task if it had not been for the provision of the Summary Jurisdiction Act 1908, section 19 (2), and the question comes to be narrowed to this, whether that provision is such as to make proper and relevant this complaint which otherwise would not have been in proper and relevant form. It is enacted by section 19 (2) of the Act of 1908 that "where the offence is created by more than one section of one or more statutes or orders it shall only be necessary to specify the leading section or one of the leading sections." I confess that I am not clear as to the precise scope and intention of that enactment, and I should be sorry to attempt to lay down any definition or pronounce any general opinion on the subject. I think that its scope and application will require to be defined by experience, and I further think that the Court will have to go step by step, and that it will be for the Court in every case to say whether the enactment does or does not apply to the particular case before it. It must always be for the Court to decide whether the sections libelled are or are not "leading sections" within the meaning of the enactment. If one tries to apply the Act in that spirit I cannot think that this section can be said to be the leading section in the matter. It is difficult to see how a section which admittedly has no reference and could have no reference to a motor car could be the "leading section" in a complaint founded on the failure to give particulars in regard to a motor car. In my opinion the test in each case for the Court to apply must be whether the complaint on the face of it gives to the person charged fair and reasonable notice of what it is he is charged with, and what offence he is said to have committed, and I do not think it can be said to be fair notice to select as the sole ground libelled one section of an Act, and to reserve for future introduction and application any number of unlibelled sections, some of which may bear directly on the charge. I have already pointed out that the sole section libelled neither creates an offence nor imposes a penalty, and I think it must be at least a minimum of what is required of the prosecutor—that he should give definite notice in the complaint of the offence which is said to have been committed and the penalty said to be incurred. For the reasons I have stated it seems to me that this particular case does not come within the scope and application of section 19 (2) of the Act of 1908, and I do not intend to go into the region of what may require to be laid down in future cases.

I therefore suggest that we should answer the first question n the negative, and so far as we are concerned in the matter that disposes of the present case.

LORD SKERRINGTON—I concur.

The Court sustained the appeal and answered the first question in the negative.

Counsel for the Appellant—MacRobert. Agent—James Ayton, S.S.C.

Counsel for the Respondent—Solicitor-General (Hunter, K.C.)—J. A. T. Robertson. Agent—Robert Pringle, W.S.

COURT OF SESSION.

Saturday, July 22.

SECOND DIVISION.

[Sheriff Court at Glasgow.

MECHAN & SONS, LIMITED *v.* NORTH-EASTERN RAILWAY COMPANY.

Sale — Delivery of Goods — Stoppage in transitu—Duration of Transit—Sale of Goods Act 1893 (56 *and* 57 *Vict. cap.* 71), *sec.* 45 (1), (2), (3), *and* (7).

An engineering company built two lifeboats to the order of a shipowning company. Under the contract the place of delivery was the buyers' yard, and the whole cost of transit thereto fell to be borne by the sellers. The boats were handed over by the sellers to a railway company for the purpose of carriage to the place of delivery, but they were consigned at a rate which only covered the cost of carriage from station to station. On the arrival of the boats at the station to which goods destined to the buyers were in use to be consigned, on 8th February 1910, the railway company's foreman informed the foreman of certain carting contractors that he would be ready to deliver them on 10th February. The carting contractors were independent contractors, who were acoustomed to cart to the buyers' yard goods arriving for them, and on 10th February they removed one of the boats from the station and delivered it to the buyers. Before the carting contractors got delivery of the other boat the railway company received notice from the sellers to stop delivery of the boats in respect that the buyers had suspended payment. The sellers subsequently requested re-delivery of the boat from the railway company, but they on 6th March delivered it to the buyers. The sellers did not receive payment therefor.

In an action of damages by the sellers against the railway company, *held* that the boat had not been delivered before the notice of stoppage *in transitu* had been received, and that the defenders were liable in damages.

The Sale of Goods Act (56 and 57 Vict. cap. 71), enacts, sec. 45 (1) — "Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodier for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodier. (2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end. (3) If after the arrival of the goods at the appointed destination the carrier or other bailee or custodier acknowledges to the buyer or his agent that he

holds the goods on his behalf, and continues in possession of them as bailee or custodier for the buyer or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer. . . . (7) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped *in transitu*, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods."

Mechan & Sons, Limited, engineers, Scotstoun Works, Glasgow, *pursuers*, raised an action in the Sheriff Court there against the North-Eastern Railway Company, *defenders*. They claimed payment of the sum of £61, 10s., being loss and damage sustained by them in respect of the defenders' wrongful delivery of a galvanised steel lifeboat sold by them to Sir James Laing & Sons, Limited, Deptford Yard, Sunderland, and consigned to them, but owing to the insolvency of said Sir James Laing & Sons, Limited, stopped by the pursuers *in transitu* while in the hands of the defenders. They averred that, notwithstanding the said stoppage *in transitu*, the lifeboat was subsequently delivered by the defenders to Sir James Laing & Sons, Limited, and that the price of the lifeboat had not been paid.

