compensation or remedy under this Act . . . (sub-sec. 3) in any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give or cause to be given information thereof."

At advising—

LORD YOUNG—Upon the matter of fact in this case I think the pursuer's averments as to the condition of the horse which was the cause of the accident are true. Several trace-boys were examined, with all of whom the horse had fallen within the year, and then there is the roadman Irving whose special notice this horse attracted. He gives it a very bad character. He says he saw it fall repeatedly—about a dozen times at all events. Indeed, his impression as to the condition of the horse was such that he has called out to the boys whether they had insured their lives. I think, therefore, that the unsafe condition of the horse is proved. But the Tramways Company say that no complaint was ever made to them; that the boys never made any complaint at the office of the company. I think that is quite true. I think that there is no evidence of the trace-boys ever having made any such complaints. But at the same time I think it is the fact that those in charge of the horse at the stables knew of its condition. Indeed they could hardly fail to know. The pursuer's father says that one of the stablemen, Robertson, described the horse to him as "a footless useless brute," and Robertson himself says that the expression he used was that it was "a lazy useless brute." The best evidence for the company is that of Duncan M'Arthur, a veterinary surgeon, who is called strangely enough by the pursuer. He examined the horse in July—the accident having taken place in the previous April—and he gives it a good character. But notwithstanding his testimony I am of opinion that the horse was in such a condition that it ought not to have been used on the tramway; and further, that those in charge of it on the part of the company must be held to have known of its condition.

The question of law then arises, Are the Tramways Company liable in damages to the pursuer for the accident, which was the natural and to be anticipated result of the horse's condition. I think they are. The horses used by the company are part of its plant, and they are bound to employ persons to see that it is in a safe condition, with reference not merely to the safety of the public who make use of their conveyances, but also of persons in their employment. And I think that in permitting this horse to be continued in use fault is to be imputed to those whose duty it was to look after the horses, and through them to the company.

I therefore should propose, if your Lordships agree with me, that the following interlocutor should be pronounced.—[*His Lordship then read the interlocutor afterwards pronounced*].

LORD CRAIGHILL, LORD RUTHERFURD CLARK, and LORD JUSTICE-CLERK concurred.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the appeal, find in fact that the pursuer James Haston sustained serious personal injury by the horse on which he was riding, in the performance of his duty as the defenders' servant, falling and rolling over upon him; that the horse was the property of the defenders and used by them in their business; that it was in a defective and dangerous condition, and unfit to be used by the defenders as it was at the time of the accident to the pursuer and for a considerable time before, and that it was so used while in a defective and dangerous condition owing to the negligence of the defenders or of some person in their service, and entrusted by them with the duty of seeing that the horses used by them in their business were in proper condition to be used with reasonable safety; and that the personal injury sustained by the pursuer was caused by reason of the said defective and dangerous condition of the said horse: Find further in fact that there was no negligence or fault on the part of the pursuer: Find in law that the defenders are liable in damages to the pursuer, and assess the same at the sum of Fifty pounds sterling: Therefore sustain the appeal, recal the interlocutor appealed against: Ordain," &c.

Counsel for Pursuer—M'Lennan. Agent—J. D. Macaulay, S.S.C.

Counsel for Defenders—Paterson. Agents—Paterson, Cameron, & Co., S.S.C.

Wednesday, June 18, 1879.*

FIRST DIVISION.

[Sheriff of Ayrshire.

GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY *v.* ORR.

Reparation—Carrier—Railway—Use of Trucks.

A trader was in use to have a large amount of traffic conveyed for him over the line of a railway company which conveyed goods to the place at which he carried on business. The company intimated to him that a fixed charge would be made for each waggon detained longer than twelve working hours after notice of arrival, and also regularly inserted in their advice-notes intimating the arrival of goods for him notice that such charge would be made. In an action for demurrage at this fixed rate, or alternatively for damages for detention of waggons longer than twelve working hours after each advice-note—*held* that the defender had failed to prove that in the circumstances of his trade twelve working hours was not a reasonable and sufficient time in which to take delivery, that he had wrongfully failed to take such delivery, and therefore that he was *liable in damages* to the railway company.

