that there may be more breaches of a certificate than one. On looking at the certificate we find a whole page of conditions, a violation of any one of which would be a breach of the certificate, but notwithstanding this it is not alleged in this complaint that there was any breach of certificate at all, not to speak of any specification of any particular breach. It is reasonable that the accused should have notice which condition he is charged with having violated, so that he may be able to prepare his defence. Again we are told there are at least five Acts of Parliament regulating public-houses, and not one of them is libelled. It appears to me that under these circumstances the conviction cannot stand.

LORD KYLLACHY—The fatal blot is that the complaint neither alleges that the things said to have been done by the accused were done in contravention of his certificate, nor alleges that they were done in breach of some specified section of some one of the Public-Houses Acts. Possibly either allegation would have been enough. But, as the complaint stands, the accused is left in ignorance whether he is charged with a breach of his certificate, or whether his offence consisted in some contravention of some special enactment of one or more of the Public-House Statutes.

LORD LOW concurred.

The Court sustained the appeal.

Counsel for the Appellant—Cook. Agents—Duncan & Hartley, W.S.

Counsel for the Respondent—A. S. D. Thomson. Agents — Fraser, Stodart, & Ballingall, W.S.

COURT OF SESSION.

Tuesday, March 19.

SECOND DIVISION.

With the LORD PRESIDENT, LORD ADAM, and LORD KINNEAR.

[Court of the Railway and Canal Commission.

ALEXANDER COWAN & SONS, LIMITED *v.* NORTH BRITISH RAILWAY COMPANY.

Railway—Railway Commissioners—Jurisdiction—Reasonable Facilities—Undue Preference—Delivery at Private Siding—Railway and Canal Traffic Act 1854 (17 *and* 18 *Vict. cap.* 31), *secs.* 1 *and* 2.

A railway company which had been in use for twenty-eight years to receive and deliver goods at a private siding belonging to a firm of traders intimated to the latter that while they were willing to receive and deliver other goods as before, they would no longer deliver coal at the private siding.

In an application to the Railway Commissioners at the instance of the traders, the Railway Commissioners found (1) that the delivery of coal at the siding in question was a "reasonable facility" which the railway company were bound to afford, and made an order upon them accordingly; and found (2) that by delivering coal at the private sidings of other traders, and refusing to deliver it at the applicants' siding, the railway company were giving an undue preference to the former, and ordained them to desist from so doing.

In an appeal by the Railway Company, *held* (1) (by a majority of Seven Judges consisting of the Lord President, the Lord Justice-Clerk, Lord Adam, Lord Kinnear, and Lord Trayner—*diss.* Lord Young and Lord Moncreiff) that the Court of the Railway and Canal Commission had no jurisdiction to ordain a railway company to deliver traffic at a private siding, in respect that such sidings are not part of the "railway" within the meaning of section 2 of the Railway and Canal Traffic Act 1854, and that the right of the railway company to refuse to deliver traffic at such sidings was not affected by the fact that they had in the past voluntarily received and delivered traffic at the siding in question, or that they were still voluntarily receiving and delivering traffic there in the case of goods other than the particular kind of goods which they had refused to deliver; and (2) (by the Second Division) that the Railway and Canal Commission had jurisdiction to make the second order appealed against.

This was an appeal from an order of the Railway and Canal Commissioners, at the instance of Alexander Cowan & Sons, Limited, papermakers, Penicuik, applicants and appellants, against the North British Railway Company, respondents.

The following statement of the facts upon which the application was founded is taken from the opinion of Sir Frederick Peel:—"Messrs Cowan are papermakers, carrying on business in the Penicuik district, and have in connection with one of their mills a siding called Low Mill siding. This siding forms a junction with the Penicuik Railway, now North British, 22 chains north of Penicuik Station, and was constructed by Messrs Cowan on their own land and at their own expense at the same time as the Penicuik Railway, and has been in use ever since that railway was opened in 1872. Its incoming traffic consists chiefly of coal from Arniston and other collieries, and of esparto grass and rags from Granton, Leith, and other places, and the total yearly tonnage is very considerable, that of coal alone exceeding 30,000 tons. In November 1899 Messrs Cowan claimed to have a rebate off the Company's coal rate, on the ground that it included the Penicuik terminal for station accommodation, or that it did not differ in amount from the coal rate to the station, although in the one case station accom-

modation was provided and in the other was not. On 10th of March last, before the above claim could be heard, they received notice from the respondents that from and after 22nd March they would no longer accept or carry coal for delivery at the Low Mill siding, and that Messrs Cowan must make arrangements for taking delivery at Penicuik Station. They stated they were under no obligation to stop trains specially at Low Mill siding either to give or take delivery of traffic there, and that they had resolved to cease to do so with regard to coal after 22nd of March. They have continued to deliver all other traffic as before at the siding."

On 3rd April 1900 Messrs Cowan presented the present application to the Railway Commissioners in which they craved an order "(1) Enjoining the respondents to afford the applicants all reasonable facilities for the receiving and forwarding and delivery of traffic upon and from their sidings, and for the return of carriages, trucks, and other vehicles; (2) Declaring the arrangements and facilities for such traffic existing prior to the hereinbefore mentioned date, 22nd March 1900, between the applicants and the respondents, to be reasonable; (3) Enjoining the respondents to restore and to desist from again interrupting such facilities and obstructing the applicants in the exercise thereof; (4) Ordering them to desist from subjecting the applicants to an undue or unreasonable prejudice or disadvantage in respect of the use of their sidings, and to desist from giving to other traders or to themselves any undue preference or advantage over the applicants."

The respondents lodged answers, in which they contended that the application should be refused. They averred—"(7) The application is incompetent. The Court has no urisdiction. The applicants' averments are irrelevant and wanting in specification, and, so far as material, are unfounded in fact. The respondents are not bound to stop their trains at Low Mill siding to deliver the applicants' coal. In any event, the demands are unreasonable. No order should or can legally be pronounced requiring or necessitating the respondents to stop trains at Low Mill siding in order to deliver coal for the applicants there."

The Railways Clauses Consolidation (Scotland) Act 1845 enacts, sec. 69—"That this or the special Act shall not prevent the owners or occupiers of lands adjoining to the railway, or any other persons, from laying down, either upon their own lands or upon the lands of other persons, with the consent of such persons, any collateral branches of railway to communicate with the railway for the purpose of bringing carriages to or from or upon the railway, but under and subject to the provisions and restrictions of the Railway Regulation Act 1842, and the company shall if required, at the expense of such owners and occupiers and other persons, and subject also to the provisions of the said last-mentioned Act, make openings in the rails and such additional lines of rail as may be necessary for effecting such communication in places where the communication can be made with safety to the public and without injury to the railway, and without inconvenience to the traffic thereon, and the company shall not take any rate or toll or other monies for the passing of any passengers, goods, or other things along any branch so to be made by any such owner or occupier or other person." Section 85 provides that "upon payment of the tolls from time to time demandable all companies and persons shall be entitled to use the railway, with engines and carriages properly constructed as by this and the special Act directed," subject to the Railway Regulation Act 1842, and to the regulations made by the company.

The Railway and Canal Traffic Act 1854 enacts, section 1—"The word 'railway' shall include every station of or belonging to such railway used for the purposes of public traffic." Section 2 enacts—"Every railway company, canal company, and railway and canal company, shall, according to their respective powers afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, or other vehicles; and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." . . .

The Railway and Canal Traffic Act 1894 enacts, sec. 4—"Whenever merchandise is received or delivered by a railway company at any siding or branch railway not belonging to the company, and a dispute arises between the railway company and the consignor or consignee of such merchandise as to any allowance or rebate to be made from the rates charged to such consignor or consignee, in respect that the railway company does not provide station accommodation or perform terminal services, the Railway and Canal Commissioners shall have jurisdiction to hear and determine such dispute, and to determine what, if any, is a reasonable and just allowance or rebate."

Proof was allowed and led. The facts established, so far as not narrated *supra*, sufficiently appear from the judgments.

