one party of the obligations which it had entered into with the other. The actual words I used were—"As these averments stand this contract was wholly repudiated. It does not appear to me to be sound law to permit a person to repudiate a contract and thereupon specifically to found upon a term in that contract which he has thus repudiated." Had I said—"As these averments with the admissions thereof stand, this contract was wholly repudiated. It does not appear to me to be sound law to permit a person to admit that he has repudiated a contract and then specifically to found upon a term of that contract the repudiation of which he has thus admitted"—then the argument of precedent for this appeal would have been unstateable. Yet any careful reading of the case would show that what was said meant nothing else than what has now been amplified.

LORD SUMNER—[*Read by Lord Dunedin*]—That the Lord Ordinary was right in sisting procedure in this cause pending the decision of the matters at issue between the parties by arbitration I do not doubt, but I must confess to having found some difficulty in reconciling the opinions delivered by the noble and learned Lords who took part in the *Johannesburg* case, as they are reported, with what I understand to be the settled law of Scotland with regard to arbitration. The decision itself that the Court should proceed with that cause presents no difficulty, for the contract being under its terms governed by English law the Court was free and in the view of your Lordships' House was bound to do so. If it be regarded as being really an authority on English law, any observations there made as to the powers of the Court under the Scotch law of arbitration would be in strictness *obiter dicta*, but still, in view of the authority which must always attach to any opinions of the two noble and learned Lords in question, they were dicta of the greatest weight, and until I had the advantage of becoming acquainted with the opinion which my noble and learned friend who has just preceded me proposed to express in the present appeal I must confess that I read those dicta as purporting to lay down what is now confessed to be an innovation in Scotch law approximating it in a material respect to the law of England. The explanations, however, now given of the meaning and effect that were really intended to be conveyed in the *Johannesburg* case have removed my difficulties. I do not understand it to have been intended to make any change in the law of England either in regard to arbitration or as to repudiation of contracts, and therefore I think it unnecessary to examine further either that case or the judgments pronounced in the present case in the Courts below, though I do not wish to be taken as accepting all the propositions which are to be found in the different judgments.

Their Lordships dismissed the appeal with costs.

Counsel for the Appellants—Lord Advocate (Morison, K.C.)—J. C. Dickson—Ronald Smith. Agents—P. Morison & Son, W.S., Edinburgh—Lumley & Lumley, Solicitors, London.

Counsel for the Respondents—Moncrieff, K.C.—A. C. Black—A. A. Baorlein. Agents—Wright, Johnston, & Mackenzie, Solicitors, Glasgow—Webster, Will, & Company, W.S., Edinburgh—F. L. Long, Solicitor, London.

Monday, May 8.

(Before Viscount Haldane, Viscount Finlay, Viscount Cave, and Lord Dunedin.)

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

(In the Court of Session, January 15, 1921, S.C. 304, 58 S.L.R. 207.)

Railway — Emergency Legislation—Detention of Waggons—Charge for Detention —Free Time—Reasonableness of Charges —Statutory Right to Arbitration Superseded—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 (*aff.* judgment of the Second Division) that so long as the Ministry of Transport Act 1919 remained in operation the Minister had power, under and subject to the provisions of that Act, to prescribe the "free time" to be allowed for loading and unloading waggons, and also to fix the charges payable for their detention beyond that time, that his decision in regard to both must be deemed to be reasonable, and that any right to appeal to arbitration under section 5 of the schedule to the Railway Rates and Charges, No. 25 (North British Railway, &c.) Order Confirmation Act 1892 (55 and 56 Vict. cap. lxiii) was, so long as the Minister remained in charge, superseded.

The defenders appealed to the House of Lords.

At delivering judgment—

VISCOUNT HALDANE—In this case an action was brought by the respondents to recover from the appellants the sum of £64, 11s. 6d., which was the amount of an account for the undue detention by the appellants of certain railway waggons, the property of the respondents. The way in which the amount was arrived at was this—It was based upon a rate per waggon per day fixed by the Minister of Transport, under the powers of the Ministry of Transport Act of 1919, as the rate to be charged for demurrage after the expiration of certain free time specified in the Minister's Direction. The scheme was that not only should the waggon arrive and be delivered to the consignee who should unload it, but that he should have a certain time for unloading it,

and that is what was meant by the free time. Beyond that time the waggon might be detained, and then it would be liable to demurrage rate.

