make provision in the plans of the proposed building, or proposed alteration of a building for something which ought to be there. I am unable to see how the refusal of the warrant in the present case can be supported consistently with the statute.

The report of the Burgh Engineer indorsed on the building plan is in these terms—"This place is sufficiently built on, having regard to the light and ventilation of existing buildings." The first interlocutor refusing the petition is just a paraphrase of the Burgh Engineer's report, because the petition is refused "in respect that all the open space presently existing is required for the proper lighting and ventilation of the premises in question." By "premises in question" I understand either the masonic hall, or the masonic hall and the tenement in Queen Street taken together, because the meaning cannot be that all the open space is required for the lighting and ventilation of the ladies' cloak-room. But then the question referred to the Dean of Guild Court under the 49th section is the sufficiency of the provisions for lighting and ventilation shown in the plans—in other words, the lighting and ventilation of the new apartment; and this question is not at all considered in the Dean of Guild's interlocutor. I grant that in the matter of ventilation it is necessary to consider the adjacent buildings, and if it had been found in fact that the new apartment could not be ventilated by reason of its proximity to other buildings, the judgment would have been relevant. But I do not suppose that this was intended; in any case, it is not said.

Again, I do not quite understand what is meant by the finding that all the open space existing is required for the proper lighting of the premises in question. As regards lighting the only question is, whether the new apartment is sufficiently lighted by the windows shown on the plans, and the interlocutor says nothing to the contrary.

Passing to the interlocutor of 10th December in which the petition is of new refused, the note to the interlocutor merely states "that the operations proposed by these petitioners do not provide suitably for light and ventilation." If this was meant to indicate anything different from the ground of judgment expressed in the previous interlocutor, I should expect to find the difference explained. I assume that the ground of judgment is the same, the variation being merely verbal. I am of opinion that the appeal should be sustained and the case remitted with an instruction to grant the prayer of the petition.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court sustained the appeal and remitted the case to the Dean of Guild with an instruction to grant the prayer of the petition.

Counsel for the Petitioners — Sol.-Gen. Dickson, Q.C. — Clyde. Agent — Lindsay Mackersey, W.S.

Counsel for the Respondents — Comrie Thomson—J. Boyd. Agent—Thomas Hunter, W.S.

Thursday, March 11.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

NORTH BRITISH RAILWAY COMPANY *v.* NORTH BRITISH GRAIN STORAGE AND TRANSIT COMPANY; *et e contra.*

Railway—Undue Preference—Jurisdiction—Railway and Canal Traffic Act 1854 (17 *and* 18 *Vict. cap.* 31), *secs.* 2, 3, 6—*Regulation of Railways Act* 1873 (36 *and* 37 *Vict. cap.* 48), *sec.* 6—*Railway and Canal Traffic Act* 1888 (51 *and* 52 *Vict. cap.* 25), *secs.* 2, 8, 12, 18 (1).

In an action by a railway company against a trader for rates due for the carriage of goods the latter pleaded that the rates charged, when compared with those charged to other traders, constituted an undue preference in their favour within the meaning of the Railway and Canal Traffic Act 1854, section 2.

Held (*aff.* the judgment of Lord Kyllachy) that the defence could not be entertained by the Court, exclusive jurisdiction to deal with the matter of undue preference, under the Railway and Canal Traffic Act 1854, section 2, having been conferred upon the Railway Commissioners by the Regulation of Railways Act 1873, section 6, and the Railway and Canal Traffic Act 1888, sections 8, 12, and 18 (1).

Railway—Authorised Rates—Deduction for Carriage of Goods in Traders' Own Waggons—Railway Rates and Charges, No. 25 (*North British Railway, &c.*) *Order Confirmation Act* 1892 (55 *and* 56 *Vict. cap. lxiii*), *Schedule of Maximum Rates and Charges, section* 2.

