that he would chain up the dog so long as the dog was in that jurisdiction under a penalty of £10 sterling, and failing his lodging caution within twenty-four hours after the order was intimated to him, granted warrant to officers of court to destroy or otherwise secure the dog.

Upon 1st August 1891 J. A. MacCallum, solicitor at Ayr, bound himself as cautioner for the accused under this conviction.

Gaffney appealed, and argued—The appeal was competent, as it had been decided that such a complaint as this was a civil process—*Duncan* v. *Greig*, February 7, 1848, Ashley, 421; *Marr & Sons* v. *Lindsay*, June 7, 1881, 8 R. 784. No doubt the respondent had found caution as ordained, but that was not implementing the decree; it was the only means he could take to prevent the dog being destroyed.

The respondent at first argued that the appeal was in its nature a criminal proceeding, and therefore not appealable to the Court of Session, but afterwards withdrew the objection—*Bruce* v. *Duncan & M'Lean*, October 13, 1848, S. Jus. Reps. 12. Gaffney had implemented the decree by finding caution as ordered, and he could not now reclaim—*M'Dougall* v. *Galt*, June 30, 1863, 1 Macph. 1012; *M'Lelland* v. *Garson*, January 10, 1883, 10 R. 445.

At advising—

LORD JUSTICE-CLERK—I understand that it is not now seriously contended that this appeal is incompetent because this proceeding was of a criminal nature. It is contended, however, that the appeal is excluded from review by the fact that there is in the prayer of the complaint a petition that the appellant Gaffney should find caution to securely fasten up his dog, and that as he has found caution, as ordered by the Magistrate, and has thereby implemented the decree, he is barred from carrying the question any further. I think it is sufficient to say, in answer to this contention, that the implement of the decree upon which the respondent relies is not at all what is meant by implement of a decree in the ordinary sense of the words. In the first place, the appellant is ordered to find caution that he will chain up his dog; and failing the said Richard Gaffney's due obedience within twenty-four hours, the judgment grants warrant to officers of court with assistants to pass, and immediately thereafter take possession of and destroy, or otherwise secure and safely dispose of said dog. Now, I think in the circumstances the only course open to Gaffney, in order to prevent his dog being destroyed, was to find caution as ordered by the Magistrate, but I do not think that that was implementing the decree in such a way as to bar him from taking an appeal against the decision.

LORD YOUNG—It falls to us to decide this case upon its merits, that is to say, we have to judge whether the proof adduced is sufficient to warrant the judgment which has been pronounced. I think that is the unavoidable result of the authorities cited to us, but I think it unfortunate that it should be unavoidable, because in this Court we are not in the habit—and I think the course is a right one—of interfering with the powers of the police and the local authorities in putting down what is a nuisance to the inhabitants of any particular place. It seems, however, to be the law that a judgment of a magistrate upon a matter of this kind may be brought for review upon its merits to the Court of Session, with, of course, the possibility of an appeal to the House of Lords. I should have thought that all considerations of expediency and good sense were so much against a procedure of this kind, that if the question had been open I should have been inclined to hold that this appeal was incompetent. During the discussion there was a case cited to us in which an appeal of this kind was brought up at the Circuit Court along with small-debt appeals and other cases much more of this character than we are accustomed to deal with in the Court of Session. I should have thought that that was the more fitting tribunal for this case, but the authorities seem to say that this appeal is competent.

LORD RUTHERFURD CLARK—I am of the same opinion.

The Court pronounced this interlocutor:—

"Find that the pursuer has failed to prove the allegation of the complaint that the defender has permitted the dog libelled to go at large, and that said dog is vicious and dangerous to the lieges: Therefore sustain the appeal, recal the interlocutor appealed against, dismiss the complaint: Find the complainer liable to the defender in expenses in the Inferior Court and in this Court," &c.

Counsel for the Appellant—M'Kechnie—C. Watt. Agents—Wylie, Robertson, & Rankin, W.S.

Counsel for the Respondent—Young—Watt. Agent—John Macmillan, S.S.C.

Wednesday, March 16, 1887.

OUTER HOUSE.

[Lord Trayner.

HOLMAN & SONS *v.* HARRISON & COMPANY.

Ship — Charter-Party — Demurrage — Discharging "as customary" at Terminus Quay, Glasgow.

