of Dr Cleland's estate for her suitable maintenance and education.

The petitioner's domicile was English.

Dr Cleland's trustees lodged answers, in which they maintained that the petition was incompetent, on the ground that by "the law of England a parent is not entitled, without special appointment as guardian, to receive payment of a legacy on behalf of his infant child, to give a good discharge for such legacy, or to sue as guardian of his infant child in respect of any such legacy."

The petitioner's daughter was six years of age; her share of Dr Cleland's estate amounted to over £1200.

On 13th June 1903, after hearing counsel for the petitioner—who referred to the cases of *Edmiston* v. *Miller's Trustees*, July 11, 1871, 9 Macph. 987, 8 S.L.R. 645, and *Seddon*, March 18, 1893, 20 R. 675, 30 S.L.R. 526—the Court delayed consideration of the petition to allow the petitioner to make application to the English courts to be appointed guardian to his daughter.

The petitioner took out an originating summons in the Chancery Division of the High Court of Justice in England to be appointed guardian, and offered to give an undertaking in writing that he would pay into Chancery any funds which he received from the trustees on behalf of his daughter.

The petitioner was not appointed guardian, Mr Justice Kekewich, before whom the application was heard, holding that the appointment could not be made unless it was secured to his satisfaction that the money would be paid into Court. His Lordship was ready to pronounce an order giving the trustees liberty to pay the money into Court, but before doing so he directed the petitioner's solicitors to inquire whether the trustees would act upon his order.

In reply to inquiries the trustees' agents wrote that as the trust was a Scotch trust, not subject to the orders of the English courts, they were anxious to know what discharge they would obtain to protect them against being called in question by the infant after she attained majority if they paid her money into the English Court.

The trustees being unable to undertake unconditionally to implement the order proposed by Mr Justice Kekewich, the petitioner lodged a note for special powers in the present petition, in which, after narrating the facts stated with regard to the proceedings in England, he prayed the Court "to grant the prayer of the petition in so far as it craves payment of said income, or otherwise to direct the respondents as trustees foresaid to make payment of the trust funds into the English courts."

At the calling of the note in Single Bills counsel were heard; the cases of *Edmiston* and *Seddon, cit. sup.*, were referred to for the petitioner.

At advising—

LORD JUSTICE-CLERK—The difficulty in this case arises from the fact that the petitioner is a domiciled Englishman, and by the law of England (as we are informed) is not the legal guardian of his child, and is not competent to receive money on her behalf or give a valid discharge for it until appointed guardian by the English Court. He has applied to the Court in England, but he has been told that he will not be appointed guardian unless the money is paid into the English Court. There is no suggestion that the petitioner is not a fit person to act as guardian and to receive the money—his rank and position are evidence of that—and I think that in the circumstances the reasonable and proper course is to issue an order on the trustees for payment of the annual proceeds to him for behoof of his child for a certain period, say for the next five years.

LORD YOUNG, LORD TRAYNER, and LORD MONCREIFF concurred.

The Court pronounced this interlocutor—

"Authorise and ordain the trustees of the late James Cleland to make payment to the petitioner of the portion of the free income of the trust funds to which his pupil daughter Catherine Alice Cleland Webb is entitled, and that for the period of five years from 2nd April 1903, and decern: Find the petitioner and respondents entitled to their expenses as the same may be taxed by the Auditor, to whom remit, out of the capital of the portion of the said trust estate to which the said Catherine Alice Cleland Webb is entitled, and continue the petition."

Counsel for the Petitioner—T. B. Morison. Agent—George F. Welsh, Solicitor.

Counsel for the Respondents — Tait. Agents—Forrester & Davidson, W.S.

Tuesday, January 19.

FIRST DIVISION.

[Lord Pearson, Ordinary.

ARDAN STEAMSHIP COMPANY, LIMITED, *v.* WEIR & COMPANY.

Ship—Charter-Party—No Fixed Time for Loading—Obligation to Provide Cargo—Reasonable Time—Custom of Port.

By charter-party, which did not fix any time for loading, a ship was chartered to go to the port of N and there load "in the usual and customary manner" a cargo of coals which the charterers bound themselves to ship. By the custom of the port of N, of which both parties were aware, a berth to load coal cannot be obtained until a coaling-order from the colliery is produced.

The charterers duly ordered a cargo of coals from the W colliery, and instructed their agent at N to attend to the loading of the ship. When she arrived, owing to an exceptional press of business at the W and other local colleries, she failed to obtain coaling

orders and could not therefore get a loading berth. It was proved that the course taken by the charterers in ordering a cargo from the W colliery was in the circumstances reasonable.

Held, on these facts (*rev.* judgment of Lord Pearson, Ordinary), that the charterers were not liable in damages to the shipowners for the detention of the ship owing to delay in loading, on the ground that where no definite time is fixed for loading, and both parties are aware of the conditions of the port of loading, the charterer fulfils his obligation if he takes all reasonable means to have the cargo loaded at the earliest time compatible with these conditions.

Opinion (*per* Lord Kinnear) that when a contract is made for loading or discharging a ship at a particular port the contract must be construed with reference to the conditions of that port, whether the contracting parties were or were not aware of them.

By charter-party dated 30th May 1900, entered into between Messrs Clark & Service, agents for the Ardan Steamship Company, Limited, owners of the steamship "Ardandearg," and Andrew Weir & Company, merchants in Glasgow, the "Ardandearg" was chartered "to 'proceed to such loading berth as freighters may name at Newcastle, N.S.W., and after being in loading berth as ordered,' to 'load in the usual and customary manner a full and complete cargo of Australian coals, as ordered by charterers, which they bind themselves to ship (except in the event of riot, commotion by keelmen, strike or lockout of shippers' pitmen, or any hands striking work, frosts or floods, or any other accidents or causes beyond the control of the charterers, which may delay her loading).' . . . Should steamer not arrive at the loading port and be ready to load on or before the 15th July charterers to have the option of cancelling this charter." There was no provision as to the number of days for loading.

The "Ardandearg" arrived at Newcastle on 14th July 1900. Owing, however, to difficulties in obtaining a cargo and loading-berth she was not ready to leave until the 23rd August following.

In these circumstances the Ardan Steamship Company, Limited, brought this action against Andrew Weir & Company, concluding for payment of £2170, which, as they averred, represented the loss to them by the detention of the "Ardandearg" at Newcastle for thirty-one days more than would have been necessary had the defenders duly fulfilled their contract to provide and load a cargo.

In their defences the defenders averred that they had duly ordered a cargo of coals from the Lambton Colliery in New South Wales, belonging to the Scottish Australian Mining Company, Limited, and that the delay of the "Ardandearg" arose from the impossibility of obtaining a cargo of coals owing to the congested state of the Australian coal trade at the time, a cause for which they denied that they were responsible.

The defenders also averred that had the "Ardandearg" arrived at Newcastle with all possible dispatch, under the terms of the charter-party, she would have reached the port before certain other ships which in fact arrived before her, and would then have obtained a cargo without delay.

The defenders pleaded, *inter alia*—"Any alleged delay in the loading having occurred through causes excepted in the charter-party, the defenders ought to be assoilzied."

Proof was allowed and led. The import of the evidence is fully stated in the opinions of the Lord Ordinary (PEARSON) and the Lord President, *infra*.