The Railways Rates and Charges, No. 25 (North British Railway, &c.) Order Confirmation Act 1892 provides, by the Schedule of Maximum Rates and Charges, section 2, that where goods are carried for a trader in his own waggons, the rates authorised to be charged by the railway company shall be reduced by a sum to be determined (in the event of difference between the parties) by an arbiter appointed by the Board of Trade.

In an action by a railway company against a trader for rates for the carriage of goods, the latter maintained that he was entitled to a deduction under the above provision in respect

that his own waggons had been used, and he pleaded compensation in respect of overcharges which, upon this ground, he was entitled to recover from the company upon accounts both before and subsequent to the period embraced by the accounts sued for. He also raised a counter action for the recovery of those overcharges, and maintained that the company were not entitled to decree in their action, and that his counter action ought to be sisted until the proper amount of the deduction had been determined by arbitration. There had been disputes by the trader and the company as to the amount of the deduction, but during the period of two and a-half years subsequent to the date when the above provision came into operation, no steps had been taken by either party to have an arbiter nominated,

The Court (*aff.* the judgment of Lord Kyllachy) *granted* decree in favour of the company in their action, and *dismissed* the counter action, on the ground that when the rates sued for were not in excess of the maximum rates which the railway company were entitled to charge, effect could not be given to a deduction the amount of which was indefinite and could not be determined by the Court, and that the prejudice to the trader, if any, was due to his neglect to enforce his statutory rights.

Observed (*by* Lord Trayner) that had diligence been used upon the dependence of the counter action the application for a sist would have been regarded more favourably.

In May 1895 the North British Railway Company brought an action against the North British Grain Storage and Transit Company, Leith, and Samuel Patmore, the only known partner of that company, concluding for payment of £1473, 6s. 11d., being the amount claimed by the pursuers as due for the carriage of grain by them for the defenders during the period commencing 8th January 1893, and ending 3rd February 1894.

In defence to this action the defenders maintained that the accounts sued for were overcharged to the extent of more than £450, and also that they had made payments under protest in excess of what was truly due by them on accounts previous as well as subsequent to the period covered by the accounts sued for, amounting to £1139, 16s.

In October 1895 the defenders brought a counter action against the North British Railway Company in which they concluded for payment of (1) £49, 3s. 2d.; (2) £69, 17s.; and (3) the sum of £1139, 16s., above mentioned.

The Railway Company ultimately restricted the conclusions of their summons to the sum of £1262, 15s. 9d. This sum was arrived at by deducting the sums of £49, 3s. 2d., and £69, 17s., sued for in the Grain Company's action, and by deducting also certain other sums in the accounts sued for in the Railway Company's action amounting to £91, 11s.

In the Railway Company's action the defenders averred (Stat. 2) that in 1889 the company through their manager Mr Walker had agreed to certain waggon allowances. This agreement was ultimately held not to be proved.

They further averred, *inter alia*—"(Stat. 3) In 1892 the Board of Trade, acting under the Railway and Canal Traffic Act 1888, issued an order to regulate the maximum rates and charges which the pursuers' company could charge from and after 1st January 1893, and this order was confirmed and became law under the Railway Rates and Charges, No. 25 (North British Railway, &c.), Order Confirmation Act 1892 (55 and 56 Vict. cap. lxiii). By said Act the pursuers are bound to make a deduction from the rates charged by them when the waggons are supplied by the trader. (Stat. 5) . . . The rates for carriage are in many cases charged without allowing any, or at all events a sufficient sum for waggons supplied by the defenders. In many cases where the grain carried for the defenders was carried in waggons provided by the defenders themselves, sufficient allowances are duly given to compensate the defenders, in accordance with the general practice of the Railway Company, and with their obligations under the statute, but in others the pursuers have charged the same rates as they have charged to the defenders and other traders, *e.g.*, the Distillery Company, Limited, when the grain was carried in Railway Company's waggons. In yet other cases, when grain was carried in the defenders' waggons, the pursuers have failed to make deductions from the rates chargeable when the traffic was carried in the Railway Company's waggons, sufficient to compensate the defenders for providing the grain waggons in question. Moreover, the deductions so allowed to the defenders are smaller than were allowed to other traders. The pursuers have before and since 1890 regularly granted to traders who supply waggons for grain traffic in similar circumstances, allowances higher than those they are willing to allow to the defenders, *e.g.* [*then followed a list of companies*]. Further, the pursuers have made to traders supplying waggons for the carriage of other kinds of traffic allowances much higher relatively to the expenditure incurred by these traders on the waggons supplied by them than they have made to the defenders [*then followed a list of firms and companies*].

