tobello during the middle of the night, and again for nearly an hour at Carlisle. During these stoppages any person might have committed the theft—not, indeed, without some risk, but we know that thieves are very adventurous. Certainly, two hours' stoppage gave ample opportunity for the theft. But apart altogether from the stoppages, a theft from a train in motion is by no means improbable. An active man getting up on the back of one of the trucks would be quite out of the view of the guard and the driver, especially if the trucks were loaded high.

The condition of the case is this, that it is a very narrow one; and I am left in this position, that I cannot choose between the one suggestion and the other. I cannot see any circumstance, beyond the one circumstance that railway servants generally have greater opportunities of stealing goods during their transit. There would have been an obligation on the Railway Company to examine any one of their servants who could have been shown to have been connected with the box. But as nothing has been proved by the pursuers to connect any one with this theft, they cannot found on the absence of witnesses.

The other Judges concurred.

The Court pronounced the following interlocutor:—

" . . . Find that it is not proved that the loss of the said articles arose from the felonious acts of any servant in the employment of the respondents: Find therefore, in point of law, that under and in virtue of the Act 11 Geo. IV. and 1 Will. IV., c. 68, sec. 1, the respondents are not liable for the loss of said articles; therefore refuse the appeal, and decern: Find the appellants liable in expenses: Allow an account thereof to be given in, and remit the same when lodged to the auditor to tax and report."

Counsel for the Pursuers—Mr Scott. Agent—John Gellatly, S.S.C.

Counsel for the Defenders—Dean of Faculty (Clark), Q.C., and Balfour. Agents—Dalmahoy & Cowan, W.S.

Thursday, February 18.

SECOND DIVISION.

[Lord Young, Ordinary.

ANDERSON *v.* NORTH BRITISH RAILWAY COMPANY.

Carrier—Undue Delay—Loss of Market—Damages.

A number of pigs were sent to the Railway station and trucked in ample time to catch an evening train for the south. They were not however dispatched until too late, whereby they did not arrive in time for the next day's market. *Held* that the Railway Company had failed to prove reasonable cause for delay in the dispatch from the station at which the pigs were loaded, and that they were liable in damages for loss of market.

Carrier—Liability—Unavoidable Accident—Loss of Market—Damages.

Another load having been delivered to the Company under similar circumstances were duly forwarded by the proper train, which however broke down on the journey, and the market was lost. *Held* that the accident merely threw upon the Company the *onus* of proving that they had acted with reasonable care, and that the pursuer had failed to show a preventible cause.

This was an action at the instance of Peter Anderson, cattle salesman, Granton, against the North British Railway Company. The pursuer concluded for payment to him by the defenders of two sums—(1) £28, and (2) £18, 8s. 6d., as representing loss caused him by the delay of the Railway Company in conveying certain supplies of pigs to the Newcastle market.

The consignments for the Tuesday morning market at Newcastle-on-Tyne are loaded at the station at Granton the previous afternoon, in order to be conveyed thence to Edinburgh or Portobello, whence they are forwarded by what is known as the "cattle" train to Newcastle, at or about eight o'clock p.m., arriving in time for the morning market.

Anderson for some years had been in the habit of sending his pigs by this train.

On 7th October 1872 the pursuer sent to the station at Granton seventy-one pigs for transmission to Newcastle for the market of the following morning. The pigs were loaded in two trucks about five o'clock in the afternoon, and should have been forwarded to Edinburgh or Portobello for the train leaving at eight o'clock the same evening, for which they were in ample time at Granton station. They did not, however, leave Granton till about midnight; and the consequence was that they missed the cattle train leaving Edinburgh about eight p.m., and were not received in Newcastle till too late for the market, and had to be kept for a week before being sold.

This formed the subject of the first claim, the pursuer maintaining that the defenders had wrongously failed to implement their contract of carriage, and that by having to keep the pigs in Newcastle for a week a loss in value to the amount of £28 was incurred. The defenders set forth that they had no special contract with Anderson to deliver in time for the market, and the rates for carriage paid by him were only the usual ones. Delivery was taken about noon on the Tuesday without objection, and there was no unreasonable delay *in transitu*. The Company do not undertake to deliver live stock in time for any particular market.

The second ground of claim was as follows:—On 4th August 1874 the pursuer sent to Granton station sixty-seven pigs, which were duly loaded by him in two trucks, and which were forwarded to Edinburgh in time for the train leaving Edinburgh at 5 p.m. The pigs were forwarded by that train, but the train broke down in the vicinity of Berwick, and so much delay was occasioned that the pigs did not arrive in Newcastle in time for the weekly market of the following morning.