The Railway Commissioners on 6th August 1900 pronounced the following order:—"This Court doth find and determine—(1) That the Railway Company in refusing to deliver coal at the junction of their railway with the Low Mill siding have not afforded to the applicants all due and reasonable facilities for the delivery of their coal traffic at the Low Mill siding. (2) That the Railway Company in delivering coal at the private sidings of other traders near Penicuik, competitors in trade with the

applicants, and refusing to deliver coal at the applicants' Low Mill siding, have given to such traders an undue and unreasonable preference and advantage over the applicants, and subjected them to an undue and unreasonable prejudice: And this Court doth declare that the facilities given by the Railway Company up to the 22nd day of March 1900 for delivery of the applicants' coal traffic at the Low Mill siding were reasonable, and such as ought to be afforded by the Railway Company to the applicants: And this Court doth order and enjoin the Railway Company, their servants and agents, to afford all reasonable facilities for the delivery of the applicants' coal traffic at the Low Mill siding, and to desist from giving to traders, competitors in trade with the applicants, any undue and unreasonable preference or advantage over the applicants in respect of the delivery of coal at sidings not belonging to the Railway Company, and from subjecting the applicants to undue and unreasonable prejudice and disadvantage in respect of such delivery of coal at the Low Mill siding."

SIR F. PEEL—[*After stating the facts, ut supra*]—Upon this state of facts Messrs Cowan apply to us to determine whether, having regard to the obligations as to facilities imposed on railway companies by the Traffic Act 1854, and to the Railway Company continuing to carry coal and other traffic to and from the private sidings of other persons, as well on the Penicuik Railway as all over the North British system, they have not a right to require the Railway Company to deliver coal at the Low Mill siding. Section 2 of the Act enacts that every railway company shall according to their powers afford all reasonable facilities for the receiving, forwarding, and delivering of traffic upon and from the railway worked by such company, and Messrs Cowan contend that the refusal of the respondents to deliver coal at the junction of their railway with the Low Mill siding is a contravention of the Act. It is part of the argument for the North British that the word 'railway' is defined in that Act to include stations used for the purposes of public traffic, and that this implies that a railway company is only bound to carry goods to and from stations on the railway. I do not think that section 1 (the interpretation clause) has this effect in determining the liability of a company as to delivery. All that it seems to do, so far as delivery is concerned, is to make a station and station ground a place at which the railway company shall give reasonable facilities for delivering traffic from it. It becomes a company's duty so to act, because a station used for purposes of public traffic is made part of the company's "railway" within the meaning of the statute, but section 2 applies equally to every part of the railway, and I think that any place on a railway which though not a station has been made, by the company's course of dealing with its business, a usual terminus of the transit of particular traffic is a place where it ought and can be required to deliver. Such a place is in the case before us the junction of the Penicuik Railway with the Low Mill siding. The junction is in a good position for the company's using it, and the siding has been conveniently laid out for exchanging trucks with the railway, and coal has been carried to it uninterruptedly since the railway was opened in 1872. It is not suggested that the safety or convenience of the public affords any reason for a change, and it may be taken upon the evidence that not only is the station unprovided with the accommodation that is wanted for the unloading and other requirements of a coal traffic of the quantity of Messrs Cowan's, but also that the only place at the side of the railway where such accommodation is supplied is the Low Mill siding. Looking at these circumstances, I think it is a reasonable facility within the meaning of the section that the respondents should stop their trains at the entrance of the siding, and deliver trucks intended for it by detaching and depositing them clear of the running line. It makes it, I think, the more reasonable that this facility should be given that the company has obtained a monopoly of the carrying trade on its railway, and has made it impossible for siding traffic to be worked by the siding proprietors as contemplated by the Act (Railway Clauses Act 1845), which gives them the right to connect their siding with the railway.

Messrs Cowan further state that there are other papermakers in the Esk valley, and that there is a private siding at Esk Mills, half-a-mile north of Penicuik, and another at Dalmore Mills, two miles from the station, and that at both these places the respondents are still delivering coal, and they complain that in the conveyance and delivery of coal they are subjected to a disadvantage from which other persons under no differing circumstances are exempted, and have not received that equality of treatment to which the Act of 1854 entitles them. The respondents have shown no good reason to justify the difference complained of, and I think they ought to be enjoined to give Messrs Cowan the same facilities in the conveyance and delivery of coal that they give to other traders on the Penicuik Railway.

LORD COBHAM concurred.

LORD STORMONTH DARLING—I shall only add a few words on the questions of law which were raised in the argument. And first, in the application for reasonable facilities under the Railway and Canal Traffic Act 1854, it is said by the Railway Company that we have no jurisdiction to compel them to stop their goods trains at Low Mill siding for the purpose of delivering the applicants' coal. This argument is founded mainly on the *Hastings* case, L.R., 6 Q.B.D. 586, and the *Darlaston* case (1894), 2 Q.B. 694.

Now, I take it that this Commission sitting in Scotland is as much bound by a decision of the English Court of Appeal as if it were sitting in England when the

decision turns entirely upon the construction of a British statute. Accordingly, I accept implicitly the judgments in these two cases. The *Hastings* case lays down the proposition that we have no jurisdiction to order a railway company to make a new railway station, and the *Darlaston* case that we have no jurisdiction to make an order involving the re-erection *ex intervallo* of a station which has been closed. Both proceed upon the ground that there is no obligation upon a railway company to establish a station at any particular place, or indeed to work or maintain its line at all. But in the *Hastings* case Lord Selborne was careful to guard himself against any undue limitation of the powers of this Commission. After stating the proposition that a company is not bound to establish a station at any particular place unless it thinks fit to do so, his Lordship added — "But when the company has in fact opened a station at a particular place, and actually uses it for the purposes of public traffic, and invites the public to resort to it for the purpose of being received or delivered as passengers to or from trains announced as starting from or stopping at that station, or of having their goods received there for carriage or delivered there after carriage, it is, in my opinion, bound by the Act to afford at that station (to the extent of its powers) all reasonable facilities for receiving, forwarding, and delivering such passengers and goods." Accordingly, if Lord Selborne had been dealing with a case in which a company refused to deliver a particular description of goods addressed to a particular trader at a public station which was in full use for goods traffic, I conceive that his Lordship would have had no hesitation in sustaining the jurisdiction of this Commission to pronounce upon such a proposal as unreasonable unless the company were able to adduce some good reason in support of it.

Now, of course I am aware that a public station is not the same thing as a private siding. A public station is part of the railway, and a private siding is not. But this siding was formed and connected with the main line under the provisions of section 69 of the Railway Clauses Consolidation (Scotland) Act 1845. It was formed by the applicants at a cost (not including land) of over £6000, and their actual outlay in maintaining it is about £500 a-year. It is at this moment in full operation, and there is no proposal on the part of the Railway Company to discontinue its use except as regards coal. They are still willing to stop their trains there for the purpose of taking up and setting down the large general traffic of the applicants. The practical result of their proposal would often be (as shown by the figures given in Mr Garden's evidence) that having a mixed goods train composed of some trucks containing coal for the applicants and other trucks containing general merchandise, they would stop the train, uncouple the one set of trucks, and then carry on the others a quarter of a mile beyond their true destination. There is, therefore, no question of putting the respondents to loss or inconvenience, or of interfering with their legitimate discretion in the conduct of their business. A great deal must always be left to the discretion of a railway company, and in judging what is a "reasonable facility," we are bound to consider what is reasonable in the interests of the company itself as well as what is reasonable in the interests of the public or of a private trader. But here if we do what the applicants ask we shall not be dictating to the company how to marshal their goods trains, or what particular trains they are to stop; we shall only be requiring that they shall continue to deliver the applicants' coal in the same way as they have been doing for more than twenty years, and as they still propose to do in the case of all the applicants' other traffic.

Accordingly, it seems to me that, although this is a private siding, it falls within the principle laid down by Lord Selborne in the passage which I have quoted. That principle is, that when a railway company has in fact instituted a practice, which it proposes to continue, of receiving and delivering traffic at a particular place on its system, it ceases to be absolute master of the mode in which the traffic at that place is to be conducted, but is bound to afford all reasonable facilities for receiving, forwarding, and delivering it. The owner of the siding has just as much interest to complain of any capricious alteration in the *status quo* as the public would have in the case of a public station. And the words of the statute are not limited to delivery at a public station, but extend to delivery from any part of the railway system. It is a different question whether we could compel a railway company to deliver goods at a newly-constructed siding, and I express no opinion with regard to that.

