Saturday, January 15.

SECOND DIVISION.

[Lord Sands, Ordinary.

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

Railway—Emergency Legislation—Charge for Detention of Waggons—Reasonableness—Power of Minister of Transport to Prescribe "Free Time"—Ultra vires—Statutory Right to Arbitration—Ministry of Transport Act 1919 (9 *and* 10 *Geo. V, cap.* 50), *sec.* 3 (1) (*c*) *and* (*e*)—*Railway Rates and Charges No.* 25 (*North British Railway, &c.*) *Order Confirmation Act* 1892 (55 *and* 56 *Vict. cap.* lxiii), *sec.* 5.

Held (*rev.* judgment of Lord Ordinary Sands), that so long as the Ministry of Transport Act 1919 remains in operation the Minister has power, in respect of the undertaking of the North British Railway Company, after taking the advice of the Advisory Committee, to prescribe the "free time" to be allowed for unloading waggons before charges begin to run for detention; that the "free time" so prescribed must be deemed to be reasonable; and that its reasonableness cannot be made the subject of an appeal to arbitration under section 5 of the Schedule of the Railway Rates and Charges No. 25 (North British Railway, &c.) Order Confirmation Act 1892.

The Ministry of Transport Act 1919 (9 and 10 Geo. V, cap. 50) enacts, sec. 3 (1) (*c*)—"The directors and other persons concerned with the management, and officers and servants of any undertaking of the whole or part of which, or of the plant whereof, possession is retained or taken, shall obey the directions of the Minister as to the user thereof, and any directions of the Minister in relation to the undertaking or part or plant thereof of which possession is retained or taken—(1) as to rates, fares, tolls, dues, and charges to be charged, subject, however, to the provisions hereinafter contained respecting references to the advisory committee established for advising as to directions on the matters aforesaid. . . . (*e*) In the case of any undertaking of which possession is retained or taken by the Minister as aforesaid, any rates, fares, tolls, dues, and other charges directed by the Minister shall be deemed to be reasonable, and may, notwithstanding any agreement or statutory provisions limiting the amount of such charges or increases therein, be charged. . . ."

The North British Railway Company, *pursuers*, brought an action against the Steel Company of Scotland, Limited, *defenders*, for payment of £64, 11s. 6d. as charges for the detention of waggons placed by the pursuers at the disposal of the defenders for use at their private siding.

The parties averred, *inter alia*—"(Cond. 3) By virtue of the Railway Rates and Charges, No. 25 (North British Railway, &c.) Order Confirmation Act 1892 (55 and 56 Vict. cap. lxiii), and the Schedule of Maximum Rates and Charges contained therein, the pursuers are authorised to charge, *inter alia*, a reasonable sum by way of addition to the tonnage rate for the detention by the defenders of trucks or waggons before or after conveyance beyond such period as shall be reasonably necessary for enabling the defenders to give or take delivery of the merchandise. (*Ans.* 3) The Act and schedule mentioned are referred to for their terms. (Cond. 4) Under the powers of the Ministry of Transport Act 1919 (9 and 10 Geo. V, cap. 50) the Minister of Transport, by intimation to the pursuers dated 20th December 1919, directed that in respect of the undertaking of the pursuers the charges set out in the schedule to the direction shall as from the 1st day of January 1920 be charged for detention of railway companies' waggons and sheets beyond the respective free periods defined in the said schedule. The said schedule sets forth, *inter alia*, the charges to be made for the detention of waggons and sheets before and after transit over the railway, and also the free periods allowed for loading or unloading merchandise, including coal, coke, and patent fuel. A copy of the public notice containing the said schedule is herewith produced and referred to. The explanations and averments in answer, so far as not coinciding herewith, are denied under reference to the statutes, direction, notice, and schedule mentioned. (*Ans.* 4) The Ministry of Transport Act 1919 (9 and 10 Geo. V, c. 50) and the said intimation or direction by the Minister of Transport and the said public notice and schedule are referred to for their terms. *Quoad ultra* denied. Explained that the said direction and schedule purport (*a*) to fix the free periods allowed to the defenders for giving and taking delivery of merchandise before and after conveyance, and (*b*) to prescribe the charges to be made for detention of waggons beyond said free periods. Explained that the Ministry of Transport Act confers no power on the Ministry of Transport to prescribe or interfere with the facilities to which the defenders are entitled under the Act of Parliament applicable to the pursuers' undertaking, and in particular to fix the time reasonably necessary for giving and taking delivery of merchandise before and after conveyance. Further explained that in terms of the schedule to the Railway Rates and Charges No. 25 (North British Railway) Order Confirmation Act 1892, the defenders have a statutory right of detention of railway waggons for uses incidental to the conveyance of the merchandise beyond the periods reasonably required for giving and taking delivery of the merchandise. Said statutory right of detention is deemed to be a special service rendered to the trader in respect of which a reasonable charge is exigible. The charges contained in the said direction and Schedule of the Minister of Transport are unreasonable and excessive, and are not fixed with the view of assessing a reasonable remuneration for such special service. In effect they deprive the defenders of their statutory right to the special service conferred by the foresaid Act. Said charges

