

of illegal traffic, which it is essential to put down. But there are many cases running along the margin of these sections which may be comprehended in the spirit of them. Now, it seems to me to be perfectly plain that if the appellant had sold the liquor in his own dwelling-house he would have contravened the 17th section; and the question therefore is, does he escape this contravention by going to his own doorstep? This going down a few steps has changed the offence from one under the 17th section to one under the 16th, but I cannot help seeing that if the appellant had been charged under the 16th section there might have been a very ingenious defence stated, on the allegation that a man's own doorstep is not a public place. I may say that I should have been prepared to concur in a contrary judgment, but as I have said, your Lordships have decided the case. In reference to what has fallen from your Lordships as to the construction of "place or premises" in the 17th section, I am by no means ready to concur in the view that these words there mean only a place or premises capable of being licensed.

Appeal sustained, with £7, 7s. expenses.

Counsel for Appellant—R. V. Campbell.
Agent—Alexander Wylie, W.S.

Counsel for Respondent—Brand. Agent—
A. Kirk Mackie, S.S.C.

COURT OF SESSION.

Tuesday, May 27.

FIRST DIVISION.

[Lord Rutherford Clark,
Ordinary.

HOUGH AND OTHERS v. ATHYA & SON.

Ship—Charter-Party—Lay-Days—Computation of Lay-Days.

Where a ship spent four and a-half days at the port of call over and above the period allowed for orders, and five and a-half at the port of discharge—held that in calculating lay-days a fraction of a day was to be counted as an entire day, and consequently that eleven lay-days were to be credited to the shipowner.

The pursuers in this case, the owners of the steamship "Polam," sued the defenders, who were endorsees of the bills of lading and consignees of the cargo, for two days' demurrage at the rate of £40 per diem. By the charter-party it was agreed that the "Polam" should proceed to Odessa, and after loading there return to a safe port in the United Kingdom, calling at Queenstown or Falmouth for orders, which were to be given within twelve hours after arrival, or lay-days to count. It was further stipulated that "thirteen running days are to be allowed to the said merchants (if not sooner despatched) for loading and unloading, and ten days on de-

murage over and above the said laying-days at £40 per day." The "Polam" arrived at Falmouth on the 16th November 1876, between 10 and 11 a.m., and consequently the twelve hours allowed by the charter-party expired between the same hours that night; but she did not leave Falmouth till about 7 p.m. on the 21st, having received orders to do so about 1 o'clock. She reached Glasgow on the evening of the 24th, but the unloading was not completed till the afternoon of the 30th. On these facts the pursuers claimed two days' demurrage, contending that eleven days had been occupied in place of the nine which under the charter-party still remained to the merchant after deducting four which had been made use of in loading at Odessa. The defenders resisted this claim.

The point of controversy related to the manner of computing lay-days. The pursuers maintained that in calculating lay-days, both at common law and under this charter-party, a fraction of a day was to be credited to the shipowner as an entire lay-day, even although the remainder was devoted to purposes of navigation. The defenders, on the other hand, contended that at common law, or at all events under this charter-party, a lay-day meant a day of twenty-four hours, which, they contended further, need not run on continuously, but might be spent partly at one port and partly at another. In accordance with the one view, five days were spent at Falmouth and six at Glasgow—making in all eleven; in accordance with the other, four and a-half were spent at Falmouth and five and a-half at Glasgow—or in all ten. The defenders also resisted payment of the second day's demurrage on a different ground, viz., that the delay in discharging the cargo was caused by the fault of the ship.

After a proof the Lord Ordinary (RUTHERFURD CLARK) issued an interlocutor decerning against the defenders in terms of the conclusions of the libel. He added this note—

"Note—The first question in this case is, whether the running days are to be counted by hours or by days, so that a part of a day counted for a whole day. There is little authority upon it, but following the decisions in the *Commercial Steamship Co.*, 10 L.R., Q.B. 346, the Lord Ordinary thinks that the computation must be by days.

"The result is, that when the ship arrived at Glasgow on 24th November the running days had been exhausted except four. Four had been occupied at the port of loading, and five had been allowed to pass at Falmouth, where in terms of the charter-party the ship called for orders.

"The ship was berthed and ready to discharge on 25th November, and the discharge was not completed till 30th November. Hence, apart from any specialty, the ship is entitled to two days' demurrage. But it is said by the defenders that the discharge was unduly delayed by the fault of the ship. On this point there is a great conflict of evidence. But the Lord Ordinary thinks that the defenders, on whom the *onus* lies, have not proved their allegation. It is a very material circumstance in favour of the pursuers that they complained in writing that delivery was not being taken with due dispatch, a complaint of which the defenders seem to have taken no notice.

"A question of some importance was noticed in the discussion, viz., whether the pursuers were bound to give delivery otherwise than by the crew, or by a number of men equal to the crew. But in the view which the Lord Ordinary has taken of the case it is not necessary to enter on that question."