A charter-party provided that a vessel should proceed with a cargo of iron ore to the Terminus Quay, Glasgow, and be discharged as fast as steamer could deliver, after berthed, "as customary." According to the custom of the port of Glasgow, iron ore must at the Terminus Quay be discharged into the trucks of the Cale-

donian Railway Company from the ship's side, and in no other way. The vessel was detained two days beyond the time necessary to discharge her according to the average rate of delivery, owing to failure of the railway company to supply a sufficient number of trucks. In an action for demurrage it was proved that the failure to supply trucks did not arise from the inability of the railway company to furnish them, but from their refusal or delay to do so owing to questions which had arisen between them and the charterers. *Held* that in a question with the shipowners the charterers were liable for the delay.

Wyllie v. *Harrison*, October 29, 1885, 13 R. 29, and 23 S.L.R. 62, *distinguished.*

By a charter-party between John Holman & Sons, shipowners, London, and Harrison & Company, merchants, Glasgow, the latter chartered from the former certain vessels for the carriage of iron ore from Bilbao to the Queen's Dock or Terminus (Glasgow) in charterers' option. The charter-party provided that the cargo was to be discharged "as fast as steamer could deliver after berthed as customary," and demurrage was to be at the rate of 6d. per gross registered ton per day.

The s.s. "Fortescue," which sailed under this charter, arrived at her discharging berth General Terminus, Glasgow, at 6 a.m. on Thursday the 25th March 1886. She was not discharged till the 30th March. Taking the average delivery, according to the custom and experience at the particular berth where she was discharged, the vessel should have been completely discharged on the 27th March.

John Holman & Sons brought an action against Harrison & Company for three days' demurrage (£118, 8s.)

The pursuers averred—"At the time the said charter-party was entered into, it was, as it now is, the practice at the port of Glasgow that iron ore when sent to the General Terminus should be delivered into trucks, and it was the duty of the defenders to have provided, or to have arranged with other parties to provide, sufficient trucks to enable the cargo to be discharged into trucks as fast as the ship could deliver, or otherwise to have taken delivery of the cargo as fast as the same could be put out of the ship. The defenders instructed the railway company to carry the said cargo partly to Messrs Dunlop & Co., and partly to the Steel Company of Scotland. The ore for the Steel Company was to be picked, and could only be discharged at the same time as that for Dunlop & Company. The defenders at the time knew that Dunlop & Company had trucks of the railway standing at their works on demurrage, and that according to the regulations of the railway company, trucks for ore to be carried to them would not be supplied while this was so; and it was while knowing this that the defenders ordered the ore to be sent to Dunlop & Company, and they refused to order it elsewhere. In consequence of the defenders ordering the ore to Dunlop & Company as aforesaid, and of the failure to supply trucks, the delivery was delayed as after mentioned, but though the defenders knew of the delay they persisted in continuing to order the goods to be sent to Dunlop & Company. There were plenty of trucks available to have enabled the cargo to have been discharged as customary on or before Friday, 26th March, and the railway company were ready and willing to have supplied them if the defenders had not persisted in ordering the goods to Messrs Dunlop & Company under the circumstances before mentioned, and all this the defenders were well aware of."

The defenders in their answers averred that "the custom of the port of Glasgow is that iron ore is discharged into trucks furnished by the railway company and brought to the ship's side. The discharge is not proceeded with during the night, the working day being from six a.m. to six p.m., with two hours off for meals, making ten working hours per day. The regulations of the dock do not admit of any other method of delivery, and the consignee or receiver of the cargo is dependent for the supply of trucks upon the railway company. The custom is for the consignee or receiver of the cargo to give notice to the railway company that trucks are required, and in the present case the defenders gave due and timeous notice to the Caledonian Railway Company that the ship was expected, and that trucks were required for the discharge of the cargo. The Terminus Quay is part of the system of the Caledonian Railway Company, who have the absolute control of the traffic arrangements there."

A proof was led, the result of which is fully set forth in the Lord Ordinary's opinion.

The Lord Ordinary on 16th March 1887 decerned against the defenders for £59, 4s. being two days' demurrage.

"*Opinion.*—The 'Fortescue' arrived and was at her discharging berth, General Terminus, Glasgow, ready to deliver her cargo at 6 a.m. on Thursday the 25th March 1886. Her cargo consisted of about 1460 tons of iron ore, and according to the terms of the charter-party under which the cargo was carried, the consignees or charterers were to take delivery 'as fast as the steamer can deliver after being berthed as customary.' It is proved that between 500 and 600 tons per day would have been an average delivery according to the custom and experience at the particular berth where the 'Fortescue' was discharging, although, so far as the vessel was concerned, the discharge might have proceeded more rapidly. Taking the view that the charterers' duty was to take delivery 'as customary,' the whole cargo could easily have been discharged in three days, and therefore the vessel should have been completely discharged on Saturday the 27th March. She was not discharged, however, until Tuesday the 30th, and the pursuers

claim three days' demurrage. The demurrage, according to the charter-party, if incurred, was to be at the rate of 6d. per gross register ton per day, which in the case of the 'Fortescue' (1184 gross) amounted to £29, 12s. per day.