The *circumstances of the case* appear from the following narrative given in the opinion of the Sheriff-Substitute (A. O. M. Mackenzie)—"The boat was one of two built by the pursuers for Sir James Laing & Sons, Limited, of Sunderland. By the terms of the contract between Sir James Laing & Sons and the pursuers, the place of delivery was the Boathouse Shed, Deptford Yard, Sunderland, and the pursuers were bound to pay the expense of carriage to that place. The two boats were delivered to the Caledonian Railway Company at Whiteinch Station on 6th February for the purpose of being carried to the place of delivery named in the contract of sale, but were consigned at a rate which only covered the cost of carriage from station to station. The Caledonian Railway Company having carried the boats to Carlisle, forwarded them by the defenders' railway to Sunderland. The station on the defenders' railway to which goods for Sir James Laing & Sons were in use to be carried was Millfield Station, and the boats were accordingly conveyed by the defenders to that station, which they reached on the morning of Saturday, 8th February. Millfield Station is about one-and-a-quarter miles from Deptford Yard, and the practice was that goods arriving at the station for Sir James Laing & Sons were carted to the yard by M'Laren & Company, carting contractors, who had general instructions to that effect from Laing & Sons. On 8th February, the defenders' foreman informed the foreman of M'Laren & Company of the arrival of the boats, and told him that he would have them at the crane for removal on the morning of Monday, the 10th. On the morning of 10th February, the waggons on which the boats were loaded having in the meantime been taken to the crane, one of M'Laren's men brought a pole-cart to the station, loaded one of the boats, and carted it to Laing & Sons. He intended to return for the other, but in the meantime the defenders learnt that Laing & Sons had suspended payment. At this time Laing & Sons owed the defenders a considerable sum for the carriage of other goods, and by the contract between them the defenders were entitled, in the event of Laing & Sons suspending payment, to detain any goods belonging to them which might be in their, the defenders', possession, and upon their premises. The defenders accordingly resolved to retain possession of the boat which had not been removed from the station, and informed the foreman carter that they would not allow him to remove it. Two or three hours later the defenders received notice from the Caledonian Railway Company, on behalf of the pursuers, to stop delivery of the boats, and a request for re-delivery to the pursuers of the boat remaining at Millfield Station was subsequently made. Notwithstanding this notice and request by the pursuers, the defenders delivered the remaining boat to the liquidator of Laing & Sons on 6th March. The pursuers, who have not been paid for the boat, contend that this was a wrongful act on the part of the defenders, and claim damages."

The defenders pleaded, *inter alia*—"(3) The transit of the lifeboat, the price of which is sued for, having ended at Millfield Station, and that after arrival there the defenders being only custodiers thereof for the said Sir James Laing & Sons, Limited, defenders ought to be assoilzied with expenses. (4) Alternatively, the freight charged being at a special rate and covering only transit from Whiteinch Station to Millfield Station, the transit ended at said Millfield Station, and, in any event, ended after refusal of delivery by the defenders to the said Sir James Laing & Sons, Limited, the consignees. (7) The defenders having exercised their right of lien prior to the alleged notice of stoppage, and not having thereby enlarged the pursuers' right to stop *in transitu*, ought to be assoilzied with expenses."

On 7th February 1910 the Sheriff-Substitute pronounced this interlocutor—"*Finds in fact* (1) that the boat referred to was in course of transit to the buyers Sir James Laing & Sons, Limited, at the time when defenders received notice of the pursuers' claim to stop the same *in transitu;* (2) that after receiving said notice the defenders delivered the said boat to the buyers: *Finds in law* in these circumstances that the defenders are liable to the pursuers in damages; assesses the same at the sum of sixty-one pounds ten shillings: Therefore decerns against the defenders as craved."

Note.—"The main question in this case is whether the boat referred to on record was effectually stopped while in the course of transit to the buyers.