were not fixed in good faith as representing a fair reward for said special service of detention, but are penal in character and were framed with a view to defeating the defenders' statutory rights. The said direction and Schedule are *ultra vires* (1) in so far as they prescribe the periods reasonably necessary for giving and taking delivery of merchandise before and after conveyance, and (2) in so far as the said charges are in excess of what is a reasonable return for the special service of detention. (Cond. 5) Between 1st January and 31st May 1920 certain waggons owned by the pursuers, or which they were for the time being entitled to use, were placed by the pursuers at the disposal of the defenders at their Blochairn Siding for the purpose of unloading merchandise. Particulars regarding (1) the said waggons, (2) the periods of time during which they were placed at the disposal of the defenders, and (3) the sums charged by the pursuers against the defenders in respect of the detention of the said waggons, are contained in an account which will be produced in the course of the process. A copy of the said account has already been furnished to the defenders. The waggons in question were at the disposal of the defenders at their said siding during the periods of time shown in the said account, and the charges per day set forth in the said account as applicable to the particular waggons in question are the charges per day set forth in the beforementioned schedule. The explanation in answer is denied. (*Ans.* 5) Admitted that between 1st January and 31st May 1920 certain waggons were placed by the pursuers at the disposal of the defenders at their said siding for the purpose of loading or unloading merchandise. The account mentioned is referred to for its terms. Explained that the said waggons were not detained beyond the time reasonably necessary for giving or taking delivery of the merchandise carried over pursuers' railway. *Quoad ultra* admitted. (Cond. 6) The foresaid account, amounting to £64, 11s. 6d., is made up on the footing that the charges which the pursuers are entitled to make against the defenders for the detention of any waggons commence to run at the expiry of the periods of time set forth in the said schedule. (*Ans.* 6) Believed to be true that the account amounting to £64, 11s. 6d. is made up on the footing that the charges commenced to run at the expiry of the periods of time set forth in the said schedule. (Cond. 7) The defenders dispute that the charges which the pursuers are entitled to make against them in respect of the detention of waggons and the free days are those set forth in the said schedule. (*Ans.* 7) Admitted. Reference is made to answer 4. (Cond. 8) The defenders do not raise any objection to the pursuers' claim on the question of the fact of detention, but only on the question of the amount per day charged for detention and the duration of the free time. The defenders also claim that the direction of the minister is invalid, and that the question in dispute falls to be determined by a court of law. (*Ans.* 8) Admitted. Reference is made to answer 4."

The pursuers, *inter alia*, *pleaded* — "1. The pursuers being entitled to make the charges against the defenders directed by the Minister of Transport 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 issued by the minister, 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 it was *ultra vires* the Minister of Transport (*a*) to prescribe, or in any event to prescribe without reference to reasonable requirements, the time to be held as necessary for giving and taking delivery of merchandise before and after conveyance; (*b*) to impose charges, or in any event to impose charges calculated without reference to the reasonable remuneration for service. 3. The said direction and relative schedule of the Minister of Transport in so far as (*a*) it purports to prescribe the time to be held as necessary for giving and taking delivery of merchandise before and after conveyance, (*b*) it imposes charges for services, being unauthorised by the Ministry of Transport Act 1919, and *ultra vires* and invalid, the defender should be assoilzied."

