including the Polquhairn Company. The wagons were supplied by the Railway Company to the Polquhairn Company at the request of the latter, and in accordance with the regulations. The practice is that after the wagons are loaded the coal company ticket them with the name of the consignee—in the present case J. K. Campbell, Irvine Harbour. The consignor's instructions are conveyed to the Railway Company in the shape of a consignment note. This consignment note is a request by the consigner to convey the traffic to its destination and the name of the consignee is given. The wagons are removed from the colliery by the Railway Company when the traffic is opened. The notice opening the traffic is generally given by the consignee. The only contract, however, is the one made between the consignor and the Railway Company. There is no contractual relation between the Railway Company and the consignee. The opening of traffic by the latter has nothing to do with the contract. Under his contract the consignor is bound to release the wagons at the discharge end on the expiry of the free days allowed as a reasonable period for enabling delivery to be made. It is only through the contract with the consignor that the Railway Company is brought into relation with the consignee at all. The question is one of service rendered under the statute. It is not a question of fault at all. The service was rendered in the present case at the request and for the convenience of the trader. The Railway Company was therefore within their legal rights under the statute in framing the regulations, upon which alone they supplied wagons so as to make the consignor primarily liable for demurrage at both ends. That is the only question the Court is called upon to decide in the present proceedings. It is proved that the wagons were ordered by the Polquhairn Company in the knowledge that this was one of the conditions on which the Railway Company supplied them. It therefore formed part of the contract between them. No repudiation in the correspondence can affect the Railway Company's right. As regards the consignment note, the conditions attached do not affect the Railway Company's rights in this respect. The order of the Railway Commissioners affects the amount to be charged. The other conditions, so far as not affected by that order, stand. The stipulation for a lien on the goods does not affect the Railway Company's right as against the consignor. I am therefore of opinion that the judgment appealed against is right. The grounds are very well stated by the Sheriff-Substitute in his note. For the reasons stated, however, I think that the second and third findings should be recalled. In lieu thereof there should be a finding (2) that at the date when the order for the wagons in question was given by the defenders it was one of the conditions upon which the Railway Company supplied them that the persons giving the order would be held primarily responsible for the due loading and discharge of wagons, and for payment of demurrage charges, and (3) that the defenders knew when they ordered the said wagons that this was the condition on which the Railway Company supplied them. *Quoad ultra* the interlocutors appealed against should be affirmed.

The LORD PRESIDENT and LORD SKERRINGTON concurred.

LORD JOHNSTON was absent.

The Court affirmed the interlocutors of the Sheriff-Substitute and of the Sheriff, dated respectively 17th March 1914 and 14th July 1914: Found in terms of the findings in fact Nos. 1, 4, 5, 6, 8, 9, and 10 of the Sheriff-Substitute's said interlocutor: Recalled the findings Nos. 2 and 3, and in lieu thereof found (2) that at the date when the order for the wagons in question was given by the defenders it was one of the conditions upon which the Railway Company supplied them that the persons giving the order would be held primarily responsible for the due loading and discharge of wagons and for payment of demurrage charges, and (3) that the defenders knew when they ordered the said wagons that this was the condition on which the Railway Company supplied them; and found also in terms of the finding-in-law contained in the Sheriff-Substitute's said interlocutor; and of new decerned against the defenders for payment in terms of said interlocutor.

Counsel for the Appellants — Watson, K.C.—Burnet. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—Sandeman, K.C. — D. Jamieson. Agents — John C. Brodie & Sons, W.S.

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*Friday, November* 12.

## SECOND DIVISION.

(SINGLE BILLS.)

[Lord Anderson, Ordinary.

## MACKAY *v.* BOSWALL-PRESTON AND ANOTHER.

*Expenses—Process—Caution for Expenses—Reclaiming Note—Sequestration of Successful Defender.*

In an action for payment of £120 the defenders were assoilzied and the pursuer reclaimed The defenders' estates were thereafter sequestrated and their trustee declined to sist himself as a party to the action. The pursuer having moved the Court to ordain the defenders to find caution, the Court *refused* the motion.

James John Mackay, insurance manager, Harrow, Middlesex, *pursuer*, brought an action against George Houston Boswall-Preston and another, carrying on business as motor engineers at 10 Queensferry Street, Edinburgh, *defenders*, for payment of £120 sterling as commission due to him in procuring a loan of £12,000 for the defenders. The defenders pleaded, *inter alia* — "(2) The loan of £12,000 not having been ob-

tained through the agency of the pursuer, the defenders should be assoilzied." On 29th October 1914 the Lord Ordinary (ANDERSON) sustained this plea, and assoilzied the defenders from the conclusions of the summons. The pursuer reclaimed, and the defenders were sequestrated in December 1914. The Court thereafter ordered intimation to be made to their trustee, who declined to sist himself as a party to the action.