"The principal defence is that no delay took place in the discharge of the 'Fortescue' for which the defenders are or can be held responsible, and they rely upon the decision pronounced in the case of *Wyllie* v. *Harrison*, 13 R. 92, as one virtually determining in their favour the question now raised. If the cases are not distinguishable in any material respect, I am bound to apply the decision in *Wyllie's* case and assoilzie the defenders, but in my opinion the cases are distinguishable in one very important and indeed essential particular.

"In both cases the vessel had to discharge cargo at the same quay and under the same conditions as regards the custom there. According to custom all vessels discharging at that quay were required to discharge their cargo directly into railway trucks—the cargo was not allowed to be put down upon the quay. If, therefore, trucks could not be got through the inability of the railway company to furnish them, no responsibility for the delay thus occasioned in the discharge rested upon the charterers. This, I think, was the ground of judgment in *Wyllie's* case—'There being no trucks available' (said the Lord Justice-Clerk), 'or not sufficient trucks available, I think a delay occurred for which neither party was responsible to the other;' and the judgment in the case of *Postlethwaite*, 5 App. Cas. 599, proceeded on the same ground, namely, that the only means by which the vessel could be discharged according to the custom of the port were not available during the period for which demurrage was claimed.

"In the present case, however, it is proved that during the whole period between the arrival of the 'Fortescue' and the completion of her discharge, the railway company had at their command, available for the discharge of the vessel, a supply of trucks fully adequate for that purpose. In this respect the present case in my opinion differs so materially from the case of *Wyllie*, that the decision in the latter is not necessarily a precedent which I must follow. There therefore now arises the question, not raised or disposed of by *Wyllie's* case, whether there being trucks available for the discharge of the vessel, but which at the time the railway company refuse to give, the defenders are liable for the detention of the vessel thence arising.

"It appears from the proof that on the 24th March, in anticipation of the 'Fortescue's' arrival, the defenders wrote to the railway company requesting them to provide trucks for the discharge of that vessel, and notifying that of the cargo 800 tons were to be sent to the Clyde Iron Company, and 600 tons to the Steel Company. They also gave notice to these two companies of the expected arrival of the ship, and of the cargo which was to be delivered to them respectively. The railway company did not on the 25th March, however, supply trucks (although they had plenty of trucks available) for either portion of the cargo, for reasons which may be considered separately.

"(1) As regards the 800 tons destined to the Clyde Iron Works, the railway company declined to supply trucks, because at that time the Clyde Iron Company had in their own works, and in transit to their works from the general terminus railway waggons which had been loaded and not emptied for more than forty-eight hours, the railway company having intimated by circular in 1884 to the Clyde Iron Company and other similar companies, that in such circumstances they would not provide waggons for traffic. The defenders have endeavoured to show that the Clyde Iron Company was not in default in reference to the waggons which had already been despatched by the railway company to them, but I think they have failed in this. I regard it as conclusively established that there was a 'block' in the Clyde Iron Company's works, that there were railway waggons at the works, and in transit to them (to a considerable number) not emptied within forty-eight hours after their loading and arrival, and that they were in breach of the condition which the railway company had stipulated for as precedent to their providing any 'waggons for traffic.' The first delay in the delivery of the 'Fortescue's' cargo was thus caused by the fault of the consignee; it was not fault on the part of the railway company, or inability on their part to provide the waggons necessary for discharge. The defenders maintain, that having given notice to the railway company to provide waggons for delivery of the cargo, and also to the persons to whom the cargo was to be delivered to receive it, they had no further duty to the pursuers, and that they are not responsible for any delay which arose in the actual discharge. They further maintained that delay arising from the cause which here occurred is one of those risks attending the discharge of cargo at this particular wharf which the pursuers must submit to as being involved in the delivery of cargo 'as customary.' I think neither of these contentions is sound. In the first place, I think the defenders owed a duty to the pursuers beyond the mere giving of notice to the railway company and the persons to whom they had sold the cargo. They had the duty of seeing that the notices or orders so given were duly attended to. It is to be kept in mind that the defenders were the consignees of the cargo in a question with the pursuers. It was the defenders' duty as consignees, and under the terms of their own bargain, to take delivery as fast as the steamer could give it according to the only mode of delivery permitted at that berth, and they were the only persons to whom the pursuers could look to take delivery or to bear the consequences arising from their not doing so timeously. It is something new to hear it contended that persons having the duty of seeing to the timeous discharge of a cargo fulfil that duty by asking somebody else to