"The circumstances in which this question arises are as follows—". . . [*After the*

narrative above quoted] . . . —The general rule as to the duration of the transit of goods consigned in pursuance of a contract of sale is that they 'are deemed to be in course of transit from the time when they are delivered to a carrier for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier'—Sale of Goods Act 1893, sec. 45 (1). In the present case it is clear that the boat to which the action relates had not actually been delivered to Laing & Sons when the notice of stoppage *in transitu* was received by the defenders, for it was still in the defenders' station. But the defenders contend that there had been constructive delivery of the boat before that notice was received, and consequently that the transit was at an end. In support of this contention the defenders' agent founded, in the first place, on sub-section 3 of section 45 of the Sale of Goods Act. It is enacted by that sub-section that 'if after the arrival of the goods at the appointed destination the carrier acknowledges to the buyer, or his agent, that he holds the goods on his behalf, and continues in possession of them as bailee or custodier for the buyer or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.' It appears to me that this sub-section is not applicable to the circumstances of the present case, because Millfield Station was not the appointed destination of the boats. The appointed destination in the sense of the section is the destination agreed upon between the seller and the buyer—*Kendall* v. *Marshall*, L.R., 11 Q.B.D. 356; *per cur.* in *ex parte Cooper*, L.R., 11 Ch. Div. 68—and as to what that was in this case there is no room for doubt, for Laing & Sons' order, which contains the terms of the contract between them and the pursuers, distinctly specifies the boatbuilders' shed at their yard as the place of delivery. The boats accordingly had not arrived at their appointed destination when notice of their arrival at Millfield Station was given to the foreman of the carting contractors, and consequently, even if that notice could otherwise be regarded as amounting to an acknowledgment in terms of the sub-section, which I do not think it can, it was not given under the conditions postulated by the sub-section. It follows that it could not have the effect of ending the transit.

"The defenders' agent further founded on sub-section 7 of section 45 of the Act, which enacts that 'when part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped *in transitu*, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.' He argued that in the present case the delivery of the one boat was given in such circumstances as to show an agreement to give up both. I cannot agree. There is a presumption against actual delivery of a part of a consignment of goods operating as constructive delivery of the whole, especially where as in the present case the goods are clearly divisible—*ex parte Cooper*, L.R., 11 Ch. Div. 68; *Kemp* v. *Falk*, L.R., 7 App. Cas. 573, *per* Lord Blackburn, at p. 586; *Bolton*, L.R., 1 C.P. 431, *per* Erle, C.J., at p. 440—and I cannot find in the circumstances of the present case anything to rebut that presumption. The defenders were no doubt ready to deliver both boats before they heard that Laing & Sons had suspended payment, and were even anxious that they should be removed as soon as possible. But I do not find in the evidence proof that there was a concluded agreement between the defenders and the carting contractor on the one hand to give up, and on the other to take possession of both boats. Further, the agreement, if there was any, was between the defenders and the servant of the carting contractor, and I do not think that the contractors' servant can be regarded as having been the agent of the buyers for the purpose of taking delivery. His sole duty was to cart the goods to the buyers' yard, and if delivery was made to him it was made in order that the goods might be forwarded to their appointed destination under the contract of sale. Until they reached that destination the transit in my opinion was not at an end.

"For these reasons I am of opinion that the second boat had not been delivered either actually or constructively before the notice of stoppage *in transitu* was received by the defenders, and that the defenders were therefore in fault in delivering the second boat to the liquidator. It follows that they are liable in damages, and I think it proved that the loss sustained by the pursuers is equal to the sum sued for, being the price which Laing & Sons had agreed to pay them."

On 7th June 1910 the Sheriff (GARDNER MILLAR) pronounced this interlocutor—"Recals the interlocutor of 7th February last: *Finds in fact* that the boat referred to in the petition was not in course of transit to the buyers, Sir James Laing & Sons, Limited, at the time when the defenders received notice of the pursuers' claim to stop the same *in transitu*: *Finds in law* that the defenders did not commit a wrongful act in subsequently delivering the said boat to the liquidator of the said company, and are not liable in damages to the pursuers therefor: Therefore assoilzies the defenders from the conclusions of the action, and decerns."

Note.—"The agents for both parties stated that they accepted the statement of facts contained in the learned Sheriff-Substitute's note, with this exception, that the agent for the defenders maintained that the goods were not delivered to the Railway Company for the purpose of being conveyed to the place named in the contract, namely, the Boathouse Shed, Deptford Yard, Sunderland, but to Millfield Station of the defenders' company. Under the contract of sale undoubtedly the place of delivery was to be the Boathouse Shed referred to,

but under the contract of carriage with the Railway Company it was the station, as the contract was for conveyance from station to station. It seems clear from the evidence that the Railway Company was not to do any carting either from or to the railway system. In my view of the case, the question of which of these two places was the place of delivery is not of any real consequence.