On 2nd April 1903 the Lord Ordinary pronounced an interlocutor by which he ordained the defenders to make payment to the pursuers of the sum of £1612.

Opinion.—"This is an action by the owners of the steamship "Ardandearg" against the charterers for damage incurred through undue delay at the port of loading.

"The charter-party was signed in Glasgow on 30th May 1900 by the charterers and by Messrs Clark & Service, as agents for owners. It stipulated that the ship (which had a carrying capacity of about 4500) should 'with all possible despatch proceed to such loading-berth as freighters may name at Newcastle, N.S.W., and after being in a loading-berth as ordered, wholly unballasted and ready to load . . . shall there load in the usual and customary manner a full and complete cargo of Australian coals as ordered by charterers, which they bind themselves to ship (except in the event of riot, commotion of keelmen, strike or lockout of shippers' pitmen, or any hands striking work, frosts or floods, or any other causes beyond the control of the charterers which may delay her loading),' and should thereafter proceed to a port of discharge in Java. It was provided that if the ship should not arrive at her loading port and be ready to load on or before 15th July the charterers should have the option of cancelling the charter. No time for loading was specified, but the charter bears 'lay-days not before 25th June.'

"The ship, which was in Japan, arrived at Newcastle, N.S.W., on 14th July ready to load. She was, however, not berthed for loading until 13th August about noon. The loading was completed by the evening of the 23rd, and she sailed for Java on the morning of 24th August. There being no lay-days for loading specified in the charter it was the duty of the defenders to perform their part of the loading within a reasonable time, that is to say, reasonable time under the circumstances then existing, even though the circumstances were unusual. To a certain extent the charterer may (as here) protect himself from demurrage claims by an exception clause specifying certain impediments for which he is not to be responsible and ending with general words which, however, are held as restricted to matters *ejusdem generis*. But even beyond the exception clause the charterer, in contesting a claim for demurrage, may found

upon all circumstances which in fact tended to delay or protract the loading unless they were within his own control or the control of those for whom he is responsible, or unless he could overcome them by the use of reasonable diligence.

"There is, however, a distinction which must be kept in view between impediments to loading properly so called and impediments to providing the stipulated cargo. The obligation to provide a cargo is separate from and anterior to the obligation to load, and corresponds to the owner's obligation to provide the ship, and it by no means follows that because the loading may be delayed for a time reasonable in the circumstances the same rule will apply to delay or failure in providing the cargo. No doubt an exception clause might be found which should extend to circumstances that impede the providing of the cargo instead of being confined to circumstances which delay the loading. In the present case the exception of strike or lockout of shippers' pitmen points in that direction, and might possibly (if it had happened) have furnished the charterers with an excuse for not providing a cargo in due course. But the clause as framed bears reference to causes which may delay the loading.

"The facts on which the general question of the defenders' liability turns are briefly these. Within ten days after the date of the charter-party the defenders entered into a contract with a mining company which owned two pits in the neighbourhood of Newcastle, N.S.W., known as the Lambton Colliery and Burwood Colliery. The mining company undertook to 'load the "Ardandearg" with a cargo of best screened Lambton coals at Newcastle, N.S.W. (5000 tons, 10 per cent. more or less) in regular colliery turn as customary, strikes, &c., excepted.' These words, 'in regular colliery turn as customary,' might be founded on by either party to the contract. They gave the defenders the right to have the ship served in regular turn, but exposed them to the risk of having to wait for her turn until ships arriving earlier were loaded. This contract was not disclosed to the pursuers, who contracted with the defenders alone. The Lambton coal which was thus specified came from the smaller pit, which had an output of about 350 tons per day. There being no stock of Lambton coal at the colliery, the best that the mining company could do was to send down their output daily by rail to the harbour, and as the appliances at the port of Newcastle admit of a ship taking in 100 tons of coal per hour, the best possible for a 4500 ton ship would be to take twelve days to load at the rate of three and a-half hours per day.

"But further, it turns out that the Dutch Government were at that time large buyers of coal for shipment to Java and had through their agents and contractors placed contracts with the colliery owners for the supply of 20,000 tons of Lambton coal. The ships chartered for the purpose were the 'Palatinia,' the 'Timor,' the 'Ardandearg,' and the 'Borneo,' and they arrived at Newcastle in that order on 10th, 12th and 14th July respectively. It would appear that the colliery took no pains to secure that the ships should arrive at proper intervals, but protected themselves by the stipulation that they should load in regular colliery turn. In the result the three first-named ships, having arrived within the space of four days, made demands on the colliery company for about 15,000 tons, which they could only supply by means of their daily output of 350 tons in the order of arrival. The 'Palatinia' was loaded by 1st August, and the 'Timor' (which took partly Burwood coal) by 10th August, both having to leave the cranes more than once to await further supplies of coal. Obviously, therefore, the cargo which the defenders had bound themselves to provide for the 'Ardandearg,' and to ship did not exist at the date of her arrival on 14th July, or of her berthing on 13th August, otherwise as unwrought coal in the mines.

"Before going to Newcastle the 'Ardandearg' put in to Sydney, and remained there for a week for purposes to which I will advert presently. While at Sydney, which is 65 miles south-west of Newcastle, the captain reported himself to Mr Pauss, the charterers' agent, who told him that there was a great crowd of ships at Newcastle, and that he would lose his turn if he did not get away at once. Mr Pauss gave him a letter to Messrs Gibbs, Bright & Company, of Newcastle, which he delivered on arrival there on Saturday afternoon, the 14th July. From them he first learned that the cargo was to consist of Lambton coal, and on inquiring at the colliery office he was informed that there would be serious delay, amounting to forty-two or forty-five days. He protested, and afterwards sent demurrage notes. It seems clear that he did his best, and that if he could have obtained a coal order there would have been no difficulty on the side of the harbour authorities in assigning him a crane berth. On arrival he entered his ship with the berthing master as ready to receive cargo, but he could not obtain a coal order—that is, a loading order—from the company because the coal was not forward. As it was, even after he got to the loading berth, on 13th August, he had to leave it twice for want of coal. During the ten days from 13th to 23rd August he was only fifty-four hours actually taking cargo aboard. It clearly appears from the evidence of the captain, and also of Mr Knowles, the berthing master, that if coal had been ready for the 'Ardandearg' there would have been no difficulty in giving her a berth even on 14th July.

"This being so, it is a fallacy on the part of the defenders to attribute the delay to the congested state of the port. There was undoubtedly a very large and exceptional demand for coal, and an exceptional accumulation of tonnage at Newcastle. This state of matters might quite well have furnished the charterers with a good defence if, for example, it had resulted in a scarcity of hands, or of railway waggons, or avail-

able crane berths or of any other of the loading appliances of the port. But that has no application here. Precisely the same thing would have happened as is here complained of had there been no ships there but the three I have named, and no colliery but the Lambton. It was not a case of waiting for berths but of waiting for cargo. And although the defenders indicate (statement 3) that but for the congestion they might have loaded the 'Ardandearg' with other Australian coal brought from some other colliery at Newcastle, and have sent her to Java with that, they could only have done so in breach of their contract with the mining company, who were protected by the clause as to 'regular colliery turn.'

