

the whole value of the shares. Although aware of this he made no objection. Upon 1st April 1891 Lord Wellwood, as Lord Ordinary officiating on the Bills, pronounced an interlocutor making a call upon each of the contributories mentioned in the list, and ordered payment of the call to the official liquidators.

Upon 11th May 1891 Stocker presented a petition to the Lord Ordinary. He denied that he ever was a shareholder in the company or that he ever applied for shares or agreed to become a shareholder therein, and he prayed the Court to ordain the liquidators to rectify the register of the members and list of contributories of the company by removing therefrom his name as holder of the said shares.

The liquidators lodged answers, in which they averred that Stocker was a creditor of Law, the original proprietor of the paper mills, and the vendor to the company; that he had agreed to take payment of Law's debt to him in shares of the company, for which he gave no consideration; that the ten shares of which he stood as owner in the list of contributories were allotted to him; and that after that he was treated as a member of the company. Intimation of the call was sent to him but he took no notice of it.

Upon 17th July 1891 the Lord Ordinary pronounced this interlocutor:—"The Lord Ordinary having heard counsel and considered the petition for Alexander D. Stocker, No. 499 of process, and answers for the liquidators, No. 503 of process, Repels the defence of the liquidators that the petitioner is too late; allows the parties a proof of their averments," &c.

The liquidators reclaimed, and argued—This petition to the Lord Ordinary was presented too late. The list of contributories had been settled and an order to pay the calls made upon the shareholders. It was admitted that settling aright the list of contributories did not also settle the register of members, but the petitioner ought to have brought a suspension of the charge for payment of the call when it was made. It was admitted that diligence had not yet been done upon the decree ordering payment. The petitioner stood upon the provisions of the Companies Act 1862, but these provisions had been altered by the Act of 1886, and Stocker could not now proceed by petition to have the register rectified. He ought to have appeared at the time the list of contributories was to be settled—and proper intimation of that time was made to him—and objected to his name being put upon the list, but he had not adopted that course.

The respondent argued—The petitioner had taken the only course that was open to him. Suspension of the decree for payment of the call could not act as rectification of the register, and he would still be a partner in the company. The Act of 1862 provided a means of getting the register altered, and the Act of 1886 had not altered that mode of procedure, it merely made the Lord Ordinary the

Court to which the petition was to be presented instead of the Division. Mere delay in bringing his petition could not prejudice the case—*In re Alexandra Park Company* (Hart's case), July 16, 1868, L.R., 6 Eq. 512.

At advising—

LORD JUSTICE-CLERK—By the Act 1886 it became lawful for the Court when it had made a winding-up or a supervision order to remit to a Lord Ordinary to take the same proceedings in the liquidation as had previously been taken by the Court itself under the provisions of the Act of 1862. The section also provided that any judgment of the Lord Ordinary should be subject to review by a reclaiming-note presented within fourteen days. The 6th section of the 1886 Act did that, but I think it did nothing else. It transferred the contract of the liquidation, and it gave a power of review, but in my opinion it did not deprive any party of his right if he desired to take the benefit of the provisions of the Act of 1862. If this petition would not have been barred under the old mode of procedure by anything which had taken place in the Inner House up to that point in the proceedings, I do not think the fact that the proceedings have taken place in the Outer House can bar it. In my opinion the petition would have been competent under the former method of procedure, and therefore I think it is competent now.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

The Court refused the reclaiming-note and remitted the case to the Lord Ordinary.

Counsel for Appellants — D.-F. Balfour, Q.C. — Burnet. Agents — Carmichael & Millar, W.S.

Counsel for Respondent — Asher, Q.C. — Salvesen. Agents — Alexander Morison, S.S.C.

Tuesday, October 27.

SECOND DIVISION.

[Sheriff of Lanarkshire.

STEPHENS, MAWSON, & GOSS v.
MACLEOD & COMPANY.

Ship — Charter-Party — Construction — Demurrage — Custom of the Port.