The break down was, the pursuer alleged, the consequence of some imperfection or insufficiency in the engine, waggons, or rails, for which the Company were liable, and for the loss of market he claimed £18, 8s. 6d.

The pursuer pleaded—"The pursuer having incurred the loss of the sums sued for by and through the fault and negligence of the defenders, as above condescended on, the defenders are liable to him in compensation, and decree should be pronounced in terms of the summons."

The defenders *inter alia* pleaded—"(1) The pursuer's statements are not relevant or sufficient to support the conclusions of the summons. (2) The pursuer having taken delivery of the pigs without protest, is barred from making the present claim. (3) The defenders should be assoilzied, in respect —1. They were under no obligation, express or implied, to deliver the pursuer's pigs in time for the Newcastle market. 2. There was no unreasonable delay in the transit of the pigs."

After a proof the Lord Ordinary, on 25th November 1874, pronounced the following interlocutor:— "The Lord Ordinary having heard counsel for the parties, &c.—Repels the defences, and decerns against the defenders in terms of the conclusions of the summons: Finds the defenders liable in expenses," &c.

The following Opinion was given by Lord Young on the questions at issue:—

"The two claims presented for consideration, although of the same general character, differ in their details, and each of them is in some respects more, and in others less, favourable to the pursuer than the other. I have not found either free from difficulty, but on the whole, after the best consideration I have been able to give to the evidence and to the law applicable to the facts which I think established, I have arrived at the conclusion that the pursuer is entitled to succeed in both.

"The general rule of law applicable to the case, and on which the pursuer relies, is not doubtful. It is that a common carrier is bound to receive goods tendered on him for carriage, and to forward them to (or towards, as the case may be) their destination, according to the means of conveyance which he professes to maintain, and according to the ordinary course of such conveyance, without any unreasonable delay in their dispatch, or detention by the way. In this case there is no question of the receipt of the goods by the carrier at Granton on a common contract to carry them to Newcastle, and there is, I think, no question that the duty to dispatch them without unreasonable delay, and to carry them without any undue detention by the way, thereby attached as matter of contract, This indeed, as a general proposition, was not contested by the defenders. They only disputed the pursuer's contention that, on the facts of this case it so operated as to subject them in liability. And indeed, when a rule of law cannot be stated with more certainty and precision than is compatible with the use of such expression as 'reasonable dispatch,' or 'undue detention,' it is to be expected that disputes under it will turn on its application or operation with reference to the facts of individual cases. These expressions, which the poverty of language or the nature of the subject renders unavoidable, or suggests as the best that can be employed, are themselves incapable of useful definition, and involve an appeal to the good sense and judgment of the jury or other tribunal which is called upon to determine particular cases.

"The pursuer's first claim regards a lot of swine which he delivered to the defenders at Granton on 7th October 1872, in good time to be forwarded to Newcastle by the 6.45 P.M. train of that day. The pursuer had frequently sent pigs in the same way before during a period of several years, and the ordinary course of conveyance admittedly was, that the trucks containing the animals were dispatched by the train which left Granton at 6.45 P.M., joined the 8 P.M. train from Edinburgh at Portobello, and were thence conveyed by that train to Newcastle, arriving there next morning between 5 and 6 o'clock, in time for the morning market, which opens between 6 and 7 o'clock, On the particular occasion (7th October 1872), the train (with the pursuer's swine), which ought to have started from Granton at 6.45, was not dispatched till 8.15. It was accordingly too late to join the ordinary train at Portobello (the 8 P.M. train from Edinburgh), and the trucks with the swine being forwarded by a train later by several hours did not reach Newcastle till mid-day the following day, whereby the market was lost. The explanation of the unusual delay at Granton is, that there was no engine available to start the train at the proper time. It appears that a pilot engine was in use to be sent to Granton in time to leave again with the train at 6.45, but that on this occasion it did not arrive till about 8 o'clock. The reason suggested is, that it was the time of Falkirk Tryst, when the traffic on the line is always heavier than usual, and that thus it was, or might have been, impossible, with reference to the other traffic, to spare an engine sooner. The reason does not seem a good one in itself, and the evidence on the subject is of the most general description. I cannot hold that the *extra* traffic usual during a Falkirk Tryst is an admissible excuse for not sending an engine at the proper time to start a stated and ordinary train from Granton, by which the Railway Company had contracted to forward goods in the ordinary course of their business, and with reference to which the contract immediately in question was undoubtedly made. The defenders, however, urged that had the action been brought so as to enable the trial to take place nearer the time, they might have been able to assign a better or more precise reason, and to support it by better evidence, and claimed some indulgence by reason of the delay in bringing the action. I admit the validity of the topic, but am nevertheless unable to allow it such effect in the circumstances as to overcome the pursuer's case, which I regard as a strong one. I think it was according to the defenders' contract, and duty thence arising, to dispatch the pursuer's swine from Granton at 6.45, or at least in time to be forwarded from Portobello to Newcastle by the 8 P.M. train from Edinburgh. This was according to the regular course of their conveyance, of which the pursuer had much previous experience, and with reference to which the contract was made. Not having done so, or assigned any admissible excuse, and the pursuer having sustained actual damage in consequence, I am of opinion that he is entitled to compensation.