"The controversy really turns on the true construction of the charter-party in view of the facts as proved. The defenders found two separate arguments on the words of the obligation to 'load in the usual and customary maner a full and complete cargo of Australian coals, as ordered by charterers.' In the first place, they say that these words import that the charterers fulfil their obligation by ordering the cargo, as distinguished from providing it, a construction which is quite inadmissible, and appears to be founded on a mere misreading of the clause. Then it is said that the expression to 'load in the usual and customary manner' includes the awaiting a regular colliery turn with the colliery from which the vessel is being loaded, and questions to that effect are being put to the witnesses, especially to those examined on commission, and receive an affirmative answer. To me it seems that the 'colliery turn' affects the time and not the manner of loading, and that all the ships at Newcastle load in the same manner when their turn comes. If so important a qualification as the 'colliery turn' is to be imported into a charter-party, I think it ought to be expressed and not introduced under the cover of an ordinary clause, which, *prima facie*, and according to its ordinary use, applies to something quite different. I say this on the assumption that the 'colliery turn' really forms part of the custom of this port, which I think very doubtful. I do not doubt it is part of the custom of the collieries, but the relative custom of the port seems merely to be (as one would expect) that the port authorities will not allow their loading appliances to be occupied by ships which are not in a position to make use of them. Then it is contended that the exception clause applies. I have already pointed out that it is limited to causes which may delay the loading, and that the failure to provide a cargo, though it results in the loading being delayed, does not *prima facie* fall within the application of the clause. Moreover, it is not an impediment *ejusdem generis* with any of those enumerated in the clause.

"I hold then (1) that the delay was caused not by the exceptional congestion of shipping, but by the failure of the defenders to perform their primary duty of providing a cargo, and that the principle upon which a reasonable time is allowed to the charterers for loading does not apply to such a case; (2) that if it does apply, the time which elapsed after the ship arrived and was tendered to the defenders as ready to load was *prima facie* unreasonable, and that it lies on the defender to show that it was reasonable in the circumstances, which he has failed to do; and (3) that there were no clauses in the charter-party which on a sound construction will excuse the defenders or the delay.

"So much for what happened after the ship's arrival at Newcastle. But the defenders go further, and say that she was so late in arriving there as to be in breach of the charter-party, and her late arrival was the cause of the delay. She arrived four days after the 'Palatinia' and two days after the 'Timor,' and she ought (it is said) to have arrived before either of them, and thus have secured the first turn. I apprehend that the defenders, in order to succeed on this ground, must show that the delay in arrival was either a breach of contract or was so unreasonable as to carry responsibility for all its consequences. It was not *prima facie* a breach of the contract, for she arrived at Newcastle before the date mentioned in the cancelling clause. Still she was bound to proceed with all possible despatch, and it is suggested that she did not do so. It is said (1) that she ought to have made better speed on the voyage from Kobe by two or three days, but was prevented by the state of her boilers; and (2) that instead of proceeding with a cargo to Sydney and spending a week there, she ought to have gone in ballast from Kobe to Newcastle, and that all necessary repairs could have been done at that port. She would thus (it is said) have saved from eight to ten days, and would at all events have easily been in front of the 'Palatina.'

"The ship was at Yokohama on her way to Kobe with cargo when she got notice of her new charter. She arrived at Kobe on 4th June, and finished her discharge on the 9th. Instead of sand ballast she took on board a ballast cargo consisting partly of rice and partly of general merchandise, but it does not appear that this delayed her departure. She finished loading late on 11th June and left Kobe on the 12th. Before leaving it was arranged that she should go to Sydney to be dry-docked, it being about the proper time for it, as she had not been dry-docked since she had been in Cardiff six or seven months before, and there being no dry dock at Newcastle. About three days out from Kobe her boilers began to leak, which affected her speed, bringing it down from ten knots to about nine knots, and she thereby lost two or three days. Her engines and boilers had been surveyed and reported on by Lloyds' surveyor at New York in February previous, who had reported that 'the engines and boilers so far as seen are in safe working condition, 'and eligible in my opinion to remain as classed without fresh record.' But it would seem that some latent defect developed after leaving Kobe, which fell within one of the exceptions contained in

the printed slip attached to the charter-party. The consequence was that she had to have her boilers repaired. This also was done at Sydney, and taking the evidence of the master and Mr Pauss together, I cannot hold it proved that it could have been done, or at least that it could have been so satisfactorily done, at Newcastle. At all events, the resolve to have this and the dry-docking done at Sydney seem to me a thing eminently within the discretion of the master, and I see no reason to doubt that his decision was reasonable and proper. The result was a week spent at Sydney, from 7th to 14th July, notwithstanding the suggestion of Mr Pauss that she could be towed round light to Newcastle and repair the boilers there, and it was during this week that the 'Palatinia' and 'Timor' arrived. On the whole my opinion is, that having regard to the master's then state of knowledge, his whole actings at and after Kobe were reasonable, and are certainly not proved to have been in breach of the contract, or to have been so unreasonable as to make the owners liable for her losing the colliery turn.

"It remains to assess the amount payable by the defenders. The claim made in the summons is for thirty-one days at £70, amounting to £2170. It appears to me that the thirty-one days is right, or at all events is not too long, being calculated on the footing that the loading should have been completed by 23rd July. The figure of £70 a day is I think excessive. On the other hand, I cannot adopt the suggestion made in the evidence that one should take into consideration the exceptional cost and delay which attended what is spoken of as the remainder of the round voyage, namely, from Java to New York and thence home. I think the choice lies between adopting the 6d. per nett register ton per day, which is stipulated in the charter-party as the demurrage on unloading, and accepting the view of the defenders founded on the accounts of the Kobe-Newcastle-Java voyage, which brings out £20, 2s. 1d., or on a more correct view, £24, 2s. 11d. per day. I do not think the latter furnishes a fair test of the worth of the ship to the owners at the time of the detention, and I prefer to take the sum mentioned in the contract, not because the rate stipulated for demurrage on discharge necessarily applies to loading also, but because it *prima facie* expresses the views of the contracting parties, and it is not displaced by any clear alternative. This brings out a sum of £52 per day, or £1612 in all.

"Among other authorities to which I was referred in argument I may mention *Little*, 1895, 22 R. 796; *Lilly*, 1895, 22 R, 278; *Gardiner*, 1893, 20 R. 414; *Stevens, Mawson & Company*, 1891, 19 R. 38; *Wyllie*, 1895, 13 R. 92; *Dall 'Orso*, 1876, 3 R. 419 (disapproved in *Tharsis Company*, 1891, 2 Q.B. 647); and also English cases of *Dobell & Company*, 1900, 1 Q.B. 526; *Lyle Shipping Company*, 1900, 2 Q.B. 638; *Richardsons*, 1898, 1 Q.B. 261; *Monsen*, 1895, 2 Q.B. 562; *Hick*, App. Cas., 1893, p. 22; *Grant & Co.*, 1884, 9 App. Cas. 470. For the defenders I was further referred to *Postlethwaite*, 1880, 5 App. Cas. 599; *Castlegate Steamship Co.*, 1892, 1 Q.B. 854; *Hulthen*, 1902, 2 K.B. 199; *Ogmore Steamship Company*, 6 Com. Cas. 104; *Tapscott*, 1872, L.R., 8 C.P. 46; *Good*, 1892, 2 Q.B. 555; *Bulman*, 1894, 1 Q.B. 179."

