsy kind. The Sheriff-Substitute does not affirm any one of these allegations, and they are one and all negatived by the proof. The presumption against the defender has been successfully rebutted. The proof shows that the accident to the pursuer's child happened without the existence of any fault on the part of the defender or his servant. Your Lordship has already pointed out from the proof what led to this regrettable accident, and I need not repeat what your Lordship has said. I will only add that if the accident was occasioned by some latent defect in the harness not discoverable by ordinary and usual inspection, the defender would not be liable for the consequences of such defect. I think the appeal should be sustained and the defender assoilzied.

LORD MONCREIFF — I agree with the majority of the Court that the interlocutor of the Sheriff-Substitute should be recalled. Neither in his interlocutor nor in his note does the Sheriff-Substitute find fault on the part of the defender proved. On the contrary, it appears from his note that he is not prepared to find fault proved.

I am quite willing to take the case on the footing that the pursuer having established that the accident occurred in broad daylight the onus is shifted to the defender to prove that he was not in fault. Taking the case on that footing I am prepared to hold that the defender has made out that there was no fault on his part.

I could have imagined a case on the footing that there was fault in driving a loaded van downhill without a brake. But no charge on this head is set forth by the pursuer on record, and no evidence was led on the point.

The Court pronounced this interlocutor—

"Sustain the appeal: Recal the interlocutor appealed against: Find it has not been proved that the accident complained of was due to any fault on the part of defender: Therefore assoilzie the defender from the conclusions of the action, and decern."

Counsel for the Pursuer and Respondent —W. Mitchell. Agent—Alexander Bowie, S.S.C.

Counsel for the Defender and Appellant —Salvesen, K.C. —T. B. Morison. Agent —R. S. Rutherford, Solicitor,

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Tuesday, November 10.

FIRST DIVISION.

[Lord Low, Ordinary.

LANARKSHIRE STEEL COMPANY *v.* CALEDONIAN RAILWAY COMPANY.

Railway—Rates of Carriage—Increase of Rates—Increase of Rates found Unreasonable by Railway Commissioners — Recovery of Increased Rates Paid Under Protest—Condictio Indebiti—Action for Recovery by Trader who has not Applied to Commissioners—Jurisdiction—Railway and Canal Traffic Act 1888 (51 *and* 52 *Vict. c.* 25), *secs.* 10 *and* 12—*Railway and Canal Traffic Act* 1894 (57 *and* 58 *Vict. c.* 54), *sec.* 1 (1), (3), (5).

Certain railway companies jointly issued a notice intimating an increase of rates for the carriage of coal. A steel company whose works were served by one of these railway companies objected to the increase of rates as being unreasonable, and demanded that it should be withdrawn. The railway company, however, rendered their monthly accounts for carriage to the steel company upon the basis of the increased rates. The steel company paid the accounts as charged under protest, and, as they alleged, upon the understanding that their right to claim a rebate for the increase should not be prejudiced, and that, if ultimately it should be found that the railway companies were not entitled to increase the rates, the increased charges should be returned. The steel company did not lodge a complaint in respect of the increase of rates with the Railway and Canal Commissioners, but seven companies which were substantially *in pari casu* with the steel company lodged such complaints, with the result that in October 1901 the Railway and Canal Commissioners found in the case of each of the seven complaints lodged that the increase in the rates was unreasonable, and directed the railway companies to discontinue to charge the increased rates. In consequence the railway companies ceased to charge the increased rates. The steel company alleged that they had not proceeded with their application to the Commissioners in reliance on representations by the defenders that their claims would not be prejudiced in consequence.

Held that, even assuming that the determination of the Railway and Canal Commissioners did not proceed upon the special circumstances of the particular cases brought before them, but was equally applicable to the circumstances of the steel company, an action brought by the steel company to recover from the railway company the amount paid in respect of the difference between the old rates and the increased rates during the period in which the increased rates were charged was incompetent, and the railway company *assoilzied*.

The Railway and Canal Traffic Act 1894 (57 and 58 Vict. c. 54) enacts as follows—Section 1 (1)—"Where a railway company have, either alone or jointly with any other railway company or companies, since the last day of December one thousand eight hundred and ninety-two, directly or indirectly increased or hereafter increase directly or indirectly any rate or charge, then if any complaint is made that the rate or charge is unreasonable it shall lie on the company to prove that the increase of the rate or charge is reasonable, and for that purpose it shall not be sufficient to show that the rate or charge is within any limit fixed by an Act of Parliament." . . .

(3) "The Railway and Canal Commissioners shall have jurisdiction to hear and determine any complaint with respect to any such increase of rate or charge, but not until a complaint with respect thereto has been made to and considered by the Board of Trade."

(5) "Section 12 of the Railway and Canal Traffic Act 1888 shall apply in the case of any such complaint." . . .

The Railway and Canal Traffic Act 1888 (51 and 52 Vict. c. 25) enacts (section 12)—"Where the Commissioners have jurisdiction to hear and determine any matter, they may, in addition to or in substitution for any other relief, award to any complaining party who is aggrieved such damages as they find him to have sustained; and such award of damages shall be in complete satisfaction of any claim for damages, including repayment of overcharges, which but for this Act such party would have had by reason of the matter of complaint. Provided that such damages shall not be awarded unless complaint has been made to the Commissioners within one year from the discovery by the party aggrieved of the matter complained of." . .

Section 10. "Where any question in dispute arises involving the legality of any toll, rate, or charge, or portion of a toll, rate, or charge, charged or sought to be charged for merchandise traffic by a company to which this Act applies, the Commissioners shall have jurisdiction to hear and determine the same, and to enforce payment of such toll, rate, or charge, or so much thereof as the Commissioners decide to be legal."

The Lanarkshire Steel Company, Limited, brought this action against the Caledonian Railway Company and certain other railway companies for their interest, concluding for payment of certain sums amounting in all to £1043, with interest, or alternatively for payment of the said sum in name of damages.

The works for the manufacture of steel carried on by the pursuers were situated on and connected with railways belonging to the defenders, and large quantities of coal, coke, &c. consumed in the pursuers' works were carried by the defenders.

In December 1899 the Caledonian Railway Company, the North British Railway Company, and the Glasgow and South Western Railway Company jointly issued a general notice that they intended, as from 1st January 1900, to increase the rates for the carriage of coal and dross between all places on their respective railways.

