ought to be pursued, they were free to allow things to proceed as usual till the doubt that existed should the one way or the other be resolved.

The result is that, as I think, the appellant, the trustee for the bankrupt's creditors, is entitled to the judgment of the Court.

Lord Rutherfurd Clark—I am of the same opinion. It is clear that the sale was one of honest faith. Then the sale was followed by delivery, and I see no other question in the case.

The Court pronounced this interlocutor:—

"Find that the flax in question was purchased by Messrs O. G. Miller & Son on the 11th day of July 1884 on the terms expressed in the sale-note: Find that the goods were delivered on the morning of the 4th day of August, and were partly used for the purpose of manufacture on that day: Find that on Sunday the 3rd of August 1884 Messrs Miller became doubtful of their own solvency, and on Monday the 4th had an interview with their agent Mr Thornton, and resolved to stop payment on the 5th: Find that there was no suspensive condition attached to the contract of sale in question, and that there was no fraud in the acceptance of delivery on the part of the buyers: Find in law that in these circumstances the property of the goods passed to Messrs O. G. Miller & Son, and that the pursuers are not entitled to restitution of the same: Therefore sustain the appeal, recal the interlocutor of the Sheriff-Substitute of 13th January last: Assoilzie the defenders from the conclusions of the action: Find them entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for Pursuers (Respondents)—Pearson—Dickson. Agents—Henderson & Clark, W.S.

Counsel for Defender (Appellant)—Mackintosh—J. P. B. Robertson. Agent—J. Smith Clark, S.S.C.

Wednesday, June 3.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

J. & A. PRICE *v.* THOMSON & GRAY, *et e contra.*

Shipping Law—Demurrage—Obligation to Take Delivery and Supply Ballast.

The charterers of a vessel engaged to take delivery of cargo (which was to be unloaded under an agreement with the owners) "as fast as ship could put it out," and to supply and put on board ballast. The vessel was detained beyond the lay-days by delay on the part of the charterers to take delivery as fast as the ship could put it out, and by their not supplying ballast to keep the ship in trim during the discharging. *Held* that although no protest had been taken they were liable to the owners in demurrage for the number of days which the ship was detained over the lay-days, and that in this question Sundays, holidays, and days when the weather prevented unloading ought not to be computed.

In December 1881 Messrs J. & A. Price, merchants in Melbourne, Victoria, chartered the ship "Blair Drummond" of Glasgow from her owners, Messrs Thomson & Gray, shipowners there, to proceed to Melbourne, and load there, or at Corio Bay, a full and complete cargo of wheat or flour in bags, and being loaded to proceed to a port in the United Kingdom, at a freight stipulated at so much per ton.

In April 1882, when the vessel was lying at Geelong partly loaded with the stipulated cargo, it was found by the charterers that, in consequence of a great rise in the price of grain there, a cargo could only be sent home at a loss. They therefore entered into negotiations with the owners to have the charter-party cancelled, which after some delay were brought to an end on certain terms, on fulfilment of which the owners were to instruct the master to give delivery to holders of the bill of lading or charterers of the cargo then on board at Geelong. Among the stipulations were:—"(1) Payment to the owners of the sum of £3500." "(3) That delivery of cargo shall be taken from ship as fast as ship can put it out." "(4) If delivery required in Melbourne, then the charterers to supply and put on board ballast, free of cost to ship, in consideration of such delivery."

In fulfilment of this arrangement the "Blair Drummond" proceeded from Geelong to Melbourne, and there discharged the cargo she had on board, and received ballast instead, with which she sailed from Melbourne for Calcutta.

On 21st May 1883 J. & A. Price, and Wincott, Cooper, & Co., merchants in London, as their mandatories, raised an action in the Court of Session against Thomson & Gray for payment of certain sums amounting together to £607, 16s. 11d., which they alleged to be due to them under the arrangement above narrated.

In defence Thomson & Gray, *inter alia*, advanced a counter claim for a sum of £507, 10s. which they alleged to be due to them for demurrage by undue detention of the ship by J. & A. Price & Co. at Melbourne, and also for another sum of £330, 15s. for certain other claims under the arrangement. Thomson & Gray also on 29th June 1883 raised a counter action in the Court of Session for £160, 15s. 7d., being the balance of their claim for £738, 5s. after deducting £577, 9s. 5d., being the amount of disbursements made by J. & A. Price as their agents at Melbourne on behalf of the vessel.

The averments of Thomson & Gray relative to the claim for demurrage were the same in both actions, and were to the following effect:—It was a condition of cancelling the charter-party that re-delivery of the cargo was to be taken as fast as the ship could put it out. They were prepared to re-deliver on 28th April, and the cargo could then have been discharged by the 8th of May, whereas it was not fully discharged till 7th June. The delay was due to J. & A. Price, in consequence of their having caused the ship to be taken from Geelong to Melbourne, where after some delay they began to take delivery. Even allowing for the removal from Geelong to Melbourne, the delivery ought at furthest to have been completed

by 17th May. The detention was thus longer than it should have been by twenty-one days, and demurrage for this period at £24, 3s., being at the rate of 4d. per ton per day, amounted to the sum of £507, 10s. claimed by them on this head, which they averred to be the usual and customary demurrage or damages for detention of a vessel of the size and class of the "Blair Drummond" where not specially agreed on.