This action was raised by the Glasgow and South-Western Railway Company against William Orr, grain merchant and coal agent, Irvine, carrying on an extensive business in Ayrshire, in the course

* This case, which appears to have been omitted at the time of its decision, has recently been brought under the notice of the Reporters as one of importance, and is herefore now reported.

of which large quantities of grain and coal were conveyed for him by the pursuer's line.

The pursuer sued for £223, 6s. as the amount of demurrage for detention of waggons said to have been detained by the defender at Irvine through failure to take timeous delivery and unload, this demurrage being calculated at 3s. per day. Alternatively they claimed that sum as damages for improper detention of waggons.

They had given notice by posting notices at their stations, and sending such notice embodied in their advice-notes of arrival to consignees of goods, that if goods were not removed within twelve working hours (6 a.m. to 6 p.m.) after notice to the consignee of arrival, demurrage would be charged at 3s. each per day. In particular, it was proved that the defender was aware of this notice being given, and that it had been inserted in his advice-notes of arrival of his goods. He had never however acquiesced in it, and had always disputed the right of the pursuers to demand demurrage. The pursuers' account was made up on the footing that demurrage was payable as these notices imported, and accounts for demurrage had been regularly rendered to the defender immediately after the several detentions on which their claim was founded respectively occurred.

The defence was—First, that there was no special contract to pay such demurrage; second, that while admitting that trucks were often kept more than twelve hours after arrival, the defender was not in any way to blame for such delay, but had all along so conducted his business as to cause the pursuers as little delay as possible; third, that any delay was due not to fault of his, but to causes such as the manner in which the pursuers managed the traffic, and to freshets and stormy weather affecting Irvine harbour, which made it impossible to ship coal there without more interruption than in any other port in Ayrshire.

After a proof the Sheriff-Substitute (Orr Paterson), after finding the facts to the effect above explained, found that except in certain specified instances the defender had failed to prove that in any of the cases in which damages for detention were claimed, the period of twelve working hours after advice of arrival was not a sufficient or reasonable allowance of time for him to take delivery; "that the pursuers have through the detention of the waggons caused by the defender's failure to take timeous delivery of the goods consigned to him, suffered loss and damage to the following amounts—three-ton waggons, 1s. 1d. per day, four-ton waggons, 1s. 5¼d. per day, six-ton waggons, 2s. 2d. per day: Finds in law that the pursuers are entitled to recover from the defender the loss and damage so sustained by them through the detention of their waggons by the defender's failure to take timeous delivery" and remitted to the Sheriff-Clerk to calculate the damage at these rates, which were made up on the basis stated in the following passage of his note:—"It was contended for the defender that this claim for demurrage could not be enforced in the absence of special agreement, it being really a charge for the use of the waggons, and that the company as common carriers were not entitled to make any additional charge for the use of their waggons over and above the statutory charges authorised to be taken as tolls.

"This contention is not, it is thought, applicable to the present claim, which is for loss and damage sustained by the railway company through the wrongous detention of their waggons after offer to deliver to the consignee and expiry of a sufficient time to take delivery. The company's duty to carry terminates, and their right as common carriers to exact their charges for carriage arises, upon arrival of the goods at the place of consignation, advice to the consignee of the arrival, and of their readiness to give delivery and expiry of a reasonable time within which the consignee could take delivery; neither by statute nor at common law are they deprived of the right to reparation for the loss they may sustain through the wrongous detention of their waggons by the consignee after they should have been emptied and returned.

"The claim being for the loss and damage sustained by the company through the wrongous detention of their waggons, the Sheriff-Substitute has to determine on the materials before him what damage has been suffered by the company in the present case. No exceptional damage through derangement of traffic or otherwise has been proved, and the Sheriff-Substitute, as the fairest criterion of damage, has estimated what the earnings of the detained waggons would have amounted to had they during the period of detention been employed in the traffic for which they were ordinarily used. The usual journey from the collieries to the harbour for which carriage was paid being from ten to twenty miles, and the average period for earning the carriage being three days, the Sheriff-Substitute has, in order to determine the loss per day, calculated it at a third of the earnings of the waggon for a fourteen miles journey after deducting the cost of locomotive power. At the rates for carriage charged by the company this amounts in the case of a three-ton waggon to 1s. 1d., in the case of a four-ton waggon to 1s. 5¼d., and in the case of a six-ton waggon to 2s. 2d."