A charter-party stipulated that a vessel should proceed to "Portugalete, or any other usual ore loading-place in the river Nervion, not above Luchana, as ordered by merchant's agents on arrival, or so near thereunto as she may safely get, and there load in the customary manner from the factor of the said merchant a full and complete cargo of iron ore. . . . Steamer to be loaded at the rate of not less than

400 tons per working day as customary, after being berthed in turn, and ten days on demurrage over and above the said lay-days at 16s. 8d. per hour." The rules of the port provided that the turn for loading vessels was to be taken from an official list of arrivals. The vessel arrived at Portugalete on 17th June, and received her official number. She was ordered by the shippers' factor to load from a particular station or deposit. On 21st June the vessel was ready to receive cargo, but as other previous arrivals had to be loaded from this particular station, she could not be berthed until June 27th, when her loading began, which was completed on the evening of the 28th June. In the meantime vessels which had arrived later were able sooner to load their cargoes from other and less crowded stations.

In an action for demurrage by the shipowners, *held* (diss. Lord Young) that as the charter-party did not stipulate that the vessel should berth in turn at a particular place, she should have been berthed in turn with other ships according to the order of their arrival at any berth where iron ore was loaded at Portugalete; that her time for loading in turn arrived on 21st June; and that the defenders were liable for the detention of the vessel before the loading commenced.

Messrs Stephens, Mawson, & Goss, shipowners, Newport, chartered the s.s. "Cassia" to J. & A. Wyllie, by charter-party dated 7th June 1890. Upon 5th July 1890 Macleod & Company, merchants, St Vincent Street, Glasgow, who were the receivers of the cargo, undertook, in consideration of the owners not exercising their lien for demurrage, to hold themselves liable for any demurrage that might be due.

The charter-party was in these terms—That the "Cassia" should, "with all convenient speed, sail and proceed to Portugalete, or any other usual ore loading-place in the river Nervion, not above Luchana, as ordered by merchant's agents on arrival, or so near thereunto as she may safely get, and there load in the customary manner from the factors of the said merchant a full and complete cargo of iron ore," with which she should proceed to Glasgow. . . . "Steamer to be loaded at the rate of not less than 400 tons per working day as customary (Sundays and holidays excepted), after being berthed in turn, and ten days on demurrage over and above the said lay-days, at 16s. 8d. per hour, to be paid as the same shall become due."

The "Cassia" accordingly sailed for and arrived at Portugalete, and was ready to receive cargo upon 17th June 1890. She was not, however, berthed until about 8 a.m. on 27th June, and the loading was not completed until about 6:15 p.m. on 28th June.

Stephens, Mawson, & Goss sued Macleod & Company for 56 hours' demurrage, amounting to £45, 16s. 8d., contending

that the steamer ought to have begun loading upon 21st June.

Upon 28th January 1891 the Sheriff-Substitute allowed a proof on interrogatories and cross interrogatories, which established that the load for the "Cassia" was about 1500 tons; that the defenders' agent at Bilbao, on receipt of a telegram announcing the sailing of the ship, ordered Victor de Chavarri, Bilbao, to be prepared to load the vessel with the cargo desired; that at various points on the banks of the river Nervion, including Portugalete, there were different stations at which iron ore was deposited, and that to each station were allotted particular kinds of iron ore. The Bilbao River and Cantabrian Railway Company, Limited, published rules for all vessels loading at Portugalete, as follow—
"1. The turn for loading vessels will be taken from the official list of arrivals, each vessel being entered on the company's turn list according to the number given as from the semaphore station at Galea Point. 4. No vessel will be considered as being ready to load or available to take turn unless she has been duly advised to load by the shipper of the mineral, and that all necessary official and customs papers have been lodged at the office of the company's stationmaster at Sestao, also that there exists a sufficient quantity of mineral in the deposit to load a full and complete cargo, or such a quantity as may be asked for by the captain. 5. When two or more vessels are presented, and in turn, to load mineral from the same deposits, the company will use its discretion as to allowing more than one of such vessels to load at the same time."