Now first of all it is important to see under what powers the rate on which that amount was based was fixed, and these your Lordships will find in the Direction given by the Minister of Transport to the North British Railway Company under the statute to which I have referred. He said that as from the first day of January 1920 the charges set out in the schedule were to be "charged for detention of railway companies' waggons and sheets beyond the respective free periods defined in the said schedule." Turning to the schedule it is headed "Charges to be made for the Detention of Waggons and Sheets before and after Transit over the Railway." Your Lordships will observe the transit is taken as something independent, something that is to be the foundation of the whole matter, and the detention is to be outside that. Well, as one would expect, there is a definition of the free period to which I have referred—the free period allowed for, say, unloading the waggon after transit has come to an end and the consignee is in a position to take delivery. That is given in the schedule, and in the case of "traffic other than coal, coke, or patent fuel two days, exclusive of the day on which the waggon is placed at the trader's disposal. If reloaded an additional day shall be allowed," and in the case of "coal, coke, or patent fuel three days, exclusive of the day on which the waggon is placed at the trader's disposal. If reloaded an additional day shall be allowed." That is the free period, but then the schedule also contains the amount of the charge to be made for the detention beyond that free period. It is put down in the case of waggons "not exceeding 16 tons capacity, 3s."—I take that for illustration—"for each of the first two days after the expiration of the free period. For each subsequent day, 5s.," with an increasing amount for heavier waggons. That is the Direction in the schedule under which, as I have said, the amount sued for was made out. The alternative way, and the old way, of doing this would have been under the North British Railway Order Confirmation Act 1892, which arranged things somewhat differently. There too there was a schedule, and the schedule, after defining what were to be the maximum rates, laid down that "The company may charge for the services hereunder mentioned, or any of them, when rendered to a trader at his request or for his convenience, a reasonable sum by way of addition to the tonnage rate. Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party."

Among the services which the company is to render at or in connection with sidings not belonging to it was this—"the detention of trucks." Well, obviously when that is described as a service, it must be allowing trucks to be detained for "the use or occupation of any accommodation, before or after conveyance, 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." In that state of things it is obvious that under the old Act—under the Act of 1892—there was a right in the consignor to have the period in respect of which the charge for detention was not to begin to run fixed by arbitration. In other words, the arbitrator came in and said with regard to the time the matter should be determined by him if it was not determined clearly by the general terms of the schedule.

Now the question before the House in this appeal is whether that old machinery is swept away, or whether it continues to the extent of preserving the right to arbitration. The Lord Ordinary (Lord Sands), who decided in part in favour of the appellants, found that the Minister of Transport under the Act of 1919 had no power to supersede arbitration as far as regards the fixing of the time from which the charge for detention of waggons beginning to run was concerned, and that the appellants were entitled to have that time determined by an arbitrator. But when the case went to the Second Division the Second Division took a different view, and, as it was put by Lord Dundas, it was laid down that as to the period of days as well as the amount of rate both were involved as necessary ingredients in making the charge for detention, and that the result desired to be made clear could not be attained unless both the time and the transit were taken into account.

The question is which of these two views is right? because if the view of the Second Division is right then the arbitration clause is swept away altogether and the Minister has the full determination of the matter. It was pointed out by Mr Macmillan in his argument (what I think is important) that the sweeping language in which power is given to the Minister of Transport is qualified only in one set of particulars by a right to arbitration, and those are the particulars set out in sub-section (*f*) in regard to undue preferences and to allowances and rebates. That is the only case specifically dealt with in which any reference, not indeed to an arbitrator, but, which is the same thing, to the Railway Commissioners, is preserved. The Minister is left with his power uninterfered with by any other express section of the statute. The Act seems to give the Minister a right to determine what the trader is to pay for a number of things, and among them undue detention of waggons. The amount to be paid for undue detention of waggons depends of course upon what is undue detention of waggons, and that depends on what is the due use of the waggon. It seems almost impossible that the Minister should be able to discharge his duty unless he could deal with both these things, because otherwise an arbitration confined to the period of time would be an arbitration which would nullify the decision which the Minister would have to come to in order to make his decision a complete decision. The rate per day and the time of its beginning to run are

inter-related elements, and away from them it seems impossible to get.