The pursuers, by letter of 26th January 1900, objected to the increase of rates as unreasonable and demanded its withdrawal. The railway companies demanded payment of the rates as increased from 1st January 1900. The defenders, the Caledonian Railway, rendered monthly accounts to the pursuers in respect of the carriage of mineral to the pursuers' works upon the basis of the increased rates. The pursuers declined to pay these accounts in so far as they consisted of increased rates, but sent cheques upon the basis of the rates which had been in force prior to the notice. These cheques were returned.

The pursuers averred (Cond. 6) that "the Caledonian Railway Company stated that they would decline to carry the pursuers' traffic in the future unless payment were made of said accounts, and that in the event of the pursuers refusing to pay the said accounts, and accounts rendered in future on the said basis, payment on the new basis would be exacted on each waggon as it entered the pursuers' works. Had this threat been carried out it would have meant the closing of the pursuers' works. The fear of the said threat being put in force coerced the pursuers into acceding to defenders' demands."

On May 14th a letter was addressed by the pursuers' law-agents to the defenders stating *inter alia*, as follows:—"Our clients intend to follow up their intimation of protest against the increase of rates; but in order to allow of your books being cleared they are willing to pay the accounts for January, February, and March which have been rendered, on the understanding, however, that they make that payment under protest, and that their right to claim a rebate for the increase shall not be prejudiced, and that if in the ultimate issue of the question it should be found that the railway companies were not entitled to make the increased charges the same shall be returned to our clients."

The pursuers averred that the defenders ultimately agreed to accept payment in terms of the said letter dated 14th May, and that payment of the accounts for January, February, and March was made by the pursuers on the conditions contained in that letter. The defenders denied this.

Seven coalmasters having obtained certificates from the Board of Trade applied to

the Railway and Canal Commissioners to have the increase of rates declared unreasonable and for an order upon the railway companies to desist from charging the said rates. The pursuers averred that the said applications were general in their terms, referring not only to the rates then in force to and from the applicants' collieries but also to all rates over the respondents' systems which had been increased by the notice before-mentioned; and that the railway companies in their replies attempted to justify the said increase upon general grounds, applicable not only to the seven coalmasters' traffic but to the working of the respondents' whole systems, including the pursuers' traffic.

On 30th October 1901 the Railway Commissioners pronounced orders in each of the applications by the seven coalmasters finding that it had not been proved by the railway companies that the increase in the rates which had been made was reasonable and ordinary, and directing the railway companies to discontinue to charge the said rates. In consequence of these orders the railway companies ceased to charge the increased rates as from 1st November 1901.

On 18th December 1900 the pursuers had lodged with the Board of Trade a complaint in terms of the Railway and Canal Traffic Acts 1888 and 1894 against the railway companies. They averred that at a meeting which they had at the Board of Trade offices with the defenders' representatives the latter induced them to delay taking proceedings on the ground that a decision would soon be given by the Railway Commissioners upon the complaints of the seven coalmasters; that no hardship could accrue to the pursuers by the delay; that the railway companies 'were good for the money,' and 'were not going to run away,' thereby causing the pursuers to understand that in the event of the increase of rates being declared to be unreasonable the railway companies would make restitution of all money paid under protest to the legality of the said increase; and that in reliance upon this undertaking, given by the said defenders' representative, the pursuers, believing that they would not be prejudiced thereby, desisted from further objections to the delay claimed.

The defenders averred "that the proceedings before the Railway Commissioners on the application of the seven coalmasters had reference only to the rates payable by the respective applicants specifically set forth in each application, and had nothing to do with and made no reference to the rates paid by the pursuers. There was a separate proof led by each of the applicants, and the Railway Commissioners pronounced a separate order in each application, which order applied only to the scheduled rates payable by each applicant, and no judgment or order of the Railway Commissioners applied to the rates charged by the defenders against the pursuers. The increased rates in question were less than the maximum rates which the defenders were entitled to make, and were lawful. The defenders believe and aver that the increase in question on the rates charged to the pursuers was reasonable. The question of reasonableness cannot be determined in the present action. It is one which, if it could now be competently raised (which is denied), is within the exclusive jurisdiction of the Railway Commissioners."

The pursuers pleaded—"(1) The defences are irrelevant. (2) The pursuers having been illegally overcharged by the defenders the Caledonian Railway Company to the extent sued for, are entitled to repetition of the sums so overcharged with expenses. (4) The illegality of the increase in the rates and charges having been established by the order of the Railway and Canal Commission, the pursuers are entitled to decree. (6) *Separatim*, The pursuers having, in reliance upon representations of the defenders the Caledonian Railway Company, barred themselves from obtaining restitution of said overcharges in the Court of the Railway and Canal Commission, are entitled to damages as concluded for."

The defenders pleaded—"(1) The action is incompetent. (2) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons. (3) The increased rates in question being in themselves lawful charges, and the pursuers not having applied to the Railway Commissioners regarding the said increases, they cannot now raise the question of the reasonableness or the legality thereof. (4) The question of the legality of the increased rates complained of being in the circumstances within the exclusive jurisdiction of the Railway Commissioners, the action should be dismissed. (7) *Esto* that the increased rates charged by the defenders to the pursuers were not lawful charges; the pursuers' remedy was a claim for damages to be fixed by the Railway and Canal Commissioners, and they cannot recover any part of the increased rates in this process."

The Lord Ordinary (Low), by interlocutor dated June 30th 1903, before answer, allowed to the parties a proof of their respective averments.

Opinion— . . . "The object of the present action is to obtain repayment from the Caledonian Company of the difference between the old rates and the increased rates for the period during which the latter rates were exacted from the pursuers.

"The first question is, whether it can be regarded as settled, in a question with the pursuers, that the increase of rates was unreasonable, and therefore illegal. The defenders contend that that question must be answered in the negative, because the judgment of the Commissioners was confined to the seven cases which were brought before them, and proceeded upon the special circumstances of these cases. The judgment and orders of the Commissioners therefore, they argued, had no application to the case of a trader who had not filed a complaint.

"I have examined the complaints and the answers of the Railway Companies

thereto, and the judgment and orders of the Commissioners, and I am satisfied that the judgment of the Commissioners did not proceed upon the special circumstances of the particular cases which were brought before them. The railway companies had increased all the rates for coal, coke, and dross on all their railways, and they sought to justify that increase on the general ground that the cost of working their coal traffic had greatly increased. They failed to satisfy the Commissioners that the increased cost of working was sufficient to justify a general and universal increase of the rates, and the Commissioners found accordingly.

"The defenders, however, further argued that although the result of the orders of the Commissioners in the cases which were brought before them might be that the railway companies could not thereafter impose the increased rates upon anyone, it did not follow that the rates fell to be regarded as illegal prior to the judgment of the Commissioners, seeing that they were within the maximum charges which the companies were authorised to make. Further, the defenders argued that in any view repayment of the overcharge could only be recovered through the medium of a complaint to the Commissioners as provided by the statute.