The defender appealed to the Sheriff, maintaining in point of law that the company was not entitled to make any charge for the use of waggons other and beyond the tolls authorised for transit, and fixed by their Acts (except under special agreement), and that the company was not entitled to demand sums for undue detention however long or repeated.

The Sheriff (Campbell) adhered.

The defender appealed to the Court of Session.

Section 110 of the Glasgow and South Western Railway Act 1855 (18 and 19 Vict. c. xcvii) provided that "It shall not be lawful for the company to charge in respect of the several articles, matters, and things of . . conveyed by them on said railways, any greater sum, including the charges for the use of the carriages, waggons, or trucks, and for locomotive power, and all other charges incidental to such conveyance, except a reasonable charge for the expense of loading and unloading where such service is performed by the said company, and for the use of any wharf, basin, loading place, and station, except as aforesaid, than the several sums hereinafter mentioned;" and then followed charges which might be made for lime, coal, grain, &c., *per ton per mile.*

At advising—

Lord President—I think this is a very simple case, and that it has been very well handled by the Sheriff-Substitute and the Sheriff. It was stated alternatively as an action for demurrage for the detention of waggons, calculated at a certain rate, that is 3s. a-day, or as an action of damages. As to the form of action, I do not proceed on that, in fact, I do not quite understand it, but as an action for damages for wrongous detention it is perfectly good, and I think that no statute has anything to do with the case. It is simply a question of damages at common law. The question is whether the Railway Company having undertaken to carry coals to the harbour of Irvine, did deliver them according to the contract? and whether the defender wrongously detained the trucks? Now I am not going into the evidence that has been led. I quite agree with the Sheriff-Substitute's findings in fact. The only question upon which I think it necessary to say anything is the assessment of damages, and I have not heard a word against the mode in which the Sheriff-Substitute has dealt with that. It seems to me a most reasonable view that he takes in that passage [quoted *supra*] of his Note to which I called the attention of the defender's counsel, and having fixed certain principles or rules for assessing the matter of damage, he remits to the Sheriff-Clerk to make up a state of the damages on the principles fixed. Now, I see in that gentleman's report that he says—"The defender is charged in the following account with the actual time the waggons were detained by him after being allowed twelve working hours from the time at which he was advised of their arrival; a proportion has been charged of part of a day's detention, and Sundays being excluded from the calculation." Now, that is the time for which the charge is made, beginning at the expiry of twelve working hours after the arrival of the waggons had been notified by the pursuers, and the rates at which these charges are made are fixed by the Sheriff-Substitute in his interlocutor as for a three-ton waggon 1s. 1d. per day, for a four-ton waggon 1s. 5¼d. per day, and for a six-ton waggon 2s. 2d. per day, these rates being fixed on a calculation which he explains in his interlocutor and note, and which seem to me to be founded on a most rational and intelligible view of the subject. I would no more think of interfering with that assessment of damages by the Sheriff-Substitute than I would of interfering with an assessment of damages by a jury. I would not do that in the one case or the other unless I was satisfied that the damages are what are called excessive, nor can I think there is the slightest ground for complaining in that respect.

Therefore, on the matter of the fact that this company sustained loss and damage by the wrongous failure of the defender to take delivery, I think the evidence is conclusive, and I think the damages have been fairly and reasonably assessed.

Lord Deas—In some respects the contention of the appellant has been very reasonable. He does not, as I understand, object to the amount of damages assessed against him provided damages are due at all. That is very reasonable. But what he contends for is, that under no circumstances is there any duty on him to take delivery of his coals when they arrive at the station, and consequently that under no circumstances can he be liable to the railway company in damages for those coals being detained and occupying the railway or the premises belonging to the railway. I cannot characterise that contention as equally reasonable with the other. On the contrary, I think it is most unreasonable and most untenable. And that is the whole case.