The "Cassia" passed Galea Point by the first tide on 17th June and received the official number 4 upon the company's turn list. Upon the same day the captain of the "Cassia" wrote to the defenders—"The present is to advise you that the above steamer 'Cassia' under my orders is now ready to receive cargo, and that my time will commence according to charter-party." When the "Cassia" arrived the master was ordered by the defenders' factor to have her berthed at the Penuco deposit as soon as her turn came. There were three steamers in turn before her at the same deposit. The master of the vessel deponed that the "Cassia's" turn for loading arrived on the 21st June at noon. She was not loaded in turn. The "Ingoldsby" and the "Navarra," which arrived on the 19th, and the "Petunia" which arrived on 20th June, were loaded before her, and after her turn arrived. They were loaded at other deposits than the Penuco. Upon 21st June the master of the "Cassia" wrote to the defenders—"Finding that the s.s. 'Ingoldsby' of Cardiff, who arrived at this port on the 19th inst., a later date than my steamer 'Cassia,' who arrived on the 17th inst., is now under tips at Portugalete, and has commenced loading, I hereby give you notice that the s.s. 'Cassia' time will commence from noon on the 21/6/90, as per charter-party, at Glasgow June 7th, and that I shall also

protest and hold you responsible for all detention that may ensue."

It was proved for the defenders that they had ordered the "Cassia" to ship ore from the Penuco deposit, and that this ore could only be loaded at certain berths; that the "Cassia" was admitted in turn with other vessels to ore of these berths, and no undue delay took place at her loading.

The Sheriff-Substitute (GUTHRIE) upon 5th May 1891 pronounced this judgment—"Finds that the pursuers' ship 'Cassia' arrived at Bilbao River to fulfil the contract contained in the charter-party, No. 8/1 of process, on the 17th of June 1890, and completed loading a cargo of iron ore at Portugalete, as ordered, upon Saturday, 28th June, at 8 p.m.: Finds that, according to the custom of the port, she was in turn for being berthed, and was berthed at 8 a.m. on June 27th, and that she was thus loaded within the lay-days provided by the charter-party, her carrying capacity being 1500 tons: Therefore assolvies the defenders, and decerns."

"*Note.*—This case appears to be a clear one. In the reading of clauses in charter-parties as to loading and discharging, the custom of the port is an implied term, even if not expressed, and the question for consideration is, whether by the practice of the port of Bilbao, or the loading-places on the river Nervion, to which this vessel was chartered, and which, it is assumed, are included in that port, the turn of the 'Cassia' arrived on the 21st June, as alleged by the pursuers, or not until the 27th. It seems to me that the only ground on which the former contention can be supported involves the proposition that the defenders were bound to alter their loading orders and supply a different kind of ore, or ore from a different 'deposit' or mine from that which they had provided for the 'Cassia' before her arrival, and for which she had been booked. For the evidence sufficiently instructs that the regular practice of the port is for vessels to take their turn at the particular 'deposit' or loading-place to which they are ordered, and that if several vessels are waiting for cargo from the same loading-place, the last comer must just be served in its rotation. It is hardly suggested that the charterers should be deprived of their choice of a cargo, and have their arrangements with the mineral owners deranged, in order that the ship may be loaded at another 'deposit' which happens to be immediately available. But it is said that the defenders should have known and did know that the turn list for the deposit of ore to which the 'Cassia' was ordered was very full, and that her detention was probable. Detention in this way is not in any fair or reasonable sense attributable to the merchant. The delay is occasioned by the state of the port, and unless he has guarded against it by his bargain, falls upon the ship, which is only entitled to be berthed in turn at the place where alone the cargo arranged for her can be loaded. The defenders were bound to have a ready cargo, and it is not disputed that they had one at

a certain place; but if at a port where there are various ores, and various loading-places or deposits for these ores, a ship-owner means to get dispatch by being allowed to load that ore which happens to be lying at a vacant loading-place, irrespective of the merchant's previous arrangements, he must surely stipulate for it. I cannot accept the view that under this charter-party, and the practice of the river, the merchant was bound to supply such ore as would give the ship regular turn in the sense for which the pursuer contends. That view ignores the requirements of the consignee to whom the charterer may have sold his cargo, and there is no attempt to prove that all the ores shipped in Bilbao river are equally useful to all buyers in all parts of the world, or even at Glasgow, whither the 'Cassia' was to proceed."