"The pursuer's second claim is for alleged undue detention by the way of another lot of swine which he delivered to the defenders at Granton on 3d August last for carriage to Newcastle. The detention occurred on the line of the North-Eastern Railway Company, about six miles south of Berwick. It lasted about five hours and forty minutes, and the consequence was that the train (with the swine) arrived at Newcastle about six hours behind the proper time, and that the pursuer in consequence again lost the market. The cause was a break-down, occasioned by the front part of the train breaking away from the hind part, the couplings having given way. Four of the waggons immediately behind the point of breakage were thrown off the line that nearest to it (the property of the de-

fenders) being thrown over the fence into an adjoining field, and so broken that it was impossible to tell by examination whether the break-down had been caused by any defect in it. The line was found to be in good order and unobstructed, and it was not suggested that any of the other waggons, or any of the equipments or arrangements of the train, were defective. Some defect in the defenders' waggon, which was so much broken as to preclude examination, or in its attachment to the preceding waggon, which was carried forward safely, is a probable cause of the accident, and the tendency of the evidence is to exclude any other. The question, on these facts, is, whether the defenders are liable to the pursuer for the damage occasioned to him by the detention.

"The liability of a carrier for delay in the delivery of goods occasioned by an accident on the journey stands on a different footing from his liability for damage thereby done to the goods, the element of insurance which the contract of carriage implies extending only to the safety of the goods, which the carrier is thereby, as an insurer, bound to deliver in the like good condition as he received them, the acts of God or a public enemy only excepted. Therefore, although the defenders would have been (I think clearly) liable for the destruction of the pursuer's pigs by the accident in question, or any inferior damage to them, it does not follow that they are liable for the mere delay of delivery thereby occasioned. The case of passengers is more analogous; for with respect to them, even in the case of bodily injury, the liability of the carrier rests, not on implied insurance, but on his common-law duty, arising from the contract to carry safely in so far as that can be done by the employment of proper carriages, and the exercise of due care and foresight. Had a passenger, booked by the defenders from Granton to Newcastle, been killed or injured by a similar accident befalling the train in which he travelled, I think it not probable that the defenders would have escaped liability on the ground that the accident was not such as might have been avoided by ordinary care and foresight. But not to dwell on this analogy, and assuming that a case of personal injuries may involve, upon the question of liability, other considerations than apply to the detention of goods, however long, I think it is the law that a carrier is responsible for excessive delay in the delivery of goods, though occasioned by such an accident in the course of the transit as occurred here, unless it shall appear that it could not have been avoided by due and ordinary care on his part, or that of those for whom he is responsible on his contract. I say 'excessive delay,' meaning thereby to throw out of account such ordinary delays as, having regard to the length of the journey and character of the conveyance, it shall appear to be reasonable and according to the practice of life to allow for. Here, again, it is necessary to employ general language, and such as involves an appeal to the sense and judgment of the tribunals called on to consider the circumstances of individual cases.

"Now, it does not appear to me to be running the matter fine, or encroaching on the time-margin which a railway company may reasonably claim in the running of their trains or the conduct of their traffic, to characterise a detention of about six hours beyond the ordinary time on a journey between Granton and Newcastle as *prima facie* undue or excessive, and therefore such as *prima facie* to infer liability for any actual damage thereby occasioned to a sender of goods. I should certainly not hold that a railway company, in the absence of express contract, were liable as on a guarantee of advertised or ordinary time for the disappointment (however injurious) of passengers or senders of goods whenever their trains were late. People who, from necessity or choice, run the matter so close that such delays as experience shows ought in common prudence to be allowed for, must bear the consequences of their disappointment unless the delay shall be excessive. But there must be a limit, whatever difficulty may attend the fixing of it, or in determining whether it has been transgressed in individual cases. In my opinion the delay of which the pursuer here complains transgressed due limit, and was excessive. I therefore think that it is incumbent on the Railway Company to account for it, and to show that it was owing to a cause which was unavoidable by ordinary care and foresight, or otherwise to be liable for the consequences. On the evidence, I am unable to hold that the defenders have so accounted for the delay complained of, and I am therefore of opinion that the pursuer is entitled to compensation for the damage which he sustained.