I am therefore of opinion that our jurisdiction to entertain this application is clear. If so, there can be no doubt that we ought to exercise it, because the Railway Company has not advanced a single reason in support of it.

I propose that we should make an order requiring the respondents to afford the applicants all reasonable facilties for delivering their coal traffic at the Low Mill siding, and declaring the arrangements and facilities for the delivery of such traffic which existed before 22d March 1900 to have been reasonable, and such as ought in future to be afforded.

The respondents appealed to the Court of Session, and argued—The Railway Commissioners had no jurisdiction to make the order complained of. Their powers to ordain a railway company to afford reasonable facilities in receiving and delivering traffic were defined by section 2 of the Railway and Canal Traffic Act 1854. That section applied solely to the railway as a route for public traffic, and to stations, as defined by section 1, *i.e.*, stations used for the purposes of public traffic. It had no application to a private siding, which was not part of the railway, but the property of

the private trader. No doubt the latter could compel the Railway Company under the Railway Clauses Act 1845 to make a junction with his siding, and to permit him to make use of the line for hauling his own traffic, but that was the limit of his rights. It was settled that a railway company was not bound to build a station at any particular place—*South-Eastern Railway Company* v. *Railway Commissioners* [1881], 6 Q.B.D. 586, *per* Lord Selborne at p. 592; or to rebuild one that had been discontinued—*Darlaston Local Board* v. *London and North-Western Railway Company* [1894], 2 Q.B. 694; *Johnson* v. *Midland Railway Company* (1849), 4 Exch. 367; *North British Railway Company* v. *North-Eastern Railway Company*, December 17, 1896, 24 R. [H.L.], 19. The same reasoning applied *a fortiori* to the case of a siding, which was not part of the undertaking of the Railway Company. If the Railway Company could not be compelled, as matter of legal obligation, to receive or deliver at a private siding, the fact that they had done so for a number of years by voluntary agreement could not affect their right to cease to do so if they thought it no longer to their advantage. (2) Nor had the Railway Commissioners jurisdiction to find that the appellants had given undue preference to other traders. The prohibition in section 2 against giving undue preferences, although expressed in wide terms, must be qualified as meaning in connection with a railway or public station as defined by the Act—*West* v. *London and North-Western Railway Company* [1870], 5 C.P. 622; *Shaw Savill and Albion Company* v. *West India Dock Company* [1888], 39 Ch. D. 524. In any view, the Railway Commissioners had no power to stereotype the existing arrangement by ordering the appellants to give the same facilities to the respondents as they gave to other traders. The appellants were entitled to exercise their discretion in bringing about equality of treatment, and might do so by ceasing to deliver coal at sidings for all the other traders.

Argued for the respondents—The question before the Railway Commissioners was not a question of legal right but of "reasonable facilities" and "undue preference," and therefore within their jurisdiction to determine. There was nothing in the Act of 1854 which supported the narrow construction of the word "railway," maintained by the appellants, viz., that it was restricted to the unbroken line and to public stations. Section 2 must be interpreted in the light of the rights conferred on the private trader by the Railways Clauses Consolidation Act 1845, empowering him to compel a railway company to make a junction with his siding (sec. 69), and permit him to bring his traffic upon the company's line (sec. 85). Admitting that a railway company could not be compelled to build or continue a station, the decisions to that effect did not touch the right of the owner of a private siding, which was a higher right, and one which the railway company could not terminate at their pleasure—*Bell* v. *Midland Railway Company* [1859], 3 De Gex and Jones 673; *Woodruff* v. *Brecon Railway Company* [1884], 28 Ch. D. 190; *Portway* v. *Colne Valley and Halstead Railway Company* [1891], 7 Br. and Macn. 102. The circumstances of the present case did not raise the legal question stated by the appellants, for they were in fact delivering coal for other traders. That showed that the question was really a question of reasonable facilities, and the Commissioners therefore had jurisdiction, just as in the case of a public station, where the Commissioners could enforce adequate accommodation so long as the company maintained the station and invited the public to use it. The Commissioners had jurisdiction to ordain the appellants to desist from giving an undue preference to other traders to the prejudice of the respondents. Even if the respondents had no statutory rights in respect of their siding, the case would be one of undue preference incidental to carriage and delivery of traffic within the meaning of section 2 of the Act of 1854. Further, the provisions of section 4 of the Railway and Canal Traffic Act 1894 showed that the Legislature regarded the reception and delivery of goods at private sidings as part of the ordinary business of a railway company.

On 23rd February 1901 their Lordships of the Second Division appointed the cause to be argued before the Judges of the Division with the assistance of three Judges of the First Division in regard to the first finding of the Commissioners and the order following thereon.

On 6th March the cause was argued before their Lordships of the Second Division and the Lord President, Lord Adam, and Lord Kinnear.

At advising—

LORD PRESIDENT—The applicants are papermakers, carrying on business at Valleyfield, near Penicuik, and the respondents own and work a public line of railway which terminates at Penicuik Station. That line was originally constructed by the Penicuik Railway Company, and opened for traffic in 1872. At or about that time the applicants or their predecessors in title laid down three sidings from three of their mills opening on to the line of railway now belonging to the respondents, and first the Penicuik Railway Company, and afterwards the respondents, since they acquired the line, received and delivered the applicants' traffic at these sidings until the differences after mentioned arose. The present question relates to one of these sidings—Low Mill siding—which connects with the respondents' line outside Penicuik distant signal, 22 chains from Penicuik Station. This siding has been in use since the railway was opened, the incoming traffic being chiefly coal, esparto grass, and rags for the applicants' works.

In November 1899 the applicants claimed a rebate from the respondents' coal rate upon the ground that it included a terminal charge for station accommodation and terminal services, and that the coal did not

receive any such accommodation and services at Penicuik. The respondents then, on 10th March 1900, gave notice to the applicants that from and after the 22nd of that month they would not accept or carry coal for delivery at the applicants' Low Mill siding; that they were under no obligation to stop their trains specially at that siding for the purpose of giving or taking delivery of the applicants' traffic, and that they had resolved to cease to do so with regard to coal after that date. They accordingly requested the applicants to make arrangements to take delivery of their coal at Penicuik Station, and to advise the collieries from which they purchased. The applicants then, on 3rd April 1900, presented the present application praying the Railway Commissioners for an order enjoining the respondents, *inter alia*, to afford to the applicants the same facilities at Low Mill siding as they had previously enjoyed. A proof was led, and thereafter the Railway Commissioners, on 6th August 1900, found and determined, *inter alia*—(1) "That the Railway Company, in refusing to deliver coal at the junction of their railway with the Low Mill siding, have not afforded to the applicants all due and reasonable facilities for the delivery of their coal traffic at the Low Mill siding." The respondents appealed against the findings of the Railway Commissioners, and with reference to the finding and determination above quoted, with which alone we have to deal, the respondents maintain that the Railway Commissioners had not jurisdiction to make it.

It may be convenient to consider the question thus raised under two heads—(1) Whether the Railway Commissioners would have had jurisdiction to make such a finding if the respondents had not previously received or delivered any traffic at the siding; and (2) whether if upon that state of facts the Railway Commissioners would not have had jurisdiction, the circumstance that traffic of the applicants has in fact been received and delivered at the siding confers jurisdiction upon them. Under this second head it will be proper to consider *separatim* whether, if the Railway Commissioners would not have had jurisdiction, if the respondents had intimated that they declined any longer to receive or deliver any traffic at the siding, the result is varied by the circumstance that their refusal has hitherto been limited to one particular kind of traffic, viz., coal.

The decision of the question depends upon the construction and effect of certain statutory provisions to which I shall now advert.

The right of owners of land adjoining a railway to make connection with it by sidings is conferred by section 69 of the Railway Clauses Consolidation (Scotland) Act 1845, which provides, *inter alia*, that that or the special Act shall not prevent the owners or occupiers of lands adjoining to the railway, or any other persons, from laying down, either upon their own lands or upon the lands of other persons with the consent of such persons, any collateral branches of railway, to communicate with the railway for the purpose of bringing carriages to or from or upon the railway, and that the company shall if required, at the expense of such owners and occupiers and other persons, and subject to certain qualifications not material to the present question, make openings in the rails, and such additional lines of rail as may be necessary for effecting such communication. It is plain that this section contemplates that the persons entitled to make the connection shall work it with their own vehicles, and provide their own haulage and servants, no obligation being laid upon the Railway Company owning the line except to permit them to enter upon and use it as a road on payment of tolls as provided by section 85. In particular, the section contains no provision that the Railway Company shall render any services in working the siding, or that they shall be bound to stop any of their trains for the purpose of receiving or delivering traffic at it.

