'other similar services,' and accordingly I think that the words when used in the consignment-notes in question must be read as having that meaning. If that is a sound view, there can, I think, be no doubt that the fish train falls to be regarded as a service similar to a passenger train.

"I may add that even if the matter was not so clear as I think it is, the objection could hardly be sustained when taken by the defenders, seeing that they accepted the consignment-notes as embodying the contract under which the fish was to be carried, in the knowledge that it was to be sent, and with the intention that it should be sent, by the fish train." [*The Lord Ordinary then dealt with the averments of fault on specified occasions, on which he held that the defenders had failed to prove their case.*]

The defender reclaimed, and argued—A "passenger train" was a train designed to carry passengers, advertised to stop at and start from particular stations at particular times—*Burnett* v. *Great North of Scotland Railway Company* (1885), 10 App. Cas. 147. The Lord Ordinary's construction of the Act of 1892 did not apply to the consignment-notes here in question, which made no reference to "other similar service." It was not denied that the defenders' fish had been late for market, and this admission imposed on the pursuers an onus, which they had not discharged, to explain the delay—*Scottish Marine Insurance Company* v. *Turner*, March 3, 1853, 1 Macq. 334, Lord Truro, p. 340; Dickson on Evidence, sec. 276. Further, the pursuers being in breach of contract could not rely on the terms of their contract with the defenders, and as common carriers were liable for loss of market—*M'Connachie* v. *Great North of Scotland Railway Company*, November 6, 1875, 3 R. 79, 13 S.L.R. 39; *Anderson* v. *North British Railway Company*, February 18, 1875, 2 R. 443, 12 S.L.R. 312.

Argued for the respondents—The pursuers had fulfilled their obligations in all respects. The defenders' definition of "passenger train" could not be supported. The pursuers had no powers to run trains for passengers between the termini in question — Railway Rates and Charges (Caledonian Railway) Order Confirmation 1892 (55 and 56 Vict. cap. 57).

LORD TRAYNER—My opinion in this case is that the Lord Ordinary is right both in fact and in law. The terms of the contract between the parties I take it to be those expressed in the consignment-note, which provides that the goods are to be carried by "passenger train at owner's risk." The Lord Ordinary says that "passenger train" does not necessarily mean a train that carries passengers, and this the reclaimers concede, because, while the Railway Company may provide a train which is fitted for passenger traffic and which may convey passengers if they turn up—it cannot find them if they do not come—and therefore a train may be a "passenger train" though there are no passengers in it. I think a reasonable construction of the words "passenger train" is this—a train which has all the equipment of a passenger train and all the privileges of a passenger train. If that is the meaning of the contract, as I think it is, the question comes to be whether or not on the two occasions libelled the pursuers failed to carry it out. On that question, which depends on the proof, I agree, as I have said, with the Lord Ordinary.

LORD MONCREIFF—I am of the same opinion. I am quite satisfied that the train by which the fish were sent was a "passenger train" in the sense of the contract, and that being so, the Railway Company cannot be held liable unless the defenders prove that the loss or detention arose from wilful misconduct on the part of the Railway Company's servants. [*His Lordship then dealt with the specific occasions of fault above referred to.*]

On the whole matter I have no hesitation in thinking that the judgment should be affirmed.

The LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

The Court adhered.

Counsel for the Pursuers and Respondents—Guthrie, K.C.—Blackburn. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Defenders and Reclaimers — Salvesen, K.C. — Wilton. Agent — W. Marshall Henderson, S.S.C.

Thursday, March 17.

FIRST DIVISION.

[Sheriff of Aberdeen.

DONALD *v.* IRVINE.

Process—Appeal—Competency—Failure to Box Prints—Motion to Repone—"Cause Shown"—A.S., 10th March 1870, *sec.* 3 (1) *and* (3).

In an appeal the appellant failed to print and box the papers until two days after the expiry of the period prescribed by A.S., 10th March 1870, sec. 3 (1). He moved under sec. 3 (3) to be reponed, and explained that the failure to print and box timeously had been caused by the miscalculation of a clerk, arising out of his use of a diary which omitted Sundays. The Court *granted* the motion, and *reponed* the appellant.

By section 106 of the Court of Session Act 1868 (31 and 32 Vict. c. 100) power is given to the Court to pass Acts of Sederunt for, *inter alia*, altering the course of proceeding prescribed in the Act. The Act of Sederunt, 10th March 1870, made in pursuance of this power, in section 3 (1) enacts: "The appellant shall, during session, within

fourteen days after the process has been received by the Clerk of Court, print and box the note of appeal, record, interlocutors, and proof, if any; . . . and if the appellant shall fail, within the said period of fourteen days, to print and box or lodge and furnish the papers required as aforesaid, he shall be held to have abandoned his appeal, and shall not be entitled to insist except upon being reponed as hereinafter provided."