The defenders set forth in detail the reductions claimed in the accounts sued for. These, in so far as not ultimately allowed by the pursuers, consisted of additional amounts claimed by the defenders as allowable in respect of the defenders' own waggons having been used.

They also averred (Stat. 4) that from before, and since, 1890 they had paid accounts to the Railway Company which they had maintained at the time were excessive, and which they had paid under protest. This was ultimately admitted by the pursuers.

The pursuers also admitted, that "where goods are carried in traders' own waggons a deduction is generally allowed from the rate applicable to goods carried in the Railway Company's waggons."

It was not disputed that in the accounts as ultimately sued for the rates claimed were within the maximum limit of rates chargeable by the Railway Company.

The pursuers pleaded, *inter alia*—"(2) The rates charged by the pursuers being such as they are legally entitled to charge, the pursuers are entitled to decree as craved. (3) The defenders' statements are irrelevant and not sufficiently specific. (6) The defences, so far as based on alleged insufficient waggon allowances, raise questions not competent to be disposed of by the Court of Session."

The defenders pleaded, *inter alia*—(4) *Separatim*, the pursuers are bound to make such allowances in terms of the Statute of 1892 (55 and 56 Vict. cap. 63). (5) The allowances claimed by the defenders being moderate, and such as barely suffice to compensate them for the cost of providing and maintaining the waggons in question, the defenders are entitled to deduct the amount of the same from the sum sued for. (6) The balance of the sum sued for having been already paid, or compensated by excess payments made by defenders to the pursuers on accounts prior as well as subsequent to the accounts sued for, and the defenders having raised an action against the present pursuers for recovery of said excess payments, the present action should at all events, as regards said balance, be conjoined with said action, or otherwise be sisted to await the issue thereof. (7) The defenders being entitled under the Statutes of 1845 and 1854, to allowances at the same proportional rates as those granted by the pursuers to other traders, and the pursuers having refused to grant the same to the defenders, the defenders are entitled to deduct the amount thereof from the sum sued for."

In the Grain Company's action the pursuers repeated the averments above quoted from Statements 3 and 4. In article 7 they repeated the averment in Statement 5, with the alteration that the allegations were made with regard to the accounts referring to the periods between July 1890 and July 1893, and between February 1894 and June 1895.

They pleaded, *inter alia*—"(8) The pursuers being entitled, under the Statutes of 1845 and 1854, and at common law, to allowances at the same proportional rates as those granted by the defenders to other traders, and the defenders having refused to grant the same to the pursuers, the pursuers are entitled to decree for the amount thereof. (9) As from 1st January 1893 the defenders are in any event bound to make such allowances in terms of the Statute of 1892 (55 and 56 Vict. cap. lxiii). (10) The allowances claimed by the pursuers being moderate, and such as barely suffice to compensate them for the cost of providing and maintaining the waggons in question, the pursuers are entitled to decree for the amount of the same."

The defenders repeated their fifth plea-in-law, and further pleaded, *inter alia*—"(1) The pursuers' statements are irrelevant and insufficient to support the conclusions of the summons. (6) The pursuers' statements, in so far as relating to alleged insufficient waggon allowances, raise questions which cannot competently be disposed of by the Court of Session, and the action should be dismissed in so far as it relates to the said questions."

The Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33), section 83, enacts as follows:—"And whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favouring particular parties or for the purpose of collusively and unfairly creating a monopoly either in the hands of the company or of particular parties: It shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special Act contained, from time to time to alter or vary the tolls by the special Act authorised to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit; provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers, and of all goods and carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in such tolls shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway."