The next important statute bearing upon the question is the Railway and Canal Traffic Act 1854. By section 1 of that Act it is declared that the word "railway" shall include every station of or belonging to such railway used for the purposes of public traffic, and by section 2 it is declared, *inter alia*, that every railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles. Lord Esher in the *Darlaston* case said—"It seems to me a necessary implication that the word 'railway' in section 2 does not include a station which is not in use for the purposes of public traffic,' and this proposition appears to be indisputably correct.

It is, as I understand, upon this section that the claim of the applicants is founded, their contention being that the receiving and delivering of traffic at the siding are reasonable facilities within the meaning of the section. None of the Commissioners express any opinion as to whether they would (in their judgment) have had jurisdiction under this section to make the finding and determination which they have made if there had not been any previous usage of receiving and delivering traffic at the siding, their decision being (apparently) founded exclusively upon the usage which has taken place, and Lord Stormonth Darling says in his judgment—"It is a different question whether we could compel a railway company to deliver goods at a newly constructed siding, and I express no opinion with regard to that. It seems to me, however, to be very essential (or at all events very material) to form an opinion upon this question before proceeding to consider the effect, if any, of the previous course of dealing between the parties.

I am of opinion that the Commissioners have not jurisdiction to order a railway company to receive or deliver traffic at a private siding at which no traffic is being or has previously been received or delivered by the company. While section 1 of the Act of 1854 declares that the word "railway" shall include every station of or belonging to it used for the purposes of public traffic, it makes no mention of private sidings, and its language, in my judgment, plainly excludes the idea that such sidings form any part of its undertaking. They are the private property of persons who by the use of them obtain access to the railway, and in the absence of any statutory provision that the railway company shall stop its trains at or serve such private sidings I consider that no duty to do so can reasonably be implied. The persons owning the sidings are not bound apart from agreement to send their traffic, or any part of it, over the railway company's line, and even if they did so for a time, or as regards some kinds of traffic, they would not be bound to continue to do so as regards any kind of traffic. Again, the Railway Commissioners have no power to enjoin things merely because they may think that they would be reasonable facilities; they are only entitled to administer the existing Railway Acts, and to enforce facilities thereby provided where such facilities are refused. In the *Hastings* case, 6 Q.B.D. 591, Lord Selborne said—"The first observation which arises upon this enactment" (36 and 37 Vict. c. 48, which transferred to the Railway Commissioners the power which had previously been vested in the Court) "is that it does not enable the Commissioners to impose upon a railway company any new duties or obligations depending upon any mere exercise of the Commissioners' own judgment. Their authority is only to inquire into and to prevent particular violations and contraventions of the statute," and no statute has been contravened in this case.

I am therefore of opinion that the first question above stated should be answered in the negative.

The second question is, whether an obligation upon a railway company to receive and deliver traffic at a private siding, not imposed by any Act of Parliament, arises from the fact that traffic has been for a longer or shorter time received and delivered by the company at the siding, and whether this creates a jurisdiction in the Commissioners to order the continuance of such reception and delivery which they would not, apart from the prior usage, possess. The Commissioners appear to have considered that this question should be answered in the affirmative, and I gather from their opinions that it is upon this ground alone that they felt themselves warranted in making the finding and determination now under consideration. Sir Frederick Peel says—"I think that any place on a railway which though not a station has been made by the company's course of dealing with its business a usual terminus of the transit of particular traffic is a place where it ought and can be required to deliver. Such a place is in the case before us the junction of the Penicuik Railway with the Low Mill siding." And Lord Stormonth Darling, after referring to the *Hastings* case and the *Darlaston* case, says that it seems to him that although this is a private siding it falls within the principle laid down by Lord Selborne in the passage which he quotes, adding—"That principle is that when a railway company has in fact instituted a practice which it proposes to continue of receiving and delivering traffic at a particular place on its system, it ceases to be absolute master of the mode in which the traffic at that place is to be conducted, but is bound to afford all reasonable facilities for receiving, forwarding, and delivering it. The owner of the siding has just as much interest to complain of any capricious alteration in the *status quo* as the public would have in the case of a public station." Lord Cobham does not deal expressly with the question, but he agrees with his colleagues upon all the points considered by them.

I am not sure whether the Commissioners mean that where traffic has been for a longer or shorter time received and delivered by a railway company at a private siding, the company would not be entitled, after due intimation, to cease to receive or deliver any traffic at it, but would be bound to go on receiving and delivering traffic as before, or whether they only mean that so long as the company receives or delivers any kind of traffic at a private siding it is bound to receive and deliver all kinds of traffic there, and I shall therefore deal with both views.

It appears to me that the first view is at variance with the principle on which the decision in the *Darlaston* case proceeded. It was there held that a railway company is not bound to make or to continue a station at any particular place, although where it has elected to make a station and to keep it open for traffic it is bound to give reasonable facilities at it, because it is part of the railway within the meaning of the Act of 1854. I think the same considerations apply, *a fortiori*, to prevent a company from being required to continue to receive and deliver traffic at a private siding where it has done so voluntarily (practically by agreement), so long as the terms given by the traders for its voluntary services were satisfactory. As I have already pointed out, private sidings are not parts of the railway within the meaning of the Act of 1854 or of any other Act, and consequently to require the company to receive and deliver traffic at a private siding would be to require it to give facilities not imposed upon it by any statute. The sidings are private property, not falling within the definition of railway, and they are places at which a railway company is not, in my judgment, bound to stop its trains, and to which it is not bound to send its locomotives, waggons, or servants, unless the Commissioners are right in holding that the effect of usage is to compel them to do so. Further, it appears to me that it would not be reasonable to hold

that the mere circumstance of parties, *ex hypothesi* of this part of the argument, not under statutory obligation to do so, having found it to suit their mutual convenience, on terms mutually satisfactory, to receive and deliver traffic at a private siding, reared up a permanent obligation against one of them (the railway company) to continue to do so when the terms offered were no longer satisfactory to the company. In this case the applicants altered the *status quo* by claiming a rebate on coal traffic, in respect that it did not receive station accommodation or terminal services at Penicuik, and it appears to me that the respondents were just as well entitled to say that they would no longer receive and deliver traffic at the siding as the applicants were to say that they declined to pay a rate which they considered excessive. In other words, the effect of the applicants terminating, as they were quite entitled to do, the tacit agreement under which the siding had been served was, in my judgment, to remit the parties respectively to their original positions, so that the question must now be determined in the same way as if the respondents had never rendered any services at the siding. If I be right in thinking, for the reasons already given, that in their inception the services rendered by the respondents at the siding were voluntary, I can see no reason why they should not be at least as well entitled to cease altogether to serve the siding as a company is to pull down or close one of its public stations. I do not suppose that the fact of an owner of adjoining land having made a siding and used it for receiving and delivering traffic from and to the railway as long as it suited him to do so would bind him to send his traffic over the company's line by that siding in all time coming, and if the one party to the voluntary dealing is not bound to continue it in perpetuity, neither should the other, in the absence of any statutory obligation, be held bound to do so.