Section 3 (3) of the Act of Sederunt enacts:—"It shall be lawful for the appellant, within eight days after the appeal has been held to be abandoned as aforesaid, to move the Court during session . . . to repone him to the effect of entitling him to insist in the appeal; which motion shall not be granted by the Court . . . except upon cause shown and upon such conditions as to printing and payment of expenses to the respondent or otherwise as to the Court . . . shall seem just."

This was an appeal against an interlocutor of the Sheriff of Aberdeen (CRAWFORD) dismissing an appeal against an interlocutor of the Sheriff-Substitute there (D. ROBERTSON), whereby an interim interdict granted against the appellant was declared to be perpetual. The process was received by the Clerk on 29th February 1904, but the papers were not printed and boxed until the 2nd March.

The appellant moved in the Single Bills to be reponed, and explained that the agent's clerk in charge of the cause had counted off the fourteen days allowed for having the papers printed and boxed upon a diary which omitted Sundays, and he had consequently exceeded the period by two days. He argued that the matter was entirely in the discretion of the Court, and as no hurt was being done to the respondent, and there was no gross carelessness to be punished, it would be inequitable to make him suffer the penalty entailed by the omission—*Walker* v. *Reid*, May 12, 1877, 4 R. 714, 14 S.L.R. 502; *Boyd, Gilmour, & Company* v. *Glasgow and South-Western Railway Company*, November 16, 1888, 16 R. 104, 26 S.L.R. 84.

Argued for the respondent—There was no discretion in the Court to waive the requirements of the Act of Sederunt, and reponing was only competent upon cause shown. Such an excuse as was here offered was quite insufficient—*Taylor* v. *Macilwain*, October 18, 1900, 3 F. 1, 38 S.L.R. 1; *Bennie* v. *Cross & Company*, March 8, 1904, 41 S.L.R. 381.

LORD PRESIDENT—I am of opinion that, subject to paying the expenses of this appearance, the appellant should be reponed. It is to be observed that there was no gross carelessness. Unfortunately the agent's clerk used a diary of a peculiar nature which the agent himself did not examine, and by which the clerk was misled. It is not as if the matter had been wholly overlooked, and I think that to refuse the reponing would be too severe a penalty for the inadvertence of the clerk.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court reponed the appellant upon payment of two guineas of expenses, and sent the case to the roll.

Counsel for the Appellant—W. T. Watson. Agents — Macdonald & Stewart, S.S.C.

Counsel for the Respondent — Munro. Agent—Andrew Urquhart, S.S.C.

Thursday, March 17.

FIRST DIVISION.

CRIGHTON AND OTHERS (FORREST'S TRUSTEES) *v.* MACDONALD AND OTHERS (MITCHELL'S TRUSTEES) AND OTHERS.

Succession—Vesting—Conditional Institution of Issue.

A mutual trust-disposition and settlement by spouses provided for payment, on the death of the survivor of them, of the interest of a sum of money to each of three of the wife's sisters, and on the death of each of the sisters, or the death of the surviving spouse, if any, of the sisters predeceased, for payment of the three several principal sums among the children of the said three sisters and a deceased sister, subject to apportionment, and failing apportionment then equally among them, "the issue of such of the said children as shall predecease the foresaid respective terms of payment being entitled to the share which would have fallen to their predeceasing parent."

Held (*following dicta* in *Bowman* v. *Bowman*, 1 F. (H.L.) 69, 36 S.L.R. 959) that vesting was postponed until the term of payment.

By antenuptial contract of marriage between William Forrest, younger of Easter Ogil, and Miss Agnes Marnie, daughter of James Marnie, Esquire, of Deuchar, dated 24th June 1850, the said Miss Agnes Marnie conveyed to trustees the whole means and estate then belonging to her, or to which she might succeed during the marriage, for the purpose, *inter alia*, of payment of the income of the estate to the spouses during their joint lives, and to the survivor during his or her life. It was provided that in the event of there being no issue of the marriage it should be competent for Mrs Forrest, subject to her husband's liferent, by any deed or last will to assign or bequeath all or any part of the trust funds to such person or persons as she should think fit. There was no issue of the marriage.

By mutual trust-disposition and settlement dated 7th February 1872, and recorded 16th December 1873, Mr and Mrs Forrest disponed and assigned to trustees the whole means and estate which should belong to