The pursuers appealed, and argued—The defenders were liable in demurrage from the 21st June, as that was the date at which the vessel was intimated as being ready to receive her cargo. The charter-party provided only that the ship should be berthed "in turn," that is, in turn according to the number she got on passing Galea Point. She was however kept waiting till 27th June, because she could not get to the particular deposit from which she was ordered to load; the defenders were therefore liable. The alleged custom of the port could not be read into the charter-party if there was no precise statement concerning it, and the words "customary manner" could not be taken as incorporating the custom of the port—*Dall'Orso v. Mason & Company*, February 4, 1876, 3 R. 419. All days lost after the date at which the ship might have loaded could be claimed as demurrage days—*Holman v. Peruvian Nitrate Company*, February 8, 1878, 5 R. 657.

The respondents argued—The charterers were not liable. The ship passed Galea Point on 17th June, and received a number in accordance with the rule. She was however directed to take a particular kind of ore for cargo, which could only be obtained at a particular deposit. It so happened that three other ships were loading at that deposit, but when their cargoes were completed the "Cassia" came next. That was loading in turn in the customary manner as provided for in the charter-party. The rules of the port, under the fifth of which the "Cassia" had berthed, were imported into the charter-party as being the custom of the port, and if the vessel was berthed "in turn" according to the custom of the port, demurrage was not due. There was no objection taken that she was kept longer than was proper to enable her to load at the particular deposit to which she was sent—*Postlethwaite v. J. & A. Freeland*, June 7, 1880, L.R., 5 App. Cas. 599; *King and Another v. Hinde*, April 27, 1883, L.R., Ireland, 12 Q.B.C.P. and Ex. Div. 113.

At advising—

LORD JUSTICE-CLERK—The defenders chartered a steamer from the pursuers,

and the charter-party stipulated that she should "proceed to Portugalete or any other usual ore loading-place in the river Nervion not above Luchana as ordered by merchant's agents on arrival, or as near thereunto as she may safely get, and there load in the customary manner, from the factor of the said merchant, a full and complete cargo of iron ore." Then there is a stipulation that the steamer is "to be loaded at the rate of not less than 400 tons per working day as customary after being berthed in turn."

The ship thereafter sailed, and the fact is that the "Cassia" arrived opposite the signal station and got a number—the number four—for berthing, upon 17th July. She then anchored and waited for her berth. Upon the same day the master gave notice by letter to the merchants that the steamer was ready to receive cargo, and that his time would commence according to charter-party. He found upon 21st June that certain vessels which had passed the signal station at later dates than his ship, and which had received later numbers for berthing, had been sent to berths for the purpose of loading cargo although he had not got a berth. He accordingly writes to the merchants, after stating the fact, "that the s.s. 'Cassia's' time will commence from noon on the 21/6/90 as per charter-party at Glasgow June 7th, and that I shall also protest and hold you responsible."

Now, the defenders maintain that under a certain custom of the port although the vessels which arrived later than the "Cassia" were loaded before her, the pursuers have no claim for detention of their vessel, because these vessels were sent to particular deposits which were empty, while the number of vessels at the deposit to which the "Cassia" was destined was such that she could not be berthed before 27th June. I am of opinion that the defenders' contention cannot be given effect to. The charter-party provides that the ship is to be berthed in turn, and I can find nothing in it to show that that phrase means anything more than is usually understood by it. It is said that the captain ought to have known that there were certain rules of the port regarding the loading of the ships "in turn," more especially rule 5, which shows that these words mean more than when used in the ordinary sense, but I think that rule has nothing to do with the question. It bears upon the face of it to be a regulation merely to enable the authorities at the port to decide whether they can both be loaded at the place at which they present themselves at the same time, or whether one must wait until the other is loaded. That does not to me appear to be at all inconsistent with the right of ship-owners to demurrage if vessels coming into port after their vessel are put to berth before it. I therefore think the Sheriff-Substitute's interlocutor should be recalled. I may say that I have seen the opinion of Lord Trayner, in which the case is fully stated. I quite agree with that opinion, and therefore I have confined myself to these general observations.