The Railway and Canal Traffic Act 1854 (17 and 18 Vict. cap. 31) enacts—Section 2—. . . "No such company (viz., railway company, canal company, or railway and canal company) shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." . . . Section 3—"It shall be lawful for any company or person complaining against any such companies or company of anything done or of any omission made in violation or contravention of this Act to apply in a summary way by motion or summons . . . in Scotland to the Court of Session in Scotland . . . or to any judge of . . . such court . . . and . . . it shall be lawful for such court or judge to hear and determine the matter of such complaint; and for that purpose, if such court or judge shall think fit, to direct and prosecute, in such mode and by such engineers, barristers, or other persons as they shall think proper, all such inquiries as

may be deemed necessary to enable such court or judge to form a just judgment on the matter of such complaint; and if it be made to appear to such court or judge on such hearing, or on the report of any such person, that anything has been done or omission made in violation or contravention of this Act by such company or companies, it shall be lawful for such court or judge to issue a writ of injunction or interdict restraining such company or companies from further continuing such violation or contravention of this Act, and enjoining obedience to the same." . . . . . Section 6—"No proceeding shall be taken for any violation or contravention of the above enactments except in the manner herein provided; but nothing herein contained shall take away or diminish any rights, remedies, or privileges of any person or company against any railway or canal or railway and canal company under the existing law."

The Regulation of Railways Act 1873 (36 and 37 Vict. cap. 48), section 6, enacts as follows:—"Any person complaining of anything done or of any omission made in violation or contravention of section 2 of the Railway and Canal Traffic Act 1854 . . . may apply to the Commissioners, . . . and for the purpose of enabling the Commissioners to hear and determine the matter of any such complaint, they shall have and may exercise all the jurisdiction conferred by section 3 of the Railway and Canal Traffic Act 1854, on the several courts and judges empowered to hear and determine complaints under that Act; and may make orders of like nature with the writs and orders authorised to be issued and made by the said courts and judges; and the said courts and judges shall, except for the purpose of enforcing any decision or order of the Commissioners, cease to exercise the jurisdiction conferred on them by that section.

The Railway and Canal Traffic Act 1888 (51 and 52 Vict. cap. 25) enacts (section 2) that the new Commission, styled the Railway and Canal Commission, established by the Act "shall be a court of record." Section 8—"There shall be transferred to and vested in the Commissioners all the jurisdiction and powers which at the commencement of this Act were vested in, or capable of being exercised by the Railway Commissioners, whether under the Regulation of Railways Act 1873, or any other Act, or otherwise, and any reference to the Railway Commissioners in the Regulation of Railways Act 1873, or in any other Act, or in any document, shall, from and after the commencement of this Act, be construed to refer to the Railway and Canal Commission established by this Act." 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 18 (1)—"For the purposes of this Act the Commissioners shall have full jurisdiction to hear and determine all matters whether of law or of fact, and shall as respects the attendance and examination of witnesses, the production and inspection of documents, the enforcement of their orders, the entry on and inspection of property, and other matters necessary or proper for the due exercise of their jurisdiction under this Act, or otherwise, for carrying this Act into effect, have all such powers, rights, and privileges as are vested in a superior court." . . . This Act came into operation (*see* section 56) on 1st January 1889.

The Railway Rates and Charges, No. 25 (North British Railway, &c.) Order Confirmation Act 1892 (55 and 56 Vict. cap. lxiii.) confirms the Railway Rates and Charges, No. 25 (North British Railway, &c.) Order, 1892, made by the Board of Trade under the Railway and Canal Traffic Act 1888, by which, *inter alia*, it is provided (section 2) that this Order should come into effect on 1st January 1893, and (section 4) that the maximum rates and charges which the North British Railway Company shall be entitled to charge, shall be the rates and charges specified in the schedule to this Order. The Schedule to the Order, "I. Maximum Rates and Charges," section 2, provides as follows:—"The maximum rate for conveyance is the maximum rate which the company may charge for the conveyance of merchandise by merchandise train, and includes the provision of locomotive power and trucks by the company, and every other expense incidental to such conveyance not otherwise herein provided for. Provided that where for the conveyance of any merchandise the company do not provide trucks, the rate authorised for conveyance shall be reduced by a sum which shall, in case of difference between the company and the person liable to pay the charge, be determined by an arbitrator appointed by the Board of Trade."