"With respect to the amount of damages, I need only say that I think the sums claimed are reasonable, and fairly supported by the evidence."

The Railway Company reclaimed.

Reclaimers' authorities—*Finlay* v. *N. B. Ry. Co.*, 8 Macph. 959; *Briton* v. *Gt. Western Ry. Co.*, 1858, 28 L. J. Exch. 51; *Lord* v. *Midland Ry. Co.*, 1869, 2 L. R., C. P. 339; *Macdonald* v. *Highland Ry. Co.*; *Taylor* v. *Gt. Western Ry. Co.*, 1 L. R., C. P. 385; *Bird* v. *Gt. Western Ry. Co.*, 28 L. J., Exch. 3, Nov. 4, 1858; *Kearney* v. *London and Brighton Ry. Co.*, 5 L. R., Q. B. 411, aff. in Exch; *Lyon* v. *Lamb*, June 22, 1838, 16 D. ; *Redhead* v. *Midland Railway Co.*, 4 L. R., Q. B. 379.

Respondent's authorities—*Denton* v. *G. W. Ry.* 25 L. J., Q. B. 129; *Holcroft* v. *G. W. Ry.*, 21 L. J., Q. B. 178; *Pickford* v. *Grand Junction Ry.*, April 27, 1844, 12 Mason 766; *Dawson* v. *Manchester Ry.*, Jan. 15, 1862, 2 L. T. 682; *M'Cauley*, Dec. 9, 1846, 9 D. 245; *Wren* v. *E. C. Ry.*, 1 L. J. (n. s.), Q. B. 5; *Sharp* v. *Midland Ry.*, 14 L. T., Ex. 437; Shelford on Railways, i., 166; *Blakemore* v. *L. and T. Ry.*, 1 Foster, 766; *Bates* v. *Cameron*, Dec. 6, 1855, 18 D. 186: *Cohen*, 3 Foster and Finlayson, 463; *Anderson* v. *Pyper*, 2 Murray 261; *M'Glashan* v. *Dundee Ry.*, 13 D. 937; *Snedden*, 11 D. 1159.

At advising—

LORD JUSTICE-CLERK—There are two claims made by the pursuer in this action, both founded on the alleged detention by the defenders of separate consignments of pigs for the Newcastle market, dispatched by the pursuer from Granton. The first of these transactions dates as far back as the 7th of October 1872, the second took place in August 1874. The question which is raised under both of these claims is whether the railway company is liable for the animals not having been delivered in due course so as to be in time for the market to which they were sent. The cases must be considered separately.

In regard to the first, the Lord Ordinary has very clearly stated the facts on which it rests, and I need not recapitulate them. There is no doubt that the Railway Company were aware both from

the course of dealing, and from the circumstances of the consignment itself, that the animals were intended to be delivered in time for the early market next day. I adopt also the general views expressed by the Lord Ordinary as to the nature of the obligation undertaken by the Railway Company in regard to this contract of carriage. They did not undertake to deliver the animals at any specific time, but they did undertake to deliver them in reasonable time looking to the nature of the goods and the circumstances in which the contract was made. I should say, farther, that although the consignment was not in the strict sense one of perishable articles, yet from its consisting of live stock the undertaking to carry implied a greater obligation of dispatch than would be inferred in the case of ordinary goods. But what is reasonable dispatch is a question to be determined on the circumstances of each case, and is substantially a jury question.

In the present case it is not disputed that the train by which the consignment was dispatched did not arrive until many hours after its ordinary time. The train was not timed by published time tables, but the company were probably obliged to deliver at or about their ordinary time, unless they can show reasonable cause to the contrary. The cause alleged is the detention of the train during the whole of the day in question owing to unusual pressure of traffic arising from the occurrence of the Falkirk tryst; and this fact the company have satisfactorily established. To this extent I think the plea is relevant. The mere amount of time by which the train was delayed from arriving at Newcastle is not, in my opinion, the material test by which the question is to be solved. I think an unusual pressure on the resources of the line arising from such an occurrence is one of those contingencies the risk of which is taken by a trader who employs that mode of conveyance for the carriage of his goods. The Railway Company in such circumstances cannot be expected to extemporise either rails or plant. As their carriages can only run on one set of rails, their means of conveying the traffic are necessarily limited, and I should be sorry to give any countenance to the idea that an action like this will lie for the detention of goods on every occasion on which the line may be blocked. It would certainly not tend to the safety of this mode of conveyance, sufficiently hazardous as it is, if railway companies were impelled by such liabilities to forward their goods trains to the detention or risk of their passenger traffic. These are contingencies incident to the mode of transit, but for which the pursuer would have been obliged to carry his pigs to another market.