LORD YOUNG—The Sheriff very properly points out that the port with the custom of which we are here concerned is the port of Bilbao. The town itself, which is the ancient capital of Biscay, is situated on the river Nervion, about ten miles up from the mouth, and the port, which is the principal port in the north of Spain, extends from the town down the whole course of the river to the sea. Portugalete is the name of the lowest reach of the river, and to it iron, which is the principal export, is (for the convenience of larger vessels) carried by the Bilbao River Railway Company and shipped from wharves apparently provided by the railway company, and maintained and conducted with the sanction and under the supervision of the harbour authorities. The limits to which the name Portugalete applies, if definite, have not been proved, but it is proved that there are at this place, whatever the length of it, several loading-places for iron with distinguishing names or numbers, and assigned respectively to different mineowners or iron exporters with a view to the convenience of the export trade of the port. Nor are the loading-places thus provided confined to Portugalete, but extend up the river towards the town of Bilbao. One at least of the witnesses speaks to "a number of loading-places in the river," necessarily above Portugalete, and it is noticeable that the charter-party immediately in question provides that the ship shall "proceed to Portugalete or any other usual ore loading-place in the river Nervion not above Luchana as ordered by merchants' agents on arrival." This shows clearly enough that the loading was to be where the merchant's agent ordered after the arrival of the ship, provided only that the place should not be above Luchana.

It is proved that the merchants' agent on receipt of the telegram announcing the sailing of the ship on 11th June, ordered Mr Victor de Chavarri of Bilbao to have the stipulated cargo ready against the time of her arrival, and to see that it was shipped as soon as the vessel was in its due order, according to the custom of the port, berthed to receive it. It is also proved that this was done in due and ordinary course without the delay of an hour.

The place of deposit and loading assigned by the harbour authorities to Chavarri was known as the "Penuco deposit," and on the arrival of the ship in the river the master was ordered to have it berthed there as soon as its turn came. It so happened that there were three ships in turn before her, but these were loaded and dispatched without any avoidable delay, and when her (the Cassia's) turn came she was berthed and loaded with all possible expedition. This is proved, and nothing to the contrary is here suggested.

The action is based on the averment that the Cassia's "time for loading in regular turn commenced at noon on 21st June, but she was not berthed until about 8 a.m. on 27th June," and if the averment is true the action is well founded, and otherwise not. If her turn did not come

till the 27th, there is no room for complaint on account of the delay or the time the vessel was detained. Now, this complaint of failure to get her turn is explained by the master in his evidence when he says—"The turn of the 'Cassia' for loading arrived on the 21st at noon. She was not loaded in turn. The s.s. 'Ingoldsby,' the s.s. 'Petunia,' and the s.s. 'Navarra,' were loaded before the 'Cassia' after her turn arrived. The 'Ingoldsby' arrived on the 19th, a.m. I cannot say when she left, unless I am allowed to refer to the turn list. The 'Ingoldsby' was put under the tip on the 21st—I believe at noon. I cannot give the particulars asked as to the arrival and departure of the 'Petunia' and 'Navarra' without referring to the turn list."

There is no other specification or explanation of the complaint. But these vessels were none of them entered for the same loading-place as the "Cassia," but for others which accidentally, although fortunately for them chanced to be sooner vacant than the Penuco. I am unable to see the relevancy of this fact. There was no undue preference given to these vessels over the "Cassia," and the delay of the "Cassia's" turn at the Penuco would have been exactly the same had they never arrived at all, and the places where they got the cargoes they wanted been unoccupied, or indeed non-existent. Would it have been relevant or pertinent to say that had it pleased the merchants' agent to order the "Cassia" to one of the numerous loading-places further up the river, but not above Luchana, she might have been loaded sooner than at the Penuco?