The defenders reclaimed, and argued—On the facts it was proved that the defenders did all that a reasonable business man could to provide a cargo. The pursuers were not entitled to object to the defenders' selection of a colliery, because that was a matter left to the defenders by the charter-party. But on the evidence no better result could have been obtained from any other colliery. If, then, it was established that the defenders had used all reasonable means to load in time they had fulfilled their obligation. They were not bound to have a cargo waiting on the quay on the chance of the arrival of the ship—*Wyllie* v. *Harrison*, October 29, 1885, 13 R. 92, 23 S.L.R. 52; *Hick* v. *Raymond* [1891], 2 Q.B. 626 [1893], App. Cas. 22; *Postlethwaite* v. *Freeland*, 1880, 5 App. Cas. 599; *Little* v. *Stevenson & Co.*, March 19, 1896, 23 R. (H.L.) 12, 33 S.L.R. 514; *Lyle Shipping Company* v. *Corporation of Cardiff* [1900], 2 Q.B. 638; *Ogmore Steamship Company*, 1901, 6 Comm. Cas. 104; *Jones* v. *Green*, 1903, 9 Comm. Cas. 20. The last-cited case was a direct decision of the Court of Appeal on a question arising out of the same charter-party at the same port and under the same circumstances. The *dicta* of Lord Trayner in *Gardiner* v. *Macfarlane, M'Crindell, & Company* ("*The Lismore*"), February 24, 1893, 20 R. 414, 30 S.L.R. 541, could not be supported in view of the opinions in the House of Lords in the cases cited above—*Dall 'Orso* v. *Mason & Co.*, February 4, 1876, 3 R. 419, 13 S.L.R. 270, was expressly disapproved in *Tharsis Sulphur and Copper Company* v. *Morel Brothers & Company* [1891], 2 Q.B. 647. Nor could the decision in *Stevens, Mawson, & Goss* v. *Macleod & Company* ("*The Cassia*"), October 29, 1891, 19 R. 38, 29 S.L.R. 30, be reconciled with the later and higher authority. Both parties must be taken to have contracted in view of the harbour conditions at Newcastle—*Harris* v. *Dreesman*, 1854, 23 L.J., Ex, 270; *Carlton Steamship Co.* v. *Castle Mail Packet Co.* [1898], App. Cas. 486; *Smith & Service* v. *Rosario Nitrate Company* [1894], 1 Q.B. 174. On the evidence the shipowners were aware of it; even if they were not, they take the risk of port conditions, if, as was undoubtedly the case here, these conditions were well known in the trade—*Hudson* v. *Ede*, L.R., 2 Q.B. 566, and L.R., 3 Q.B. 412; *King* v. *Hinde*, 12 L.R., Ir. 113. The obligation of the charterers to load "as customary," or "in the usual and customary manner," meant in the usual and customary manner of the port—*Castlegate Steamship Company* v. *Dempsey* [1892], 1 Q.B. 54 and 854; *Good & Company* v. *Isaacs* [1892], 2 Q.B. 555. The charterer's obligation to load did not commence till the ship was berthed; until then she was not an "arrived" ship—*Tapscott* v. *Balfour*, L.R., 8 C.P. 46; *Tharsis Sulphur and Copper Company* v. *Morel Brothers & Company* [1891], 2 Q.B. 647; *Bulman* v.

Fenwick & Company [1894], 1 Q.B. 179. If a shipowner desired to avoid the risk of his being detained owing to difficulties at the port of loading, he could stipulate in the charter-party that the ship must be loaded within a certain time of her arrival. To make such a stipulation would diminish his chances of obtaining a charter. The effect of the Lord Ordinary's judgment was to read such a stipulation into the charter-party though it was not there, and thus to give the shipowner the benefit of a limit without the corresponding disadvantage.

Argued for the respondents—The charterer was liable here because he had failed to have a cargo ready. That was an absolute obligation—*Stevens, Mawson, & Goss* v. *Macleod* (*The "Cassia"*), October 29, 1891, 19 R. 38, 29 S.L.R. 30; *Gardiner* v. *Macfarlane, M'Crindell, & Company* (*The "Lismore"*), February 24, 1893, 20 R. 414, 30 S.L.R. 541; *Krog & Co.* v. *Burns & Lindemann*, July 17, 1903, 40 S.L.R. 874; *Postlethwaite* v. *Freeland*, 5 App. Ca. 599, at p. 608; *Grant* v. *Coverdale*, 9 App. Ca. 470; Carver, Carriage at Sea, secs. 252, 628. The English cases cited by the reclaimers only established that the shipowner must take the risk of delays in loading due to the conditions or rules of the port, whereas the delay here was not due to want of loading facilities at Newcastle, but to the want of a cargo. Nor were cases about reasonable time in discharging a cargo in point—*e.g.*, *Wyllie* v. *Harrison, cit. supra.* The discharge of a ship was recognised as a joint duty, in the performance of which each must take the circumstances as he found them, whereas the provision of a cargo was an obligation resting on the charterer alone. A purely local custom, such as was proved to exist at Newcastle, could not be imported by implication into the charter, at least unless both parties were aware of it, which (they submitted) was not proved—*Milne* v. *Samson*, 1843, 6 D. 355; *Holman* v. *Peruvian Nitrate Company*, February 6, 1878, 5 R. 657, 15 S.L.R. 349; *Kirchner* v. *Venus*, 1859, 12 Moore, P.C.C. 361; *Lawson* v. *Burness*, 1862, 1 H. & C. 396. The English case of *Jones* v. *Green*, 1903, 9 Comm. Cas. 20, was distinguishable. It was there found in fact that the shipowner was aware of the congested state of business in the Australian collieries. In that case he might fairly be held to have taken the risk of delay arising from a cause of which he was aware, but in the present case no such knowledge had been proved. The obligation to load "in the usual and customary manner" had been often construed. It implied an obligation to load in the manner customary in the port; it did not imply any waiver of the obligation to have a cargo ready for loading —*Lamb* v. *Kaselack, Alsen, & Company*, January 31, 1882, 9 R. 482, 19 S.L.R. 336; *Lockhart* v. *Falk*, L.R., 10 Ex. 132; *Nelson* v. *Dahl*, 12 Ch, Div. 568; *Dunlop & Son* v. *Balfour, Williamson, & Company* [1892], 1 Q.B. 507; *Castlegate Steamship Company* v. *Dempsey* [1892], 1 Q.B. 854. *Monsen* v. *Macfarlane* [1895], 2 Q.B. 562, and *Breda* v. *Ellingsen*, January 15, 1901, 8 S.L.T. 288, were also cited.

An argument was also submitted on both sides as to the proper measure of damages, but this, in the view taken by the Court, it is unnecessary to report.

At advising—

LORD PRESIDENT—Two questions have been argued in this case—(1) Whether the defenders are liable in damages to the pursuers as owners of the steamship "Ardandearg" in respect of undue detention of that vessel by the defenders as the charterers of her, at Newcastle, N.S.W., in July and August 1900, and (2) If liability for damages is established against the defenders, what amount should be awarded to the pursuers in name of damages.

The pursuers were in May 1900 owners of the steamship "Ardandearg," which has a net registered tonnage of 2090 tons and a dead-weight carrying capacity of about 4500 tons.