If, therefore, it had been established in this case not merely that the line at Portobello was blocked on the day in question by the accumulation of trains, but that the delay in forwarding the pursuer's goods was directly owing to that cause, I could not have found the defenders liable. But I am of opinion that this has not been proved, and that it lay with the defenders to prove it. It seems that this traffic from Granton was worked by a pilot engine, which conveyed the goods trains up to Portobello, waited at that station until the train could be shunted to the main line, and then returned to Granton to be ready for the next train.

On the occasion in question the pilot engine was two hours beyond its usual time in reaching Granton for the trip which ought to have left Granton at 6.55. In point of fact it arrived at Granton at 7.25 and did not leave for Portobello until 8.15. I think it is sufficiently proved that the delay in reaching Granton was caused by the pressure of traffic, but of the cause of the delay in starting from Granton we have no evidence whatever. This seems to me fatal to the defence. It was known that the train from Edinburgh leaving at 8.2, by which the consignment was to be sent, would keep its time at Portobello. The train with the pursuer's pigs which left at 8.15 arrived at Portobello at the Joppa station at 8.30, almost simultaneously with the departure from that station of the Edinburgh train, which they accordingly missed. The very fact that the trains had been detained all day put on the defenders the obligation of greater alacrity in dispatching their train from Granton, and as they have entirely failed to prove any reasonable cause for the delay in starting from Granton, I think they have been rightly found liable in this first demand.

I think it unnecessary to refer to the numerous authorities which were quoted to us, as I think the views I have expressed are entirely consistent with the principles which have been established both in this Court and in England.

Two considerations were pressed upon us as sufficient to exonerate the Company. The first—the delay which has taken place in enforcing this claim; the second—the fact that the pursuer might have sent his goods by an earlier train. As regards the delay, the consideration is not without weight; but it seemed hardly disputed that the claim was intimated immediately after the occurrence, and it has not been shewn that the defenders have suffered in the way of loss of evidence by the time which has elapsed. As regards the second, I think the pursuer was entitled to expect when he put his goods on the train at five o'clock that afternoon that they would arrive in time to join the 8·2 train from Edinburgh.

The second claim stands in a different position. It relates to a consignment of pigs dispatched by the pursuer from Granton on the 4th of August 1874. The train by which they were sent, from some cause which has not been explained, ran off the line at Windmillhill Station, six miles south of Berwick,—one of the carriages which ran off was smashed to pieces, and the pigs were consequently detained for several hours. The pursuer alleges a loss of market in this case also. The question is, whether the accident was owing to the fault of the defenders. On that question I am o opinion that the fact of the occurrence of the accident does not of itself prove that the defenders were in fault. I think, both in law and in reason, it only throws upon the Company the burden of shewing that they acted with reasonable care. The cause of the accident has not been ascertained, and the pursuer has entirely failed in my opinion to reduce the possible causes to such as the Company were bound to have prevented. It is well known that such occurrences do take place from causes which remain entirely occult. It is proved that the Company's servants examined the carriages at Berwick according to their usual custom, and found nothing which appeared to be wrong. In these circumstances, I cannot find that the detention arose from any cause for which the defenders were responsible, or against which reasonable care ought to have provided. It was suggested that

the Company should have made the history of these broken waggons more complete, and I concur in thinking that this would have been desirable. But on the evidence I am of opinion that the pursuer has failed to establish that fault which was essential to support his demand.

Lord Ormidale—When it is borne in mind, on the one hand, how dependent the public are on railways for the transport throughout the kingdom of goods as well as passengers, and, on the other hand, how unavoidable are the accidents and impediments to which railway transport however well and carefully conducted is exposed, the importance as well as the delicacy of the questions involved in this case can be readily understood.

The case consists of two branches, each of which depends to some extent upon different considerations. There is, firstly, the liability of the defenders for the pursuer's claim of damages arising in October 1872; and there is, secondly, his claim of damages arising in August 1874. No dispute was ultimately maintained on the part of the defenders as to the amount of the damages sued for under either of these claims, supposing their liability to be otherwise established. But they deny or dispute, on various grounds, that they are liable at all.

1. The material facts to be kept in view in reference to the pursuer's first claim of damages, and about which there is little if any dispute, are these:—For about twelve years immediately preceding the 7th of October 1872 the pursuer had been in the practice of sending weekly on Monday afternoon by the defenders' line of railway live pigs from Granton to Newcastle for the Tuesday morning market there, and for all that time the pursuer's pigs were trucked by the defenders on the afternoon of the Mondays at Granton, and forwarded to their destination by a train which regularly left that place for Portobello at 6.45, in time to join the eight o'clock evening meat train from Edinburgh to Newcastle, where it arrived early on the Tuesday mornings, some hours before the opening of the market. On the evening of the 7th of October 1872 the pursuer, in accordance with his usual practice, sent to the station at Granton 71 pigs for transmission, in the usual way and by the usual train, to Newcastle for the market of the following morning. They were received by the defenders and trucked in good time for such transmission, but they were not forwarded from Granton in due and ordinary course so as to join the meat train at Portobello, and in consequence they did not reach Newcastle till about noon the following day, after the morning market, or the better part of it, was over, the result being that the pursuer sustained the damage which constitutes his first claim.