On 7th December 1920 the Lord Ordinary (SANDS) pronounced the following interlocutor—"Repels plea 2 (*b*) for the defenders: *Quoad ultra*, Finds that the defenders are entitled under the Railway Rates and Charges Act 1892, Schedule (5), to have any difference in regard to the time reasonably necessary before a charge for detention of waggons begins to run determined by arbitration: Continues the cause and grants leave to reclaim."

Opinion.—"Under section 3 (*c*) of the Ministry of Transport Act 1919 the directors and other officials of railway companies are bound to obey the directions of the Minister, *inter alia* (1) as to the rates, fares, tolls, dues, and charges to be charged. There is nothing in the provision, taken by itself, that affects the rights of traders. Under former arrangements subordinate officials were bound to obey the directions of the board of directors as to the rates to be charged, and this provision seems simply to put the Minister in his turn over the directors. It does not appear to me to empower the Minister to direct the making of charges in excess of statutory maxima any more than the directors had such power. In other words, it is quite consistent with observation, as in a question with traders, of the previously existing rules as to the fixing of maximum rates. It is otherwise, however, when we turn to sub-section (*e*). That subsection provides—'In the case of any undertaking of which possession is retained or taken by the Minister as aforesaid any rates, fares, tolls, dues, and other charges directed by the Minister shall be deemed to be reasonable, and may, notwithstanding any agreement or statutory provisions limiting the amount of such charges or

increases therein, be charged in respect of any undertaking during the period for which the Minister retains possession of such undertaking, and for a further period of eighteen months after the expiration of the said period, or until fresh provision shall be made by parliament with regard to the amount of any such rates, fares, tolls, dues, and other charges, whichever shall first happen.'

"I heard a great deal of ingenious argument upon this sub-section on the part of the defenders, but they failed to satisfy me that the sub-section can be construed otherwise than according to its *prima facie* intendment. The Minister of Transport has, for the time being, complete authority as to the fixing of rates irrespective altogether of existing statutory limitations. Nor can any question be raised in a court of law as to the reasonability of such charges or the arbitrary or non-arbitrary manner in which the table of rates is framed.

"This does not, however, exhaust the question between the parties.

"Under the Railway Rates and Charges Act, No. 25, 1892 (schedule), rates and charges for goods are authorised under three heads — carriage, terminal charges, and extra services, one of which is the 'detention of trucks beyond such time as shall be reasonably necessary,' &c.

"Any difference arising in respect of the latter is to be determined by an arbitrator to be appointed by the Board of Trade (5). Under this provision two questions might emerge for arbitration — (1) What is the reasonable rate per day for detention? (2) What in relation to the particular traffic is the time reasonably necessary for unloading and delivery of waggons?

"These two questions are quite separable, and, as I understand, disputes have in the past arisen in regard to the one where the other was not at all implicated.

"The Minister of Transport claims power under section 3 of the 1919 Act to supersede the right of the traders to arbitration under both heads.

"If the Act of 1919 were the beginning of things as regards legislation it might be that the general power to fix rates, fares, tolls, dues, and other charges conferred upon the Minister might be held to include a power not merely to fix the rate of demurrage but also to fix the period from which this rate should run. But the statute of 1892 is not repealed. It is only affected in this way that the order of the Minister is to override 'any agreement or statutory provisions limiting the amount of such charges.' The statutes must be read together. Full effect must still be given to the older statute where it does not clearly conflict with the later one. It appears to me that the statutory right of the Minister under the later Act is satisfied if he has full power to prescribe the rate of demurrage to be charged in respect of the detention of waggons beyond such period as shall be reasonably necessary, and that the statutory right of the trader to have this period determined by arbitration is not inconsistent with the powers conferred upon the Minister. To put it more generally, it does not appear to me to be necessary, particularly in view of the temporary character of the Act, to construe the sub-section as empowering the Minister simply to wipe out the elaborate and detailed provisions and safeguards of the schedule to the Act of 1892 and to substitute a new code for the statutory one. The provisions of the sub-section are satisfied if as regards each detail he has power to fix the amount of the rate. It is the 'limitation of the amounts' that the Minister is authorised to override. The Minister, for example, may fix what rate he thinks proper for conveyance, but he cannot override the statutory provisions as to what that rate includes, for that is not a provision 'limiting the amount of a rate.' It may be said perhaps by the defenders that the provision in regard to the amount to be paid in respect of the detention of waggons does not limit the amount of a rate. But it appears to limit the amount to what an arbiter thinks reasonable; whereas under the 1919 Act it appears to be fixed at what the Minister of Transport thinks reasonable.