By charter-party entered into in Glasgow on 30th May 1900 by the agents for the pursuers and the defenders it was stipulated that the "Ardandearg" should, "with all possible despatch proceed to such loading-berth as freighters may name at Newcastle, N.S.W., and after being in loading-berth as ordered, wholly unballasted and ready to load, should there load, in the usual and customary manner, a full and complete cargo of Australian coals as ordered by charterers, which they bind themselves to ship (except in the event of riot, commotion by keelmen, strike or lockout of shippers' pitmen, or any hands striking work, frosts or floods, or any other causes beyond the control of the charterers, which may delay her loading)."

The "Ardandearg" was ordered from Kobe to Newcastle, N.S.W., to fulfil this charter. She shipped a cargo of rice at Kobe, described by the pursuers as a ballast cargo, and she next went to Sydney, where she unloaded it, remaining there for about a week. She then proceeded to Newcastle, N.S.W., and arrived there on or about 14th July 1900. She was then ready to load cargo, but in consequence of the defenders being unable to obtain an adequate supply of coal from the collieries she was detained at Newcastle until 23rd August 1900, when she completed her loading. If coal had been obtainable at Newcastle she could have loaded it and proceeded on her voyage about a month earlier than the date on which she actually sailed.

On or about 9th June 1900 the defenders entered into a contract with the Scottish Australian Mining Company, Limited, under which that company agreed "to load the 'Ardandearg' with a cargo of best screened Lambton coals at Newcastle, N.S.W. (5000 tons, 10 per cent., more or less), in regular colliery turn as customary, strikes, &c., excepted." It does not appear from the evidence that the defenders could have entered into a contract with any other company or person under which they could have obtained quicker despatch in providing a cargo than that which they received from the Scottish Australian Mining Company, Limited, under the contract just mentioned. None of the collieries in the

locality can produce more than 1000 or 1100 tons per day, and a ship's turn for loading is subject to her obtaining a coaling order from a colliery. I therefore think, that at all events *prima facie*, the charterers did not do anything unreasonable as charterers in ordering the coal from the Lambton Colliery.

As soon as this contract was entered into instructions were cabled by the defenders to the mining company's office at Newcastle, N.S.W., in regard to it, and the probable arrival of the "Ardandearg," so that the arrangements for loading her might be advanced as far as possible.

Under the charter-party the "Ardandearg" was, as already stated, bound to proceed to Newcastle, N.S.W., "with all possible dispatch," and the defenders allege that she did not do so, having, as already mentioned, loaded a cargo of rice at Kobe and discharged it at Sydney, where she remained for a week before she proceeded to Newcastle. The defenders maintain that but for this delay, and the further delay occasioned by the leaky condition of the "Ardandearg's" boilers, she would have obtained a loading berth at Newcastle, N.S.W., and been loaded much sooner than she actually was, there having been when she arrived at Newcastle a large number of vessels there waiting for cargoes of coal, which prevented her from getting a loading berth and a supply of coal as soon as she would otherwise have done.

In particular, two steamers, the "Palatinia" and the "Timor," which were to load from the Lambton colliery, arrived a day or two before the "Ardandearg." The captain of the "Ardandearg" seems to have been warned that he should get to Newcastle before the "Timor." The defenders allege, and there appears to me to be good ground for the allegation, that if the "Ardandearg's" boilers had been in proper condition, and she had not gone to Sydney with her ballast cargo, and remained there for about a week, or if she had used greater dispatch in proceeding to Newcastle, N.S.W., the two vessels above mentioned (the "Palatinia" and the "Timor"), which were to load from the colliery from which she was to receive her cargo, would not have prevented her, as they did, from getting a loading berth until after they were loaded, she in the meantime having to wait her turn in accordance with the custom of the port and the collieries. Upon these facts there appears to me to be ground for maintaining that the "Ardandearg" did not duly fulfil her charter obligations, but I do not think it necessary to express an opinion upon this point, in view of the conclusion which I have reached upon the question whether the charterers duly fulfilled their obligation to provide a cargo.

The loading of the "Ardandearg" was begun on 13th August, and was completed on the evening of the 23rd, and she sailed for Java on the morning of the 24th August.

The practice at Newcastle is to supply coals to steamships upon a combined turn of arrival at the port and colliery turn, or in other words to load them in order of arrival as and when they obtain a loading order from the colliery.

As no days for loading were specified in the "Ardandearg's" charter it was the duty of the defenders, the charterers, to load her as speedily as was reasonably practicable, and what time was reasonably practicable necessarily depended upon the condition of things existing at and about Newcastle, N.S.W., and in particular upon the number of vessels waiting to be loaded and the supply of coal obtainable from the collieries.

The Lord Ordinary says in his judgment (I think correctly) that the obligation to provide a cargo is separate from and anterior to the obligation to load, corresponding to the obligation of the shipowners to provide the ship, as also that it does not follow that because the loading may be delayed for a time, reasonable in the circumstances, the same rule applies to delay in providing or failure to provide a cargo. While this appears to me to be true as a general proposition, I think it will be found that in the present case the two things depended very much upon the same circumstances and considerations.

The equipments at the port enabled about 100 tons of coal to be put on board of a ship per hour, and as only about 350 tons could be obtained from the colliery per day, a vessel of the carrying capacity of the "Ardandearg," required about twelve days to load. It further appears that at the time in question the Dutch Government was purchasing large quantities of coal from the Lambton Colliery, having arranged for a supply of about 20,000 tons of that coal, to remove which (or part of which) the "Palatinia" and "Timor," as well as the "Ardandearg" and the "Borneo" were chartered, and they arrived at Newcastle, N.S.W., in the order mentioned, on the 10th, 12th, and 14th of July respectively.

The "Ardandearg" had, as already stated, gone to Sydney on her way from Kobe to Newcastle, N.S.W., and if she had not gone there, and if her boilers had not been leaking, as they were, she would apparently have arrived at Newcastle before the "Palatinia" and "Timor," and consequently been in a position to load before these vessels, instead of their having from their priority of arrival acquired the right to load, as they did load, before her. If the "Ardandearg" could have obtained an order for a crane berth and a supply of coal, or in other words got the usual colliery turn, she could have been loaded very speedily and the present question would not have arisen, but a loading order and a loading berth could not be obtained earlier than they were obtained owing to her late arrival, which was due, at all events in part, to the circumstances already mentioned. Even after the "Ardandearg" obtained a loading order and a loading berth she had to leave the berth more than once in consequence of an adequate supply of coal not coming down from the colliery.

I concur with the Lord Ordinary in think-

ing that it is established by the evidence that if coal had been in readiness for the "Ardandearg" she could have obtained a berth as late as 14th July.

The Lord Ordinary, however has held (1) That the delay of the "Ardandearg" at Newcastle was caused not by the exceptional congestion of shipping or the limited output of the collieries but by the failure of the defenders to perform their primary duty of providing a cargo, and that the principle upon which a reasonable time is allowed to the charterers of a vessel for loading does not apply to such a case as this. (2) That if it does apply the time which elapsed after the "Ardandearg" arrived at Newcastle and was tendered to the defenders as ready to load was *prima facie* unreasonable, and that it lies upon the defenders to show that it was reasonable in the circumstances, which the Lord Ordinary thinks that they have failed to do; and (3) That there are no clauses in the charter-party which on a sound construction excuse the defenders for the delay.