"In order to test these arguments it is necessary to see what the course of legislation has been.

"By section 79 of the Railway Clauses Consolidation Act 1845 railway companies were authorised to make such 'reasonable charges' in respect of traffic carried by them as they might from time to time determine upon, not exceeding the tolls by the Special Act authorised to be taken by them.

"That enactment is still in force, and therefore rates must not only be within the maximum authorised, but must be reasonable, although no doubt (apart from the provisions of the Railway and Canal Traffic Act 1894), a rate which was within the maximum was *prima facie* and presumably reasonable.

"Until the passing of the Railway and Canal Traffic Act 1888 the Railway Commissioners had no jurisdiction to deal with the reasonableness of a rate. I think, however, that that Act empowered them to do so, because by section 10 they are given jurisdiction to hear and determine 'any question or dispute involving the legality of any toll, rate, charge, or portion of a toll, rate, or charge.' I think that that enactment includes the case of a rate which is illegal because, although within the maximum, it is unreasonable.

"The Railway and Canal Traffic Act 1894 deals with rates which are increased after the last day of December 1892, and provides that if complaint is made that such increase is unreasonable the onus of proving that it is reasonable shall lie on the Railway Company.

"By section 1 (3) it is enacted that the Railway Commissioners shall have jurisdiction to hear and determine any complaint with respect to any such increase of rate.

"I think that the result is that the Railway Commissioners are the only tribunal which has jurisdiction to determine whether an increased rate is or is not reasonable, and in this case they have held that the increase was not reasonable. The question therefore seems to me to be whether a trader who has paid the increased rate under protest is entitled to recover by action the amount which he has paid in excess of the legal rate?

"The defenders' contention that that also is a question which is within the exclusive jurisdiction of the Commissioners is founded upon the provisions of section 12 of the Act of 1888, and section 1 (5) of the Act of 1894.

"The former section provides that 'Where the Commissioners have jurisdiction to hear and determine any matter, they may, in addition to or in substitution for any other relief, award to any complaining party who is aggrieved such damages as they find him to have sustained; and such award of damages shall be in complete satisfaction of any claim for damages, including repayment of overcharges, which but for this Act such party would have had by reason of the matter of comlplaint.

"By section 1 (5) of the Act of 1894 that provision is made applicable in the case of complaints under the latter Act.

"If therefore the pursuers had made a complaint to the Commissioners that the increase of charge was unreasonable, they might also have claimed and been awarded damages, including the repayment of the overcharge for which they now sue.

"Now, as I have already said, I think that the Commissioners alone have jurisdiction to determine that an increase of rate is unreasonable, and it also seems to me that the Legislature intended that the question of damages should be disposed of by the same tribunal, and did not intend that after the question of the reasonableness or legality of the rate or charge had been determined by the Commissioners the trader whose complaint had been sustained might then bring an action of damages at common law. I think that view is fortified by the fact that it is provided by the 12th section of the Act of 1888 that damages shall not be awarded 'unless complaint has been made to the Commissioners within one year from the discovery by the party aggrieved of the matter complained of.'

"But assuming that a general claim of damages can only be dealt with by the Railway Commissioners, it does not seem to me necessarily to follow that the increased rate having been disallowed by the Commissioners, a trader who has paid it under protest, but who has not lodged a complaint and application, cannot recover the overcharge. I think that there is a distinction between a claim of damages and a claim for repayment of an overcharge which has been made under protest and under the threat that if it was not paid goods would not be delivered. If a trader paid an overcharge without objection it

may be that he could only recover in name of damages, but if payment has been extorted from him under protest I think that he can claim repayment on the ground that the money all along belonged to him and ought never to have been in the hands of the railway company.

"I am therefore of opinion, although the question appears to me to be attended with great difficulty, that assuming the averments of the pursuers to be true, their claim is not excluded by the enactments to which I have referred.

"The pursuers further aver that the defenders agreed to repay the overcharge in the event of the Commissioners finding the increase of rates to be unreasonable.

"The pursuers in the first place say that the defenders agreed to accept payment of the increased rates upon the terms stated in the pursuers' letter of 14th May 1900, which I have already quoted. The whole correspondence (which is only partially quoted in the record) has been produced, and seems to me rather to favour the view that the defenders did in the end agree to the pursuers' terms. The letters show, however, that at one stage there was a personal interview between the representatives of the pursuers and of the defenders, and until it is ascertained what occurred at that interview it is impossible to say with confidence what were the precise terms upon which payment was ultimately made and accepted.

"Further, the pursuers lodged a complaint with the Board of Trade, which is the necessary preliminary to an application to the Railway Commissioners under the Act of 1894, and they aver that at a meeting which they had at the Board of Trade offices with the defenders' representatives the latter induced them to delay taking proceedings on the ground that a decision would soon be given by the Railway Commissioners upon the complaints of the seven coalmasters, and that the railway companies 'were good for the money'—that is, for the increase of rate which had been paid under protest.

"I think that those averments might have been made more pointed, but I am unable to say that they are not relevant.

"I therefore propose to allow a proof. The points which it seems to me the pursuers require to establish are that they were compelled to pay the rates, and did so under protest, the amount which they so paid, and the alleged agreement on the part of the defenders to repay the overcharge in the event of the increase of the rates being held to be unreasonable."

The defenders reclaimed.

In two other actions—*Moore & Company* v. *Glasgow and South Western Railway Company* and *Moore & Company* v. *Caledonian Railway Company*—the circumstances were practically identical with those of the case here reported. The cases were heard together and the interlocutors were similar.