"The first question of importance is, what was the position of the carting contractor who took delivery of the first boat, and came prepared to take delivery of the second? It is not averred that the pursuers made any arrangements for the conveyance of the boats from the station of the Railway Company to the Boathouse Shed at Deptford. It is proved that the Railway Company did not employ any carriers at all, and did not hold themselves responsible for the carting. No express contract for the conveyance of these boats from the station to the yard was entered into by the purchasers, Sir James Laing & Sons, Limited. It appears, however, that there was a firm of carting contractors at Millfield Station named M'Laren & Company. One of the partners, named Mr Gray, was in the employment of Sir James Laing & Sons, Limited, as iron-order clerk, and at the same time carried on an independent business as carting contractor. Laing & Sons were in the habit of putting all the carting they could in the way of Messrs M'Laren, of which Mr Gray was a partner. Messrs M'Laren without any special instructions were in the habit of taking any goods which arrived at Millfield Station addressed to Messrs Laing to their yard, and were paid by Messrs Laing. There seems, therefore, to have been a general mandate by Messrs Laing to M'Laren to convey all goods addressed to them from the station to their yard. Accordingly I think that Messrs M'Laren, in asking for these goods, were in the employment of Messrs Laing, and that for the purposes of this action it must be taken that their carts were the carts of the purchasers Laing & Sons. It may be that Messrs Laing would have a right to charge the pursuers for the cartage, in respect that the goods were to be delivered at their yard, but they would equally have had a right to do so if the cartage had been done by their own carts.

"Now in order that a right to stop *in transitu* should be effectual, it is necessary that the goods should be in the hands of a third party, other than the buyer and seller, for the purpose of conveying the goods from one to the other. If the goods are in the hands of the carrier for any other purpose than that of carriage, either to warehouse them on behalf of the purchaser or as his agent for any other purpose, then the transit from the seller is at an end. So also, if the purchaser gives orders that the goods should be sent to a particular place, there to be kept till he gives fresh orders as to their destination to a new carrier, the original transit is at an end when they reach that place, and any further transit is a fresh and independent transit. *Bethell & Company* v. *Clark & Company*, 20 Q.B.D. 615, Lord Esher's judgment. Now in the present case the two boats arrived at Millfield Station on Saturday, and the foreman of the defenders' goods-yard—Warburton—gave notice to Bulmer, who was the foreman of Messrs M'Laren, that two boats had arrived at the station addressed to Messrs Laing, and that he would have them at the crane on Monday morning, when they could be carted away. On Monday morning a carter named Barnet, under direction of Bulmer, came with a pole-waggon and took delivery of one boat, between half-past eight and nine o'clock, and carted it to Messrs Laing's yard. Subsequent to the first boat leaving, the defenders received information that Messrs Laing & Sons had stopped payment. The officials at the station communicated with the head office as to what they were to do with goods consigned to Messrs Laing as to delivery. It seems that the Railway Company had a contract with Messrs Laing, which is known as a 'ledger account.' Under it the Railway Company agreed not to demand carriage for each consignment of goods before delivery, and on the other hand Messrs Laing granted the Railway Company a general lien over all goods in the Railway Company's hands consigned to them for any general balance that might be due to the Railway Company for freight. Accordingly when the notice of stoppage of payment by Laing & Sons reached the principal office of the Railway Company they gave orders that no goods were to be delivered to Messrs Laing. Accordingly when Barnet returned with the waggon for delivery of the second boat, about half-past nine, he was informed that the boat would not be delivered to him.

"Now it seems to me that although the appointed destination in the contract of sale was the shed, nevertheless the purchaser was entitled to anticipate delivery at that shed, and that if he did so the transit was at an end. Accordingly when the carrier, who was in the employment of Messrs Laing, received delivery of the first boat in his cart, the transit was ended, and the pursuers could not have stopped the goods *in transitu* in his hands. If that is so, the same effect should be given to the fact that he returned and asked for delivery of the second boat, and that the defenders relying upon the contract for the general lien refused to give him delivery. Messrs Laing seem to have acquiesced in the position taken up by the Railway Company, and we have no evidence that they protested that the Railway Company had no right to retain the boat. Accordingly I think that when the carrier, on behalf of Laing & Sons, went to the Railway Company's yard and asked for delivery of the boat and was refused, on the ground of the contract for the general lien, there was constructive delivery so far as the contract of carriage was concerned. If that is so, then the transit was ended, and it is admitted that the notice of stoppage took place after this had been done.

"This case is to be distinguished from the

cases where a carrier retains the goods under his lien in the particular contract for the carriage of these goods. There the contract of carriage is not ended until it is fulfilled, and that is only done when the cost of the carriage of these particular goods is paid and they are delivered. The carrier there holds under the specific contract of carriage. In this case the railway did not demand payment of the freight for the boats, and they do not suggest that they were holding the second boat for the cost of the carriage of the two. Indeed, the freight for these boats was to be paid by the pursuers and not by Messrs Laing. What they did say was that they held the boats under a different contract, namely, the one of general lien, and that was one quite independent of this contract of carriage. Accordingly I am of opinion that the transit of these goods ended when the Railway Company refused delivery of the second boat, on the ground that they had a right to retain these boats, not as carriers but under a written contract with Messrs Laing to hold all goods consigned to them under a general lien. If that is so, the pursuers' notice of stoppage came too late, and the defenders were not guilty of any wrongful act in subsequently delivering the boat to Messrs Laing & Sons, liquidator. I think, therefore, the defenders must be assoilzied."