The first of these points seems to me to be the most important in the case. I think that the pursuers are well founded in the distinction which they take between the obligation to load and the prior or antecedent obligation to provide a cargo, as also that the duty of a charterer to provide a cargo is *prima facie* absolute. It appears to me, however, while fully recognising the doctrine that the obligation of a charterer to provide a cargo is *prima facie* absolute, that there were in the present case circumstances, known to both parties, which prevented the obligation from possessing that absolute character.

I think that where parties contract with reference to a state of things known to both of them, and which in the knowledge of both renders it uncertain whether a cargo can be provided by a particular day, the party who is liable to fulfil the obligation may not be answerable in damages for delay if he did all that could have been done towards obtaining a cargo. Mr Robert Clark of the firm of Clark & Service, the managing owners of the "Ardandearg," who chartered her for the voyage out of which the present claim arises, knew about the New South Wales Collieries, as he had had experience of chartering sailing ships, though not steamers, to load coal from these collieries, and sailing ships are to his knowledge loaded by crane in the same ways as steamers. The charter-party also shows that the pursuers were aware that the cargo was to be "a full and complete cargo of Australian coals." The trade was a very large one, there having been in July 1900 180,000 tons of shipping tonnage awaiting cargoes of coal, and the conditions under which the coal trade was carried on at Newcastle, N.S.W., seem to have been perfectly well known.

The case of *Little* v. *Stevenson & Co.*, 23 R. (H.L.) 12, appears to me to have an important bearing on this question. In that case the Lord Chancellor said, with reference to an argument very similar to that submitted to us by the pursuers' counsel in the present case—"What is suggested is this, not that the provision in respect of demurrage ever in fact arose, because it certainly did not arise, but that inasmuch as there was a default on the part of the shippers to provide coal, which default by a series of causes prevented the vessel obtaining her berth, therefore the default was in the shippers, and accordingly the shipowners have made good this claim, . . . and the proposition of law is that a merchant must be always ready with his cargo at all times and in all places, and under all circumstances, to take advantage of any such contingency if it should arise. There is not a fragment of authority for any such proposition." I may also refer to the dictum of Lord Justice Rigby in the case of the *Carlton Steamship Company* v. *The Castle Mail Packets Company* [1898] A.C. 486, where he said "I do not think that a delay which arises from a contingency the probability of which must have been perfectly well known to and contemplated by the shipowners when they entered into the charter-party can be considered unreasonable."

It is true that clauses protecting the charterers usually apply to things which delay the actual loading, not to difficulties in obtaining the cargo and getting it brought to the place of loading, but these difficulties also may be provided against by appropriate words—*Hudson* v. *Ede*, L.R. 2 Q.B. 566, L.R. 3 Q.B. 412, and looking to the known course of trade, which was the basis of the contract to which the present question relates, I think that in this case the charterers fulfilled their duty by getting the coal down from the collieries as speedily as it could be sent. In *Hudson* v. *Ede*, from the circumstances of the port cargo had to be brought down the river after the arrival of the ship, and it was held that the words "detention by ice," occurring in the charter, must be construed to extend to detention by ice of the lighters coming down the river to load the ship, and that consequently the shipowner could not recover demurrage or damages for the time during which the river above Sulinah was frozen. Another point decided in this case was that the ignorance of the shipower as to the circumstances of the port did not affect the question. The present case is *a fortiori* of *Hudson* v. *Ede*, as the shipowners in the present case knew the conditions existing at the port of loading.

I may refer to three cases relating to charters for the loading of coal at and the conveyance of it by sea from Newcastle, N.S.W., decided by Mr Justice Kennedy on 2nd December 1902, viz., *R. & D. Innes, Limited*, v. *F. Green & Company, The Barque "Tuilpue," Limited*, v. *J. & A. Brown*, and *R. W. Leyland & Company* v. *Anthony Gibbs, Sons, & Company*, and to the judgments of the Court of Appeal affirming his Lordship's decisions in these cases pronounced on 27th July 1903 (9 Comm. Cases, 20). The judgments in both Courts were in favour of the

charterers for reasons similar to those now given. For the reasons now stated I am of opinion that the Lord Ordinary's judgment should be recalled and that the defenders should be assoilzied.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR—I am of the same opinion. The principle by which the decision must be ruled is established by many cases, and particularly, to take the most authoritative, by *Hick* [1893], A.C. 22; and *Postlethwaite*, 5 A.C. 599, in the House of Lords. The doctrine may be stated in two propositions—First, that when by the terms of a charter-party there is no fixed period of time within which the charterer has agreed to load or discharge a ship, the law implies an agreement on his part to load or discharge within a reasonable time; and secondly, that what is meant by a reasonable time is a time that is reasonable under the actual circumstances existing when the agreement must be performed, provided that such circumstances, in so far as they involve delay, are not caused or contributed to by the charterer. The doctrine is not a novel one nor confined to contracts of affreightment. Lord Watson points out in *Hick* v. *Raymond & Reid* that it is as old as the law of contract, and adds—"The rule is of general application, and is not confined to contracts for the carriage of goods by sea. In the case of other contracts the condition has been frequently interpreted, and has been invariably held to mean that a party on whom it is incumbent to duly fulfil his obligation, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably, is not in breach of contract." To apply the doctrine correctly to the case in hand we must consider the precise terms of the charter-party so far as bearing on the obligation to load, and the particular stage of the process of loading at which the delay complained of is said to have occurred. I do not read the contract, because its terms have been fully explained by your Lordship, but what is important to observe is that no time for the loading is fixed, and secondly that if the ship should not arrive at her loading port and be ready to load on or before 15th July the charterer should have the option of cancelling the contract. But the terms in which the obligation to load are expressed require consideration. It is stipulated that the ship shall "with all possible despatch proceed to such loading berth as freighters may name at Newcastle, N.S.W., and after being in a loading berth as ordered, wholly unballasted and ready to load, . . . shall there load in the usual and customary manner a full and complete cargo of Australian coals as ordered by charterers, which they bind themselves to ship (except in the event of riot, commotion of keelman, strike or lock-out of shippers' pitmen, or any hands striking work, frosts, or floods, or any other causes beyond the control of the charterers which may delay her loading)." Taken literally this language imports that the operation of loading is to be executed by the shipowners. But the true meaning of such clauses, is explained by Lord Selborne in *Grant* v. *Coverdale*, 9 A.C. 470. Both parties have to concur in the operation of loading. The ship is to proceed to the loading berth named and load the cargo. But the charterer must have the cargo there to be loaded, and must tender it to be put on board. And accordingly the charter, while it requires the ship to load a cargo of coals as ordered by the charterers, goes on to say while they—that is the charterers—bind themselves to ship subject to certain conditions which will relieve them of the consequences of a failure from causes beyond their control. The charter-party thus recognises the distinct stages of the process of loading, the provision of the cargo (which is the charterers' part exclusively, and includes, as Lord Selborne puts it—"All those things which are so essential to the operation of loading that they are conditions *sine quibus non* to that operation)," and the actual operation of putting the cargo on board. It is necessary to mark the distinction in order to refer the various qualifying conditions to the parts of the process on which they are respectively intended to relate, and I think it is clear that the condition as to the usual and customary manner of loading is applicable to the operation of putting cargo on board of a ship when the ship has got into a loading berth, and, on the other hand, that the exemption in the event of riots, or other causes beyond the control of the charterers applies to the first part of the process, which belongs exclusively to the charterers, and is wide enough to cover causes operating at the colliery at which the coals are being got.