I see no reason to doubt the propriety and expediency of the rules prescribed and followed at this great iron-exporting port, and constituting its custom. They have existed and been observed for many years with apparently universal approval. There is not a word in the evidence condemnatory of them, and that they were exactly followed in the present case does not admit of dispute and is not disputed. The master of the "Cassia" does indeed say that he has no knowledge what the turn deposit with reference to iron ore at Bilbao means, and cannot say from what deposit the "Cassia" was loaded. This cannot be true, for he says himself—"I acquired the knowledge of the practice at Bilbao having been there on previous voyages. The "Cassia" had loaded ore on more than one occasion at Bilbao previously." The ignorance he alleges is incredible if the evidence of Mr Penlington and Mr Macleod is to be believed, and is indeed contradicted by the whole tenor of the evidence. But it would be idle to dwell on this topic, for if this witness was so stupid or non-observant as to be ignorant of the custom of a port which he had frequently been subjected to and which was familiar to all others acquainted with the port the circumstance would be really immaterial.

It would, in my opinion, be unwarrantable and unbecoming to censure the rules and customs of the port of Bilbao, or to

condemn the defenders as wrongdoers to the pursuers for submitting to them as they did, exactly as all others did, and continue to do. Then in what respect did the defenders fail in their duty to the pursuers? The only suggestion of omission on their part which I have heard is that they ought to have had the Penuco deposit inserted in the charter-party as the loading-place. But they were surely entitled to bargain, the pursuers being willing, that the loading should be at any loading-place in the river Nervion not above Luchana, which their agent should order after the arrival of the vessel. Further, the naming of Penuco in the charter-party could not even conceivably have benefited the pursuers. The suggestion that they might in that case have refused the charter-party altogether would be fanciful.

LORD RUTHERFURD CLARK—I confess I have found some difficulty in this case, but upon the whole I have come to agree with Lord Trayner's opinion, which I have read.

LORD TRAYNER—This is a claim for demurrage on account of the detention of the pursuer's vessel in loading a cargo of iron ore at Portugalete. The material facts in the case are not in dispute—the question between the parties depends rather on the construction and effect of the charter-party entered into between them, under which the cargo in question was loaded. By that charter-party it was provided that the "Cassia" should proceed to Portugalete or any other usual ore loading-place in the river Nervion and there "load in the customary manner" from the factors of the charterers a full and complete cargo of iron ore, and being so loaded should therewith proceed to Glasgow. It was further provided that the "Cassia" should "be loaded at the rate of not less than 400 tons per working day as customary (Sundays and holidays excepted) after being berthed in turn . . . and ten days on demurrage over and above the said lay-days at 16s. 8d. per hour." The ship reached Portugalete, the only loading port to which she was ordered, on 17th June 1890, on which day notice was given to the charterers that the ship was ready to receive cargo. She was not however berthed till the 27th June, when her loading commenced, which was completed on the evening of the following day. There was certainly no delay in the loading after it commenced, but the question is, whether the defenders are liable for the detention of the vessel before the loading commenced.

The pursuers say that the "Cassia" if berthed "in turn" according to the terms of the charter-party, would have been berthed on 21st June—the defenders say that the "Cassia's" turn to be berthed did not come before the 27th June when she was in fact berthed and the loading commenced. What, then, is the meaning of the provision in the charter-party that the "Cassia" was to be "berthed in turn," and what was the right of the pursuers under that provision? The natural and ordinary meaning of the words "berthed in turn" would seem to be that the vessel should be

berthed for loading in turn with other vessels, according to the order of their arrival at the port, and there is nothing in the charter-party to give these words any meaning other than their ordinary meaning. This meaning, too, was what the words imported according to the rules in force at Portugaleta "for regulating the turns of vessels loading." According to these rules "the turn for loading vessels will be taken from the official list of arrivals, each vessel being entered on the company's turn list according to the number given as from the semaphore station at Galea Point. The "Cassia's" turn according to that rule was No. 4 on the 17th of June. That turn, however, she did not get, for it is admitted by the defenders that several vessels which arrived after the 17th of June were berthed and loaded before the "Cassia" was berthed. It was the berthing and loading of these vessels which led to the detention of the "Cassia" for which the pursuers now seek demurrage. If, therefore, nothing but the terms of the charter-party, and the rule of the port to which I have referred are considered, it seems to me to be clear beyond dispute that the "Cassia" was not berthed in turn, with the result that she was detained beyond the stipulated lay-days, and that demurrage for such detention is according to the contract due to the pursuers for such detention.