The pursuer moved the Court in Single Bills to ordain the defenders to find caution.

Argued for the pursuer and reclaimer—The defenders should be ordained to find caution. This was not the case of a private trust deed, where the Court would not interfere, but of a sequestration which had been expressly distinguished as regards the requirements of finding caution—*Johnstone* v. *Henderson*, 1906, 8 F. 689, 43 S.L.R. 486; *Allan and Others (Smith's Trustees)* v. *M'Cheyne*, 1879, 16 S.L.R. 592; *Stevenson* v. *Lee*, 1886, 13 R. 913, 23 S.L.R. 649.

Argued for the defenders and respondents—The rule was clearly established that a bankrupt defender was not bound to find caution—*Taylor* v. *Rothwell and Others*, 1833, 6 W. and S. 301; *Ferguson* v. *Leslie*, 1873, 11 S.L.R. 16; Mackay's Manual, p. 169. There was no case where a successful defender had been called upon to find caution.

LORD JUSTICE-CLERK — In this case it seems to me that nothing has been stated that should take the case out of the scope of what was said in *Taylor's* case. The defenders have been successful in their defence, and have been assoilzied with expenses; and now the pursuer—he being the reclaimer, seeking to overturn the judgment of the Lord Ordinary—asks that they should be ordained to find caution because they have become bankrupt since the date of the Lord Ordinary's interlocutor. I think on the authorities we ought not to grant this motion.

LORD DUNDAS concurred.

LORD SALVESEN—I am quite of the same opinion. I think it is only in very exceptional cases indeed that a defender is ordained by the Court to find caution simply on the ground that he has become bankrupt and has a trustee administering his estates. But I know of no case where a successful defender has been ordained in the Inner House to find caution, and I should be very slow indeed to assist in establishing such a precedent.

LORD GUTHRIE—If the rule in *Taylor* is invariable, Mr Morton must fail; but even if it lays down only the usual practice he has suggested no circumstances whatever to take this case out of the usual practice.

The Court refused the motion.

Counsel for the Pursuer and Reclaimer—Morton. Agent—J. M'Kie Thomson, S.S.C.

Counsel for the Defenders and Respondents—Mackenzie Stuart. Agents—Balfour & Manson, S.S.C.

*Friday, November* 12.

## FIRST DIVISION.

## BROWN'S TRUSTEES *v.* GREGSON.

*Succession—Election—Legitim — Will and Codicil—Clause of Forfeiture—Effect of Parent's Repudiation of Liferent on Gift of Fee to Children—Disposal of the Liferent.*

A testator divided the whole residue of his estate amongst his seven children in equal shares, declaring the said bequests in each case to be in full of legitim, with a clause that if any of the children "shall repudiate this settlement and claim their legal rights . . ., then such child or children shall forfeit all right to any share . . ., and the share or shares of such child or children shall accresce and belong equally to my other children and their issue." By codicil he directed his trustees, instead of making over her share of residue to one of his daughters, to hold it and to pay her the income, "or in their discretion to pay and apply the said income or so much thereof as they may consider necessary for her behoof," and on her death to divide the share, with "any accumulations of income thereon," amongst her children then alive and the issue of predeceasers, and failing them his own children then alive and the issue of predeceasers. The daughter, who survived the testator and had two children alive, claimed legitim. *Held* (1) that the daughter's election to claim legitim did not affect the gift of the fee to the children, as it was independent of the bequest to the mother; and (2) that the income of the share during the daughter's life was carried by the destination in the forfeiture clause to the testator's other children, the direction to accumulate never having come into force owing to the repudiation of the liferent.

Robert Charles Brown of Sundaywell, in the county of Dumfries, and others, the trustees presently acting under the trust-disposition and settlement of the late James Brown, Esq., of Barlay, in the county of Kirkcudbright, dated 5th March 1901, and with several codicils registered in the Books of Council and Session, 18th March 1910, *first parties;* Anita Mary Angelica Latham Gregson, a minor, daughter of William Brice Gregson, residing at Tilton Catsfield, Battle, Sussex, with consent and concurrence of the said William Brice Gregson, as curator-at-law of his said daughter, and the said William Brice Gregson, as tutor-at-law of Edith Mary Evelyn Gelson Gregson, his daughter, a pupil, *second parties;* and Miss Christina Isabella Brown, care of Messrs J. & J. Turnbull, W.S., 58 Frederick Street, Edinburgh; the said Robert Charles Brown; Mrs Eliza Beatrice Brown or Maclachlan, wife of Norman Maclachlan, residing at Ardmeallie, Rothiemay; Mrs Jane Rosalind Dudgeon Brown or Davidson, wife of Leybourne Davidson, residing at York House,