The defenders reclaimed, and argued—The *Commercial Steamship Company, infra*, was a case of demurrage, and there was a clear distinction between lay-days and demurrage. In the latter case a fixed sum was settled as the value of the day, and therefore it was intended that in that case a fraction of a day should count for the whole day. Lay-days, on the other hand, were given to the merchant for his own purposes, to be arranged as he thought fit. Lay-days consequently were periods of twenty-four hours, provided only that if there was a fraction over at the end that should be treated as a whole day. That was the general rule of law—but even if it was not, the stipulation regarding the twelve hours given for orders at the port of call made it quite plain that hours were the basis of calculation here.

Authorities — *Commercial Steamship Company*, June 17, 1875, L.R. 10 Q.B. 346; *La Cour v. Donaldson*, May 22, 1874, 1 R. 912; *Hansen v. Donaldson*, June 20, 1874, 1 R. 1066; *Dickinson v. Martini*, July 11, 1874, 1 R. 1185; *French v. Gerber*, February 6, 1877, 2 Com. Pleas Div. 247.

Argued for the respondents—The stipulation regarding the twelve hours really did not alter the rule of law, and that was settled by the *Commercial Steamship Company's* case, for between lay-days and demurrage no sound distinction could be drawn. The rule was by far the more convenient.

At advising—

LORD PRESIDENT — The principal question raised in this reclaiming note is one of some practical importance which has not hitherto occurred for decision in this Court. It may be stated generally to be this—Whether in computing lay-days under a charter-party the parts of days are to be taken as entire days, or whether the calculation is to be by hours?

The provisions of the charter-party here do not seem to raise any specialty. The only point applicable to the general question is, that it was stipulated that the vessel having arrived from the foreign port at Falmouth or Queenstown was to have orders given there within twelve hours, and that lay-days were to count after the expiry of these twelve hours. But this does not appear to affect the question at all. The general provision of the charter-party is—"Thirteen running days are to be allowed to the said merchants (if not sooner despatched) for loading and for unloading, and ten days on demurrage, over and above the said laying days at £40 per day." Now, it is under this clause that the lay-days must be computed, and it appears to me that they begin to run twelve hours after arrival, exactly in the same way as if it had been from the hour of arrival, so that the interposition of the twelve hours does not raise a different question from what would have been raised if we had had to count from the arrival of the vessel.

Now, the one side contend that the lay-days were not completely exhausted when the discharge of the vessel was finished at Glasgow; the other side say that not only had the entire lay-days been exhausted, but that two days' demurrage had been incurred. The facts are these. Of the thirteen lay-days allowed by the charter-party, four were exhausted at the port of loading, and therefore according to the certificate in the log-book nine days were still available to the merchant. The vessel arrived at Falmouth on November 16, somewhere between 10 and 11 in the morning—the exact hour is not of much consequence—while the twelve hours within which orders were to be given, and after the expiry of which the lay-days were to begin to run, would bring the time down to 10 or 11 in the evening of the same day. Nothing can be counted to the lay-days as occurring on that 16th November, and therefore the first lay-day must be Friday the 17th. The vessel sailed on Tuesday the 21st at seven in the evening, and thus five lay-days were spent at Falmouth, unless we are to count lay-days as periods of twenty-four hours each. According to the one mode of counting, the ship-owner counts the 17th, 18th, 19th, 20th, and 21st; according to the other, there are only four and a-half days—that is to say, periods of twenty-four hours. The vessel arrived in Glasgow on the evening of the 24th, and the unloading was not finished until about the afternoon of the 30th. In that way six days were spent at Glasgow, not including the first evening—so that the six at Glasgow and the five at Falmouth make up eleven days, being two in excess of the nine allowed to the merchant. But here again, if the calculation is by hours and not by days, a different result is reached.

Now, it appears to me to be an important circumstance that this method of computing lay-days by hours is a novelty. There have been many cases in which the Court has had to consider the number of lay-days, but it has never, so far as I am aware, been suggested previously to this case that the calculation is to be by hours. Now this is important, because in administering law of this description custom is of more weight than in almost any other branch of the law. Further, in this matter I can see no difference between lay-days and demurrage, and in regard to demurrage there is an express authority in the case of the *Commercial Steamship Company*, in which the Court of Queen's Bench ruled that fractions of a day were to count as entire days for the purpose of calculating the amount of demurrage. I do not see why that rule should not apply to lay-days also if it is sound in law. My own impression is that it is a sound rule, and I have less hesitation in coming to that conclusion because it would be extremely unfortunate were we obliged—as we might have been—to lay down a different rule for this country from that which prevails in England. But the principle is a sound one, as the Judges in that case observed.

As to the conflict of evidence, I agree with the Lord Ordinary that the *onus* lies on the defenders, and there being this conflict he gives a perfectly good ground of decision in holding that they have not discharged this *onus*.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The Court adhered.