The pursuer maintains that the unprecedented delay which thus occurred in the transmission of his pigs to Newcastle amounted to a failure of duty on the part of the defenders as common carriers, and a breach of the contract, implied if not expressed, under which they were sent to him—or, in other words, that the delay arose from negligence or other fault on the part of the defenders, for the consequences of which they are liable. The defenders deny and dispute that any such liability can in the circumstances be held to attach to them.

In regard to the law applicable to such cases as the present, there did not appear at the discussion to be any difference between the parties. The defenders acknowledged that it has been correctly stated, so far at least as the pursuer's first claim of damages is concerned, by the Lord Ordinary, its application merely, in the circumstances, being disputed.

Now, there can be no doubt that a great—so far as appears an unprecedented delay, occurred—a delay, in my opinion, sufficient to raise such a *prima facie* case of liability against the defenders as to make it necessary for them to show that it was not caused by negligence or other fault of theirs. And as they were under no warranty, and had undertaken no absolute obligation that the pursuer's pigs should arrive at Newcastle at or before any particular time, it is quite open for them to do so; and if they can show that they did all they could in the circumstances to forward the pursuer's pigs with due and reasonable expedition, they must stand exculpated. It cannot, however, be assumed that the defenders were under no duty or obligation at all to the pursuer to carry his pigs from Granton to Portobello in time to be forwarded from there to Newcastle by the meat train referred to; for, although it may be true that they had entered into no express or special contract to this effect, it must, I think, be held that they were, in the circumstances, bound to use all due and ordinary diligence to have that done. The case comes in this way to be reduced to the question, whether the defenders did or did not use such diligence, and have shown that they did so; or, to put it in different words, whether the delay arose, not from any negligence or fault of theirs, but from circumstances beyond their control, or, at any rate, circumstances which afford them a reasonable and justifiable excuse. The law as so stated is exemplified by many of the cases cited at the discussion, and I have in particular to refer to the cases of *Britton* v. *The Great Northern Railway Company* (28 Law Journal, Exch., p. 51), where the dispute related to delay, owing to a fall of snow, in the transmission of cattle; the case of *Taylor* v. *The Great Northern Railway Company* (1 Law Reports, Common Pleas, p. 385), which related to the transmission of hampers of poultry for the London market; and in the recent case of *M'Donald & Company* v. *The Highland Railway Company* (11 Macph., 614), in this Court, which related to the transmission of perishable goods (confections) from Edinburgh to Inverness. Although here the goods were not perishable as confections, they were live animals, which could not be allowed to starve, and were, in the knowledge of the defenders, intended for a particular market, which, if they missed through delay in their transmission, the necessary consequence would be loss and damage to the pursuer.

The question, therefore, is whether in the circumstances of the present case the defenders did, or did not, use reasonable expedition in the transmission from Granton to Newcastle of the pursuer's pigs; and this being entirely a jury question, depending upon the impression that may be taken of the evidence, I cannot, for one, help regretting that it had not been tried by a jury.

In now, however, coming to a determination on the subject, it appears to me, as I have already said, that it lies on the defenders to show that the unusual delay which occurred in the present instance was not caused by the negligence or fault of themselves, but was the unavoidable result of the

state of their line, they doing all that, under the circumstances, they were bound to do to forward the pursuer's pigs with due and reasonable expedition. This, indeed, must necessarily be so, for they, and they alone, can account for the delay, it being obvious that the owner of goods, like the pursuer, who does not travel along with them, could have no means or opportunity of knowing what was the cause of the delay. He has done all that was incumbent on him by proving the usage which had existed for twelve years, and that he had, in conformity with that usage, delivered his pigs at Granton, where they were received and trucked by the defenders in ample time for transmission, in ordinary course, for next morning's market at Newcastle.