The defenders appealed, and argued — The contract between the parties was for delivery of the boats at Laing's shed at Deptford Yard, Sunderland. It made no difference whatever that the pursuer consigned the goods with the Railway Company at a rate which only covered the cost from station to station. The transit was not over at Millfield Station, but lasted to the place agreed on between buyer and seller—Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), sec. 45 (1); *Kendall* v. *Marshall, Stevens, & Company*, 1883, L.R., 11 Q.B.D. 356; *ex parte Cooper*, 1879, L.R., 11 Ch.D. 68. The place of delivery was beyond doubt Laing's shed. It could not, on the face of the evidence, be said that Laings had anticipated delivery at Millfield. This was a question of fact, and the Sheriff-Principal had erred in treating M'Laren & Company as agents of Laing. They were independent contractors. Section 45 (2) of the Sale of Goods Act (*sup. cit.*) did not therefore apply, as M'Laren had no authority to take delivery at Millfield, and were not Laing's agents "in that behalf." A contract with a carrier to carry goods did not make the carrier the agent or servant of the person with whom he contracted—*ex parte Rosevear China Clay Company*, 1879, 11 Ch.D. 560, Brett (L.J.), at p. 570; *Lyons* v. *Hoffnung and Others*, 1890, 15 A.C. 391; *M'Leod & Company* v. *Harrison*, December 7, 1880, 8 R. 227, 18 S.L.R. 129; *ex parte Watson*, 1877, L.R. 5 Ch.D. 35. It was thus well settled that constructive delivery to a carrier hired by the purchaser was not enough to defeat stoppage *in transitu*. There must be an actual agreement between the purchaser and carrier that the carrier from the date of the agreement was to hold the goods for behoof of the purchaser — *Whitehead* v. *Anderson*, 1842, 9 M. & W. 518, Parke (B.) at p. 535; *Coventry* v. *Gladstone*, 1868, L.R., 6 Eq. 44. Further, section 45 (3) had no application in the present case. The carrier here had not become custodier for the buyer, for the carrier could not change his character until the appointed place of destination, and the change of character had to be brought about by agreement. There was no such agreement. The sub-section was founded upon such cases as *Kendall* v. *Marshall, Stevens, & Company* (*sup. cit.*); *Black* v. *Cassells*, May 30, 1828, 6 S. 894; see also *Dunlop* v. *Scott & Company*, February 22, 1814, F.C. Moreover, the defenders' contention under section 45 (7) of the Sale of Goods Act that part delivery had been made in such a way as to indicate agreement to give up the whole was unsound. The Sheriff-Substitute had very accurately stated the law on this point, and the cases upon which he proceeded — *vide* Sheriff-Substitute's note (*supra*). The Sheriff-Principal was ill-founded in his view that the defenders' refusal to deliver the boat on the ground that they were entitled to hold it as security for their general lien operated constructive delivery to Laings as far as the contract of carriage was concerned.

Argued for the defenders—The Sheriff-Principal was right in the result at which he arrived. Section 45 (3) of the Sale of Goods Act 1893 (*sup. cit.*) applied to the present case. The defenders were holding the goods as custodiers, and the transit was at an end. Pursuers had only paid rates for the transmission of the boats from Glasgow to Millfield, and there was no obligation upon the defenders to do anything but give delivery at Millfield. Section 45 (7) also applied. There had been part delivery here under such circumstances as to show an agreement to give up possession. Delivery of one boat was intended both by sellers and buyers to be delivery of both boats. But for the mere accident that another waggon was not forthcoming both boats would have been delivered together —*Kemp* v. *Falk*, 1882, L.R. 7, A.C. 573—Lord Blackburn at p. 586. Taking it upon the footing that there was stoppage *in transitu*, the defenders exercised their right of lien before any stoppage was effected. Right of stoppage *in transitu* was of the nature of a lien—Bell's Comm. (7th ed.), vol. i, 250. Therefore when the defenders gave notice of their lien to the buyers the seller was barred from coming in and exercising his lien—he was too late.

At advising—

LORD JUSTICE-CLERK — This case was anxiously and ably debated at the hearing, and as there has been a difference of opinion between the Sheriff and Sheriff-Substitute, it was necessary to give it careful consideration. In the end I have come to be of opinion, and that without difficulty, that the judgment at which the Sheriff-Substitute arrived is right, and that we ought to revert to it.