The defenders, however, refer to another rule of the port as supporting their defence. It is rule 4, which provides—"No vessel will be considered as being ready to load, or available to take turn, unless she has been duly advised to load by the shipper of the mineral; . . . also that there exists a sufficient quantity of mineral in the deposit to load a full and complete cargo," &c. I think this rule has no bearing on the question before us. It provides for the shipper or charterer doing two things as necessary to any vessel taking or being available for taking her turn at a loading berth. But these two things are incumbent on every shipper as in a question with the owner whose ship has been chartered, whether expressed in the rules of a particular port or not, and any failure on the part of the charterer to observe these things, if such failure resulted in the detention of the chartered vessel, would render the charterer liable for demurrage. It is always the duty of a charterer to advise his factor or agent at the port to which the chartered ship is going that the vessel has been chartered, in order that the factor or agent may await the arrival of the vessel and procure her a loading berth. It is equally the duty of the charterer to have his cargo ready to load when the chartered ship arrives, at least to have it in such readiness that he may be able to load it within the stipulated lay-days. This rule which I have last mentioned has no reference to any duty to be performed by the ship; it is a regulation which provides as between the port authorities at this particular port and the shipper of minerals, but between them only, that unless certain conditions are complied with a ship will not be recognised as available

to take a turn for loading. If these conditions are not observed the shipper must take the consequences.

The defenders' case is, that under this rule they had advised the "Cassia" as a vessel to take ore from a certain deposit, and that this could only be loaded at certain berths—to one of which the "Cassia" was admitted in turn with vessels destined to carry ore from the same deposit, and loaded at the same berths. It appears to me, however, out of the question to say that the shipper by so advising the port authorities could alter the contract in the charter-party or limit the right which that charter-party gave to the pursuers. The charter-party makes no reference to any particular deposit or any particular berth. It stipulates that the ship shall proceed to Portugaleta and there load a cargo of iron ore for which she shall be berthed in turn—that is, berthed in turn with vessels as they arrive at Portugaleta for iron ore. If the defenders had intended to bargain for what they now contend, they should have stipulated in the charter-party for the right to berth the "Cassia" "in turn" at some particular berth, or at some berth where the ore of a particular deposit alone was shipped. They did not do so—and I think they are now attempting to add to their contract, a clause or condition to which the pursuers never agreed. The charter-party obligation on the ship was to proceed to Portugaleta and there load a cargo of iron ore on being berthed "in turn." The corresponding right of the ship was to be berthed "in turn" at any berth where iron ore was loaded at Portugaleta. There was no contract, and therefore no obligation binding the ship to wait her turn at a particular berth, or at a berth where only the ore of a particular deposit was loaded.

The charter-party, I should not omit to notice, provides that the "Cassia" is to be loaded "in the customary manner," and the defenders say that that includes the condition for which they now contend. I am satisfied it does not. The "customary manner" of loading was to be followed in loading the ore—that is, by shoot, by hand, by lighter, or whatever manner was usual and customary at Portugaleta for loading iron ore. It had nothing to do with the place of loading, and it will be observed that while the charter-party provides that the "manner" of loading is to be the customary one, the provision about being "berthed in turn" is not qualified by any reference whatever to the custom of the port. As I have said, however, the custom of the port as expressed in the rule I first referred to, would have entitled the "Cassia" to a berth on the 21st of June.

The result of my opinion is that the "Cassia" was not berthed in turn in terms of her charter-party, and that in consequence thereof demurrage was incurred for which the defenders are liable. It is not easy to fix the exact amount of the demurrage due, as the hour when the ship should have been berthed on the 21st is not well ascertained. But allowing that her turn came

at any working hour of the 21st, and seeing that the loading was not finished till 6 or 8 o'clock on the evening of the 28th, the pursuers do not overstate their claim when they state it at fifty-six hours' demurrage. This entitles them to decree for the sum of £45, 16s. 8d.