Argued for the defenders and reclaimers—While it was admitted that the general principles of the decision of the Railway Commissioners in the case of the seven coalmasters were applicable to the case of the pursuers, *non constat* that there might not be differences in the facts and circumstances of the pursuers which would prevent the Commissioners' decision being applicable to them. But, apart from that, the fact that the increase in the rates had been held to be "unreasonable" did not prove that it was illegal—*Evershed* v. *London and North Western Railway Co.*, 1877, 2 Q.B.D. 254, 3 Q.B.D. 135, *aff.* 3 App. Cases 1029. The increased rates were within the maximum, and that being so were *prima facie* legal. They were the company's terms for carriage, and had been accepted—*Great Western Railway Co.* v. *M'Carthy*, 1887, 12 App. Cas. 218. The questions as to the legality of a rate and as to the reasonableness of a rate were really distinct questions. It was the province of the courts of law to determine the one and of the Railway Commissioners to determine the other. It was essential to the pursuers' case that the increase in rates should be shown not merely to have been unreasonable but also to have been illegal, for if it was legal it could not be *indebitum* so as to base a *condictio indebiti*. It was within the exclusive jurisdiction of the Railway Commissioners to determine whether money legally paid under a system of increased rates was recoverable. The Railway and Canal Traffic Act 1888, sec. 12, and the Railway and Canal Traffic Act 1894, sec. 1 (5), made this clear. The remedy of the pursuers was to have brought a complaint before the Commissioners, craving damages in respect of the overcharge—*North British Railway Co.* v. *North British Storage and Transit Co.*, March 11, 1897, 24 R. 687, 34 S.L.R. 563; *Ricket, Smith, & Co., Limited* v. *Midland Railway Co.*, 9 Railway and Canal Traffic Cases 107; and *Smith & Forrest*, 11 Railway and Canal Traffic Cases 156, were also referred to.

Argued for the pursuers and respondents—The decision of the Railway Commissioners in each of the cases brought by the seven coalmasters must be taken as a decision on the general question as to the reasonableness of the increased rates. The judgment of the Commissioners proceeded on perfectly general grounds, and it must be assumed that if the pursuers had lodged an application with the Commissioners the Commissioners would similarly have pronounced the increase of the rates to be unreasonable. A rate that was unreasonable was illegal, even though it was within the statutory maximum—*Great Western Railway Company* v. *Sutton*, 1869, L.R. 4, E. & I. App. 226; *Canada Southern Railway Company* v. *International Bridge Company*, 1883, L.R., 8 App. Cas. 723; *Davis & Sons, Limited*, v. *Taff Vale Railway Company* (1895), A.C. 542. From the beginning of the legislation on railways it had been a condition of the right of a railway to charge, that the rate was reasonable. After the decision by the Railway Commissioners it would clearly have been illegal for the railway company

to demand the higher rates from the pursuers, and they had not done so. The jurisdiction in questions as to the legality or reasonableness of a rate had been transferred from the courts of law to the Railway Commissioners, and the courts of law must accept on that point the decision of the tribunal competent to deal with it. That being so, the question was whether the pursuers, having paid this illegally increased rate under protest, were entitled to recover the amount paid in excess of the legal rate. It was settled that the remedies of a trader for wrongs suffered owing to the breach of the Traffic Acts by a railway company included an action for the recovery of overcharges—*Great Western Railway Company, supra; London and Yorkshire Railway Company* v. *Gidlow*, 1875, L.R., 7 E. & I. App. 517; *Murray* v. *Glasgow and South Western Railway Company*, 1887, 11 R. 205, 21 S.L.R. 147: *Caledonian Railway Company* v. *Cross*, 1889, 16 R. 584, 26 S.L.R. 447. The action by the pursuers was simply a *condictio indebiti* to recover money which had been paid on an illegal demand, and which was not due. On this matter the jurisdiction of the courts of law was not ousted, and the jurisdiction of the Railway Commissioners was not exclusive—*Barry Railway Company* v. *Taff Vale Railway Company*, 1895, 1 Ch. 128. In not lodging a complaint before the Commissioners the pursuers had relied on the representation of the defenders, and in such a case a verbal representation was sufficient—*Bell* v. *Bell*, July 4, 1861, 3 D. 1201.

At advising—

LORD PRESIDENT—The question in this case is whether the pursuers are entitled by action in this Court to recover from the defenders the amount by which certain rates charged against and paid by the pursuers for the carriage of minerals on the defenders' line of railway exceeded what has been found to be the amount of the rates which the defenders were entitled to charge, or alternatively to obtain payment in name of damages of the amount by which the rates charged against and paid by the pursuers exceeded the rates which the defenders were entitled to charge for the carriage.

The Caledonian, North British, and Glasgow and South-Western Railway Companies in December 1899 issued a notice that they intended to increase the rates for the carriage of coal, coke, and dross between all places on their railways respectively, and between all places on the railways of each other, stating at the same time that the increase would take effect as from 1st January 1900.

The pursuers in that month wrote to the defenders objecting to the increase of the rates as being unreasonable, and requiring the defenders to withdraw their notice. The defenders, however, did not withdraw it, and they rendered their monthly accounts for January, February, and March 1900 in respect of the carriage of minerals to the pursuers' works upon the basis of the increased rates of which they had given notice, and the pursuers refused to pay the accounts in so far as they consisted of increased rates, but offered to pay upon the basis of the rates which had been in force prior to the notice. The defenders declined to accept such payment, and gave notice that in the event of the pursuers refusing to pay the account as charged payment at the increased rates would be demanded upon each waggon as it entered the works of the pursuers. The pursuers then paid under protest, and, as they allege, upon the understanding that their right to claim a rebate in respect of the increase should not be prejudiced, and also that if it should ultimately be found that the defenders were not entitled to make the increased charges the excess would be repaid by them to the pursuers.

Seven coalmasters whose works had connections either with the railways of the defenders or with the railways of the North British or the Glasgow and South-Western Railway Companies, having obtained certificates from the Board of Trade, presented formal complaints and applications to the Railway and Canal Traffic Commissioners, in which they craved that these Commissioners should declare that the increased rates were unreasonable, and should require the three railway companies to cease from charging them.

The pursuers obtained a certificate from the Board of Trade, but they did not follow it up by lodging a complaint against the defenders with the Railway Commissioners because (they state) that they considered it to be unnecessary to incur the expense of doing so, as the question relative to the reasonableness of the increased rates would be decided in the proceedings which had already been instituted by the other seven coalmasters above mentioned.

The Railway Commissioners after hearing evidence issued on 20th October 1901 orders in each of the seven applications by these coalmasters, finding that it had not been proved by the defenders and the North British and Glasgow and South-Western Railway Companies that the increase in the rates which had been made by them was reasonable, and ordering these companies to discontinue charging the increased rates. The three railway companies consequently ceased to charge the increased rates as from 1st November 1901, and the pursuers seek by this action to recover from the defenders the difference between the old rates and the increased rates charged by the defenders to the pursuers during the period throughout which those increased rates were charged to and paid by them.