As regards the time allowed for taking delivery, that is matter on which he may be very much interested, but I do not see that that is a matter of contention between him and the railway company. I see no reason to suppose that if he could have shown the railway company that the twelve hours allowed for shipping his coals was very hard and inconvenient they were disposed rigidly to tie him down. In short, his contention, justly or unjustly, is that they are not entitled to insist that he will take his delivery within any time at all. However long the time he takes may be, he holds he is not to be liable in damages in consequence. I rather think the Sheriff-Substitute and the Sheriff have disposed of that on the most clear grounds. The Sheriff-Substitute has a note on it, and the Sheriff goes into it at still greater length, and in particular in his note he sums up all the matters of fact and law under five or six heads, which appear to me to be quite indisputable, unless every man who gets the good of a carriage is entitled to decline taking delivery for any length of time he chooses. I can find no law for the contention here. The mass of English authorities which the appellant's counsel wished to cite to us are not in the least to the purpose. The whole question is as I have stated, and I have not the least hesitation in refusing the appeal.

Lord Mure—I am of the same opinion. The case has been dealt with in the argument as a claim made under some clauses of the company's statute. Had the claim been made under these clauses of the statute, or been attempted to be supported by them, there would have been considerable force in the argument, but the claim as I read it is not for rates under the statute. These have been settled between the parties, the rates of carriage of the goods from the collieries to the port of loading. But the claim is for loss and damage sustained by the company owing to unreasonable detention of their waggons at Irvine through the negligence of the defenders; and the only plea-in-law we have for the pursuer in respect of that might be put thus—The defender having failed to take timeous delivery of the coals, and detained the waggons for the period libelled, is liable to the pursuer in payment of the sum concluded for. Thus, apart from the question about demurrage, or if demurrage had been left out, it would have been a simple claim of loss and damage caused by the negligence of the defender. Now, on this point I was anxious to hear what the defender's counsel could say as to whether the railway company can have an action of damages for loss caused in this way, and I could not get him to come to that point at all. It seems to me that what he contended for was that if the defender or any other trader did not choose to take the waggons at once, or the coals which were in them, he would leave them there as long as he liked, and no claim

for damage could arise at all. That, I think, is an untenable proposition. If the railway company have sustained loss through the refusal of a trader to do something which necessarily obliges them to detain their waggons for days at a particular place, at common law I think they have a competent claim.

That being so, the only points he made were, whether in this particular case there was unreasonable delay caused by the defender? whether such delay was caused by the defender? and whether the sum allowed by the Sheriff-Substitute and Sheriff as the amount of damage is unreasonable? On these matters of fact I think the Sheriffs have come to a sound conclusion. It appears there was delay, and unreasonable delay, on the part of Orr in taking delivery of the goods, and I think the view the Sheriff-Substitute has adopted in the way of assessing the damages is correct, and I am not disposed to interfere with it.

Lord Shand—I am of the same opinion. It has been represented in the argument for the appellant that this is truly an attempt to make a charge in excess of those which are allowed by the company's Acts, and particularly of section 110 of the Glasgow and South-Western Railway Company's private Act, which was founded on, and contains a provision that it shall not be lawful for the company to charge beyond the particular rates there mentioned in respect of the "several articles, matters, and things, and of the several descriptions of animals hereinafter mentioned conveyed by them on the said railways, any greater sum, including the charges for the use of the carriages, waggons, and brakes, and for locomotive power, and all other charges incidental to such conveyance, except reasonable charge for the expense of loading and unloading where such service is performed by the company," than certain specified sums.