The Court pronounced this interlocutor—

“Sustain the appeal, and recal the interlocutor appealed against: Find in fact (1) that the ‘Cassia’ arrived at Portugaleta to fulfil the contract contained in the charter-party mentioned on record on 17th June 1890; (2) that intimation was given on the same day to the respondents or their agent that said ship was then ready to receive cargo; (3) that said ship was not berthed for loading cargo until the 27th June; (4) that according to the terms of said charter-party, and the custom of said port, the ‘Cassia’ would have been berthed on the 21st June if berthed in turn, and should have been berthed on that day and her loading commenced; (5) that the failure to berth the ‘Cassia’ in turn as aforesaid was a breach of said charter-party on the part of the respondents; and (6) that said failure to berth and load the ‘Cassia’ in turn as aforesaid resulted in the ‘Cassia’ being detained for a period of at least fifty-six hours beyond the lay-days specified by the charter-party: Find in law that the respondents are liable to the appellants in demurrage at the rate specified in said charter-party for the period of detention aforesaid: Therefore decern against the respondents to make payment to the appellants of the sum of £45, 16s. 8d. sterling, with interest as concluded for: Find the respondents liable in the expenses of process both in this Court and in the Sheriff Court,” &c.

Counsel for Appellants—C. S. Dickson.
Agents—J. & J. Ross, W.S.

Counsel for Respondents—Ure. Agents
—Webster, Will, & Ritchie, S.S.C.

Tuesday, October 27.

SECOND DIVISION.

[Sheriff-Substitute of
Lanarkshire.

MILLIGAN v. MUIR & COMPANY.

Reparation—Master and Servant—Insufficient Precautions for Servants' Safety—Dangerous Machine—Fencing—Presence of Foreman—Relevancy.

A lad brought an action of damages against his employers for injuries sustained by his hand slipping from a wheel which he was turning by the rim and not by the handle. He averred that he could not reach the handle because of a quantity of copper lying in

the way, that he had been ordered to work by the foreman, who by his presence had acquiesced in his manner of working, and that the wheel ought to have been fenced. He did not aver that he could not have removed the copper, or that the wheel, if properly worked, was in itself dangerous, or that it was machinery in the sense of the Factory Act. *Held* that the action was irrelevant.

Thomas Milligan, aged fifteen, residing at 66 M'Alpine Street, Anderston, Glasgow, brought an action in the Sheriff Court at Glasgow against Robert Muir & Company, coppersmiths, &c., 146 Lancefield Street, Glasgow, to recover damages at common law, and alternatively under the Employers Liability Act 1880, for injuries sustained by him while in their employment. He averred that on 19th April 1891 “he went to a machine, as instructed by his foreman, and in his full knowledge and with his approval, to assist at the working of said machine, which was being used for cutting sheets of copper. Explained that the copper-cutting machine is situated quite close to the wall. The point of the handle, which is on the rim of the wheel, is only 18 inches from the wall. On the date in question there was a considerable quantity of sheets of copper laid against the wall opposite the machine and the handle of the machine, and also on the side of the handle on which pursuer would have stood. A boy, Dunlop, who was considerably taller than pursuer, was working the handle on one side, and pursuer was placed on the other side of the handle facing him. Owing to the presence of masses of copper pursuer could not use the handle, but had to help to turn the fly-wheel by catching the rim. He worked in this manner in sight and with the knowledge of the foreman all day, and was not forbidden to do so. He had been previously working it in the same way, which was the only possible method open to pursuer, and that with foreman's knowledge. . . . Explained that the machine is driven by mechanical power by means of a heavy fly-wheel and handle attached thereto, by which it is driven by hand-power. Pursuer was assisting the lad named Dunlop in turning the fly-wheel, when his left hand, slipping off the wheel, was caught between the large spur and pinion-wheels, which are situated about 4 inches distant from the fly-wheel, and severely crushed. . . . The machine in question, where the pursuer had to work it, is of a most dangerous character. It was the duty of and incumbent on the defenders, in terms of the Factory and Workshops Act, to have the machinery fenced or protected, which could easily have been done at a trifling expense, and without interfering with the usefulness and working of the machinery. Had this reasonable precaution been adopted, the work would have been perfectly safe, and injury rendered impossible. Further, it is usual and customary for such machines to be so fenced.”

The pursuer pleaded—“(1) Pursuer having been injured as before narrated through