358) it was decided that a railway mineral depot was an enclosed place to which the public had a restricted right of access within the meaning of section 1 (4), although in that case the goods yard was open—as of course a goods yard has to be—for a considerable distance on one of its sides to the general railway system of the railway company. In this case, however, the peculiarity is that at the time when the alleged offence was committed the goods yard was not merely open on the side where it communicated with the company's general railway system, but was also for a considerable distance at anyrate open, or at least unfenced, on another side. On the side in question the goods yard is bounded by adjacent private property which lies between the goods yard and a public street. The owners of this property were at the time carrying on building operations, which were such as to require the fence which formerly cut off their property from the street to be removed, and the only division between that property and the goods yard was an earthen embankment of two feet in height. Accordingly at the time when the offence was committed there was on the side in question no actual existing fence or obstruction or definition of the limit of the goods yard with the exception of the earthen embankment to which I have referred, and which, I suppose, represented the difference in height between the level of the goods yard and that of the adjacent ground.

Now the question turns upon this—whether the description of a place as being "enclosed" requires that there shall be an enclosure such as effectively keeps the public out physically, or as Mr Patrick put it, such as requires in some perceptible and appreciable degree to be the object of force in order that it should be overcome, or whether, on the other hand, the definition cannot be satisfied by something much less physically effective. I see no reason to suppose that an "enclosed place" must be enclosed by unclimbable or impenetrable fences, and I hesitate to adopt a definition which would be subject to so much uncertainty and difficulty as one depending upon the amount of force required to overcome the enclosing obstruction. I cannot think that that was what the statute had in mind. On the contrary, I think that an "enclosed place" within the meaning of the Act is an area the limits of which are so physically demarcated or distinguished from any adjacent ground from which it can be approached as to inform members of the public approaching it that they are not allowed to have any general or unrestricted right of access to it.

If that be the true meaning of "enclosed place" within the Act, then there is no doubt that an area in the situation and condition of this goods yard was an "enclosed place," notwithstanding that access to it from a public roadway was physically easy at the date of the offence. There was the physical demarcation caused by the earthen embankment, and any member of the public approaching the yard from the street could only reach that physical demarcation by trespassing on private property, namely, the property intervening between the street and the yard on which the building operations were proceeding which had caused the temporary removal of the fence along the street.

LORD MACKENZIE—I am of the same opinion. I am quite satisfied that on the facts set out in this case the Sheriff-Substitute was entitled to take the view that this goods yard was an enclosed place. I think when one reads the description of the place and the adjacent ground, there could be no doubt in the mind of any member of the public as to whether he was standing in the goods yard of the Caledonian Railway Company or not, and that being so I think there was quite sufficient to justify the conclusion arrived at.

LORD CULLEN concurred.

The Court answered the question of law in the affirmative.

Counsel for the Appellants — Patrick. Agent—James G. Bryson, Solicitor.

Counsel for the Respondent - Fleming, A.-D. Agent—John Prosser, W.S., Crown Agent.

COURT OF SESSION.

Wednesday, December 15.

SECOND DIVISION.

[Lord Sands, Ordinary.

NORTH BRITISH RAILWAY COMPANY *v.* STEEL COMPANY OF SCOTLAND, LIMITED.

Railway — Statute — Defence of the Realm — Ultra vires — Demurrage Charges — Defence of the Realm Consolidation Act 1914 (5 *Geo. V, cap.* 8), *sec.* 1 (1) (*e*) —*Defence of the Realm Regulation* 7 *B* (1) (*b*)—*Railway Waggons Disposal* (*Scotland*) *No.* 2 *Order* 1918.