It is a different question whether, so long as a company continues to serve a siding as to some kinds of traffic, it is thereby bound to serve it as regards all kinds of traffic. In this part of the argument I assume, for the reasons already given, that the service by the respondents at the siding was in its inception voluntary, and I can see no reason why they should not have been entitled at the beginning of the dealing to express their willingness to receive and deliver some kinds of traffic while refusing to receive and deliver other kinds. If this be so, I have equal difficulty in seeing any good reason why, if it no longer suits their interests or convenience to receive and deliver some kind or kinds of traffic at a siding, they should not be entitled to cease to do so. The Commissioners assimilate the case to that of a public railway station, but the two cases appear to me to be essentially different. The public station is part of the company's undertaking, which the private siding is not, and the statutory obligations applicable to the one are not applicable to the other. It might well be held that by opening a station for public traffic a company professes or holds itself out as being ready to accept all kinds of traffic (or at least all kinds which it can accommodate), and that therefore it could not arbitrarily refuse some particular description of traffic, but these considerations have no application to the case of a private siding, as to which the company makes no profession, and does not hold itself out as willing to do anything. In expressing the opinion that the fact of a railway company serving a private siding as to some kinds of traffic does not raise an obligation to serve it as to other kinds of traffic, I of course leave out of view any question of undue preference or unequal treatment, our opinion not being asked upon these questions. The questions with which we have to deal must be considered as if there were no other papermakers and no other private sidings than those belonging to the applicants in the Penicuik district.

I quite recognise that service by a railway company which is in its origin voluntary, may, so long as the company continues to give it, be subject to regulation by the Railway Commissioners in some cases and in some respects. Thus railway companies are not bound to collect and deliver traffic outside the limits of their undertaking, but if they chose to do so they may be subject to regulation as regards rates and equality of treatment. Thus it is provided by the North British Railway Rates and Charges Act 1892, section 5, that the company may charge for the services therein mentioned, when rendered to a trader at his request or for his convenience, a reasonable sum by way of addition to the tonnage rate, and that any difference arising under the section shall be determined by an arbitrator appointed by the Board of Trade, and two of the services mentioned are "services rendered by the company at or in connection with sidings not belonging to the company," and "the collection or delivery of merchandise outside the terminal station," but I do not understand that there is any obligation upon the company to render these services at all unless it holds itself out as willing to do so. These are all services either prior or subsequent to conveyance, but if they are offered and given by the company and accepted by the trader, it is not unreasonable that the rate to be paid for them should be subject to independent regulation in view of the practical monopoly of the business of carrying enjoyed by railway companies in many places. Again, by the Railway and Canal Traffic Act 1894, section 4, it is provided that where merchandise is received or delivered by a railway company at any siding or branch railway not belonging to the company, and a dispute arises between the railway company and the consignor or consignee of such merchandise as to any allowance or rebate to be made from the rates charged to such consignor or consignee, in respect that the railway company does not provide station accommodation or perform terminal services, the Commissioners shall have jurisdiction to hear and determine

such dispute, and to determine what, if any, is a reasonable and just allowance to make, and I understand the applicants to suggest that this implies the existence of a legal obligation on the part of a railway company to receive and deliver traffic at private sidings. It does not, however, appear to me that any such implication can reasonably be derived from it. Where an authorised rate contains a charge for terminal services at both ends, and terminal service is only rendered at one end, it is reasonable that a deduction should be allowed, but this does not, in my judgment, imply any obligation upon a railway company to give services at private sidings. The only enactment is that if they choose to do so the rates shall, like the rates for collection and delivery of traffic by cartage in a town, be subject to regulation. The considerations of policy which warrant the regulation of the charges to be made for services which are voluntary are very different from those applicable to the question whether the fact of siding services having been voluntarily rendered for a time authorises the Commissioners to order that they shall be given in perpetuity, or to a question whether the fact of some kind of traffic being received or delivered by a railway company at a private siding warrants the Commissioners in ordering the company to receive and deliver all kinds of traffic there. I am not aware that it has ever been held that if a railway company desired to cease to collect and deliver goods and parcels by carts outside of its undertaking, or to provide private omnibuses for the use of passengers, it would not be entitled to do so.

For these reasons, I am of opinion that the fact of the respondents having for a time voluntarily served the siding on terms satisfactory to themselves does not give the Commissioners jurisdiction to compel them to continue to serve it upon terms which they do not regard as satisfactory, and that the fact of their receiving and delivering some other kinds of traffic at the siding does not empower the Commissioners to order them to deliver coal there.

LORD JUSTICE-CLERK—By the determination of the Railway Commissioners which is under consideration, the North British Railway is found to be refusing to afford reasonable facilities to a trader for delivery of goods at a place called Low Mill siding. That siding is not part of the company's system, but is a siding made by the private trader under the powers of the Railway Clauses Act, under which any citizen who desires to have a siding in communication with a public railway line is entitled to make such a siding, and to call upon the company at his expense to put in the necessary railroad junction, so that the siding may be utilised for goods in bulk in waggons that can run upon the line being taken into or removed from the siding. The statutory provision by which a citizen can have a connection established with the public railroad was part of the railroad scheme of the time at which the Act was passed, viz., that the citizen should have a right to use the road with his own haulage and waggons on paying the proper tolls to the railroad company. That was the purpose of conferring on him the right to have a siding. He had no right to require the company to haul to his siding and deliver there, or to call at his siding to take up waggons. In course of time, and as railway traffic developed, it became more convenient for both parties for the railway companies to do all the haulage work by arrangement with the citizen, the railway company carrying traffic to their stations, and where the company and the citizen could agree upon terms for bringing goods to or from private sidings, the company finding the haulage and service for that work also. Accordingly, in the past similar traffic to that which the company now refuse to deliver at the siding in question has been carried there and removed from there by them. Messrs Cowan & Company having raised a dispute as to what they were to pay for the service, the Railway Company have intimated their intention to discontinue hauling Messrs Cowan's goods to this siding and delivering them there, the practical result of which is that Messrs Cowan must either arrange to haul them to the siding on payment of tolls, or to take delivery of them at the company's public station. The practical question is—Have the Commissioners in the circumstances the power to decide that what Messrs Cowan ask is a reasonable facility under the statute which the company are bound to grant?

I see no ground for holding that the mere fact that a trader makes a siding, and compels a connection to the company's line under his statutory right, confers upon him the further right of demanding that the company shall deliver to or take up goods for him by their own haulage, and by stopping their trains for that purpose. The siding is not the property of the company, and is not in any sense opened as a station on the line. It is not part of their railway, and Messrs Cowan could remove it at any time. Lord Stormonth Darling in his judgment states that he gives no opinion as to whether the Commissioners could compel a company to deliver goods at a newly-made siding of this description, and that it would be a refusal of reasonable facilities to decline to do so. But it is said that the company have been in the practice of delivering, and that they are continuing to do so as regards certain goods, and that therefore they must continue to do so as regards coal traffic. I am unable to see why, if the Railway Company have under a special bargain consented to bring goods for a time to that siding, they can be compelled to continue to do so if they do not choose to renew the bargain upon the same or any other terms. The company must convey the trader's goods on their line as long as they work the line, and give facilities at any place which they open and keep open for reception or delivery. That is their duty as carriers, and they

cannot escape from it. That the company do not dispute, but they maintain that the stations they provide for such purposes are to be provided as may to them seem suitable, and that they can neither be required to open a station at any particular place nor to keep open a station at any particular place unless they consider it to be in the interest of the company to do so. These propositions are clearly stated in the cases quoted to us (*Hastings* case and *Darlaston* case), and his Lordship does not dispute the soundness of either proposition. But he quotes a passage from Lord Selborne's opinion in the *Hastings* case to the effect that when the company has in fact opened a station at a particular place and actually uses it for the purposes of public traffic, and invites the public to resort to it for traffic, they are bound by the Act to afford at that station (to the extent of their powers) all reasonable facilities for receiving, forwarding, and delivering, &c. No exception can be taken to that proposition of Lord Selborne, and indeed the source from which it comes gives it the greatest claim to acceptance; but when Lord Stormonth Darling proposes to apply that dictum to the present case, I confess I am unable to follow him. The company in this case are not carriers to this siding. They have not invited the public to resort to this siding as a station. They are not entitled to use this siding as a station for their own purposes or for receiving or delivering public traffic. They have no right to put anything on to it or take anything off it unless asked to do so by the private company whose property it is. While they can close any station they cannot interfere with this siding. Thus their position as regards it cannot be tested by any dicta regarding a station which forms part of the Railway Company's line, and to which the public is invited to come with or for goods. I am therefore quite unable to agree with his Lordship's view that Lord Selborne's opinion in the *Hastings* case affords any ground for holding that in this case the company can be interfered with if they decline to stop their trains at a siding which is private property and which they have neither provided nor used as part of their public system for their traffic.