The contract with which we have to deal was one for two boats to be built by the pursuers, and delivered by them at Sir James Laing & Sons' Deptford yard, they being the firm who gave the order. Now Messrs Laing & Sons had nothing to do with the arrangements the pursuers might make with the railway companies for conveyance between the pursuers' building yard and their premises. It was the responsibility of the pursuers to deliver at Laing's yard. That yard was the agreed-on place for delivery. That the stoppage *in transitu*, which the pursuers maintain they effected took place before the boat in question had concluded its transit and entered Laing's yard is undoubted, and therefore *prima facie* there was an effective stoppage accomplished. But it is said that some action was taken by Laing's company, as a consequence of which the transit truly ended at Millfield Railway Station. I do not think it is proved that any such action was taken. What occurred was this. Messrs M'Laren, carting contractors, who were accustomed to cart goods coming for Laing's yard to the station, finding two boats had arrived whose destination was Laings' yard, carted one of them there, but before they could cart the other the pursuers stopped it. The attempt to make out that in thus carting one of the boats the carters were acting as servants of Laing & Company seems to me to be entirely unsupported by the evidence. Any idea of the carting being done on Laing's instructions is, in my opinion, entirely out of the case. As the witness Gray says, no one instructed his firm of M'Laren to bring the boats on to the yard—"We just took them ourselves." In that there is no evidence of any authority given by Laing to take the goods for Laing in anticipation of the stipulated delivery by the pursuers at Laings' yard. In my opinion section 45 (7) of the Sale of Goods Act has no application to the case in question. I cannot see any ground for holding that there was between the builders and the Laing's firm any understanding of one boat being to be a delivery of both boats. And unless that was proved to be the case, then the second boat was not in any view a delivered boat, the builders were quite entitled to stop delivery while the second boat was still at the railway station, and therefore *in transitu* between their yard and that of the Laings.

I must decline altogether to consider any question of general lien, for which there is no foundation in the record, and to which accordingly the proof was not in any part of it directed. The case stands in the position that no motion has been made so to amend the pleadings as to admit of such a case being entered upon.

My motion to your Lordships would be to recal the interlocutor of the Sheriff, and to find in terms of the interlocutor of the Sheriff-Substitute, which seems to me in all respects to give sound findings in fact and sound application of the law to the facts.

LORD DUNDAS—I agree with your Lordships, and as I have also seen Lord Salvesen's opinion and agree with it, I will add but little. In my opinion the Sheriff-Substitute decided this case rightly, and the learned Sheriff has fallen into error. The actual facts, as distinct from the inferences to be drawn from them, are really not in dispute, and there is no reason to recapitulate them. At the threshold of the case lies the fact that the contract between the unpaid vendors (pursuers) and their vendees (Sir James Laing & Sons) was for delivery of the boats at the latter's shed at Deptford Yard, Sunderland. That was the *terminus ad quem* of the contracted transit. It seems to me, therefore, of no great moment that the vendors, in despatching the boats by rail, agreed with the Railway Company for a special station to station rate. They were none the less liable under their contract with Sir James Laing & Sons for delivery of the goods at Deptford Yard, and for payment of the necessary cartage thither from Millfield Railway Station. There is, I think, no room for doubt that the "appointed destination," to use the words of section 45 of the Sale of Goods Act 1893, is the destination appointed and agreed to by and between the vendors and vendees; and on this footing the boat in question would seem to have been effectually stopped before its agreed-on transit was completed. But it is said that the vendees anticipated the delivery, viz., at Millfield Station, and so ended the transit within the meaning of section 45 (2). I do not think they did so. It cannot be said that they themselves made any demand for such delivery. All that is relied on is the fact that one of the boats was removed from the station, and the other would have been removed if that had not been prevented by the Railway Company, by the servants of a firm of carting contractors named M'Laren. It is asserted that they were truly in this matter the servants of the vendees appointed in that behalf to obtain anticipated delivery of the boats at Millfield Station, but this view is, I think, completely negatived by the evidence. Mr Gray, a partner in the M'Laren's business, explains that he was also a clerk in the employment of Sir James Laing & Sons, and was in a position to command practically the whole of their carting work for his firm. But this "was not under a general arrangement with Sir James Laing. . . . (Q) In the case of the two boats, on whose instructions did you cart them?—(A) No one. We just took them ourselves. It has been customary for twenty-five years past to take sundry items without any instructions. It has been our practice to cart all Sir James Laing & Sons' goods from Millfield Station to the shipbuilding yard." The foreman Bulmer corroborates this—"I looked after all the traffic that came into Millfield Station. If anything was addressed to Messrs Laing & Sons, I saw that it was carted out. . . . I got no special instructions in connection with Messrs Laing's traffic to take it away. If I saw a truck come in with goods addressed to Sir James Laing, I carted it off without special instructions." I cannot doubt, therefore,