"I shall accordingly repel plea 2 (*b*) for the defenders; *quoad ultra* find that the defenders are entitled under the Railway Rates and Charges Act 1892, Schedule (5), to have any difference in regard to the time reasonably necessary before a charge for detention of waggons begins to run determined by arbitration; continue the cause and grant leave to reclaim."

The pursuers reclaimed, and argued—The pursuers were entitled to decree *de plano*. The Minister of Transport's order was *intra vires*—Ministry of Transport Act 1919 (9 and 10 Geo. V, c. 50), section 3 (*c*) and (*e*). By section 3 (*f*) certain limitations were put to the Minister's powers with regard to the matters therein specified, *e.g.*, the granting of undue preferences, but with regard to the fixing of charges the Minister had an absolute discretion. Charges fixed by him were deemed to be reasonable, section 3 (*e*), and accordingly the reasonability of a charge could not be made the subject of arbitration under section 5 of the Railway Rates and Charges No. 25 (North British Railway, &c.) Order Confirmation Act 1892 (55 and 56 Vict., c. 63). In the case of a charge for detention the word "charge" covered not only the rate payable *per diem* but also the length of the "free time," because the reasonability of the charge could not be determined unless both factors were taken into consideration.

Argued for the respondents—The Minister's Order was *ultra vires*. Section 3 (*c*) of the Ministry of Transport was not an empowering section. It could not override previous legislation. Moreover it said nothing about "free time" and gave no power to curtail services which traders were entitled to as a statutory right. Section 3 (*e*) did give power to alter rates and charges, but it gave no power to interfere with services, and to alter the length of the "free time" was to interfere with services. By altering the free

time the Minister had really encroached on "conveyance," and therefore necessarily had imposed a demurrage charge. The word "charge" meant only the rate payable *per diem*. It did not include the length of the free time. Under the Railway Rates and Charges No. 25 (North British Railway, &c.) Order Confirmation Act 1892, the two elements were always adjudicated on separately. The case of a charter-party was an absolute analogy. In a charter-party the charge was fixed, while the lay-days were left to the rules of the port of discharge. In neither demurrage nor conveyance was "free time" an element—*North British Railway Company* v. *Coltness Iron Company, Limited*, 1911, 14 Rly. and Can. Cas. 246, *per* Lord Mackenzie at p. 259. The defenders were entitled to make a charge for detention, but the charge must be reasonable, and its reasonability could be made the subject of arbitration under section 5 of the Railway Rates and Charges No. 25 (North British Railway, &c.) Order Confirmation Act 1892.

At advising—

LORD JUSTICE-CLERK—The controversy in this case depends mainly on the construction of the Ministry of Transport Act 1919, particularly sections 3 and 21. By section 3 (1) (*c*) the Railway Company's officials "shall obey the directions of the Minister" of Transport "as to the user" of the undertaking or plant of which the Minister has possession, and "any directions of the Minister in relation to" such undertaking or plant thereof "as to the rates, fares, tolls, dues, and charges to be charged," subject to the subsequent provisions respecting references to the Rates Advisory Committee. By section 21 an advisory committee is provided for. Sub-section (1) provides that the committee is to be appointed for the purpose of advising the Minister as to safeguarding any interests affected by any directions of the Minister as to rates, fares, tolls, dues, and other charges, or special services. Sub-section (2) provides that the Minister before directing any revision of any rates, fares, tolls, dues, or charges, or of any special services, shall refer the matter to the committee for their advice, and where such revision is for the purpose of an increase in the net revenue the committee shall also advise as to the best methods of obtaining such increase and the fairness and adequacy of the methods to be adopted. By section 21 (6) "special services" means the services mentioned in section 5 of the schedule to the orders relating to railway rates and charges confirmed by various Acts from 1891 to 1894. The Minister therefore has power to give directions as to those special services, and the services concerned in this case are included in them. He has also power to give directions as to the rates and charges to be charged for such services. By section 3 (1) (*e*) any rates and charges directed by the Minister "shall be deemed to be reasonable, and may, notwithstanding any agreement or statutory provisions limiting the amount of such charges or increases therein, be charged" during the period provided for in the Act.