J. & A. Price averred that they had fulfilled their part of the agreement for cancelling the charter-party, and had caused no delay in receiving the cargo.

The Lord Ordinary conjoined the actions and allowed a proof.

Thomas Guthrie, who was then master of the "Blair Drummond," deponed—In consequence of instructions from Messrs Price he left Geelong on 5th May, and arrived at Sandridge Old Pier at Melbourne on the 6th. By these instructions the number of lay-days for discharge were to be eighteen weather working-days, reckoning from the time the ship was berthed. Messrs Price never told him that it was part of the contract that delivery of the cargo was to be taken as fast as the ship could put it out. He first knew that that was part of the contract from a telegram from his owners which he received on 11th May. He could not get a berth at Melbourne on 6th May, but could have given delivery if the merchants had sent lighters. The stevedore was employed by the charterers. After he got a berth the cargo was taken away in carts. The unloading was not finished till the 7th of June. If delivery had been taken as fast as ship could put it out, it might easily have been finished in ten days. The cause of the delay was the merchants not offering to take away the grain as fast as they could have given it. The loading of ballast would not have interfered with the landing of the cargo. They had a hold clear for ballast on 19th May, which it was the duty of the charterers to send, but which they only sent after long delay. "Weather working-days" meant all days excepting Sundays and holidays and wet days. Though the stevedore was employed by the charterers the ship paid him. The stevedore employed the men who did the unloading. He (witness) left that to the stevedore. They could have put out 200 tons a-day, but as a fact a great deal less was put out. Between 1st and 7th June the cargo was put out slowly because the ship was tender on account of not receiving ballast. He frequently complained to the charterers verbally of the delay in discharging, but made no written complaint or protest, on account of Messrs Price's letter of 3d May informing him that the charter-party had been cancelled.

It appears from the evidence of a shipowner in Greenock that a vessel like the "Blair Drummond," and with her appliances for discharging, could put out 400 tons a-day. He would have considered ten days too long a time for discharging her. He would not consider taking 40 or 50 tons a-day a compliance with an undertaking to take delivery as fast as ship could put out.

Another witness, a shipmaster, thought the "Blair Drummond" could have put out at the rate of 600 tons a-day, and that ten days was ample time to have discharged her in.

It appeared from the log of the "Blair Drummond" that she was moored alongside Sandridge Old Town Pier on the afternoon of 8th May. She began discharging on the 10th, on which day she discharged 256 bags. On the 11th she had discharged 480 bags, when the steam-winch broke down and stopped work. On the 12th 833 bags were discharged; and on the 13th 640 bags up till one o'clock. "P.M. raining, stopped cargo." The 14th was Sunday, on which no work was done. From 15th to 20th inclusive she was discharging every day in quantities of from 608 to 1056 bags a-day. The entries for the 19th and 20th show that the flag had been hoisted for ballast all these two days, and none came. The 21st was again Sunday. On the 22d and 23d she kept on discharging, on the latter day taking in 95 tons of ballast, the first she got. The entry for the 24th bore that it being a general holiday no work was done. On the 25th and 26th no cargo was discharged as both days were raining. After that the discharging went on, with the exception of Sundays, till the 7th of June when it was completed. Ballast was entered as taken in on the 29th of May, and from June 3d to 12th except Sundays.

It appears from the evidence of a number of witnesses that though grain cargo could be discharged in wet weather by means of an awning, it was not customary to do so.

The Lord Ordinary pronounced this interlocutor—"Decerns in favour of Messrs J. & A. Price . . . for payment of the principal sums concluded for in their summons, amounting together to £607, 16s. 11d., under deduction of the principal sum of £265, 13s., which the Lord Ordinary finds to be due by the said J. & A. Price and partners to Messrs Thomson & Gray, as damage for eleven days' unnecessary detention of the ship 'Blair Drummond' at Melbourne . . . *Quoad ultra* assoilzies Messrs J. & A. Price and partners from the conclusions of the action at the instance of Messrs Thomson & Gray against them, and decerns.

"*Opinion.*— . . . (4) There remains the question of the owner's claim to demurrage. The master received instructions from his owner on 11th May that delivery of cargo was to be taken from ship as fast as ship could put it out. Up to this time very little cargo had been discharged, and I think that the 12th May must be taken as the first day of discharge.