Section 1 (1) of the Defence of the Realm Consolidation Act 1914 empowers His Majesty in Council "during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm." Regulation 7 B (1) (*b*) authorises the Board of Trade to make orders "prescribing the time after the expiration of which charges may be made by railway companies for the detention of waggons." As so authorised the Board of Trade made the Railway Waggons Disposal (Scotland) Order 1918, of date 28th November 1918, authorising railway companies to make such charges after the expiration of the prescribed time. In an action at the instance of a railway company against a firm of traders for payment of demurrage charges under the Order, the defenders averred that the Order deprived them of their statutory right to arbitration

under the schedule to the Railway Rates and Charges, No. 25 (North British Railway) Order Confirmation Act 1892, that the Order was passed for the benefit of the railway companies and not for securing the public safety and the defence of the realm, and that the Defence of the Realm Consolidation Act 1914 gave no power to His Majesty in Council to grant rights of exaction to third parties. They pleaded that the Regulation and the Order following on it were *ultra vires*. *Held* that the Regulation and the Order were within the powers conferred by the Defence of the Realm Consolidation Act 1914 and that they were not *ultra vires*.

The North British Railway Company, *pursuers*, brought an action against the Steel Company of Scotland, Limited, *defenders*, for payment of £199, 0s. 6d., being charges for the detention of waggons beyond the time mentioned in a regulation of the Board of Trade dated 28th November 1918 acting in pursuance of powers conferred on them by His Majesty in Council as authorised by section 1 (1) of the Defence of the Realm Act 1914.

The defenders averred, *inter alia*—"Explained that in terms of the schedule to the said Railway Rates and Charges No. 25 (North British Railway) Order Confirmation Act 1892 it is provided that 'Any difference arising under this section shall be determined by an arbiter to be appointed by the Board of Trade at the instance of either party.' Explained that Regulation 7 B and the said Railway Waggons Disposal (Scotland) No. 2 Order 1918 purport to deprive the defenders of their statutory right to arbitration, and to give the pursuers an absolute right to exact demurrage whether reasonable or not in terms of the said schedule thereto. The said Order, or in any event the said Order in so far as the pursuers found thereon, was passed for the benefit of the railway companies and not for securing the public safety and the defence of the realm. Explained that the Defence of the Realm Consolidation Act 1914 prescribes the mode of enforcing the regulations made under it by fine (restricted to £100) or imprisonment or both, but gives no power to His Majesty in Council to grant rights of exaction to third parties. In so far as the said Order confers powers upon the pursuers beyond their statutory rights it is *ultra vires*."

The pursuers pleaded—"1. The pursuers being entitled to make charges against the defenders, and the defenders being bound to pay such charges as are reasonable in amount in respect of the detention by the defenders of any waggons owned by the pursuers, or which for the time being they are entitled to use beyond the periods set forth in the schedule to the said Order, and the charges per day made by the pursuers being reasonable in amount, decree should be granted as concluded for. 2. The sum sued for being due and resting-owing by the defenders to the pursuers, decree should be granted as concluded for. 3. The defences being irrelevant, decree should be granted *de plano*."

The defenders pleaded—"1. The pursuers' averments being irrelevant the action should be dismissed. 2. No title to sue in respect that it was *ultra vires* His Majesty in Council to confer upon the pursuers rights in excess of their statutory rights. 3. The Regulation 7 B (1) (*b*) being unauthorised by the provisions of the Defence of the Realm Consolidation Act 1914 and invalid, the defenders should be assoilzied. 4. The Railway Waggons Disposal (Scotland) Order No. 2 being *ultra vires* and invalid, the defenders should be assoilzied."

The *facts* of the case so far as material and the Order founded on appear from the opinion of the Lord Ordinary (SANDS), who on 4th June 1920 decerned in favour of the pursuers in terms of the conclusions of the summons.

Opinion. — "Under section 1 (1) of the Defence of the Realm Act 1914 His Majesty in Council is empowered to issue 'Regulations for securing the public safety and the Defence of the Realm.' These Regulations may be designed, *inter alia*, 1 (1) *e*, 'to prevent the successful prosecution of the war being endangered.'