For the purposes of the present question I shall assume that the determinations of the Railway Commissioners above mentioned decided that the increases upon the rates previously charged were unreasonable, and that they would have given a similar decision if the question had been raised before them by an application at the instance of the pursuers against the defenders, although in point of fact no decision

was pronounced in any proceeding to which the present pursuers were parties. The Lord Ordinary states the first question to be whether it can be regarded as settled in a question with the pursuers that the increase of the rates was "unreasonable, and therefore illegal." It does not appear to me, however, that this is the correct mode of stating the question. It may be that if it has been decided in a question between a railway company and a trader that a particular rate is unreasonable, it will be illegal for the company to exact that rate from the trader, but the terms "unreasonable" and "illegal" do not seem to me to be synonymous, the former meaning rather unfair from an administrative or practical point of view than illegal because forbidden by some statute, law, or decision. A court of law could not have declared that the rates were unreasonable, but could only decide whether they were or were not legal. I shall, however, as already stated, assume for the purposes of the present question that the Railway Commissioners would have pronounced a similar decision in regard to the rates charged by the defenders against the pursuers if the pursuers had presented to them and pressed to judgment an application seeking a determination of the question whether the rates were or were not reasonable. But even making this assumption in their favour, the question remains whether the amounts by which the rates were increased can be recovered by an action in this Court, and I am of opinion that they cannot.

The pursuers contend that the case is one of *condictio indebiti*, but I am unable to concur in this view. It was in the exercise of administrative rather than of judicial powers that the Railway Commissioners decided that the increased rates should not be charged. Such a decision could not, in the absence of express statutory authority have been pronounced by a court of law; and it appears to me that if the pursuers have any remedy for recovery of the difference between the rates in question and those formerly charged, that remedy must be obtained from the Railway Commissioners and not from a court of law. The pursuers argue that the case is one of *condictio indebiti*, the *indebitum* being the difference between the original and the increased rates, but *prima facie* railway companies have the power to charge any rates within the limits defined by statute, subject always to the control of the Railway Commissioners if they charge unreasonably high rates. Although the Railway Commissioners may have decided that a particular charge is unreasonable because excessive, it does not follow that there was any antecedent illegality in charging it.

Prior to the passing of the Railway and Canal Traffic Act 1888 the Railway Commissioners had not jurisdiction to deal with a question relating to the reasonableness of a rate, but by section 10 of that Act they were empowered to hear and determine "any question or dispute involving the legality of any toll-rate, or charge, or portion of a toll-rate or charge." It appears to me, however, that the legality of a toll-rate or charge is not necessarily or *prima facie* probably the same thing as its reasonableness or unreasonableness, the term "legality" having *prima facie* reference to some limit or standard defined or specified by law or authoritative regulation. The question of "reasonableness" is a different one, depending upon different considerations.

The Lord Ordinary says that he considers that section 10 of the Act of 1888 includes a rate which is illegal because although it is within the maximum statutory charging power of the Railway Company it is unreasonable, but as I have already stated it appears to me that "illegal" and "unreasonable" are by no means synonymous or interchangeable terms, and that a rate may be unreasonable inasmuch as it may be considered to be higher than the value of the services rendered, without being "illegal," which appears to me to mean not sanctioned by law, or contrary to some authoritative provision or regulation on the subject.

It is true that the Railway and Canal Traffic Act 1894 provides, with reference to rates increased after the last day of December 1892, that if complaint is made that such increase is unreasonable it shall lie on the company to prove that the increase of the rate or charge is reasonable, and that for that purpose it shall not be sufficient to show that the rate or charge is within any limit fixed by an Act of Parliament or by any provisional order confirmed by Parliament. But this enactment seems to me to recognise and emphasise the difference between "illegality" and "unreasonableness"—the one involving something defined by law, and the other depending upon the application of the standard of what is fair and equitable in the circumstances of the particular case, including the cost and value of the cariage services rendered. The Lord Ordinary states that the question in the case seems to him to be whether a trader who has paid the increased rate under protest is entitled to recover by action the amount which he has paid in excess of the legal rate. If the question was one of the legality and not of the reasonableness, I should have thought that there was much force in the view that any rate which is illegal could be recovered by action at law, because it would be in the proper sense *indebitum*, but it does not seem to me to follow that a rate which has been decided by a body which like the Railway Commissioners is largely administrative, to be "unreasonable" can be recovered by an action at law in the absence of some statutory provision that every rate which has been declared by the Railway Commissioners to be unreasonable may be so recovered.

In this connection it may be proper to revert to the provisions of section 12 of the Act of 1888, and of section 1 (5) of the Act of 1894.

Section 12 provides that "Where the Commissioners have jurisdiction to hear and determine any matter, they may in addition to or in substitution for any other relief award

to any complaining party who is aggrieved such damages as they find him to have sustained; and such award of damages shall be in complete satisfaction of any claims for damages, including repayment of overcharges which but for this Act such party would have had by reason of the matter of complaint." The term "overcharges" would seem, *prima facie*, to apply to charges in excess of the statutory charging power of the company, whether as defined by statute or administratively by the Railway Commissioners, or of the rates for which it held itself out as ready to carry, and it may well be that a payment excessive in this sense could be recovered in a court of law, which could readily compare the authorised or published rate with the rate charged, but would not require to enter, or be competent to enter, upon an administrative inquiry as to the reasonableness of the rate.

The provision of the Act of 1888, just referred to, is made applicable by section 1 (5) of the Act of 1894 to such complaints as are therein mentioned.

The Lord Ordinary expresses the opinion (I think rightly), that the Railway Commissioners alone have jurisdiction to determine that an increase of rate is unreasonable, and also that the Legislature intended that the question of damages should be disposed of by the same tribunal, but that after the "legality" of the rate had been determined by the Commissioners, the trader whose complaint had been sustained might then bring an action at common law. I am not sure that the term "legality" is correct or appropriate as here used, but, subject to this doubt, it appears to me that what the Lord Ordinary here says is sound. His Lordship, however, thinks that, assuming that a general claim of damages can only be dealt with by the Railway Commissioners, it does not necessarily follow that the increased rate having been disallowed by the Commissioners the trader who has paid it under protest cannot recover the overcharge. He expresses the view that there is a distinction between a claim of damages and a claim for repayment of an overcharge which has been paid under protest and under the threat that if it is not paid the goods will not be delivered. He continues, "If a trader paid an overcharge without objection it may be that he could only recover damages, but if payment has been extorted from him under protest I think that he can claim repayment on the ground that the money all along belonged to him and ought not to have been in the hands of the railway company." This appears to amount to treating the question as one of *condictio indebiti*, and if this was the true category to which it should be referred the conclusion at which the Lord Ordinary has arrived might be correct; but if no judgment or decision has been pronounced declaring the rate to be illegal, and the railway company exacted it as a condition of agreeing to accept the goods for carriage, it does not seem to me that the case is one of *condictio indebiti* which would give a right of action in this Court, such as the pursuers are now maintaining.