Counsel for Respondents (Pursuers)—Trayner—Shaw. Agent—H. W. Cornillon, S.S.C.

Counsel for Reclaimers (Defenders)—Mackintosh—Dickson. Agent—J. Gillon Fergusson, W.S.

Wednesday, June 4.

FIRST DIVISION.

CITY OF GLASGOW BANK LIQUIDATION—
(TENNENT'S SECOND CASE) — HUGH
TENNENT v. THE LIQUIDATORS.

Public Company—Winding-up—Compromise—Jurisdiction—Companies Act 1862 (25 and 26 Vict. c. 89) section 160—Compulsion of Liquidator to Accept a Compromise.

Held that in a winding-up by or subject to the supervision of the Court it has no power to order the liquidators to accept a compromise offered by a contributory.

This was the sequel of a case already reported in the Court of Session, Jan. 22, 1879, *ante*, p. 238; and in the House of Lords, May 20, 1879, *ante* p. 509. The petitioner was now charged at the instance of the liquidators to make payment of the sum of £15,000, which was the amount of the first instalment of a call on £6000 stock, the call being at the rate of £500 per £100. The petitioner offered to surrender his whole estate, with the exception of his claims of relief against the bank and its shareholders of all sums which he might be called on to pay as a contributory; and he prayed the Court "to restrain the said liquidators from following out the said charge to the effect of doing diligence thereon against the complainer, and to decern and ordain the said liquidators—upon the petitioner making a full surrender to them of his whole estate, means, and effects, to the satisfaction of the said liquidators, or of your Lordships—to discharge the petitioner of his liability as a contributory of the said bank, and to find that the said liquidators are not entitled, as a condition of granting such discharge, to insist on the complainer assigning to the said liquidators his claims of relief against the said bank and the shareholders thereof, mentioned in the said statement of facts; or to do further or otherwise in the premises as to your Lordships shall seem proper."

By the 160th section of the Companies Act of 1862 (25 and 26 Vict. c. 89) it was enacted as follows:—"The liquidators may with the sanction of the Court, where the company is being wound-up by the Court or subject to the supervision of the Court, and with the sanction of an extraordinary resolution of the company where the company is being wound-up altogether voluntarily, compromise all calls and liabilities to calls, debts, and liabilities capable of resulting in debts, and all claims, whether present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and any contributory or alleged contributory, or other debtor or person

apprehending liability to the company, and all questions in any way relating to or affecting the assets of the company or the winding-up of the company, upon the receipt of such sums, payable at such times, and generally upon such terms as may be agreed upon, with power for the liquidators to take any security for the discharge of such debts or liabilities, and to give complete discharges in respect of all or any such calls, debts or liabilities."

Argued for the petitioner—The Court would not interfere with the liquidators as regarded the mere details of their management, but any one interested might apply to the Court whenever he thought proper to do so, as indeed the order pronounced in this liquidation specially provided. The Court must see that the liquidators dealt fairly by all concerned. It was provided by section 109 of the Companies Act that "the Court shall adjust the rights of contributories amongst themselves, and distribute any surplus that may remain amongst the parties entitled thereto." Now, that was what the Court were asked to do here, for the claim of relief emerged only when the rights of creditors had been fully settled. It was not an asset of the petitioner as regarded creditors; and consequently he offered a surrender of his entire assets to the liquidators in so far as they represented the creditors of the company, although he refused to surrender this claim. Why then should the liquidators deal differently with him from the way in which they dealt with every other shareholder who had made a full surrender?—for it was admitted that they did not drive many contributories into sequestration. [LORD PRESIDENT—The question is, Have we jurisdiction under section 160 of the Act? Have you any answer to the case of *Pearson*, 7 Chanc. App. 309?]. Admitting the authority of that case, it applied only where the liquidators represented creditors—here their only interest was as representing fellow shareholders.

Argued for the liquidators—The Court had no jurisdiction to compel the liquidators to accept a compromise—Sect. 160 of the Act, and *Pearson's* case, *supra*. If the Court had such jurisdiction, the equity of the case was with the liquidators, who were merely asking for a full surrender of the petitioner's assets, for this claim was plainly a valuable asset for creditors, as it might be sold at once.

At advising—

LORD PRESIDENT—It appears to me that the prayer of this petition is for an order upon the liquidators that they should upon condition of the petitioner making a surrender of his estate, with the exception of a certain part, accept that offer of compromise and grant him his discharge. That is the form of the prayer with one exception, and that exception consists in the commencement, in which the petitioner makes an application for an order "to restrain the said liquidators from following out the said charge to the effect of doing diligence thereon against the complainer, and to decern and ordain the said liquidators—upon the petitioner making a full surrender to them of his whole estate, means, and effects, to the satisfaction of the said liquidators or of your Lordships—to discharge the petitioner of his liability as a contributory of the said bank." But this part cannot be disconnected from what