perform it, and not attending to see whether it is performed or not. I suppose the defenders knew at least as well as the pursuers of the risk there was of delay arising in the discharge of the vessel from such a cause as occurred here, namely, the 'block' of waggons at a receiver's works. They took no trouble to inquire whether such an impediment existed in the way of the due discharge of this vessel. I think they must bear the consequences attending such a risk, of which the owners of the vessel could have no information, and with which, in my opinion, they had no concern. It was an impediment which the defenders could have 'overcome by the use of reasonable diligence'—*Postlethwaite*, 5 App. Cas. 608—which they did overcome later by sending on part of the cargo to other purchasers than those for whom it was at first destined, and which they could have overcome on the 25th March as well as on the 29th. The neglect of this duty led directly to the delay for which the pursuers now ask compensation. If the defenders had seen to the discharge of this cargo as they were bound to do, the 25th of March could not have passed without the customary discharge being made. The vessel was ready, the trucks were ready, that is, ready to be sent anywhere except to the Clyde Iron Company, and if the customary discharge had been effected on the 25th and carried on upon the 26th, the whole cargo would have been out by the 27th. By an average or customary discharge the whole cargo could have been taken out in twenty-six hours. In point of fact the whole discharge was effected in seventeen working hours. Had the defenders done what they could to effect the discharge, it would have been completed without any demurrage being incurred. But in my opinion they did not fulfil their duty to the pursuers in this matter, and the demurrage claimed is the direct result of their failure.

"In the second place, I think the pursuers never took the risk of delay arising from the blocking of the receivers' works. It is not shown that they had ever heard of such a thing happening, or that they knew of the railway company's circular issued in 1884. Even if they had, it would not alter my opinion. A block of waggons in the purchasers' works could (in the general case) only arise from bad management or accident; it might arise from having more waggons in the works to unload than could be unloaded by the men who were there to unload them; from neglect to unload the waggons duly, or ordering forward or agreeing to receive more waggons at a time than they could empty with any diligence within forty-eight hours; or it might arise from some accident happening at the works which prevented business being carried on there at all, or with its usual activity. But in my opinion the pursuers are not responsible, and take no risk regarding the bad management of persons with whom they stand in no relation by contract or otherwise, nor any responsibility or risk arising from accident which prevents those persons fulfilling their obligations to others—obligations which the pursuers had no right or interest to enforce. The shipowner took any risks necessarily attending the delivery of the cargo 'as customary' at the place of delivery, but the defenders would have them take all risks arising not at the place where the ship was bound to deliver, but at some other place which the shipowner had no part in fixing, and which might as well be in Birmingham or Manchester as in the county of Lanark, the place being just where the defenders might choose, irrespective altogether of the shipowner's desire or interest.

"(2) As regards the 600 tons destined by the defenders for the Steel Company the case stands in a different position. The railway campany did not place any waggons at the disposal of the ship for this lot, because, according to custom, all ore despatched by the defenders to the Steel Company was subjected first to a kind of selection, which could only be made after the ore was in the trucks. The defenders say that the Steel Company were bound to receive whatever ore was sent to them (although they were entitled to a certain deduction in price if it was not 'lumpy' or selected ore); that the railway company were in fault in not sending off the 600 tons as directed, and that for such fault and the delay thence arising they are not responsible to the pursuers. I doubt very much whether the railway company were much to blame, if at all, for the course they took. The defenders, so far as appears, had no one at the wharf representing them to make the selection for the Steel Company, which was usual. The railway company were probably quite entitled to wait till some one was present to make the selection, which was usually made by the defenders before despatching any ore to the Steel Company. But nothing could show better the defenders' utter inattention to the discharge of the 'Fortescue' than what took place in reference to the Steel Company's consignment. If they had had a representative at the wharf to see that the railway company was attending to the orders or directions already given to it, he could have had 600 tons (or nearly so) sent off from the vessel to the Steel Company on the 25th. There was no block in their works, and plenty of waggons at hand. But the defenders relied on the railway company, and the railway company waited on the defenders, and the vessel was compelled to wait on both. So indifferent were the defenders, according to the evidence of their manager, that they did not know what quantity of ore had gone to the Steel Company until after the 'Fortescue' was discharged and the accounts of the discharge got in from the railway company and their own purchasers. They directed the railway company to forward 600 tons from the ship to the Steel Company, but made no inquiry or effort whatever to see that their directions were attended to.