that the M'Larens were just in the ordinary position of an independent firm of carting contractors and were not acting as servants or agents of the vendees to obtain anticipated delivery of these boats. It is not shown that they had any power or authority from the vendees "in that behalf," which I suppose means "to take delivery," as on behalf of Laing & Sons at Millfield Station, anticipating the appointed destination. Then as to the alleged application of section 45 (3) of the Act, I am entirely at one with the learned Sheriff-Substitute. The sub-section does not, in my opinion, apply, because the goods had not arrived at the appointed destination when they reached the station, and therefore, even if the notice of their arrival there, given by or through the defenders' servant Ord to the carters' foreman Bulmer, could otherwise be regarded as amounting to an acknowledgment in the meaning of sub-section 3 (which I agree with the Sheriff-Substitute in thinking it could not), it was not given under the conditions therein postulated. I think the Sheriff-Substitute was right also in adding that section 45 (7) has no application in the circumstances. In order to make out that delivery of one of the boats was "made under such circumstances as to show an agreement to give up possession of" both, the defenders would, in my judgment, have to establish what upon the evidence they cannot do, viz., that vendors and vendees alike intended delivery of one boat as delivery of both. I do not propose to deal with an argument proponed by the defenders for the first time at our bar, and based upon their alleged general lien. This was plainly, I think, an afterthought—for it would if well founded have afforded a good answer to the pursuers' claim for damages. The argument did not appear to me to possess much substance, but in any case it cannot, in my judgment, now be entertained, for that would necessitate amendment of the record, which was not tendered, and an additional proof. Upon the whole matter I am for sustaining the appeal, recalling the interlocutor of the learned Sheriff appealed against, and restoring the judgment of the Sheriff-Substitute.

LORD SALVESEN—[*whose opinion was read by the Lord Justice-Clerk*]—In this case the facts, which are not really in controversy, have been very fully narrated in the opinion of the Sheriff-Substitute; and as I entirely agree in the conclusion at which he has arrived, and the legal grounds upon which he bases it, I should have thought it unnecessary to add anything but for the circumstance that the Sheriff on appeal took a different view. I think the mistake which he has made arises from his treating the carters as if they had been the servants of the consignees. He speaks of them as being "in the employment of Messrs Laing"; and he holds that the boats could not have been stopped *in transitu* when in the carters' hands in course of transmission from Millfield Station to Deptford Yard, which was the ultimate destination. In so holding I think the Sheriff has entirely misread the facts. The carting contractors, M'Laren & Co., were an independent firm who had no other connection with Messrs Laing than that they were generally employed to do their carting, and that one of the partners was also a servant of the shipbuilding company. It may be assumed that when goods arrived at Millfield Station addressed to Messrs Laing, M'Laren & Co. had a general authority to receive such goods from the Railway Company and convey them to Messrs Laings' yard; but until they were actually delivered into the yard the transit was, in my opinion, not ended. The pursuers' contract with Messrs Laing was to deliver the boats in their yard, and the whole cost of transit fell to be borne by them. I cannot doubt, therefore, that even if the boats had been put into M'Laren & Co.'s carts they could still have been stopped *in transitu* by the pursuers.

The other ground upon which the Sheriff proceeds commends itself as little to my mind. The Sheriff seems to hold that after the Railway Company had notified the carters to remove the boat and afterwards refused to deliver it on the ground that they were entitled to hold it as security for their general lien, there was constructive delivery so far as the contract of carriage was concerned. I can understand constructive delivery where goods have been delivered to a warehouseman on the order of the purchaser, or where there has been an agreement between the purchaser and the carrier, that the carrier as from the date of the agreement was to hold the goods for behoof of the purchaser, but there was nothing of the kind here. The Railway Company were in possession of the boat simply as carriers, and it was because of this that they were enabled to withhold delivery. They could have done so quite apart from the contract for a general lien if they had any interest which they might have desired to protect by asserting their right of retention. In short, they just were in the same position as the owner of a ship which has arrived at its destination, and of whose readiness to discharge her cargo notice has been given. But I never heard it suggested that a shipowner who declines to discharge goods until his lien for freight or a contract lien for demurrage or the like has been provided for, thereby ceases to hold the cargo as a carrier, or that the transit is ended when the ship gets on demurrage, and the shipowner is in a more or less figurative sense transformed into a warehouseman. Yet this proposition is involved in the argument maintained by Mr Cooper. The transit may of course be ended by agreement between the carrier and the owners of the goods carried, but such an agreement is not to be implied merely from the fact that the carrier has intimated that he is ready to deliver the goods.