But it appears to me clearly that the claim that is here made does not fall under the charges that are referred to in this section. That section substantially provides that for the conveyance of the goods the company shall be limited to certain rates, but if they are loading or unloading they may make a reasonable charge in addition. The claim here, however, is not for conveyance, nor is it, I think, for anything ineidental to conveyance within the meaning of the section, and it would be most unreasonable to hold that it was. For the claim is founded on this, that after the conveyance is at an end, the goods are ready and tendered for delivery; and indeed, as it appears to me, after the goods have been delivered in the great majority of instances, if the vehicle in which they were contained has been wrongously and improperly detained by the trader, to the loss and damage of the company, that is surely an action which the company as common carriers are entitled to maintain in respect of the breach of the defender's obligation timeously to take delivery of his goods. I think the company's duty was at an end when the waggons arrived at the station, or at least when they were handed over.

Assuming, then, that a claim of damages is competent, can there be any doubt that the circumstances raise that here? Instead of this being a harbour in which the coals had arrived, suppose that Mr Orr had had premises of his own of considerable extent with sidings run into them, and the railway company, not being bound to unload goods, had run the waggons into his premises, and so delivered them, and he kept the waggons for weeks, it might be so that the company could not get them back, and get the use of them. I am at a loss to see any principle on which it can be maintained that Orr would be entitled to do that without obligation for the damage he was thereby causing the railway company. It is clear that a claim for damages would there lie, and I cannot distinguish the case we are now dealing with from the case I have just put. From the evidence before us I see that the company did not undertake the unloading; in the next place, that Mr Orr had an agent at Troon (he says he was not an agent, but that he acted for him) to whom advice of the arrival of the waggons was given, and who took charge of the receipt and unloading of the coals; and even if that were not so, the harbour authorities take delivery of the coals as representing Mr Orr when they leave the company's premises; so that in point of fact in almost, I think, all the instances with which we have to deal—certainly in the great majority of them—where the waggons and coals were delivered, they were in the trader's hands and under the trader's control, and the trader is the party who detains the waggons. It may be that in some cases the waggons were not actually sent down to the harbour, possibly because the harbour may have been full, or for some other reason; but the great majority of the cases with which we have to deal, and in which damages are claimed for detention of the waggons, are of the nature I have described, in which the company had in point of fact delivered the waggons and could not get them back from the trader. In these circumstances I cannot help thinking there is a good claim for damages. It was suggested the company had other alternatives—the alternative of throwing them out on the pier or selling them under the authority of the Sheriff. I think the company would have acted most unreasonably and perhaps unwarrantably with reference to Mr Orr's interests if they had taken the one course or the other, for they would thereby unnecessarily enhance the claim of damages for which the trader was liable.

On these grounds I am clear that there is a claim. I think the Sheriff-Substitute has clearly and shortly stated the true principle on which the case must be decided, and that the Sheriff in his judgment has clearly stated the grounds of his opinion.

As to the amount of damage, I agree that we cannot interfere with that. Of course this case settles no general question as to what is or what is not a reasonable rate which should be allowed in name of damages either whether it is too high or too low a rate, or whether twelve hours is the proper time to be allowed in some, and twenty-four hours in other cases. The case, so far as settling the rate at which damage may be estimated, settles this simply, that in this case the Sheriff has acted reasonably in fixing the sum he has fixed, and it may be that in future cases the sum which would be given for damages may be higher or lower according to circumstances.

The Court pronounced this interlocutor:—

"Find in fact that the pursuers (respon-

dents), the Glasgow and South-Western Railway Company, hold themselves out to be, and are common carriers of coal and minerals from the collieries set forth in the account annexed to the summons to the harbour of Irvine, and, as such, supplied the waggons, and carried the coals and minerals set forth in the account, from the said collieries to the said harbour of Irvine; that in the rectified account the numbers on the waggons consigned to the defender (appellant), the number of waggons, the place where from, and what loaded with, the dates of arrival and of advice of arrival, and of being emptied, are correctly set forth; that the waggons set forth in this account (with the exception of those entered August 20th, 21st, 23d, to August 25th, 1877) were detained by the defender after notice of their arrival for an unreasonable time before being emptied; that the defender has failed (under the above exception), to prove that in any of the cases in which damages for detention are claimed, the period of twelve working hours after advice of arrival was not a sufficient or reasonable allowance of time for him to take delivery: Find in law that the defender wrongfully failed to take delivery of the coals conveyed in the said waggons, and is liable in damages for the loss sustained by the pursuers in consequence of the said wrongful failure: Find that the amount of the said damage has been fairly assessed by the Sheriff-Substitute at £83, 11s. 9d: Therefore refuse the appeal, and decern: Find the appellant liable in expenses," &c.