"In the exercise of this authority His Majesty by Regulation 7 B authorised the Board of Trade to make Orders '(*b*) for enforcing the prompt loading or unloading of waggons by prescribing the time after which charges may be made by railway companies for the detention of waggons or trucks or the use or occupation of any accommodation whether before or after the conveyance of goods, and by making failure to load or unload in accordance with the order an offence, and for enabling waggons which are not promptly unloaded by the consignee to be unloaded and their contents to be dealt with at the risk and expense of the consignee in manner provided by the Order.'

"Acting under this Regulation, the Board of Trade made a Rule and Order upon 28th November 1918 (1918 $\frac{\text{M. } 1575}{\text{S. } 67}$), which provided, *inter alia*—'After the expiration of such time as is mentioned in the schedule hereto a railway company may make charges for the detention of any waggon or sheet owned by them, or which for the time being they are entitled to use, or for the use or occupation of any accommodation provided by them in connection with or arising out of such detention of any waggon or sheet.'

"The present action is brought for the recovery of charges for the detention of waggons beyond the time mentioned in the schedule. Apart from the rule the defenders were entitled under the railway legislation, and in particular 51 and 52 Vict. cap. 25, section 24, Schedule I, 5 (iv) to detain the waggons for such a time as might be reasonably necessary on payment as for a service in addition to the tonnage of a reasonable sum. The period of detention allowable and the sum payable had been liquidated by the Railway and Canal Commission as arbiters acting in terms of the statute, and the period of detention covered by the sum fixed was greater than the period allowed under the Board of Trade Order here in question.

"It has been authoritatively established that there is a presumption that a Regulation made by His Majesty in virtue of the statutory powers above referred to has been found necessary for the successful prosecution of the war, and that to warrant the Court to treat the Order as *ultra vires* as not being designed to serve the statutory purpose it must appear clearly that it cannot serve any such purpose.

"In the present case the object of the Order was undoubtedly to increase the railway transport available by securing that waggons should be detained for as short a period as possible by traders. That was undoubtedly such a purpose as was contemplated by the statute and I did not understand this to be disputed.

"It may be, however, that an Order made for a necessary war reason may be *ultra vires* in respect that its provisions travel together beyond the necessity. Such an Order might be one which, whilst authorising the commandeering of stores, provided that no payment or consideration should be given for them. In certain circumstances, however, even such an Order might be justifiable. It might be that people were concealing and holding up stores, and that the prospect of commandeering of hoarded goods without payment might reasonably be deemed the best stimulus to bring the goods on to the market.

"In the present case I understand the contention of the defenders to be, not that the curtailment of the time of the detention of waggons was unnecessary for the purposes of the war, but that the Order sought to secure that object by an interference with their rights under the Railway Act, which was not necessary to secure the end in view.

"I take it that if the Board of Trade deemed it necessary to take steps to curtail the time of the detention of waggons it was imperative upon them to adopt practical and effectual steps to secure this end. It is suggested that they might have framed an Order forbidding under a statutory penalty the detention of any waggon beyond a specified time. But having regard to the variety of conditions, the exigencies of business, and the temporary labour and transport difficulties, it may very well have been deemed that it was impracticable to lay down a hard and fast rule under the sanction of a criminal prosecution for a statutory penalty. If it were sought strictly to enforce such a rule it might lead to a multitude of vexatious prosecutions. If it were not strictly enforced it would be a dead letter. The best that could be done was to give a strong stimulus to general despatch. If this was the view taken, it appears to me that it was probably sound, and that the form which the Order took was the one best calculated to secure the important national end in view, if not indeed the only practical way of doing so.

"It is not suggested that there can be any inquiry into the matter, and in these circumstances I am not prepared to affirm that the order was *ultra vires* as not being necessary in order 'to prevent the successful prosecution of the war being endangered.'

"I shall accordingly grant decree in favour of the pursuers for the sum sued for, with expenses."