On 13th June 1896 the Lord Ordinary (KYLLACHY), having heard counsel in the Procedure Roll, issued the following interlocutor in the Railway Company's action:—"Finds that the averments of illegal preferences to other traders contained in the 5th article of the statement of facts for the defenders are not relevant to infer a contravention of the Railway Clauses Act of 1845, and that in so far as relevant to infer a contravention of the Railway and Canal Traffic Act of 1854, the jurisdiction with respect to illegal preferences under the said last-mentioned Act is now by the Acts of 1873 and 1888 transferred to the Railway Commissioners: Therefore sustains the pursuers' sixth plea-in-law in so far as the same applies to the said averments of illegal preferences con-

tained in the said fifth article of the defenders' statement.

Opinion.— . . . "As to the claim which Mr Guthrie founds upon the Act of 1845 and the Act of 1854—that is to say, his claim in respect of illegal preferences to other traders, I am bound to say, in the first place, that it does not seem to me that he has averred any case under the Act of 1845. In other words, he has not averred that the traders referred to have had their goods carried over the same portion of the line and under identical circumstances. That being so, the pursuers' case rests upon the Act of 1854, and undoubtedly that Act may apply even although the journeys may be different. But then Mr Balfour argued that the Act of 1854, while conferring new rights upon the public, and imposing new obligations upon railway companies, made it a condition of those rights that they should be enforced in a particular manner, viz., by a particular tribunal, and that that tribunal, while originally consisting of the courts of law in the different countries (exercising *quoad hoc* a special jurisdiction), is now a new tribunal constituted by the Act of 1873, viz., the Railway Commissioners. He points out further, that although prior to 1888 there may have been a doubt as to the powers of the new tribunal, that doubt no longer exists since the passing of the Act of 1888, that Act providing for the Railway Commissioners having the means of enforcing both by way of interdict and damages any claim for illegal preference.

"Now, Mr Guthrie answers all this by referring to the case of *Evershed*, and it is certainly the fact that that case did proceed on a different view—that is to say, the Judges did assume that even after the Act of 1873 the Courts of law could entertain actions founded on the Act of 1854—actions of damages in respect of illegal preferences granted to other traders. At the same time there seems equally little doubt that in the two more recent cases of *Denaby Main Colliery Company* v. *Manchester, &c., Railway Company*, 11 App. Cas. 97; and *Phipps* v. *London and North-Western Railway Company*, 1892, 2 Q.B.D. 229, the decision in the case of *Evershed*, in so far as it can be held to have been a decision under the Act of 1854, has been more than questioned. For the explanation suggested, viz., that it really was a case under the Act of 1845, does not appear to me to be satisfactory. Therefore the case of *Evershed* cannot be said to be a case which stands uncontroverted, and that being so, I must apply my own judgment to the construction of the statute, and I must say that it is to my mind difficult to resist the conclusion expressed by Lord Blackburn and Lord Herschell in the two latter cases, viz., that the Act of 1854 created a special tribunal for cases of illegal preference, and further, that whatever its powers were, these powers were transferred in 1873 to the Railway Commissioners.

"The result appears to be that I must sustain the pursuers' sixth plea-in-law in so far as the pursuers' action is founded on illegal preference, and with respect to the averment of an agreement for an allowance as set forth in condescendence 2 and 4, I propose to allow a proof before answer and *habili modo*."

In the Grain Company's action the Lord Ordinary, of the same date, issued an interlocutor in similar terms, *mutatis mutandis*.