As regards the fact that at present they are willing to deliver on a bargain with Messrs Cowan certain classes of goods, while they decline to deliver others, that does not I think make any difference. If they are not under obligation under the reasonable facilities clauses to deliver any goods by their own train service at such a siding, I cannot see that the fact that under agreement satisfactory to themselves they undertake certain traffic deliveries for the Messrs Cowan can be held to place them under obligation to deliver all. If in the interests of their own business they see fit to agree to terms for delivering all or any part, they can do so. I cannot see any reason why they may not, like any other trader, reject what they consider not sufficiently advantageous and accept what they see fit to accept, unless by statute they are deprived of their liberty in this matter. If, as I hold, they are not bound to deliver goods by their own haulage and servants at that siding, then they can, I think, only be bound by and to the extent of any bargain they may be willing to make with the trader to whom it belongs.

On these grounds, I concur in the judgment which your Lordship proposes.

LORD YOUNG—Since the year 1872 the traffic of the respondents intended for use at their mill, called the "Low Mill," and forwarded on the appellants' railway, has been addressed to them at the "Low Mill Siding," and there delivered by the appellants. The siding was made by the respondents on their property for the purpose of facilitating this delivery both to the appellants in giving and to the respondents in receiving it—the traffic being of a kind which could be delivered at a siding only. For twenty-eight years it has been used for this purpose and no other. In giving delivery the appellants have during this long period used this siding by hauling (or shunting) on to it trucks containing the traffic so addressed, the respondents in receiving it making the only possible corresponding use of the siding.

On 10th March 1900 the appellants' manager wrote to the respondents intimating that after 22nd curt. the respondents "will not accept or carry coal for delivery at your Low Mill siding," and requiring them to "make arrangements to take delivery of your coal at Penicuik Station." There has been no proposal to make a change as to the place and mode of delivery of any traffic addressed to the respondents at their Low Mill siding other than coal. The dispute immediately before us thus regards the delivery of coal only, though it seems plain that any legal question must be the same with respect to coal and other traffic.

The appellants' intimation of 10th March was acted on for a brief period, but, with seeming good sense, discontinued on an arrangement that the question of the existence or not of the right claimed by the appellants to make the intimated change against the will of the respondents, and whether their consequent refusal to deliver coal traffic at the siding in question was consistent with their duty and the respondents' corresponding right under the provisions of the Railway and Canal Traffic Act 1854, should be submitted to the Railway and Canal Commissioners, as it was by the proceedings now before us on appeal against the Commissioners' judgment. That judgment is adverse to the appellants, being in substance that the facilities afforded by the appellants for delivering by them and receiving by the respondents of the coal traffic in question from 1872 to 22nd March 1900 were, according to their powers, &c., reasonable, and there being no reason for a change, ought to be continued.

No dispute seems ever to have arisen as to details—such as the time of delivering at the siding, with respect to days or hours or frequency, or the distance into the siding

that trucks should be hauled or shunted, or whether hauling or shunting was most convenient and reasonable. There seems never to have been any conflict between the parties regarding convenience in such matters.

If the Railway and Canal Traffic Act 1854 is applicable to the respondents' Low Mill siding, the contention of the respondents and the judgment of the Commissioners in their favour seem to me to be obviously right.

There is no suggestion by either party that the siding in question is peculiar or anywise distinguishable from other sidings belonging to manufacturers and traders in every variety of business who send or receive merchandise or traffic forwarded to or from them by the railways with which they are connected by sidings formed for the purpose of such sending and receiving. The vast number of such sidings which exist, especially in the vicinity of large towns and of railway stations (although outside station limits), and their manifest trade importance, render the questions now raised of considerable public interest. All sorts of factories, mills, distilleries, breweries, &c., are attracted to such positions by the facilities there afforded for receiving, forwarding, and delivering traffic upon and from the railways by means of sidings in all respects exactly such as that now in question. Generally the railways have attracted the factories. Here it is (no doubt truly) explained that the factories (the respondents' three mills) attracted the railway by the prospect of large traffic, for the receiving and delivering of which upon and from the railway a siding convenient to each of the three mills was constructed contemporaneously with the construction of the railway itself.

The contention of the appellants, if I rightly apprehend it, is that they are not bound and cannot be required to deliver traffic at a private siding, although it may be, and indeed admittedly is, according to their powers to do so, and indisputably reasonable that they should. If this is a true proposition, there is no answer to their case, and if not, they have as I think no case which calls for an answer. The argument used and pressed by their counsel was that if bound to deliver at one private siding they would be equally so at any other, and indeed any number of others, and might thus be required to stop their trains every half-mile, or at most ridiculously short intervals of space and time. The answer to this seems to be that the Act of 1854, like the common law applicable to common carriers, requires no more than sweet reasonableness. That it is "according to their powers" to deliver traffic at the respondents' private siding would seem to be indisputable by the appellants, who have been doing so for twenty-eight years as to the respondents' traffic, and state their intention to continue it as to all except coal. It would not have occurred to me as even stateable that what the appellants did in the past was other than affording, according to their powers, reasonable facilities to the respondents for receiving delivery of traffic from the railway on the siding constructed by them for its reception, and connected with the railway by a junction arranged with the Railway Company as convenient for the purpose. I have already observed that hitherto there has been no dispute as to details, such as time, frequency, or distance on the siding from the point of junction, and certainly no dispute of that kind is indicated in the proceedings before us. The Commissioners have therefore, in my opinion, rightly assumed that what was so long and uninterruptedly done to the satisfaction of both parties was "reasonable," if nothing was shown or even suggested to the contrary.

We must determine the legal question submitted to us on the footing that what the respondents desire and the Commissioners have ordered is as matter of fact reasonable. The law which we administer is always applicable to facts, so that any legal dispute cannot be determined by us otherwise than with reference to the facts on which it arises, and to which it is to be applied. Now, the question of law in dispute before us is, in my opinion, not whether the appellants are bound and so may be compelled to deliver traffic at any private "siding" constructed anywhere by an owner of traffic forwarded by the railway, but only whether they may be required to deliver at a siding in such a place and so constructed that delivery there is according to their power, and a facility for the reception of it by the owner which it is reasonable they should give, or continue to give, as they have in fact been doing to their own profit as carriers for twenty-eight years.

It may be questionable whether a railway company may be required to begin or continue to use a private siding for the "receiving" or "delivering" of traffic of the siding owner upon and from their railway. That question is not before us, and I abstain from indicating an opinion upon it. We must deal with the law in the case before us on the footing that the appellants are now in fact using the private siding in question in the conduct of their business as railway carriers, receiving from the forwarders traffic of a kind of which they have had experience for a quarter of a century, addressed to be carried there and there delivered, and carrying and delivering it accordingly as matter of common contract of carriage; that there is no question now before us as to their right to abandon this part of their carrying business, such abandonment never having been proposed; and that the legal question regards only the right which they claim to separate coal from the other traffic and to decline to deliver it as heretofore and as they continue to deliver the other traffic forwarded by the same trains, and so stopped as the other traffic is at this siding. I do not enter upon the reason, or I should rather say the motive of the appellants for their conduct, which is plain enough upon the statements, correspondence, and evidence before us.

I cannot regard the respondents' traffic forwarded to them on the appellants' railway by those who supplied it as other than public traffic received and carried by the appellants as common carriers. It is private property *in transitu*, as most, if not all, merchandise carried by common carriers is. Passengers are within the statutory definition of "traffic," though usually private individuals who when travelling by trains or other public conveyances are regarded as common passengers — the travelling public. The merchandise of which the respondents' traffic consists is sent to the railway by the merchants from whom it is purchased, and it was I think stated to us that coals were so sent from the collieries with which the applicants dealt in the coalmasters' trucks, in which they were also carried on to the respondents' siding.