It only remains, therefore, to consider whether the defenders have shown that they did all that was reasonably incumbent on them to forward the pursuer's pigs. I am of opinion, with the Lord Ordinary, that they have failed to do so. They have not, indeed, established by sufficient evidence the cause of the delay at all. Their case amounts, in regard to this point, to little more than a statement to the effect that owing to the Falkirk Tryst, which took place about the time, their traffic was so great as to create such impediments on their line, especially at Portobello, as to render it impracticable by due and reasonable exertions to forward the pursuer's pigs as usual. But it does not appear to me that there is anything like sufficient evidence to support this statement. And, especially, as the defenders have altogether failed, I think, to account for the great and unusual delay which occurred in taking the pursuer's pigs from Granton to Portobello, which appears to have been the real cause of the delay complained of, I am of opinion that the Lord Ordinary is right in holding them liable in the first of the pursuer's claims of damages.

In forming this opinion I have not overlooked the defenders' argument founded on the time which the pursuer allowed to elapse after his claim arose and the raising of his action, in consequence of which they, the defenders, say they are unable to account for the delay which occurred in the transmission of the pigs on the 7th of October 1872 so satisfactorily as they might otherwise have done. But, on the other hand, I cannot overlook what was stated for the pursuer, and not denied, that in point of fact he immediately, or soon after the 7th of October, intimated his claim, and called on the defenders to make reparation for his loss, and that he never afterwards departed from it. Keeping this in mind, and that the defenders must have known that the pigs were delayed in their transmission so as to lose the market, contrary to the uninterrupted usage of twelve years, I have been unable to find anything sufficient in the circumstance of the pursuer's delay in bringing his action to meet or displace the view which I have otherwise taken of the case.

2. The pursuer's other claim, while it may be held to be governed by the same general principles of law, arises in circumstances so entirely different from his first that the determination of the one can have little material effect on the determination of the other. The second claim relates to the transmission of pigs from Granton to Newcastle in August 1874. It is not, on the part of the pursuer, said that there was any delay in the departure, in this instance, of the train with the pursuer's pigs from Granton or Portobello, or any undue delay anywhere else except at or near the Windmill Station, a few miles south of Berwick, where, from some undiscoverable cause, or at any rate some cause which has not been explained, an accident occurred through a portion of the train running off the line occasioning a delay of between five and six hours, and preventing the arrival of the pursuer's pigs in sufficient time for the market next morning. Now, although none of the pursuer's pigs were injured, and although the pursuer's claim is not for any such injury, but simply for loss of market in respect of their not having been timeously brought to Newcastle, I did not understand it to be disputed that the defenders would be liable in such a claim if it were shown that the accident at Windmill Station arose from their negligence or other fault. Neither did I understand it to be disputed by the defenders that the delay of between five and six hours at Windmill of itself raised a presumption, in the absence of all evidence to the contrary, that there must have been negligence or other fault on their part in the sufficiency of the railway or of the engines or waggons composing the train, or in the mode in which it was conducted on the occasion of the accident. But what the defenders relied upon, as I understood their argument, was that while the precise cause of the accident, and consequent detention at the Windmill Station, could not be ascertained, it was proved that they had used all due and necessary precautions, and therefore could not be subjected in damages to the pursuer. It appears to me that in law this is a good defence. In the case of *Lyon* v. *Lamb* (22d June 1835, 16 D. 1188), where damages were claimed by a passenger against a coach proprietor for injury sustained by the breaking down of a stage coach, it was held that the presumption is against the proprietor, and that he is bound to show that the carriage and machinery were sufficient, and that there was no negligence; but it was also held, in the circumstances of that case, that he had satisfied this obligation. And in the English case of *Readhead* v. *Midland Railway Company*, 10th May 1869 (4 Law Reports, Queen's Bench Cases, p. 379) the same principles of decision were recognised and given effect to by the Exchequer Chamber affirming a judgment of the Court of Queen's Bench. These cases, which related to the safe carriage of passengers, are authorities equally applicable in the present case, where the timeous delivery of goods is in dispute.

There being, then, no warranty, guarantee, or insurance by the defenders—implied or express—that the pursuer's pigs should in all circumstances be brought to Newcastle at or before a given time, it is clear and free from doubt, I think, that they cannot be made liable in the pursuer's second claim of damages if they have sufficiently shown that the accident at Windmill Station was not caused by negligence or other fault on their part. Now, it appears from the proof that the usual examination was made of the waggons composing the train at Berwick shortly before the accident, and that after the accident the fullest examination had also been made without anything being found that could account for the accident. I do not see that anything more was, in the circumstances, incumbent on the defenders. If so, it follows that they are entitled to absolvitor from the second of the pursuer's claims, unless indeed it could be held

that the defenders must be liable because they have been unable to account for the accident, and show what its precise cause was. It was suggested as not being quite clear whether the Lord Ordinary may not have proceeded upon some such ground of liability as this; but if he did, I must own my inability to concur with him. Nor can I hold that it is sufficient to subject the defenders in liability that possibly there was something deficient in the carriage which was broken to pieces, and that this may have been the cause of the accident. I cannot adopt any such ground in the face of the proof, which shows that the defenders used all necessary and proper precautions to ensure that nothing was defective or wrong.