Agents for Pursuer—Gibson Craig, Dalziel, & Brodies, W.S.

Agent for Defenders—J. Young Guthrie, S.S.C.

Tuesday, March 16.

FIRST DIVISION.

FERGUSON BEQUEST FUND TRUSTEES *v.* EDUCATIONAL ENDOWMENT COMMISSIONERS AND OTHERS.

Trust — Charitable Foundation — Educational Endowments (Scotland) Act 1882 (45 *and* 46 *Vict. c.* 59)—*The Ferguson Bequest Fund.*

A testator left the residue of his estate to be held as a permanent fund, the annual income of which he directed to be applied "towards the maintenance and promotion of religious ordinances, and education, and missionary operations . . . and that by means of payment for the erection or support of churches and schools, other than and excepting parish churches and parish schools, belonging to" certain churches in Scotland; "declaring that the application and appropriation of the trust-fund shall be entirely at the option and discretion of the quorum of my said trustees as to the proportions thereof to be applied to the said several objects." *Held* (1) that the trustees were not thereby empowered to appropriate the whole fund to two of the three objects to the exclusion of the third, but that their power was a power merely of apportionment. *Held* (2) that the fund was an "educational endowment" within the meaning of the Educational Endowments Act 1882.

Held that under section 10 of the Educational Endowments Act 1882 it is within the discretion of the Commissioners under that Act to fix the number of years upon which to calculate the average proportion of the fund appropriated to educational purposes, and this discretion is not subject to the review of the Court.

Educational Endowments Act 1882, *sec.* 15.

Held that while this section directs that the Commissioners are "to have regard to the spirit of the founder's intentions," they have an absolute discretion as to the way in which they shall follow that direction.

Nature of a scheme for the future administration of certain educational endowments, which was *held* to be within the scope of and conform to the Educational Endowments (Scotland) Act 1882.

The late John Ferguson of Cairnbrock died on the 8th January 1856 leaving a trust-disposition and settlement dated 13th May 1853, with relative codicil or deed of instructions dated 22d September 1855. By the last purpose of the codicil he directed his trustees "to hold, retain, set apart, and invest, as after written, the rest, residue, remainder, and reversion of my whole subjects, property, means, assets, estates, funds, debts, effects, and sums of money, heritable and moveable, real and personal, as a permanent fund, to be called the FERGUSON BEQUEST FUND; and to pay, apply, and appropriate the interest and other annual income, profits, and produce thereof, in and towards the maintenance and promotion of religious ordinances and education and missionary operations; in the first instance, in the county of Ayr, Stewartry of Kirkcudbright, and counties of Wigton, Lanark, Renfrew, and Dumbarton; and thereafter, if my said trustees in Great Britain shall think fit, in any other counties in Scotland; and that by means of payments for the erection or support of churches and schools (other than and excepting parish churches and parish schools) belonging to or in connection with *quoad sacra* churches belonging to the Established Church of Scotland, and belonging to or in connection with the Free Church, the United Presbyterian Church, the Reformed Presbyterian Church, and the Congregational or Independent Church, all in Scotland, or any or either of them; or in supplement of funds collected for these purposes; or in supplement of the stipends or salaries of the ministers of the said *quoad sacra* and other four churches; and by payments of salaries, or in supplement of the salaries of religious missionaries and of teachers of schools of or in connection with the said *quoad sacra* churches, and the said Free Church, United Presbyterian Church, Reformed Presbyterian Church, and Congregational or Independent Church; and by payments for forming and maintaining, or in aid of funds raised for forming and maintaining libraries for the use of the general public; such missionaries, schools, and libraries