When the learned counsel for the respondents called our attention to section 4 of the Railway and Canal Traffic Act 1894, it appeared to me that it had an intelligible and not unimportant bearing on the argument, showing, as it seemed to me to do, that the Legislature regarded the reception and delivery of merchandise at private sidings ("not belonging to the company") as part of the common and familiar business of railway companies, and for which accordingly it was proper that any legislative provision should be made which experience had shown to be needed or likely to be useful to the railway company and the consigners or consignees of such merchandise. The language of the clause indicates that disputes had arisen "as to any allowance or rebate to be made from the rates charged to such consigner or consignee, in respect that the railway does not provide station accommodation or perform terminal services," and shows distinctly that the Legislature thought it fitting to give the Railway and Canal Commissioners jurisdiction to hear and determine such disputes. The Railway and Canal Traffic Act 1854 confers on certain specified judges jurisdiction to enforce its provisions as to receiving and forwarding of traffic, which jurisdiction is by section 9 of the Act of 1888 transferred to the Railway and Canal Commissioners, and the Act of 1894 (the 4th section of which I have just cited) provides (section 5) that it shall be read with the Act 1888. Reading section 2 of the Act 1854, section 9 of the Act 1888, and section 4 of the Act 1894 as when read together expressing the intention of the Legislature, I am disposed to conclude that the intention was to confer jurisdiction regarding disputes as to any allowance or rebate from rates charged on goods received or delivered "at any siding or branch railway not belonging to the railway company" upon the Railway and Canal Commissioners as being the tribunal having jurisdiction to determine any dispute as to reasonable facilities for the receiving, forwarding, and delivering of traffic at such sidings or branch railways. I put it no higher than this—that it favours the construction of which I think section 2 of the Act of 1854 admits, and which I certainly prefer, by showing probably, though not certainly, that such was the intention of the Legislature. I may also point out that in the view that it is absolutely in the power of the Railway Company to decline to deliver or receive merchandise at a siding not belonging to them except on their own terms "as to any allowance or rebate," and as to affording or refusing "reasonable facilities for the receiving and forwarding and delivering of traffic" at any such siding, clause 4 of the Act of 1894 is an absurdity.

Before concluding, I desire to call attention to the fact that the Judges of the Second Division were unanimously of opinion that the enactment of section 2 of the Act 1854 regarding the giving by a railway company of any unreasonable advantage applied to "receiving, forwarding, and delivering of traffic at any siding or branch railway not belonging to the company," and consequently that the Commissioners rightly held that it applied to the private sidings referred to in their judgment. I cannot reconcile that view, in which I concurred, with the notion that the first and leading enactment in the clause has no application to such sidings.

With respect to the cases of *Hastings* and *Darlaston*, I concur in the opinion of the Commissioners that they are inapplicable to the question before us. I think they only decide that the Railway Commissioners have no jurisdiction to order a railway company to construct a station or to reopen or reconstruct a station which they had closed or destroyed.

LORD ADAM—I have had an opportunity of reading the opinion of the Lord President, and I concur therein.

LORD KINNEAR—I have found this question to be attended with very considerable difficulty, but on the best consideration I have been able to give to it I have come to the same conclusion as your Lordship in the chair, and for the same reasons. I do not therefore think it necessary to repeat what has been already said, but concur in the proposed judgment.

LORD TRAYNER—The first question which we have to decide under this appeal is, whether the applicants are entitled to demand that the respondents shall afford them facilities for receiving, forwarding, and delivering their goods at the Low Mill siding, and whether the Railway Commissioners can order this to be done. In dealing with this question it appears to me to be immaterial, if not irrelevant, to consider that the respondents have for twenty-eight years or more both received and delivered the goods of the applicants at that siding. The respondents in doing so were acting under agreement with the applicants, or if not in execution of an express agreement, were acting voluntarily; it was not matter of obligation on the one side and of right on the other. But if the respondents were not bound so to deliver or receive goods, they may cease to do so when they please, and parties must then betake themselves to their respective legal rights. It is equally

irrelevant, in my judgment, to urge (as the applicants have done) that the agreement or arrangement heretofore observed is a reasonable one, and that it would be unreasonable to depart from it. I am afraid that neither the Railway Commissioners nor we have any right to order either the applicants or the respondents to be reasonable in their demands respectively; but what the one party is bound to give and the other party entitled to demand—that we can and must order to be given.

The applicants represent that what they ask an order on the respondents to do is what they are legally bound to do and may be compelled to do under the provision of the 2nd section of the Act of 1854. In that I think the applicants are wrong. The only facilities for receiving, delivering, and forwarding traffic there provided for are such as can and must be afforded by a railway company at any station used for the purposes of public traffic, but nowhere else. I regard this as already judicially determined in the *Hastings* and *Darlaston* cases. Low Mill siding is not a station used for public traffic—it is the private property of the applicants, and used for no traffic but their own, and therefore in my opinion is not a place at which the applicants can insist on having the facilities they ask. If the respondents can be ordered to stop their trains at the Low Mill siding for the purpose of receiving or delivering the goods of the applicants, they may equally be ordered to stop and receive or deliver goods at any and every siding on their line. Under such an order the inconveniences arising in the course of working the railway would or might be such as to prevent the fair working of the railway altogether. The ground of my judgment, however, is that the applicants cannot, in respect of the provision of the 2nd section of the Act of 1854, demand the facilities here prayed for, and that it is *ultra vires* of the Railway Commissioners to grant their application.

As regards the rest of the order appealed against, I think the appeal should be dismissed. If the respondents receive and deliver goods to other traders at their private siding they must do as much for the applicants. Otherwise the respondents would be conferring an undue preference or advantage in favour of those whom they so distinguished, to the disadvantage or prejudice of the complainers, and such a proceeding is forbidden by the section of the statute I have already referred to.

LORD MONCREIFF—The order of the Railway Commissioners complained of has two branches—(*First*) They declare that the facilities given by the Railway Company up to 22nd March 1900 for delivery of the applicants' coal traffic at the Low Mill siding were reasonable and such as ought to be afforded to the applicants; that since that date the Railway Company have not afforded due and reasonable facilities for delivery of the coal; and they order and enjoin the Railway Company to afford such reasonable facilities in the future. (*Secondly*) The Commissioners find that the Railway Company, in delivering coal at the sidings of other traders near Penicuik, competitors in trade with the applicants, and refusing to deliver coal at Low Mill siding, have given such traders an undue and unreasonable preference over the applicants and they order them to desist giving such traders any such undue and unreasonable preference.

If the first order is legal and is obeyed, the second, forbidding a preference, is of comparatively little importance, because the applicants are, I understand, quite satisfied with the facilities afforded up to 22nd March 1900. But if it is held that the first order is *ultra vires* of the Commissioners, it will be necessary to consider whether the second order is legal and can stand by itself. If it is legal the Railway Company must continue to afford the same facilities to the applicants, unless they are prepared to abandon their present system of delivering goods at all other sidings, and thus the result will be the same as long as the company continues its present system.

Your Lordships are at present only asked to consider the validity of the first order. At the same time the fact that the company still continues to give such facilities may, as I shall show, have a bearing on the validity of the first order.

What we have to decide is not whether the order of the Commissioners is reasonable—we must assume that it is reasonable if legal—but whether it is within their power to make such an order in any circumstances. But in considering this question of law we are entitled to consider the proved or admitted circumstances in which the application is made and we are empowered to draw all such inferences as are not inconsistent with the facts and are necessary for determining the question of law submitted to us. (Railway and Canal Traffic Act of 1888, sec. 17 (4)).

The facts are not in dispute. They are simply these. Since the formation of this line in 1872, when this siding was constructed at a cost of £6000, the Railway Company have been in use to deliver at the siding large quantities of coal and other goods, and the same system has been pursued in regard to coal and other commodities consigned to other traders who have sidings on the line. Since 22nd March 1900, however, the Railway Company have refused to deliver coal at Low Mill siding, and have requested the applicants to take delivery of such coal at Penicuik Station. At the same time they continue to deliver other goods at the siding; and they also continue and intend to continue to deliver coal and other commodities as before at the sidings of the other competing traders in the neighbourhood.

It will thus be seen that the history of this line has been that the company's uniform mode of dealing with siding traffic has been to take and give delivery of goods at the private sidings all along the line. But the Railway Company maintain that, without reason assigned, they are entitled while continuing to deliver as before at

other sidings, and even to deliver all other commodities at Low Mill siding, to refuse to deliver coal there. This contention is rested on the construction which the Railway Company put upon section 2 of the Railway and Canal Traffic Act 1854, coupled with the definition of the word "railway" in the first section, viz., that the provisions of that section as to the duty of a railway company to afford all reasonable facilities for the receiving, forwarding, and delivering of traffic upon and from their railway is confined entirely to their own line of rails and the public stations thereon, and does not extend to a private siding. They maintain that the trader's right is simply to obtain access from his siding to the company's line, and that the company are not bound to take or give delivery of goods consigned by or to him there, or to deal with it at all except at their public stations.