That seems to me to be the true construction of this Act of Parliament. It is an Act of Parliament of the modern type which has put great power into the hand of the Executive. That is not uncommon in these days, and there is no presumption when you have to consider an Act of Parliament that that has not been done. It would have been otherwise twenty or thirty years ago. Reading the plain words of the Act of 1919, and looking at the structure of the Act, I am unable to come to any other conclusion except that the Second Division was right and the Lord Ordinary was wrong, and that consequently this appeal ought to fail.

VISCOUNT FINLAY—The question in this case relates to the construction of a provision in the Ministry of Transport Act 1919 which is contained in the third section of the Act under head (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 . . . (i) as to the rates, fares, tolls, dues, and charges to be charged" . . . I do not think I need read the rest of the section. The question that arises here is with regard to the time that is to be allowed by way of free days as the time necessary for loading or unloading as the case may be. That time was dealt with in the old Act, the Act of 1892, by the fifth section of the schedule, which provides that "The company may charge for the services hereunder mentioned, or any of them, when rendered to a trader at his request or for his convenience a reasonable sum by way of addition to the tonnage rate. Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party"; and then under the fourth head of the matters enumerated in that section there is a provision with regard to the matter which has given rise to the present litigation—"(iv) The detention of trucks, or the use or occupation of any accommodation, before or after conveyance, 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." The question that arose, which was determined in one way by Lord Sands, the Lord Ordinary, and the other way by the Court of Appeal, was this — Has the Minister power to give directions which are to be obeyed by those connected with the railway with reference to what I will call the duration of the free period, the free days—Has he power to give these directions so as to supersede altogether the provisions of the Act of 1892 which define the criterion, with an arrangement for arbitration in case of difference between the parties? It was pointed out with great force that the circumstances as to what is the reasonable time to be allowed may vary in each case, and it was contended and pressed strongly upon your Lordships in the argument for the appellants that this circumstance went a long way to show that it could not be intended that the Minister was to deal with a matter of that kind by a general regulation such as that which has been made in the present case. I think that Mr Macmillan's argument has removed the difficulty which I at one period felt on that point. It comes to this. As he pointed out, there is power for the Minister to fix the charge for the conveyance; there is also power for him to fix the charge for the services. I need not refer again to the sections which he has just referred to bearing out his proposition with regard to that. It follows that as the Minister can fix both he must necessarily have the power to determine what the conveyance is to include, and that involves fixing the number of free days that are to be allowed, because the conveyance is supposed to cover them.

Now that being so it would be extraordinarily anomalous if the provision for arbitration in the Act of 1892 in the section which I read a few minutes ago were still to exist, because you must have as one element in fixing the charge for conveyance what exactly it is that it covers—how many free days does it cover; and the reasonable view of the Act is, I think, on the whole, that which results from the consideration that the Minister who has the power to fix what is to be charged for conveyance, and also what is to be paid for services such as those to which I have referred, must have the power to determine what the free days are to be, as that is one element, and a necessary element, in determining what the amount to be allowed for conveyance should be.

For these reasons I think that the case for the appellant fails.

VISCOUNT CAVE—It appears to me that when the Minister of Transport was empowered by section 3 of the Act of 1919 to fix rates and charges, including rates for the conveyance of goods and rates or charges for the detention of trucks, he was impliedly authorised to say what free period should be included in conveyance and when detention should begin. The fixing of a charge for detention involves the consideration both of the amount of the charge and the period when it shall begin to operate. The two are closely intermixed, and unless the Minister can determine both he can hardly discharge his duty under the Act.

I agree that the appeal fails and should be dismissed.

LORD DUNEDIN—I cannot say that I have had from the beginning of this case the slightest doubt that the decision of the Second Division was right. I should myself have thought that when the Legislature enacts that the directors and other persons concerned are to obey the directions of the Minister "as to rates, fares, tolls, dues, and charges to be charged" nothing more would

be necessary, because if those are statutorily fixed charges I do not know upon what ground a trader who admitted that the service had been rendered could refuse payment. But it is made quite clear afterwards by sub-section (*e*), which says that the charges directed by the Minister "shall be deemed to be reasonable, and may be charged notwithstanding any agreement or statutory provisions limiting the amount of such charges."