"But whether the railway company were in fault or not, I think the defenders are responsible therefor to the pursuers. If

there was fault on the part of anybody (other than the shipowners) which unduly delayed the discharge of the 'Fortescue,' the defenders must answer for it to the pursuers. They may have claims of relief, but the defenders in the first instance are directly liable to the pursuers.

"The case, I think, comes to this, the defenders as charterers of the vessel have bound themselves to take delivery of the cargo as fast as the vessel can give it, as customary, at a certain wharf. If that is not done the defenders are liable in the consequences unless they can validly excuse themselves. The only excuse (for there is no assertion that the ship was in fault) which in my opinion can be considered valid is, that delivery sooner or at a more rapid rate was impossible because of the want of the appliances necessary to deliver 'as customary.' But there was no lack of such appliances in the present case which could have been made available. If they were not so made available from any cause unconnected with the ship or its owners, and the ship was consequently unduly detained, the defenders must at least primarily be answerable for the consequences of such detention. The railway company's fault or the purchaser's fault is a thing with which the pursuers have no concern; they have no contract with either. Neither the railway company nor the purchaser had any duty to perform to the owners of the vessel. But beyond that, it is quite apparent from the proof that if the defenders had done their duty, instead of expecting the railway company to do it for them, they could have had all the necessary waggons to discharge the vessel in due time by directing (as they latterly did) the waggons to be delivered to other purchasers whose conduct had not created the impediment which stood in the way of delivery to the Clyde Iron Company.

"The pursuers claim three days' demurrage. There appears to me, however, to be some reason for saying that if the vessel had not changed her berth on the 29th the discharge would have been completed on that day. I give the defenders the benefit of any doubt on this subject, and find them liable in £59, 4s., being two days' demur rage."

Counsel for the Pursuers — Dickson. Agent—F. J. Martin, W.S.

Counsel for the Defenders—Low. Agents—Ronald & Ritchie, S.S.C.

Friday, October 16.

FIRST DIVISION.

[Lord Low, Ordinary.

EDINBURGH NORTHERN TRAMWAYS COMPANY *v.* MANN AND BEATTIE.

(*Ante*, vol. xxviii., p. 828.)

Process—Appeal to House of Lords—Leave to Appeal—Interlocutory Judgment—Possibility of Two Appeals.

Circumstances in which the Court *refused* a petition for leave to appeal to the House of Lords against interlocutors which did not exhaust the conclusions of the action.

Process—Appeal to House of Lords—Effect of Intimation of Order of Service.

Intimation of an order for service on an appeal to the House of Lords renders any further procedure in the Court of Session incompetent.

In this action the Lord Ordinary (TRAYNER) on 18th July 1890 pronounced this interlocutor—"Finds that the defenders George Villiers Mann and William Hamilton Beattie are bound to account to the pursuers for the whole sums of money, debentures, shares, or other considerations received by them under and in virtue of the agreement entered into between them and the Patent Cable Tramways Corporation, Limited, dated 25th October 1884: Appoints the said defenders to lodge in process by the first sederunt day of next session an account of all sums of money, debentures, shares, or other considerations received by them under said agreement, as also an account or accounts of all sums which they claim respectively to be entitled to set against the before-mentioned sums of money, debentures, shares, or other considerations, with the vouchers of such account or accounts: *Quoad ultra* continues the cause: Grants leave to reclaim."

The defenders having reclaimed, the First Division on 26th June 1891 adhered to the Lord Ordinary's interlocutor.

On 15th July the defenders presented a petition for leave to appeal to the House of Lords.

Argued for the defenders—The question of law between the parties had been settled by the judgment of the Court, and all that remained was a question of accounting; it was usual for the Court to grant leave to appeal at such a stage of the proceedings—*Bell* v. *Kennedy*, July 10, 1868, 6 Macph. 1062; *Gardner* v. *Beresford's Trustees*, July 17, 1877, 4 R. 1091.

Argued for the pursuers—There was more than a mere question of accounting remaining here. There was the question of the company's liability for the cost of promoting an abortive Act of Parliament. There was thus the possibility of a double appeal to the House of Lords, and in such a case the Court were in the habit of refusing leave till the whole cause was decided—*Stewart* v. *Kennedy*, February 26, 1888, 16 R. 521.