The pursuers further state that the defenders agreed to repay the alleged overcharge in the event of the Railway Commissioners finding the increase of rates to be unreasonable; but their allegations on this point are very vague, and I doubt whether so special an agreement could be proved otherwise than by writ or oath. If such an agreement was made it would in the ordinary course of business have been reduced to writing.

The pursuers further aver that at a meeting which they had at the Board of Trade Offices with the representatives of the defenders these representatives induced them to delay taking proceedings on the ground that a decision would shortly be given by the Railway Commissioners upon the complaints of the seven coalmasters, and that the railway companies were good for the money, *i.e.*, for the increase of rate which had been paid under protest. If it is intended to represent that this constituted an agreement by the defenders to repay any sums which might be exacted in excess of what might be ascertained to be their charging powers, or of what might be held by the Railway Commissioners to be reasonable, it seems to me that such an agreement should, and naturally would, have been reduced to writing, and that it would be unsafe to allow it to be established by evidence of a general conversation.

The Lord Ordinary states that the points which it appears to him that the pursuers require to establish are that they were compelled to pay the rates, and did so under protest and subject to an agreement on the part of the defenders to repay the overcharges in the event of the increased rates being held to be unreasonable. It is not alleged that the defenders used any illegal means to compel the pursuers to pay the rates; and it is plain that what they did was merely to say they would decline to carry the goods in the way in which and to the places to which they had been accustomed to carry them unless the rates which they demanded were paid. If this is all that is meant, the Court is now in a position to judge whether such an averment is relevant to entitle the pursuer to a proof of it, and I think that it is not.

It is not necessary to express or even to form an opinion as to whether the pursuers could recover what they maintain to have been excessive charges by any proceeding before the Railway Commissioners.

For these reasons I am of opinion that there are no disputed averments relevant or sufficient in law to entitle the pursuers to a proof, that the interlocutor of the Lord Ordinary should be recalled, and that the defenders should be assoilzied, or that the action should be dismissed.

LORD ADAM—I have had an opportunity of reading your Lordship's opinion, and I entirely concur.

LORD M'LAREN—I am also of the same opinion. In considering the relevancy of the averments of these various pursuers I

think we must begin by inquiring what were the rights of the trader in relation to the Railway Company under the statutes passed prior to 1894. The right of the trader was to have his goods carried subject to two conditions—first, that the carriage charged should not exceed the maximum authorised by the statute; and secondly, that it should not be unreasonable. In case of any dispute the trader had to establish his case under these implied propositions. Now under the law existing prior to 1894 a court might without difficulty have held that a rate or charge was unreasonable if the company were charging for the same journey a higher rate to one trader than it charged to another. It might with more difficulty have held a rate to be unreasonable if the charges for one journey were so much lower than the charges for a different journey (it might be upon a different part of the line altogether) as to give an unfair preference to the traders in one town over those in another. But certainly there would have been very great difficulty on the part of any court before whom such a question might come in holding that a general increase of rate, a percentage added to all the rates on the system, but still within the maximum authorised by the statute, was an unreasonable charge. That difficulty must have been acknowledged, because it was the foundation of the legislation of 1894 by which greater powers in this matter were given to the Railway Commissioners. I mention the case of a general increase of rates because it is the very case that we have to deal with, and I know of no instance in which a court of law under the law established prior to 1894 held a general increase of rates—the increased rates being still within the statutory maximum—to be illegal because it was unreasonable.

The whole complexion of the question was altered by the Act of 1894, especially in two relations—first, that the jurisdiction was practically transferred from the courts of law to the Railway Commissioners, who, as your Lordship has observed, act as an administrative rather than as a judicial body. The Commission, no doubt, may be regarded as a quasi-judicial body, because they must decide according to the statutes, and there is a right of appeal upon any question of error in law. But they are a body constituted with a view to the decision of commercial matters, and their decision upon all questions of fact or of administration within the statute is final. Such a body is evidently much more capable of dealing with a question of the reasonableness of a rate than a court of law whose traditions and ways of action are altogether alien to such inquiries. But then not only is a tribunal instituted, but a presumption is created that any increase of rates after the last day of 1892 is unreasonable—that is to say, the presumption is that the rate then in existence was a reasonable rate, and it is put upon the company to show that it was reasonable to increase that rate. That condition is a condition peculiar to the jurisdiction given to the Railway Commissioners, and it is one which would not affect our judgment if an action were brought in this Court to determine that a particular rate was unreasonable. Now, the Commissioners having taken evidence on a certain number of applications by different traders, pronounced this general increase of rates to be unreasonable, and cut down the tariff to that of 1892. But in the exercise of the powers given or jurisdiction conferred by section 12 of the Act of 1888 the Railway Commissioners made an order with a view to the assessment of damages. It was not necessary to proceed further under this order as the matter was compromised and payment made by the Railway Companies.

It deserves to be noticed that that power of giving damages is not a power given with special relation to the question of reasonableness of rates. It is a power contained in a different enactment altogether—a general power applicable to all proceedings before the Railway Commissioners—and therefore if we were to exercise that power in this case I suppose we should have to exercise it in every case in which an application might be made to the Railway Commissioners in all questions relating to traffic. That seems rather a large proposition to be established, not by the words of any statute, but by a process of reasoning or inference from a variety of considerations such as have been adduced to us in argument.

The present claim is a claim by other traders who were not before the Railway Commission, but who are in *pari casu* with the gentlemen who were before the Commission, and they ask us as a court of law to hold them entited to damages. Now, I observe that these gentlemen are not without a remedy, because if the railway companies, while submitting to the award or arbitrament of the Commission in regard to the seven persons who applied to them, were so foolish as to go on to charge the higher rates against the rest of the public, of course everyone who was aggrieved would just present a supplementary petition to the Commissioners in his own name and would at once obtain a reduction of his rates. I am not sure that that question is before us, but perhaps he might even come to a court of law and say, "Now this is an unreasonable rate, and I am not relying on the presumption created by the Act of 1894, but I say this is an unreasonable rate, because it is a higher rate than is being charged to other traders," and it seems to me there would be a perfectly clear case for resisting such a charge in a court of law. But it is quite a different question whether we could give damages on such an application. I see no ground for such a claim of damages. The only ground is a statutory claim, and that claim can only be adjudicated upon in a statutory way, namely, by the Railway Commission. The reason why that jurisdiction cannot help the pursuers is that there is a statutory limitation of one year, and that period of time has expired. Well, then, we are

asked first to explicate a jurisdiction which has been given to a different Court, differently constituted; and secondly, to ignore the limitation of time, which is by the terms of the statuie made a condition of the claim of damages. I think it is quite impossible that we could entertain such an application. While, no doubt, there may be a certain hardship to these pursuers in not being able to obtain repayment of the rates which they have already paid, that hardship is entirely the result of their neglect within the proper time to bring an application before the Railway Commission, or to bargain with the company and see that they were paid their damages without going to the Railway Commission. I therefore agree that the interlocutor of the Lord Ordinary should be recalled.