"The master says that his ship could have discharged her cargo at Melbourne in ten days easily, and attributes the delay which took place to the neglect of the charterers to provide carts for taking it away. Other witnesses say that the discharge could have been effected in less time; but I accept the master's estimate of ten days as being a just and reasonable allowance of time in the circumstances. Then the discharging days would be the 12th, 15th, 16th, 17th, 18th, 19th, 20th, 22d, 23d, and 27th of May. As to the days omitted, the 13th, 25th, and 26th, were days when the discharging could not proceed, on account of rain, without injury to the cargo. On the 13th it did not rain all day, but I am not disposed in this question to include a broken day as one of the ten which should be allowed for working. The 14th and 21st were Sundays and the 24th was a public holiday, on which loading could not proceed. Under the agreement to discharge cargo as fast as ship can put it out, I think the measure of the charterers' obligation

is the possibility of actually discharging cargo, and days when discharging is necessarily stopped ought not to be counted. The considerations which lead to the inclusion of such days, where a fixed number of working days is stipulated, appear to me to be inapplicable to the present case. I allow nothing for ballast, because it appears that the loading of ballast can proceed simultaneously with the discharging of cargo, and would in this case have been completed before the 27th May. The discharging was not actually completed till the evening of 7th June. It follows that the ship was detained eleven days on demurrage, no deduction being to be made for Sundays or rainy days, because the ship ought then to have been on her voyage. The amount of demurrage, calculated at the rate of £24, 3s. per day, is thus £265, 13s. The principal sums due by Thomson & Gray, the owners, to Messrs Price amount to £607, 16s. 11d., which is to be reduced by the amount of the demurrage, and the balance of principal due to Messrs Price is £342, 3s. 11d. Messrs Price will also be entitled to interest on the £607, 16s. 11d., from 8th August 1882, less interest due by them on £265, 13s. from 8th June of that year."

Messrs J. & A. Price reclaimed.

At advising—

Lord Craighill—I agree with the Lord Ordinary on the question as to demurrage, which is the only question on which a complaint has been made against his interlocutor. I had at first some doubt upon the subject, but in the end I have come to be perfectly satisfied with his judgment.

Twenty-one days' demurrage was claimed by the defenders, the shipowners; the Lord Ordinary has allowed eleven, thinking that the cargo could easily have been delivered, and delivery taken by the charterers, in ten days. These eleven days in our consideration of the case may conveniently be divided into two periods, one of four and one of seven days, the first extending from 27th to 31st May, and the second from 1st to 7th June. With regard to this last period I have found no difficulty at all. By their contract the charterers undertook to supply and put on board ballast, and this obligation not only might but ought to have been fulfilled as the cargo was in process of delivery, that the ship when the cargo was put out might be sufficiently stiffened and all fear of accident be avoided. The defenders, however, between the 12th, when delivery began, and 29th May, when that was still going on, denied all liability to supply, and did not supply, any ballast whatever. The consequence was that the master found it necessary to refuse to allow more cargo to be put out because of danger to his ship, and then only the defenders acknowledged their obligation. The delay between 1st and 7th June was thus the plain result of the defenders' refusal timeously to acknowledge their obligation for ballast, and demurrage for this period is damage which they must make good, and demurrage for the earlier four days of the eleven also appears to me to be due as the Lord Ordinary has found. The defenders raised a controversy as to the terms of the contract, denying, contrary to the truth of the case, that they were bound to take the cargo as fast as it could be put out of the ship. By so doing they obtained a slower delivery than could, and but for this reason would have been given. In such circumstances it cannot be held that the master acquiesced in the operations of the stevedore and those employed by him. What at first sight appears most adverse to a claim for demurrage—the want of a written complaint and of a protest—is also thus accounted for, and the result is, that there being no bar to the making of the claim, the claim when made ought to be allowed. The rate of demurrage is not in controversy. If eleven days are to be allowed for, the sum due is that for which upon this point the Lord Ordinary has given judgment.

Lord Rutherfurd Clark—I agree with Lord Craighill.

Lord Justice-Clerk—I am substantially of the same opinion.

Lord Young—I regret to differ from the judgment of Lord Craighill. The case is one which involves no question of law, but is one of facts and circumstances merely, and it is therefore unnecessary for me to say any more than that I am unable to concur in that opinion.

The Court adhered.

Counsel for J. & A. Price (Reclaimers)—Guthrie Smith—Dickson. Agent—John Gill, S.S.C.

Counsel for Thomson & Gray (Respondents)—Solicitor-General Asher, Q.C.—Lang. Agent—Thomas Carmichael, S.S.C.

Wednesday, June 3.

SECOND DIVISION.

[Sheriff of Ross, Cromarty, and Sutherland.

WINANS *v.* MACRAE.

Interdict—Trespass—Deer-Forest—Lamb Straying on Unfenced Ground.

A pet lamb belonging to a cottar who lived close to a public road which passed through a large deer-forest, and who had no right to graze any animal therein, strayed on various occasions from the roadside, which was not fenced, on to the forest. The Court *refused* to grant the lessee of the forest interdict against the cottar grazing any animal upon the forest, on the ground that he had not shown that he had suffered any appreciable injury.

On 30th July 1884 William Louis Winans, who in 1882 became tenant under a twenty-one years' lease of the estate of Kintail (the property of J. T. Mackenzie), including the lands of Morvich, which he had turned into a deer-forest, brought an action in the Sheriff Court of Rossshire to interdict Murdoch Macrae, a shoemaker who occupied a house at Cairngorm on the lands of Morvich, "from putting any lamb, lambs, sheep, cattle, or other bestial upon the lands of Morvich, in the parish of Glenshiel and county of