The defenders reclaimed, and argued—The defenders were entitled to absolvitor *de plano*, or alternatively to a proof of their averments. The Order and the Regulation were *ultra vires*. (1) They were not in a reasonable sense necessary for the prosecution of the war or the safety or defence of the realm as required by the empowering Act—Defence of the Realm Consolidation Act 1914 (5 Geo. V, cap. 8), sec. 1 (1). To fall within the statute an order must be reasonably necessary for these purposes, and the Court must judge of its reasonableness by the conditions existing at the time—*Rex* v. *Halliday*, [1917] A.C. 260, *per* Lord Atkinson at p. 272, 54 S.L.R. 662; *Chester* v. *Bateson*, [1920] 1 K.B. 829; *Newcastle Breweries, Limited* v. *The King*, [1920] 1 K.B. 854; *Hudson's Bay Company* v. *Maclay*, 1920, 36 T.L.R. 469, *per* Greer, J., at p. 475. The mere fact that the Order in question was dated a fortnight after the Armistice raised a presumption that it was not reasonably necessary for these purposes. (2) The Order was an invasion of the civil rights of the defenders. It deprived the defenders of their statutory right to arbitration under the Railway Rates and Charges, No. 25 (North British Railway) Order Confirmation Act 1892, shortened the free time hitherto allowed by 50 per cent., and imposed a new sanction in the form of demurrage charges to be imposed by the Railway Company. This new sanction was *ultra vires* of the Defence of the Realm Consolidation Act 1914, which authorised the making of regulations to be enforced by certain statutory sanctions, viz., fine or imprisonment. No new sanction either in addition to or in substitution for these could be lawfully imposed. The sanction imposed by the Order was an alteration of civil rights to enforce the Order, and was not an alteration consequent on the Order. Further, the sanction so imposed was not a payment to the State, but a payment to the other party to the contract, and it was for the benefit of that party. The Regulation might be perfectly honest, but that would not render it *intra vires* if it did not otherwise fall within the statute. (3) *Esto* that the Board of Trade had power to alter civil rights in the way they had done, it was *ultra vires* in them to delegate that power to another party, viz., the Railway Company.

Argued for the pursuers and respondents—The pursuers were entitled to a presumption that the purpose of the Order was for the defence of the realm, and that it was honestly issued for that purpose. This presumption could only be displaced by definite averments of a very exceptional character, and the pursuers' averments fell far short of anything that would entitle them to proof. They did not say how the Order was intended to benefit the Railway Company, and how it was not for the better securing of the public safety. Demurrage could not be regarded as a contractual right of the traders—*North British Railway Company*

v. *Coltness Iron Company, Limited,* 14 Railway and Canal Traffic Cases, 246, *per* Lord Mackenzie at p. 264. The free days were not a proprietary right of the trader. His duty was to discharge with all reasonable despatch. Interference with civil rights was not a test of *ultra vires.* As a matter of fact the majority of the cases where that plea was put forward and repelled involved interference with civil rights—*Commercial and Estates Company of Egypt* v. *Ball,* 1920, 36 T.L.R. 526; *Gurney* v. *Houghton,* 1920, 36 T.L.R. 682; *Lipton Limited* v. *Ford,* [1917] 2 K.B. 647, *per* Atkin, J., at p. 654; *Director of Public Prosecutions* v. *Solomon Ford,* 1918, 35 T.L.R. 206; *Brightman & Company, Limited* v. *Tate,* [1919] 1 K.B. 463. The fact that the Order dealt with railway waggons raised a *prima facie* presumption that it was required for the successful prosecution of the war. The fact that the Order was issued after the conclusion of the Armistice did not imply that it was *ultra vires.* The war might at any time have been resumed, and the emergency powers under the Defence of the Realm Consolidation Act 1914 were still required. The pursuers' contentions were in accordance with the interpretation of the statute as given by Lord Atkinson in *Rex* v. *Halliday.* The Order and the Regulation did not abrogate the defenders' right to arbitration as to the amount of charges. They only interfered with their right of appeal to an arbiter on the question of free time.