I am of opinion that this contention, which as far as I know is now advanced for the first time, involves too narrow a construction of the clause. The material words of the second section are these:—"Every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively." The question is whether traffic brought from or to a railway line is not traffic delivered upon and from a railway in the sense of the statute. I do not think that the definition of "railway" affects the question. It runs thus—"The word 'railway' shall include every station of and belonging to such railway used for the purposes of public traffic." In the first place, the definition does not profess to be exhaustive; and, in the second place, it may have been thought necessary in the case of a station, because a station might not be considered to be part of the line. I am content to take the argument upon the terms of the second section. The private siding itself is no part of a railway—that was never contended; but the junction of a private siding with the main line cannot be ignored in considering what constitutes traffic delivered upon or from a railway. Siding traffic—that is, traffic taken from or to private sidings—is a distinct and recognised part of a railway company's public traffic (for it is public traffic), which they are bound to forward and deliver upon and from their railway "according to their powers." No doubt it was originally contemplated that the trader should simply have access to the main line and right to use it for his own purposes with his own engines on payment of tolls and subject to bye-laws and regulations. But in practice, and in particular on this line, that mode of disposing of siding traffic, which is open to manifest objections, is not adopted, and the Railway Company, for their own convenience and profit, give and take delivery of the trucks at the junctions with the sidings. On the faith of this system much money has been expended on the formation and upkeep of the sidings, which doubtless would not have been incurred if it had been known that the company considered themselves entitled arbitrarily to discontinue the practice. For instance, the upkeep of Low Mill siding costs the applicants £500 a-year; its formation cost £6000. We are now asked to find that it is so entirely within the right of the Railway Company to deliver or not to deliver goods at private sidings that the Commissioners have no jurisdiction in regard to the regulation of such traffic beyond the limited jurisdiction conferred upon them by the 4th section of the Railway and Canal Traffic Act 1894, to determine what is a reasonable and just rebate where merchandise is received or delivered by a railway company at any siding, etc., not belonging to the company. I may observe in passing that this is a statutory recognition of the existence of the practice, and also that if a railway company could always meet a demand for rebate by a threat to discontinue the traffic the enactment would be comparatively useless.

I am not prepared to adopt that view. Looking to the existing practice of this company on the Penicuik line, and especially to the fact that they still deliver other goods at Low Mill siding, I am of opinion that it is not *ultra vires* of the Commissioners to consider whether the Railway Company's refusal to deliver coal at this one siding is not in violation or contravention of the 2nd section of the Act of 1854.

I do not think that there is anything in the two cases which were pressed upon us, viz., the *Hastings* case, 6 Q.B.D. 586, and the *Darlaston* case [1894], 2 Q.B. 694, which necessarily conflicts with the view which I have indicated.

The *Hastings* case is relied on by the Railway Company mainly for the sake of Lord Selborne's dictum on p. 592—"With respect to stations, there is no obligation to establish them at any particular places or place, unless the company thinks fit to do so. The railway, as interpreted by the Act, only includes existing stations used for the purposes of public traffic." I may observe, in passing, that the word "only" is Lord Selborne's word; it does not appear in the statute. I assume for the purposes of this argument that a railway company is under no obligation to establish a station at any particular place, and (although this is not so clear) that they are entitled without reason assigned to discontinue an existing station if they think fit. But there are passages in Lord Selborne's opinion, both before and after the one which I have quoted, which apply closely to the present case. "A company may carry or not upon its own line as it thinks fit, and if it does so, may undertake that business under various conditions and limitations. But if and so far as it does undertake so to carry either passengers or goods traffic, it comes, in my opinion, under the obligation to afford for the purposes of that traffic the facilities required by the first branch of the second section of the

Act." Now, assuming that a junction with a siding is to be regarded as a station, the Railway Company have not closed Low Mill siding; they are still delivering other goods there, and they are bound to continue to give facilities at it as before, and are not entitled to exclude any particular class of goods.

But further, private sidings, or rather the junctions of the sidings with the company's line, are not stations belonging to the company which they can open or close at their pleasure, and the only question is in what way shall the traffic which the traders are entitled to give and receive at their sidings be regulated. We are not here dealing with an extreme case. It is not, in my opinion, necessary to consider what would be the rights of the Railway Company or the powers of the Commissioners if the Railway Company decided to discontinue in all cases and as to all goods their present system of dealing with siding traffic, or even if a trader proposed to make a new connection with the company's line. We have to deal with the existing state of matters on the Penicuik line. We find that the Railway Company have been in use since the formation of the line to give and take delivery at all the sidings upon it. These are the facilities which they have been in use to give and are giving, except in the case of the applicants as to one commodity, and it is in their power to continue to give such facilities. They have deliberately ignored the alternative mode of dealing with siding traffic, viz., letting the traders bring their own engines on to the main line. I therefore think that the Commissioners were called on to deal with an existing practice and existing facilities, and that therefore they had jurisdiction to consider whether those facilities should be continued or not.

In regard to the *Darlaston* case, it is sufficient to say that although at one time there was a station at Darlaston, it was closed and demolished five years before an application for its restoration was made. The case therefore decides no more than this, that where there is no existing station, and the railway company do not profess at the time of the application to receive passengers or goods at the place where members of the public desire that a station should be placed, it is beyond the jurisdiction of the Commissioners to interfere with the discretion of the railway company by making an order upon them to establish a station at such a place.

On these grounds I am of opinion with Lord Young that the first order of the Commissioners was within their powers.

The Court pronounced the following interlocutor:—

> "The Lords of the Second Division of the Court, along with three Judges of the First Division, having heard counsel for the parties in this appeal, in conformity with the opinion of the majority of the Judges present at the hearing, sustain the appeal to the effect of recalling, and hereby recal, the deliverance or order of the Railway and Canal Commissioners, dated 6th August 1900—(1) in so far as the said deliverance or order finds that the Railway Company in refusing to deliver coal at the junction of their railway with the Low Mill siding have not afforded to the applicants all due and reasonable facilities for the delivery of their coal traffic at the Low Mill siding; (2) in so far as said deliverance or order declares that the facilities given by the Railway Company, up to the 22nd day of March 1900, for delivery of the applicants' coal traffic at the Low Mill siding were reasonable, and such as ought to be afforded by the Railway Company to the applicants; and (3) in so far as the Railway and Canal Commissioners by said order and deliverance did order and enjoin the Railway Company, their servants and agents, to afford all reasonable facilities for the delivery of the applicants' coal traffic at the Low Mill siding: *Quoad ultra* dismiss the appeal, and find no expenses due to or by either party."

Counsel for the Applicants, Alexander Cowan & Sons—Ure, K.C.—Clyde. Agents—Menzies, Black, & Menzies, W.S.

Counsel for the Respondents, The North British Railway Company—Dean of Faculty (Asher, K.C.)—Solicitor-General (Dickson, K.C.)—Grierson. Agent—James Watson, S.S.C.

Tuesday, March 19.

SECOND DIVISION

With the LORD PRESIDENT, LORD ADAM, and LORD KINNEAR.

[Sheriff Court at Glasgow.

PARISH OF RUTHERGLEN *v.* PARISH OF GLASGOW.

Poor—Settlement—Residential Settlement—Acquisition of Residential Settlement by Deserted Wife—Children Maintained by Husband's Parish.

Held, by a majority of Seven Judges, consisting of the Lord President, Lord Justice-Clerk, Lord Adam, Lord Kinnear, and Lord Trayner — *diss.* Lord Young and Lord Moncreiff — that a wife whose husband had deserted her and their children was not prevented from acquiring a residential settlement for herself because the parish of the settlement of her husband at the time of his desertion had meanwhile supported the children of the marriage as paupers without calling upon her to support them.

On 16th October 1893 Alexander Faulds, whose settlement was then in Barony Parish, Glasgow, deserted his wife Catherine Mechan or Faulds and their five children, Catherine, Robert, Mary, William, and Alexander. Mrs Faulds and the children were on that date taken to the Barony