The Lord Ordinary says—"The provisions of the sub-section—*i.e.*, sub-section (*e*)—are satisfied if as regards each detail he (the Minister) has power to fix the amount of the rate. It is the 'limitation of the amounts' that the Minister is authorised to override." The Minister has a general power to direct the charging of such rates and charges as he thinks proper, and so wide is his power in this respect that whatever rates and charges he directs are to be deemed to be reasonable even although he directs charges or rates to be levied which are in excess of any statutory limit. But the Lord Ordinary considers there are two separable points to be considered, (*a*) a reasonable rate per day for detention, and (*b*) a reasonable "free time," and he has found that the defenders are entitled to have any difference in regard to the time reasonably necessary before a charge for detention begins to run determined by arbitration. In so doing the Lord Ordinary proceeds on the Statute of 1892, which he says "is not repealed. It is only affected in this way, that the Order of the Minister is to override 'any agreement or statutory provisions limiting the amount of such charges.' The statutes must be read together. Full effect must still be given to the older statute where it does not clearly conflict with the later one." I cannot agree with the Lord Ordinary. By the 1919 Act the persons connected with the management of a railway, and the company's officers and servants, shall obey the directions of the Minister as to the "user" of the plant thereof and any directions of the Minister in relation to the railway or plant thereof as to the rates and charges to be charged. In my opinion detention of waggons involves a "user" of plant as to which the Minister is entitled to issue directions which the management must obey. To prescribe the free time to be allowed before charges for detention begin to run seems to me to fall within the power to give directions as to the user of waggons and as to special services. In my opinion all the directions of the Minister in question in the present case fall within the scope of section 3 (1) (*c*). The power to give directions in relation to the plant as to the rates and charges to be charged appears to me necessarily to infer that the Minister has the power to fix the time after the expiry of which the rates or charges will begin to run as well as the power to fix the rate to be charged. In my opinion the Minister is not subjected to the limitations prescribed by section 5 of the schedule to the Act of 1892, nor is the railway management entitled to disobey his directions even if these are of such a nature that the arbiter provided for by that section would hold them to be unreasonable if reference could be made to him. A new method for checking an unreasonable minister apart from parliamentary influence and action, and for safeguarding traders' interests, is provided by setting up an advisory committee. The appeal to arbitration under the 1892 Act is in my opinion superseded or sopited while the Minister is in charge, *i.e.*, while the 1919 Act remains in operation. I find no warrant in the

statute for saying that while the Minister can deal with the rates to be charged he has no power to deal with the free time. On the contrary, it seems to me that the language of the 1919 statute is so broad as necessarily to cover both points. It is significant that while arbitration is excluded as to the reasonableness of rates and charges imposed in obedience to a direction of the Minister, the rights of traders to complain to the Railway and Canal Commission in respect of illegal or undue preference are left standing, but that is done in specific terms by section 3 (1) (*f*). There is in my opinion nothing which either expressly or by implication would justify a similar result as regards the free time to be allowed in the case of detention. It seems to me, on the contrary, that the Legislature intended that the Minister should have a free hand to deal with detention of waggons, the free time to be allowed, the rate to be charged, and the time from which the new rate directed by the Minister should be charged.

I am therefore of opinion that we should recal the Lord Ordinary's interlocutor and pronounce decree in favour of the pursuers as concluded for.

LORD DUNDAS—I am of the same opinion, and substantially for the same reasons.