Thereafter the Lord Ordinary having heard proof as to the alleged agreement in regard to the deductions to be allowed, on 12th December 1896 issued the following interlocutor in the Railway Company's action:—"Finds (1) that the pursuers do not now dispute the statement of the defenders in statement 4; (2) that the pursuers also admit the deductions claimed by the defenders in statements 5 and 6, amounting the said deductions to £49, 3s. 2d. and £69, 17s. respectively, and have given credit for the same; (3) that the defenders have failed to prove the agreement alleged to have been made between Mr Patmore and Mr Walker as set forth in statement 2; and further, that they have not proved, and separately have not averred, facts and circumstances relevant to infer an agreement between the two companies to the effect alleged; in respect of these findings, and of the findings in the preceding interlocutor of 13th June last, and also in respect of the minutes of restriction, decerns against the defenders for payment to the pursuers of the sum of One thousand two hundred and sixty-two pounds fifteen shillings and ninepence (£1262, 15s. 9d.): Finds the pursuers entitled to expenses," &c.

Of the same date the Lord Ordinary also issued an interlocutor in the Grain Company's action, which, after findings in similar terms, *mutatis mutandis*, to those contained in the interlocutor quoted, proceeded as follows:—"In respect of these findings and of the findings in the preceding interlocutor of 13th June last, dismisses the action, and decerns, reserving to the pursuers to bring such future action as may be necessary to enforce any determination on the subject of illegal preferences which the pursuers may obtain from the Railway Commissioners: Finds the defenders entitled to expenses," &c.

Opinion.— . . . "The Grain Company asked that the action at their instance should be sisted to await the result of a proposed application to the Railway Commissioners. I do not think that this is necessary, and I think it will be better and more convenient that if the Grain Company obtain a favourable judgment from the Railway Commissioners, that judgment should be enforced if necessary by a new and separate action."

The Grain Company reclaimed, and argued — It was conceded that the reclaimers had no case under the Railway Clauses Consolidation (Scotland) Act 1845, section 83. But they had made a relevant averment to the effect that the Railway Company had contravened the provisions of the Railway and Canal Traffic Act 1854, section 2. By section 3 of that Act a certain procedure was provided for enabling the Court by interdict to restrain a rail-

way company from contravening the enactments of section 2, but it did not follow that the provisions of that section could only receive effect in that way, and that a person who was sued by a railway company could not plead section 2 in defence to the claim made upon him, or bring an action for recovery of sums not truly due to the railway company (having regard to section 2), but paid by him under protest—*London and North-Western Railway Company* v. *Evershed*, 1878, 3 App. Cas. 1029, and also 2 Q.B.D. 254, and 3 Q.B.D. 134; *Denaby Main Colliery Company* v. *Manchester, Sheffield, and Lincolnshire Railway Company*, 1885, 11 App. Cas. 97, *per* Lord Halsbury, L.C., at p. 112. The interpretation put upon Lord Halsbury's opinion by Cave, J., in *Lancashire and Yorkshire Railway Company* v. *Greenwood*, 1888, 21 Q.B.D. 215, at p. 219, was unduly restricted. That case was only the decision of a single judge. The powers given by section 3 were transferred from the Court to the old Commissioners by the Regulation of Railways Act 1873, section 6, and from the old Commissioners to the new Commissioners by the Railway and Canal Traffic Act 1888, section 8, but if the Court had jurisdiction originally to give effect to section 2 of the 1854 Act in defence to an unwarranted claim by a railway company (as it was maintained they had), there was nothing in either the 1873 Act or the 1888 Act to deprive them of that jurisdiction. By section 12 of the 1888 Act a power of awarding damages "in addition to or substitution for any other relief" was given to the Commissioners, such award being "in complete satisfaction of any claim for damages, including repayment of overcharges," but this provision did not take away any jurisdiction previously possessed by the Court, or give any further *exclusive* jurisdiction to the Commissioners. The reclaimers were therefore entitled to plead the overcharge in respect of undue preference in defence to the Railway Company's action, and to set off against the Railway Company's claim the sums paid in excess and sued for in the counter action. In any view, the actions should be sisted to await the result of an application to the Railway Commissioners. (2) As regards the period after 1st January 1893, the reclaimers were in an even stronger position in virtue of the provisions of the Railway Rates and Charges No. 25 (North British Railway, &c.) Order Confirmation Act 1892, Schedule of Maximum Rates and Charges, section 2. Under that section, when goods were carried in trader's own waggons, the Railway Company were not entitled to charge their published rate, but only their published rate less a certain deduction. The sum sued for by the Railway Company in their action was not therefore a liquid sum, because the proper amount of the deduction had not been ascertained, and until it had been ascertained the exact sum to which the Railway Company was entitled could not be known. The Railway Company, therefore, were not entitled to decree until the proper amount of the deduction was determined by arbitration (there being a disagreement as to the proper allowance). Until that had been done there was no legal rate for which the Railway Company could sue, and it was the part of the Railway Company to have the proper allowance fixed by arbitration so that it might be known what was the rate which they were legally entitled to charge, and having ascertained such rate, then, but not before, to sue for it. As regards the counter action, so far as relating to the period subsequent to 1st January 1893, the only course open to the reclaimers was to bring an action for recovery of the overcharges with a view to compelling arbitration as to the amount, and to obtaining decree for the proper amount when determined in the arbitration. The actions ought therefore to be sisted pending the result of arbitration under the 1892 Act—see *Tough* v. *Dumbarton Water-Works Commissioners*, December 20, 1872, 11 Macph. 236.