LORD KINNEAR—I am of the same opinion. My view is that the whole matter which forms the subject of these actions belongs to the exclusive jurisdiction of the Railway Commissioners. The action —to take that at the instance of the Lanarkshire Steel Company as an example—is *condictio indebiti*—that is to say, it is an action demanding that money paid to the railway companies shall be refunded because it was paid on an illegal demand. The word "illegal," which is at the foundation of this demand, is very indefinite, but when one turns to the condescendence for the purpose of ascertaining what the alleged illegality really was, it is brought out clearly enough. It is not alleged that the rates complained of were unlawful in the sense of being prohibited by any statute or by any rule of positive law. On the contrary, it is admitted that the rates charged were within the statutory maximum allowed by Parliament. But then it is said they were illegal because unreasonable, in this sense only, that they were not conform with the first section of the Railway and Canal Traffic Act of 1894. That is the only illegality which I can find alleged on record or which was maintained in argument, except a general allegation of unreasonableness, which by itself is in my opinion altogether irrelevant to support any action. For reasons that have been very clearly explained more than once in the House of Lords, we cannot hold a charge to be unreasonable which is permitted by Parliament, unless it be shown that there are special circumstances in the particular case to exclude the presumption arising from the sanction of Parliament. But the only special ground alleged is the provision of the Act of 1894, by which it is enacted that when a railway company has since the last day of December 1892 raised any rate or charge, then if any complaint is made that the rate or charge is unreasonable, it shall lie on the railway company to prove that the increase is reasonable; and the jurisdiction to hear and determine any such complaint with respect to any such increase of rate or charge is given to the Railway and Canal Commissioners, who are at the same time empowered to give such relief in the way of damages and otherwise as they may think the justice of the case requires. Now, I hold that upon principles which are perfectly well settled—at all events in this Court—and require no citation of authority, that when a new jurisdiction is created and at the same time conferred upon a special tribunal, the jurisdiction of the ordinary courts is excluded. But the enactments in question give a new right of complaint for the purpose of enforcing an entirely novel restriction upon railway companies in the administration of their affairs, and the duty of hearing and determining such complaints is committed, not to the ordinary courts of the country but to a special tribunal created by a very recent statute for the very purpose of controlling and regulating railway companies in the administration of their traffic so as to secure their reasonable treatment of all traders, and therefore I think the statute confers upon that special tribunal an absolutely primary jurisdiction which no court of the country has any power or authority to interfere with except in so far as it may be found, if so be, that the right of appeal to this Court from decisions of the Railway Commissioners is applicable to their decisions under this section. We have no occasion, however, to consider whether there is any such right of appeal; and as regards the original jurisdiction I am clear that it belongs to the Commissioners and not to us. On that ground alone I think these actions are incompetent in this Court, because we have no jurisdiction to deal with the subject-matter at all.

But the Lord Ordinary seems to make a distinction between the various questions that may be considered by the Railway Commissioners, and he says that they have determined the question of reasonableness, and that what remains for this Court to decide is the right of the pursuers to recover by *condictio indebiti* the excess of rates which the railway companies have obtained, and which they say was an unreasonable excess. The argument in support of that finding was that the Railway Commissioners have decided that the charges complained of were unseasonable in so far as they went beyond the amount charged on 31st December 1894. That is not so in point of fact. The Railway Commissioners have decided nothing as between the Railway Company and the present pursuers. But it is said they have decided these things at the instance of other traders upon general grounds which are equally applicable to the cases of the present pursuers. I daresay if we were to reason on the grounds of the Railway Commissioners' decision with reference to the materials before us for ourselves, it may be very probable that we should find that the grounds explained by that tribunal might be equally applicable to the present case as to those decided. That may or may not be, but that is a question which I decline to consider, because I think it is altogether outside

the jurisdiction of this Court. To entertain an action of this kind upon the ground that no distinction could be taken between the case now made and some former cases decided by the Railway Commissioners would be just as much an invasion of their exclusive jurisdiction as if we were to entertain the question as a new one and decide it on grounds which we ourselves were to find out and determine in the ordinary course of our procedure. It is not the function of the Railway Commissioners to furnish a rule for the determination of questions of reasonableness that courts of law are to follow. That is not their duty. The argument to which the Lord Ordinary gives effect, and which was pressed on us with great earnestness, really assumes that this Court of Railway Commissioners is provided as machinery for the purpose of aiding the ordinary courts of law in the exercise of their ordinary jurisdiction, and for supplementing the resources of our ordinary procedure, but that appears to me to be an entire misapprehension of the functions of this body. It is a tribunal constituted for the purpose of deciding and determining, as an independent Court, all questions which may properly be brought before it and which cannot be brought before the ordinary courts of law, and therefore I cannot say for myself that I attach any material importance at all to the argument which was urged before us for the purpose of showing that there was no distinction between this case and the case of the seven traders that have been already before the Commissioners.

But if the Commissioners had in fact decided that the rates complained of in this action were unreasonable, I do not think it would advance the pursuers' case in the slightest degree. If that were decided as matter of judgment between the pursuers and the railway companies by the Commissioners it would still give no foundatiou for an action of this kind. The pursuers maintain that the rate charged being in the opinion of the Railway Commissioners unreasonable, it must be held to be illegal, and they are entitled to have it repaid. But this is an entirely new restriction, as I have said, laid on the railway companies. The statute says — You are not to raise your rates beyond the amount charged in 1902 except on condition that if complaints are made before the Commissioners you must show that the increase was reasonable. But the Act does not go on to say that when that is shown the traders who have paid increased rates are to have an absolute right to demand repayment. That is not the remedy the statute gives. The statute says — Where the Commissioners entertain a complaint and find it to be well founded, they may award the complainer who is aggrieved such damages as they find him to have sustained, and such award of damages shall be in complete satisfaction of any claim for damages, including repayment of overcharges. And therefore there is by the statute no absolute rule for repayment of overcharges at all. The case that must be put before the Railway Commissioners, and which the Commissioners have to determine, is what amount of damages has the aggrieved trader suffered, and their award may be more or less than the amount actually paid, but whether the amount actually paid is to be repaid or not in the shape of damages must depend, according to the statute, upon the Commissioners being satisfied that such damages ought to be awarded. And therefore it appears to me that an action in this Court founded on the assumption that there is an absolute right to enforce repayment of the overcharges is entirely excluded by the Act of Parliament. That is not the right of the complaining trader. His right is to go to the Railway Commissioners and have the whole matter he is complaining of examined by them; and it is for them, and them alone, to consider the amount of pecuniary relief, if any, which the aggrieved trader is entitled to receive.