LORD JUSTICE-CLERK—In this case the only question argued before us was whether the regulation and Order founded on by the pursuers were *ultra vires.* If not, there was no question as to the amount sued for. It is admitted in answer 5 that the demurrage rate charged by the pursuers was reasonable. The Defence of the Realm Consolidation Act 1914 (5 Geo. V., cap. 8), section 1 (1), provides that "His Majesty in Council has power during the continuance of the present war to issue regulations for securing the further safety and defence of the realm, and as to the powers and duties of the Admiralty and Army Council, and of the members of His Majesty's forces and other persons acting in his behalf." One of the regulations purporting to be issued under the authority of that section is Regulation 7 B. That regulation provides, *inter alia,* that "the Board of Trade may for the purpose of making the most efficient use of railway plant or labour with a view to the successful prosecution of the war, make orders . . . prescribing the time after the expiration of which charges may be made by railway companies for the detention of waggons or trucks." That is exactly what the Board of Trade have done by the Order founded on.

In the case of *Halliday,* [1917] A.C. 260, it was pointed out in the judgments in the House of Lords (perhaps most emphatically though indirectly in the dissenting judgment of Lord Shaw at pp. 287-288) how thorough and comprehensive the statute is. The Legislature authorised the Executive acting by His Majesty in Council to issue regulations. That authority is subject to two limitations only—one as to time, viz., during the continuance of the present war; the other as to purpose, viz., to secure the public safety and the defence of the realm. There is no provision to the effect that the regulations to be issued are not to be contrary to or are to be controlled by existing laws, statutory or non-statutory. Lord Wrenbury said in *Halliday's* case, [1917] A.C. 260, at p. 307—"A 'regulation' may affect a previously existing statute." The defenders do not say the regulation in question goes beyond either of those limitations. They do however aver that the regulation and Order (1) deprive the defenders of their statutory right to arbitration, and (2) give the pursuers an absolute right to exact demurrage whether reasonable or not. Keeping in view that the rate of the demurrage charged is admitted to be reasonable, I do not think the regulation or Order can be challenged because of the rate thereby authorised. The Board of Trade is given by the regulation power to prescribe what is called free time, and the railway companies are authorised by the Order to "make charges for the detention of any waggon" beyond that time. If the parties disagree as to the amount of these charges, any difference, except as to the duration of the free time, will fall to be determined by an arbiter to be appointed by the Board of Trade in terms of the railway company's statute of 1892. That right of appeal, excepting as aforesaid, is not disputed by the pursuers, and is not in my opinion affected either by the regulation or Order. The right of appeal to an arbiter as regards free time is, however, disputed. The regulation expressly gives the Board of Trade power to fix the free time. That is a new power given to the Board of Trade by the regulation, and it is not made subject to any right of appeal to arbitration. The right to appeal to arbitration, to which the defenders refer, has to do with differences between the railway companies and traders, and in my opinion does not apply to Orders made by the Board of Trade under the regulation now being considered. The right of appeal to an arbiter given by the Act of 1892 is limited by section 5 of the schedule to differences "arising under this section." In my opinion that right does not extend to differences which do not arise under that section but under the regulation or Order with which we are now dealing.

The defenders further aver that the Order was passed for the benefit of the railway companies and not for securing the public safety and the defence of the realm. That averment is completely wanting in specification, and is irrelevant even if a challenge on any such ground were competent in a court of law. This objection applies only to the Order. The Order is not said to have been issued *in mala fide,* and in prescribing the free times allowed in the schedule it is simply doing one of the very things which Regulation 7 B authorised the Board of Trade to do.

The defenders in argument raised the further objection that the Order was issued

after the Armistice, viz., on 28th November 1918. But an armistice does not mean the end of a war, nor is it equivalent to the conclusion of peace. At 28th November 1918 the Armistice merely involved a cessation of hostilities or truce which might very well have been exceedingly brief. It has never been held that the continuance of the war ceased in 1918 (see *Kotzias* v. *Tyser*, [1920] 2 K.B. 69). But the defenders cannot raise that point. If they had desired to do so they would have required to make averments sufficient to support such a plea and to have stated the necessary plea. I am not surprised that they have done neither.