Argued for the Railway Company—(1) The reclaimers were not entitled to set off overcharges not ascertained against rates fixed and allowed. (2) It was admitted by the reclaimers that they had no case under the Act of 1845. Alleged overcharges in respect of undue preference under the Railway and Canal Traffic Act 1854, section 2, could not be pleaded in defence to an action for recovery of charges for the carriage of goods, or recovered by counter-claim or counter action if already paid under protest—*Lancashire and Yorkshire Railway Company* v. *Greenwood, cit.*, per Cave, J., at p. 220. The jurisdiction of the Railway Commissioners as to questions of undue preference under the Act of 1854, section 2, was exclusive. The effect of section 6 of the 1854 Act, taken along with section 12 of the Act of 1888, was that section 2 of the 1854 Act could only be enforced either by the procedure detailed in section 3 of that Act, as modified by section 6 of the Act of 1873 and section 8 of the Act of 1888, or by an award of damages under section 12 of the 1888 Act—See *Phipps* v. *London and North-Western Railway Company* [1892], 2 Q.B. 229, especially *per* Lord Herschell, at p. 249. An action for recovery of overcharges in respect of undue preference under section 2 of the 1854 Act, even if formerly competent for the purpose of obtaining decree for overcharges already paid, after the existence of an undue preference had been determined by the Railway Commissioners, was now incompetent, or at least unnecessary and useless, in respect that the Railway Commissioners, under the 1888 Act, section 18 (1), had power to enforce a decree for repayment of such overcharges. (3) As regards the 1892 Act, it was the part of the reclaimers, if dissatisfied with the amount of the waggon allowance, to appeal to arbitration, and as they had not seen fit to do so during a period lasting several years, they were not entitled now to prevent the Railway Company obtaining decree for the sum sued for by them until the Railway Company had initiated an arbitration under the Act.

The only valid defence of this nature to the Railway Company's action would have been a decision obtained by the trader in an arbitration invoked by him, and such a decision was also necessary to justify an action for recovery of overcharges already paid. The result was that the Railway Company were entitled to decree in the action at their instance, and that the Grain Company's action ought to be dismissed.

At advising—

LORD TRAYNER — We have here two actions, one at the instance of the North British Railway Company against the Grain Storage and Transit Company, and the other by the Grain Company against the Railway Company. The action first mentioned is first in date and the leading action; the second action has for its purpose the enforcing of the alleged rights pleaded in defence to the first action.