Upon the second question which the Lord Ordinary has determined I agree with your Lordships. I think the averment of any special agreement which can be enforced in this Court is altogether irrelevant. I think it irrelevant altogether apart from the opinion your Lordship has expressed as to the manner in which alone it could be enforced—an opinion in which I entirely agree. But I think it follows, from the view I have taken, that no alleged agreement could entitle the pursuer to recover in an action of this kind in this Court, short of a specific contract that the Railway Company would repay a specific charge in the event of its being found at the instance of other traders that the charges made against them involved an unreasonable increase of rates. There is nothing in the least approaching to any specific averment which would enable the pursuers to recover on the ground of contract.

I therefore agree with your Lordship that the Lord Ordinary's interlocutor cannot be sustained, but I rather think that the consequence ought not to be the dismissal of the action, but rather the absolvitor of the railway companies, because we do not dispose of this action merely on the ground of irrelevancy, which might leave it open to have another action with the same conclusions but with more specific averments against the companies, but on the ground of no jurisdiction, and that gives right to the defenders to be assoilzied from the whole conclusions.

The Court pronounced a decree of absolvitor.

Counsel for the Pursuers and Respondents, The Lanarkshire Steel Company—Dundas, K.C. — Strain. Agents—Drummond & Reid, W.S.

Counsel for A. G. Moore & Co.—Ure, K.C. —Horne. Agents—Drummond & Reid, W.S.

Counsel for the Defenders and Reclaimers, the Caledonian Railway Company — Clyde, K.C. — Cooper. Agents — Hope, Todd, & Kirk, W.S.

Counsel for the Glasgow and South-Western Railway Company—Guthrie, K.C. —Hunter. Agent—James Watson, S.S.C.

Thursday, November 5.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

HART'S TRUSTEES *v.* ARROL.

Landlord and Tenant—Lease—Rei interitus—Loss of Licence—Right of Tenant to Renounce Lease—Public-House.

A lease of licensed premises was entered into for a period of ten years, with a provision that the tenant should not be entitled to use the premises for any other purpose than that of carrying on the business of wine and spirit merchant. When the lease had still several years to run the Licensing Court refused to renew the licence. The landlord having intimated that he did not insist on the condition above mentioned, *held* (*aff.* judgment pf Lord Kyllachy, Ordinary) that the loss of the licence did not constitute *rei interitus* so as to entitle the tenant to resile from the lease.

This was an action at the instance of the trustees of the late William Hart, proprietor of a shop at 69 Shields Road and 1 Houston Street, Glasgow, which until 15th May 1902 was licensed as a public-house, against Archibald Tower Arrol, brewer, and John Urquhart, publican, the tenants of the said shop.

The action raised questions as to the validity of the lease which it is not necessary to report, and also as to the obligation of the defenders to continue their tenancy after the licence of the premises was withdrawn. The material facts relative to the latter question, as they were disclosed after a proof, were as follows:—The lease was for a period of ten and a-half years from the term of Martinmas 1895 at an annual rent of £49. The subjects let were described as "All and Whole that shop situated (*address*), all as formerly occupied by J M Picken, wine and spirit merchant there, and now occupied by the second parties" (Arrol and Urquhart). The subjects were let "allenarly for the purpose of the second parties carrying on therein the business of wine and spirit merchants." The lease contained the following clause:—"But it is hereby specially provided and declared that the second parties (the tenants) and their foresaids shall not be at liberty, without the previous written consent of the first parties or their successors, to assign this lease or any part thereof, or to sub-let the premises hereby let or any part thereof, or to leave the premises in whole or in part vacant or unused, or to use the same or any part thereof for any other purpose than that of the said business of wine and spirit merchants." The premises let had been licensed as a public-house for a considerable period, but at the Licensing Court held in April 1902 an application by Urquhart (who was then the licence holder) for a renewal of the licence was refused.

The present action, which was raised before the licence of the premises was withdrawn, concluded, *inter alia*, that the defenders were bound to stock and plenish the shop, and to carry on there the business of wine and spirit merchants. By an amendment of the summons, dated February 20th 1903, the following conclusion was added:—"And that said lease is binding upon the defenders, and that the defenders are liable conjunctly and severally to make payment of the said rent of £49 (so far as not already paid) half-yearly, by equal portions at the terms of Whitsunday and Martinmas, for said shop during the period of said ten and a-half years from and after the term of Martinmas 1898."

By minute for the pursuers, dated 20th February 1903, it was stated "that the pursuers did not insist on the defenders using the shop forming 69 Shields Road and No. 1 Houston Street, or any part thereof, for no other purpose than that of the business of wine and spirit merchants, and that the pursuers assented to the defenders using said shop for any lawful purpose, and that the pursuers accordingly withdrew any part of the conclusions of the summons to the effect that the defenders were bound to carry on in said shop the business of wine and spirit merchants therein till the expiry of said lease."

Defences to the action were lodged by Arrol, but not by Urquhart, against whom decree in absence was taken. In his defences Arrol offered to pay the rent of the premises up to Whitsunday 1902.

He pleaded, *inter alia*—"(6) It having been a condition of this defender's contract of yearly tenancy of the premises that the business to be carried on therein should be that of wine and spirit merchants, and performance of the said condition having been rendered impossible by the lapse of the licence, the said contract was terminated without notice as at 15th May 1902. (8) *Esto* that the alleged lease be held to be valid, this defender is entitled to absolvitor, in respect that he was bound under such lease to carry on the business of wine and spirit merchants in the premises let, and that performance of that obligation has without fault upon his part been rendered impossible by the refusal of the Licensing Magistrates to renew or transfer the licence."

Proof was allowed and led. On 12th March 1903 the Lord Ordinary (KYLLACHY) pronounced an interlocutor by which he decerned and ordained the defender Arrol "to stock and plenish, within six months from the date hereof, the premises in question to an extent at least sufficient to afford security to the pursuers for the rent thereof, and thereafter to maintain