The defenders averred that the free time allowed by the schedule to the Order was not reasonable. But there is nothing in the statute or regulation to the effect that the Board of Trade are to be restricted to allowing only such free time as the courts of law may regard as reasonable. In such a matter the Board of Trade are likely to be much better able to judge than the courts of law. However that may be, the regulations impose no such restraint on the discretion of the Board of Trade. I can find no ground to support the contention that it was *ultra vires* to authorise the Board of Trade to issue the Order in question.

In my opinion the judgment of the Lord Ordinary is right. The defenders have stated no relevant defence, and the reclaiming note should be refused.

LORD DUNDAS—I am of the same opinion. I can well understand that this case is regarded as an important one by the defenders and other traders, but I cannot say that in my judgment it is attended with much difficulty. From the time the case was opened I felt that the defenders had a very uphill task; and I think that they must fail for the reasons stated shortly by the Lord Ordinary and more fully by your lordship in the chair. At one time the defenders' counsel seemed disposed to tender some amendment of their pleadings, but they thought better of the idea and abandoned it. The pleadings unamended cannot be remitted to probation, and I agree that the Lord Ordinary's judgment must stand.

LORD SALVESEN—I agree with the Lord Ordinary. Regulation 7 B expressly authorises the Board of Trade to make orders to enforce the prompt loading or unloading of waggons "by prescribing the time after the expiration of which charges may be made by railway companies for the detention of waggons." The Order dated 28th November 1918 does not go beyond this authority. The defenders must therefore show that Regulation 7B was *ultra vires*. Their main if not their only averment is that "it was passed for the benefit of the railway companies." It may be conceded that incidentally an advantage would be secured by the companies if loading or unloading of waggons used on their lines were accelerated as the result of the Order. But this may equally be said of many orders, such as those by which the maximum rates for railway carriage were raised, and is not *per se* relevant to infer that the Order was *ultra vires*. On the face of the Order it is not apparent that it served no purpose in furthering the successful prosecution of the war or in securing the public safety and the defence of the realm. On the contrary, looking to the fact that the transport services, important at all times, are specially important in war time, I should readily infer that an Order which was designed to expedite the loading and unloading of waggons so that more goods might be conveyed in them might greatly assist the problem of supplying the troops with food and munitions of war. It is sufficient, however, to say that no averment to a contrary effect is made, and the averment which is made, that the Order deprived the defenders of their former statutory rights, does not supply the want, for the very object of such regulations as 7B was to enable the executive to modify or abrogate the pre-existing rights of individuals whether at common law or under statute. I am therefore for affirming the interlocutor appealed from.

LORD ORMIDALE was absent.

The Court adhered.

Counsel for the Pursuers and Respondents—Macmillan, K.C.—Watson, K.C.—Graham Robertson. Agent—James Watson, S.S.C.

Counsel for the Defenders and Reclaimers — Mackay, K.C. — Aitchison. Agents — Drummond & Reid, W.S.

Saturday, November 27.

FIRST DIVISION.

[Lord Blackburn, Ordinary.

ELLERMAN LINES, LIMITED (S.S. "CITY OF NAPLES") *v.* TRUSTEES OF HARBOUR OF DUNDEE.

Ship — Collision with Sunken Wreck — Liability —Buoyage—Failure to Observe Wreck Marking Buoy — Chart — Wreck-Symbol — Vessel Steered over Charted Position of Wreck in Absence of Charted Buoys.

A vessel was approaching the entrance to a buoyed fairway in an estuary leading to a harbour about 10·40 a.m. on 15th April 1919. Pilotage was not compulsory, and the master was navigating the vessel without a pilot. His only sources of information were his chart, corrected up to 14th January 1919 (three months back), sailing directions, and observation of sea marks afloat. Near the entrance to the buoyed fairway was a "fairway" buoy to guide vessels towards the entrance. Between the "fairway" buoy and the entrance to the buoyed fairway lay a sunken wreck, the position of which was approximately indicated on the master's chart by a wreck-symbol, and by two wreck-marking buoys coloured green, conical in shape and lighted, about a cable length