Now it is the fact—and I do not think this was actually noticed in the argument—that this section 5 in the Order Confirmation Act of 1892, which deals with the right to charge for detention of waggons is inserted under the general heading of "maximum rates and charges," so that I think it is perfectly clear that this is referred to in the expression in sub-section (*e*) just as much as the ordinary conveyance charges which are referred to under the well-known name of maxima. Accordingly I think it is abundantly clear that the whole solution is contained in a very short sentence of Lord Dundas, "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."

Their Lordships dismissed the appeal, with costs.

Counsel for the Appellants — Mackay, K.C. — Aitchison — Clements. Agents — Drummond & Reid, W.S., Edinburgh — Ince, Colt, Ince, & Roscoe, Solicitors, London.

Counsel for the Respondents—Macmillan, K.C. — Graham Robertson. Agents — James Watson, S.S.C., Edinburgh—Lewin, Gregory, & Anderson, Solicitors, Westminster.

COURT OF SESSION.

Tuesday, March 14.

FIRST DIVISION.

[Lord Ashmore, Ordinary.

NICOLSON AND OTHERS *v.* MAGISTRATES OF WICK AND OTHERS.

Election Law—Poll—Validity—Secrecy of Poll—Construction of Voting Compartments—"Screened from Observation"—Poll under Temperance (Scotland) Act 1913 (2 *and* 3 *Geo. V, cap.* 33), *sec.* 2 (1)—*Ballot Act* 1872 (35 *and* 36 *Vict. cap.* 33), *secs.* 2 *and* 13, *and First Schedule, Part I, Rule* 16.

The Ballot Act 1872 (35 and 36 Vict. cap. 33), enacts—Section 2—". . . And the voter having secretly marked his vote on the paper, and folded it up so as to conceal his vote, shall place it in a closed box in the presence of the officer presiding. . . ." Section 4—"Every officer, clerk, and agent in attendance at a polling station shall maintain and aid in maintaining the secrecy of the voting in such station. . . . No person shall directly or indirectly induce any voter to display his ballot paper after he shall have marked the same so as to make known to any person the name of the candidate for or against whom he has so marked his vote." First Schedule, Part 1, Rule 16—"Each polling station shall be furnished with such number of compartments in which the voters can mark their votes screened from observation as the returning officer thinks necessary. . . ."

Circumstances in which *held* that voting compartments provided at a poll afforded reasonable facilities for secret voting, and were therefore in conformity with the requirements of the Ballot Act 1872.

William Nicolson, wine merchant, and other licence-holders in Wick, *pursuers*, brought an action against (*first*) the Provost, Magistrates, and Councillors of the Royal Burgh of Wick, as the local authority for the town and Royal Burgh of Wick under the Temperance (Scotland) Act 1913, (*second*) David Davidson, Wick, returning officer for the poll under said Act held in Wick on 14th December 1920, and (*third*) Alexander Bruce, town clerk, Wick, and as such clerk to the said local authority, *defenders*, concluding for reduction of the pretended requisitions demanding a poll under said Act in the burgh of Wick, lodged with the third-named defender on or about 30th September 1920, all minutes, resolutions, and other writings of the first-named defenders fixing the 14th day of December 1920 as the day for holding a poll in said burgh under said Act, the pretended declaration made by the second-named defender as returning officer on or about 15th December 1920, or other minute or writing whereby it was declared that a no-licence resolution was carried at said poll in terms of said Act, and any letter or other writing containing intimation of the declared result of said poll sent by the third-named defender to the Licensing Court of Wick.

The parties averred, *inter alia*—"(Cond. 2) On or about the 30th day of September 1920 a requisition, signed by certain electors in the said royal burgh, was lodged with the defender the said Alexander Bruce as clerk to the said local authority demanding a poll under the provisions of the Temperance (Scotland) Act 1913. Upon receipt of the said requisition the said local authority fixed Tuesday the 14th December 1920 as the day for a poll to be taken under said Act. (*Ans.* 2) Admitted. . . . (Cond. 3) On or about 14th December 1920 a pretended poll under said Act was held for the royal burgh of Wick, the electorate of which numbers 3032, and for premises in which there are 29 licences (including one wine licence only). The result of the pretended poll was declared by the returning officer to be as follows:—No Change 851, Limitation 29, No-Licence 1438, Spoiled Papers 27—Total 2345. The returning officer further declared that as a result of the said poll a no-licence resolution had been carried. The