This being the contract, what is the default of which the pursuers complain? There is no complaint, so far as I understand, of delay in the actual process of loading after the ship had got her berth, and indeed the averment of fault in the third article of the condescendence assumes that ten days would be a reasonable time for loading, and the loading in fact began on the 13th and finished on the 21st of August. The ground of complaint is that the ship after she came into port was delayed an unreasonable time before she got into her berth as ordered, and the cause of delay is beyond all dispute that according to the settled and established practice of the port the ship cannot have a berth until she has a colliery order enabling her to take her load from the colliery. The colliery orders are given in regular turn, and the ships coming to load have therefore to combine an order for a berth on arrival and a colliery order in turn before they can obtain admission to a berth, and it is said that the "Ardandearg" was delayed because of the defenders' undue delay to enable her to procure a berth by enabling her to get a coaling order from the colliery in good time. I

think it clear upon the evidence that the rule of requiring ships to take their regular turn to obtain a coaling order as a condition of obtaining a berth is settled and established by the practice of the port, over which the defenders had no control whatever, and which they had no power to displace for the benefit of this particular ship. I think further that as matter of fact it is clear enough that if the ship had arrived somewhat earlier she would not have been exposed to the disadvantage of the delay complained of, because the reason why she was kept so long before she could get to her berth was simply that two ships, the "Palatinia" and the "Timor," had come in immediately before her, and if she had made greater despatch upon the voyage there is no doubt she might easily have been in before them. But then I agree with the Lord Ordinary that while it is quite true that she might have got in sooner, and therefore that the direct cause of failure to get an earlier berth was the failure to arrive at an earlier date than she did arrive, she is not chargeable with any breach of contract for the delay. She came in within her contract; the cancelling day was on 15th July and she came in on 14th July. Therefore she duly performed her contract, and whatever inconvenience might have resulted from her delay I agree with the Lord Ordinary that the delay within her contract could not excuse the defenders' delay if it were shown that they were chargeable with undue delay in the performance of their part of the contract.

Therefore the whole question seems to me to be whether the defenders' delay, if they did delay, to procure a berth was due to any negligence or unreasonable failure on their part. Now, for the reason I have given I think it was not, because it was caused by regulations of the port over which they had no kind of control. The Lord Ordinary says that the defenders are in fault, because the obligation to supply a cargo is absolute and anterior to the obligation to load, and it was argued, in reliance on *dicta* in *Gardiner* v. *Macfarlane*, 20 R. 414, that this absolute obligation to supply a cargo is something outside and prior to the charter-party altogether, and that no qualifications in the charter-party can therefore affect it. I have some difficulty in following the reasoning upon which this distinction is supposed to rest. The only contract between the parties so far as I know is the charter-party, and if the obligation to supply a cargo is not to be found there, there is no other place in which it can be found in the present process, and the charter-party expresses in terms the obligation of the shipper to ship, subject to conditions. It is quite true that if it were not so expressed the engagement by the charterers of a ship to proceed to a certain port and there load a certain cargo would necessarily imply an undertaking to supply a cargo; and it may be that if such obligation were unqualified by any express terms and were construed without reference to time, it might be treated as absolute, so that inability to procure a cargo would be no answer to breach of contract. But we are not required to consider any question of that kind. There is no complaint of absolute breach of contract to supply a cargo, because the stipulated cargo was in fact supplied. But the complaint is of undue delay in bringing forward the cargo; and that resolves into a question of time as to which there can be no absolute obligation unless it is expressed. I do not know that the doctrine as to the absolute character of the obligation to furnish a cargo can be put higher than it is put by Lord Trayner in *Gardiner* v. *Macfarlane*, 20 R. 414, where his Lordship says that "the obligation is absolute to supply a cargo within a certain fixed or within a reasonable time." Now, in the present case the time is not specified, and therefore the obligation to supply the cargo is duly performed if it is provided within a reasonable time. The Lord Ordinary holds that the defenders are to blame because they had not a cargo awaiting the arrival of the ship, and the doctrine seems to be that a merchant must be always ready with his cargo, to take advantage of the arrival of the ship, the date of whose arrival he cannot exactly foresee. As a general doctrine this was peremptorily rejected by the House of Lords in *Little* v. *Stevenson & Company*, 23 R., H.L., 12, and therefore if that be the ground of his Lordship's judgment it appears to be contrary to the law established by that decision. But then the application of it to the particular case appears to me to be excluded by the conditions of the port, because it does not appear that there were any means of storage or that a merchant could do anything to bring up his cargo of coals from the colliery otherwise than in turn with other shippers, when his ship arrived and he was ready to intimate to the colliery that she was prepared to load. The delay was therefore in my opinion beyond the control of the defenders.

The Lord Ordinary is of opinion, however, that the custom of the port cannot qualify what he considers to be in itself an absolute or at all events a primary condition on the defender to load the cargo. I agree with the Lord Ordinary that the reference to the usual and customary manner of loading applies to the actual operation of putting the goods and cargo on board, and therefore does not aid the defenders in their contention. But then that is a condition which, whether expressed or not, is necessarily implied when it is stipulated or implied that the cargo is to be loaded within a reasonable time, because nothing could be more unreasonable than to require of the merchant that he should do what the settled and established practice of the port will not allow him to do. Accordingly, when it is said that the loading is to be completed within a time which is reasonable under the circumstances which are applicable to the particular operation in question, it follows that the question of reasonableness must be determined in relation to what are the

regulations and customs of the port. Therefore I think the observations of Baron Parke, afterwards Lord Wensleydale, in *Harris* v. *Dreesman*, 23 L.J., Exch. 210, are exceedingly apposite. That was an appeal from the judgment of a County Court Judge, who had not allowed evidence as to the custom of the port. The particular circumstances under which the case arose are not similar to the present case, because there was a delay in consequence of a breaking down of the engines of the colliery; but it was argued that according to the custom of the port ships had to load from the colliery in regular turn, and the County Court Judge held that that was an irrelevant consideration and would not allow it to be proved. But in the Court of Exchequer Baron Alderson said, "Supposing the contract to be that the vessel was to be loaded within a reasonable time, would it not be the result that she was loaded in reasonable time if she was loaded in her regular turn;" and Baron Parke said that "the contract being to load within reasonable time, under the circumstances it was clear the defendants might give evidence of the usage of the port as to the order of loading." I think the same doctrine is to be found in the case of *Carlton Steamship Company* v. *Castle Mail Packet Company*, [1898] A.C. 486, to which your Lordship referred, because the judgment, as I understand it, involved the principle which I think conclusive of the present case, that if there is an unavoidable necessity that something should be done in order that there should be a loading or discharge at the place agreed on, the parties must be held to have contracted with reference to the conditions of such port of loading or discharge as the case may be.