The result, according to my opinion, is, that the Lord Ordinary's interlocutor falls to be affirmed in regard to the pursuer's first, and recalled in regard to his second, claim of damages.

Lords NEAVES and GIFFORD concurred.

The Court pronounced the following interlocutor —

"The Lords having heard counsel on the reclaiming note for the North British Railway Company against Lord Young's interlocutor of 25th November 1874, Adhere to the said interlocutor as regards the first claim of the pursuer, and of new decern against the defenders therefor, amounting to £28 sterling, with interest at the rate of 5 per cent., from 8th October 1872 till payment, in terms of the conclusion of the summons; alter the said interlocutor as regards the second claim of the pursuer, and assoilzie the defenders from the conclusions of the summons relative thereto, and decern: Find the pursuer entitled to one-half of his taxed expenses, and remit to the Auditor to tax the expenses, and to report."

Counsel for Railway Company—Dean of Faculty (Clark), Q.C., and Moncreiff. Agents—Dalmahoy & Cowan, W.S.

Counsel for Anderson—Guthrie-Smith and Reid. Agents—Renton & Gray, S.S.C.

Friday, February 19.

FIRST DIVISION.

JANE TAYLOR OR YOUNG *v.* THOS. BROWN.

Appeal—Failure to print Note of Appeal along with Record, &c.—Act of Sederunt, 10th March 1870.

Held that it is within the discretion of the Court to relax the provision of the Act of Sederunt as to printing on cause shown.

This was an appeal from the Sheriff-Court of Lanarkshire under the Court of Session Act, 1868. The process and note of appeal were received by the Clerk on 9th January 1875, and duly marked by him of that date. The appellant on 22d January timeously printed, boxed, and lodged with the Clerk a print of the record, proof, and interlocutors, and on the following day the case was in the Single Bills, and, no objections being stated by the respondent, was sent to the roll. It was afterwards discovered that the appellant in his print omitted to include the note of appeal itself, which is a separate paper, and *not* on the interlocutor sheet, the 66th section of the Court of Session Act, 1868, permitting the appeal to be minuted in either way. The appellant, on 16th February 1875, printed, boxed, and afterwards lodged an appendix containing the note of appeal. To-day a note for the respondent was moved in the Single Bills praying that, in respect the appellant had failed to print the note of appeal in terms of the Act of Sederunt of 10th March 1870, section 3 (sub-section 1), the appeal should either be dismissed or the Clerk instructed to retransmit the process to the Sheriff-Clerk, with the necessary certificate of abandonment, in terms of the 3d section (sub-section 5) of the said Act of Sederunt. After hearing counsel for both parties, the Court unanimously held, that as the present omission to print the note of appeal is not an infringement of any of the provisions of the statute itself, it was within the discretion of the Court to relax the provisions of the Act of Sederunt on cause shown that the omission to print some part of the papers required to be printed was an oversight—the Lord President stating that the present objection was a very narrow and critical one. The Court pronounced the following interlocutor:—

"The Lords having considered the note for respondent, No. 20 of process, and heard counsel for both parties, refuse the prayer of said note; hold the omission to print, box, and lodge the note of appeal obviated by the print appendix of 16th February current, now lodged, containing the note of appeal; but find the appellant liable in the expenses of the said note, No. 20 of process, and the discussion thereon, which modify to £3, 3s., and for which decern against the appellant for payment to the respondent."

Counsel for Appellant—Campion. Agent—R. A. Veitch, S.S.C.

Counsel for Respondent—Alison. Agent—John Gill, L.A.

M., Clerk.

Tuesday, March 2.

SECOND DIVISION.

PATERSON *v.* MACFARLANE & HUTTON.

Joint Stock Companies—Companies Acts 1862, 25 *and* 26 *Vict. cap.* 89*—Voluntary Liquidation—Contributory—Call—Paid up Shareholder.*

A holder of fully paid up shares is a "contributory" in the sense of the statute; therefore *held* that in a voluntary winding up after the payment of all debts and expenses the liquidator was bound, in order to "adjust the rights of contributories among themselves," to make a call upon the ordinary unpaid up shareholders, to equalise the payments of the ordinary sharholders with the nominal advances of shareholders who had taken fully paid up shares in exchange for property sold to the Company.

This was a petition presented by Robert Paterson of 5 Radnor Terrace, Dumbarton Road, Glasgow, against George Macfarlane and James Hutton, chartered accountants, as liquidators of Hamilton & Paterson's Patent Cask Company (Limited).