The question we have to determine is whether or not the schedule of "charges to be made for the detention of waggons and sheets before and after transit over the railway" appended to the direction by the Minister of Transport to the pursuers' company, printed in the appendix, was made *intra vires* of the Minister. In my judgment we must answer this question in the affirmative. The Minister's powers under the Act of 1919 are extraordinarily wide; he seems to be made a complete plenipotentiary in regard to the undertakings concerned. The Lord Ordinary has drawn a distinction between the Minister's power in the matter of mere pecuniary amount of a rate and in that of prescribing the free time to be allowed for loading and unloading waggons. He thinks that as regards the former the Minister has power to alter the rate, but that in the latter case the trader has still a statutory right to have the question of reasonableness determined by an arbitrator to be appointed by the Board of Trade. I confess that I do not understand how this distinction can be maintained. It seems to me that the question of amount of rate, and that as to the period of days, are both involved as necessary ingredients in the making of a charge for detention. The Lord Ordinary says—"These two questions are quite separate, and, as I understand, disputes have in time past arisen in regard to the one where the other was not at all implicated." This may well have been so, for objection might obviously arise in regard to either element, but none the less both are essential ingredients in the charge. The defenders complain that if the pursuers' view is right they have been deprived of their statutory right to arbitration, and this result they say could not be effected unless Parliament has so directed either expressly or by clear and necessary implication. It appears to me that by the Act of 1919 Parliament has by the clearest implication repealed or at least suspended the traders' former right of appealing to arbitration as to the reasonableness or otherwise of such charges as are here in question. The Act provides that any charges directed by the Minister subject to the advice and assistance of the Rates Advisory Committee "shall be deemed to be reasonable and may be charged in respect of" the undertakings concerned. In my judgment, therefore, the charges in the schedule to the direction by the Minister cannot be said to have been made *ultra vires*. It follows that we must recal the Lord Ordinary's interlocutor and (there being no dispute as to the figures in the case) grant decree in favour of the pursuers for the amount sued for.

LORD ORMIDALE—It is enacted by section 3 (1) (*c*) of the Ministry of Transport Act 1919 that the directors and other persons concerned with the management and the officers and servants of an undertaking are to obey the directions of the Minister as to, *inter alia*, (i) the rates, fares, tolls, dues, and charges to be charged, subject to the provisions respecting references to the advisory committee to be established under the Act for advising as to directions on these matters. Whether or not this section *per se* is an empowering section does not appear to me to be very material. It must be read along with sub-section (*e*) of the same section, under which the power of the Minister as to the rates, &c., is in effect declared to be unlimited. Any rates, fares, and other charges directed by him are to be deemed reasonable, and may be charged notwithstanding any limitation as to amount which may have been imposed by agreement or by statute.

The present question arises in connection with a direction by the Minister that certain charges set out in a schedule to the direction shall be charged for detention of waggons and sheets beyond the respective free periods defined in the schedule. I see no reason for holding that the Minister had not power to direct the charges to be made for the detention of waggons and sheets before and after transit over the railway which are set out in the schedule—that is, the sum to be paid in respect of each waggon per day of detention after the expiration of the free period.

The question whether he had power to define the free periods allowed for loading and unloading is attended with more difficulty, but I have come to think that he had. Under section 21 (1) "for the purpose of giving advice and assistance to the Minister with respect to and for safeguarding any interests affected by a direction as to rates, fares, tolls, dues, and other charges or special services" provision is made for the appointment of a rates advisory committee, and under (6) of the same section "special services" mean the services mentioned in section 5 of the schedule to the Orders relating to railway rates and charges confirmed by various Acts passed in 1891 to 1894.

The Act which applies in the present case is the Railway Rates and Charges No. 25 (North British Railway, &c.) Order Confirmation Act 1892. By section 5 of the schedule to that Act the services for which the company may charge embrace, *inter alia* (iv) "the detention of trucks beyond such period as shall be reasonably necessary for enabling the company to deal with the merchandise as carriers thereof or the consignor or consignee to give or take delivery thereof." What the company may charge for these services is "a reasonable sum by way of addition to the tonnage rate."