The Railway Company (under the restricted conclusion now insisted in) sue for payment of certain rates due to them by the defenders in respect of the carriage of various quantities of grain between January 1893 and February 1894. The quantities of grain carried are not in dispute, nor are the rates charged for such carriage said to be in excess of what the pursuers are entitled to charge (except as after noticed), and therefore *prima facie* the pursuers are entitled to decree. But the defenders maintain in answer to the pursuers' claim (1) that they are entitled to have the rates reduced to those at which goods have been carried by the pursuers for other traders, and (2) that the rates sued for are subject to deduction on the ground that the goods were carried in waggons belonging to the defenders themselves. These defences must be considered separately.

I. It is conceded by the defenders that they cannot maintain their claim urged in the first defence on the ground that the undue preference to other traders was in contravention of the Railway Clauses Act 1845; accordingly it can only be maintained on the ground that the alleged undue preference was contrary to the provisions of the Railway and Canal Traffic Act of 1854. But we cannot give effect to that defence; we can neither inquire into the facts alleged, nor give the defenders the remedy they seek, because under section 6 of the Regulation of Railways Act 1873, and section 8 of the Railway and Canal Traffic Act of 1888, the jurisdiction to deal with such matters is conferred exclusively upon the Railway Commissioners.

The second defence is based (1) upon an alleged agreement, and (2) upon the provisions of the Act of 1892. I agree with the Lord Ordinary that the alleged agreement is not proved, and therefore the defenders can only rely upon the statutory provision. It is to the effect that where goods are carried for a trader in his own waggons the railway company's rate shall be reduced by a sum (in the event of the railway company and the trader differing about it) to be determined by an arbitrator appointed by the Board of Trade. Now, here the Railway Company and the trader differed as to the amount of the reduction, but no steps have been taken by the trader to have an arbitrator appointed to settle the difference and fix the amount of the reduction. Until that is done the amount of the reduction cannot be ascertained, and consequently the amount of the reduction to which the defenders are entitled is not known. It is difficult to give effect to a reduction, the amount of which is at present indefinite. It must be put in figures before we can allow it as a reduction from or set-off against the pursuers' money claim.

The defenders ask, however, that their action may be sisted (not dismissed) until the amount of the reduction is ascertained. The Lord Ordinary thinks it better and more convenient to dismiss the counter action at once. I am not prepared to differ from him. The defenders should have proceeded long ago to have their claim determined in the manner pointed out by the statute, and they cannot complain if their neglect of their own rights occasion them the expense of a new summons. I would have been more inclined to listen to the defenders' request had any diligence proceeded on the action now depending, which it was desirable to maintain. But there is nothing of the kind here.

On the whole matter, I agree with the Lord Ordinary, and am for adhering to the interlocutors reclaimed against in both actions.

The LORD JUSTICE-CLERK, LORD YOUNG, and LORD MONCREIFF concurred.

The Court adhered.

Counsel for the North British Railway Company—Sol.-Gen. (Dickson), Q.C.—Balfour, Q.C. — Grierson. Agent — James Watson, S.S.C.

Counsel for the North British Grain Storage Company — Guthrie — Clyde. Agents—Drummond & Reid, S.S.C.

Tuesday, January 29, 1895.

OUTER HOUSE.

[Lord Kincairney.

BYRES' TRUSTEES *v.* GEMMELL AND OTHERS.

Process — Competency — Multiplepoinding —Heritable Estate.

A heritable subject may competently form the fund *in medio* in a multiplepoinding.

(See *Byres' Trustees* v. *Gemmell and Others*, December 20, 1895, *ante*, vol. xxxiii. p. 236, and 23 R. 332.)

On 14th February 1894 Mrs Mary Henry or Byres executed a trust-disposition whereby she appointed David Logan and others her trustees for certain purposes, and conveyed to them her whole estate, heritable and