The contention as to the effect of partial delivery founded on sub-section 7 of section 45 of the Sale of Goods Act has been fully dealt with by the Sheriff-Substitute, and I cannot usefully add anything to what he has said.

A further argument was submitted to us on behalf of the respondents, based upon the general conditions of the consignment note which formed the contract of carriage between the pursuers and the Caledonian Railway Company. One of these conditions is to the effect that "all goods delivered to the company will be received and held by them subject to a lien for money due to them for the carriage of and other charges upon such goods, and also to a general lien for any other moneys due to them from the owners of such goods upon any account. Now it was said that it has been established in this case that the North Eastern Railway Company (not the Caledonian Railway Company) had an account of £188 against the receivers of the goods, and that as the boat was only of the value of £61, 10s., the North Eastern Company were entitled to apply its value in payment of this account. It is significant that this argument seems to have been presented for the first time at the hearing before us. There is no trace of it in the elaborate judgments of the two Sheriffs, and I am not surprised, for there are neither averments nor pleas on record which properly raise it. Further, assuming that the right claimed existed in the Railway Company, it was incumbent on them to show not merely that they had an account against Messrs Laing to the amount stated, but that the value of the boat in dispute required to be applied to meet that account. For all that appears the Railway Company may have been in possession of other property belonging to Messrs Laing which was unaffected by equities in favour of third parties. It is enough, however, to say that a special defence of this nature ought to have been distinctly tabled, so that the pursuers might have had an opportunity of investigating the facts. The only reference on the record to the monthly credit account and to the contract between the defenders and Messrs Laing for securing it, is made for the purpose of aiding the argument that the transit had ended. There is no reference whatever in the pleas to the conditions of the consignment note, nor any suggestion from beginning to end of the record that the defenders' lien could only be satisfied from the proceeds of the boat which the pursuers had stopped *in transitu* in their hands. In these circumstances we could not consider this contention without an amendment of the record (which the defenders did not ask our leave to make), and which if we held it relevant might involve further inquiry. In the whole circumstances I am of opinion that we ought to recal the interlocutor of the Sheriff and revert to the interlocutor of 7th February 1910. I would only add that no question was raised as to the amount payable by the defenders in the event of our agreeing with the judgment of the Sheriff-Substitute.

LORD ARDWALL was absent.

The Court recalled the interlocutor of the Sheriff and reverted to that of the Sheriff-Substitute.

Counsel for Pursuers (Appellants) — Sandeman, K.C.—J. Stevenson. Agents— Campbell & Smith, S.S.C.

Counsel for Defenders (Respondents) — Cooper, K.C. — M. P. Fraser. Agents — Cowan & Dalmahoy, W.S.

Saturday, July 22.

FIRST DIVISION.

(SINGLE BILLS.)

ROBERTSON, PETITIONER.

Parent and Child—Husband and Wife—Abduction of Child by Mother—Petition by Father to Recover Custody.

A wife raised against her husband an action of separation and aliment on the grounds of his alleged cruelty and habitual drunkenness. The defender was assoilzied. Thereafter the husband presented a petition to the Court, in which he averred that his wife had left the house where she had been living, leaving no address, and had taken away with her the only child of the marriage, a girl two years old, and that she was taking (or had already taken) the child out of Scotland. He craved the Court to grant warrant to messengers-at-arms to take the child into their custody and deliver her to him, and to interdict the wife from removing the child from Scotland.

The Court *refused* to grant the warrant to messengers-at-arms to take the child from the custody of the mother, but *granted* interdict against the mother removing the child from Scotland.

David Slater Robertson presented a petition for the custody of the child of the marriage between him and Mrs Mary Irvine or Robertson.

The petition set forth—"The petitioner was married in St Serf's Church, Ferry Road, Leith, on 23rd July 1904, to the respondent Mrs Mary Irvine or Robertson, and the parties took up house together at No. 11 Mayville Gardens, Trinity. The petitioner is now thirty-two years of age and the respondent thirty-four.

"On 1st July 1909 Elizabeth Irvine Robertson, the only child of the marriage, was born.

"The married life of the parties has not been on the whole a happy one, although there have been periods of considerable length when the parties lived together happily enough. About three weeks after the marriage, and about a week after the parties took up house, the respondent took offence at a harmless remark made by the petitioner's father, and a few days afterwards, although on quite good terms with the petitioner, she left his house without warning and went to Glasgow, where she took a situation as a typist. After a short time the petitioner discovered where she was and she was induced to return home.