I think also upon the evidence the practice of loading at this port was such as to make the carrying of coals from the colliery to the ship part of the traffic of the port. There was no means of storage, and each ship as she came in had her cargo brought up by railway from the colliery to the ship or to the cranes by which the ship was to be loaded. That appears to me to be very much the same kind of case as *Hudson* v. *Ede*, L.R., 3 Q.B. 412, because what happened there was that a ship was delayed by ice, not by ice in the port of loading which must render access to the ships by lighters impossible, but by obstructions between that port and another port 110 miles higher up the Danube by reason of the river being frozen over. There were no storehouses available for the merchants at the port of loading, and the practice of the port was that cargoes of grain were kept at ports higher up and brought down by steamers from these ports to the loading ports. It was held that the freezing of the river 110 miles above the port of loading was an obstruction for which the trader was not responsible, because it was an unavoidable necessity that his cargo be brought down in that way and in that way only, and that being the only and necessary means of loading it must be held that the parties contracted with reference to the practice so established. It is said that the practice at the port of Newcastle was not known to the pursuers, and therefore that the doctrine upon which I have indicated my opinion that the defenders are not responsible for delay cannot be applied to the case. I am not satisfied that it is proved that the defenders knew nothing of the custom of the port of Newcastle, because the evidence of Mr Clark shows that he at all events had had opportunity of knowing, having traded with that port before. But it appears to me that, whatever be their actual knowledge, if people make conditions with reference to loading or discharging a ship at a particular port such contract must be construed with reference to the customs of that port. If the defenders did not know what the special custom in loading coals at Newcastle might be they at all events knew there must be some custom, and they either contracted intelligently, to be bound by the particular custom which they knew it by, or else they contracted to take the risk of what the custom might be. I think with your Lordship again that *Hudson* v. *Ede* is directly in point, for in that case a shipowner was shown to be absolutely ignorant of the custom of the ports on the Danube, but it was held by the Court that that made no difference in the construction of the contract betwixt him and the trader.

For these reasons I agree with your Lordship that the interlocutor of the Lord Ordinary must be recalled. But I desire to add that I think the case of *R. & D. Jones* v. *Green & Company* (9 Comm. Cases 20), decided by Kennedy, J., and upheld by the Court of Appeal, is a valuable authority and entirely in point. I am aware the learned Judge distinguished that case from the present, but then the circumstances of the present case were not before the Court, and all that is meant, as I read the opinions of the learned Judges, in making the distinction is that, taking the case as presented by the Lord Ordinary's judgment, they take it as a different case from *Jones*. Now, I agree that as so presented it is different, but then with your Lordship I do not agree with the Lord Ordinary, and therefore I think that *Jones* v. *Green* is directly in point.

LORD M'LAREN—I should wish to make one observation upon a fact in the case which is no doubt implied in the opinions of your Lordship in the chair and Lord Kinnear. I am not quite sure if it was so prominently brought forward as it would in my judgment call for. I mean this—if it had been made to appear that the delay in loading the cargo was in any way attributable to a delay on the part of the shipper in giving his order to the colliery company, then a very different case would have been presented for our decision. But it is perfectly plain that the delay was not attributable to this cause, and that the failure to send on waggons in time was not due to the fact that other merchants had orders in the order-book of date prior to

this order, and which were therefore entitled to precedence, but was wholly and solely due to the custom that when the loading of a ship has once been begun it must go on till it is finished before another vessel is allowed to take its turn at the berth, and, as has been pointed out, there were two vessels not all loaded, and therefore the "Ardandearg" had to wait till the loading of these vessels was completed. I am glad to be able to concur in all that has fallen from Lord Kinnear, as well as your Lordship in the chair.

The Court recalled the interlocutor of the Lord Ordinary, and assoilzied the defenders from the conclusions of the action.

Counsel for the Pursuers and Respondents—Shaw, K.C.—James Clark. Agents —J. & J. Ross, W.S.

Counsel for the Defenders and Reclaimers —Ure, K.C.—Hunter. Agent—Campbell Faill, S.S.C.

Thursday, January 21.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

MONTGOMERIE & COMPANY *v.* YOUNG BROTHERS.

Process — Reclaiming-Note — Printing — Amendment of Record—Amendment Put on after Date of Interlocutor Reclaimed against — Court of Session Act 1825 (*Judicature Act*) (6 *Geo. IV. c.* 120), *sec.* 18 —*A.S., 11th July* 1828, *sec.* 77.

In an action concluding for interdict an interlocutor was pronounced whereby the Lord Ordinary granted interdict, but in less general terms than those of the conclusions of the summons, and allowed the pursuers "to amend the conclusions of the summons as proposed at the bar," opened up the record, and the amendment having been made re-closed the record. Three days after the interlocutor was pronounced an amendment was put on the process copy of the closed record by the pursuers restricting the interdict concluded for to the terms in which it had been granted. The defenders reclaimed. In the record appended to the reclaiming-note the summons was printed as originally framed. The pursuers objected to the competency of the reclaiming-note in respect that the amendment put on the summons was not printed. Objection *repelled*, in respect that when the interlocutor reclaimed against was pronounced no amendment had been made.

Process—Interdict—Master and Servant—Infringement of Rights of Others by Acts of Servant in Disobedience to Master's Instructions.

Question — Whether interdict the appropriate remedy against a master whose servants, disobeying his orders, infringe the rights of others.

This was an action at the instance of Montgomerie & Company, Limited, malt extract manufacturers, Partick, Glasgow, against Young Brothers, Oakfield Hygienic Bakery, 114 Pleasance, Edinburgh, in which the pursuers sought to have the defenders interdicted from "advertising or representing themselves as bakers or sellers of Bermaline bread, or selling loaves of bread under said name *which have not been manufactured by the pursuers, or put on the market by the pursuers or with their authority.*" The words in italics were added by way of amendment on the process copy of the closed record as stated *infra.*

The pursuers were owners of a registered trade-mark for the use of the word "Bermaline" applied to an extract of malt manufactured by them, which was a distinctive ingredient of certain bread also manufactured by them and sold under the name of "Bermaline Bread."

The pursuers averred—"(Cond. 3) From 28th June 1897 the defenders held an agency for the manufacture and sale of Bermaline bread, and were supplied by the pursuers and their predecessors with Bermaline extract for such manufacture. On 22nd November 1902 they wrote to the pursuers, requesting the removal from their shop windows of all Bermaline advertisements. But the pursuers have recently become aware that for a considerable time prior to that date the defenders have been in the habit of wilfully and fraudulently, in their various shops, advertising for sale and selling as Bermaline bread bread not manufactured with Bermaline malt extract."

A proof was led, the nature of which is sufficiently disclosed for the purposes of this report in the opinion of the Lord Ordinary and in those delivered by the Judges in the Inner House upon the merits.

On 17th July 1903 the Lord Ordinary (KYLLACHY) pronounced an interlocutor in the following terms:—"The Lord Ordinary allows the pursuers to amend the conclusions of the summons as proposed at the bar: Opens up the record for that purpose, and said amendment having been made, re-closes the record; and having considered the whole cause, interdicts, prohibits, and discharges the defenders from selling loaves of bread under the name of Bermaline bread which have not been manufactured by the pursuers or put on the market by the pursuers or with their authority: Decerns against the defenders for payment to the pursuers of the sum of 5s in full of the conclusion for damages."

Opinion.—"In this case I have not been able to resist the conclusion that during the period from 8th to 22nd November last there was sold at the defenders' shops to various persons loaves of bread which were described and sold as Bermaline bread, but which were not in fact Bermaline bread — that is to say, were not bread manufactured and put on the market by the pursuers or with their authority. There is a great conflict of evidence—a conflict perhaps extending even to the question