The Minister has therefore, it seems to me, power to give directions after consulting with the advisory committee as to the special service in question and to fix a sum to be charged, and what he so fixes shall be deemed to be reasonable and may be charged. But the power to give directions, it appears to me, must embrace not only the fixing a rate but also the definition of the free period. It is essential to have the free period defined before the date from which the demurrage rate falls to be exacted can be ascertained, and there is nothing in the Act to suggest that this is not to be determined by the same person as he who fixes the rate. To my mind the Act implies the contrary. To arrive at a "reasonable sum" necessitates a calculation which involves as one of its factors the computation of a free period, and it is for the Minister to say what is a reasonable sum.

I agree that the pursuers are entitled to decree.

LORD SALVESEN was absent.

The Court recalled the interlocutor of the Lord Ordinary and decerned againt the defenders for the sum sued for.

Counsel for Reclaimers (Pursuers)—Macmillan, K.C.—Graham Robertson. Agent—James Watson, S.S.C.

Counsel for Respondents (Defenders)—Dean of Faculty (Constable, K.C.)—Aitchison. Agents—Drummond & Reid, W.S.

Saturday, January 8.

FIRST DIVISION.

PHILLIPP'S TRUSTEES *v.* PHILLIPP'S EXECUTOR.

Succession—Marriage Contract—Provisions Contractual or Testamentary—Destination to Heirs in mobilibus—Revocation—Implied Revocation by Subsequent General Settlement.

A lady prior to her marriage had inherited from her father a legacy of £3000, and also a share of his residuary estate, and had placed each of these funds in separate trusts. Thereafter by an antenuptial contract of marriage she directed the trustees holding each of the funds to pay the capital of the said estate on the death of the survivor of the spouses, or on the re-marriage of her husband in the event of there being no child of the marriage, to her heirs *in mobilibus*, ascertained as at the date of division according to the law of Scotland. The marriage was dissolved without issue by the death of the wife. She left a last will and testament, dated subsequently to the marriage contract, whereby, after certain bequests of trinkets, she bequeathed all her real estate and the rest of her personal estate whatsoever and wheresoever to her husband. The will, which was in English form, contained no express revocation of prior dispositions of a testamentary character.

Held that the provisions in the marriage contract in favour of heirs *in mobilibus* had been impliedly revoked by the will.

Mr Thomas Duff, merchant, Dundee, who died on 12th October 1896, left a trust-disposition and last will and testament and relative codicil dated respectively 12th October 1895 and 5th August 1896, by which he, *inter alia*, left to his daughter Miss Gertrude Duff a legacy of £3000. By the ninth purpose Mr Duff directed his trustees in certain events, which happened, to divide the residue of his trust estate equally among his children. He further provided—"And notwithstanding the period before expressed for the payment of the shares of residue, I provide that it shall be lawful to and in the power and option of my trustees, if they see cause and deem it fit, to postpone the payment of the provisions foresaid to all or any of my said eight children beyond the said term of payment, and to apply the interest or other annual produce of the same during such interval to and for behoof of such of my said eight children, or by a deed under their hands to retain the said provisions or any of them vested in their own persons, or to vest the same in the persons of other trustees whom they are hereby authorised to appoint with all or any of the powers, privileges, and exemptions conferred on themselves, so that my said eight children or any of them, as the case may be, may draw and receive only the interest or annual proceeds of their respective provisions during their lives or for such time as my trustees may fix, and that the capital may be settled on or for behoof of such of my said eight children and their lawful issue on such conditions and under such restrictions and limitations and for such uses as my trustees may deem most expedient, of which expediency and the time and manner of exercising the powers hereby given they shall be the sole and final judges." Mr Duff's trustees, considering that it would be to the advantage of the said Gertrude Duff that in exercise of the option and powers conferred upon them they should vest the provisions for her behoof in trustees to be appointed by them, it was arranged, with the consent and concurrence of the said Gertrude Duff, that trustees should be appointed under separate trust deeds to hold (*a*) the legacy of £3000, and (*b*) the share of residue falling to the said Gertrude Duff. An assignation and deed of trust dated 28th