Friday, March 18.

SECOND DIVISION.

THORSEN *v.* M'DOWALL & NEILSON.

Charter-Party—Delivery of Cargo of Timber and Deals—Wharf where no Facilities to Unload Cargo on Quay—Discharge of Cargo into River.

By charter-party a sailing vessel was taken bound to deliver a cargo of timber and deals at the port of discharge, at such wharf or dock as the charterers should direct. On the arrival of the vessel at Glasgow, the port of discharge, the charterers directed the master to discharge in the Queen's Dock. On account of the state of the traffic in that dock the harbourmaster refused to allow the vessel to be berthed there, and assigned the vessel a discharging-berth at Yorkhill, a wharf used for the landing of foreign cattle, and where there were no appliances for unloading timber and deals on the quay. To this arrangement the charterers submitted. The master berthed the vessel at Yorkhill and discharged the cargo into the river Clyde.

Held that he acted rightly in doing so, and that having thus delivered the cargo over the ship's side he was not bound to tow it on rafts to the nearest quay and land it thereon.

Charter-Party—Construction of Clauses of Charter-Party regarding the Mode of Paying Freight—Delivery of Cargo—Ship's Lien over Delivered Cargo till Freight Paid.

A charter-party contained the following clauses concerning the payment of freight—(1) The ship was to deliver the cargo of timber and deals at the port of discharge on being paid freight at a certain rate per 165 cubic feet; (3) "Freight to be paid as follows—One-third in cash on arrival, and the remainder after unloading and on right delivery of the cargo"; (12) "The master or owners to have a lien on cargo for all freight, dead freight, and demurrage."

Held that under the charter-party, after payment of the one-third of the freight payable on arrival, no further freight required to be paid until the whole cargo had been unloaded and found to be in as good condition as when shipped, while on the other hand the ship had a lien over the cargo so unloaded until the whole freight had been paid.

By charter-party dated 30th December 1890 the barque "Theodor Korner" was taken bound to load "a full cargo, to consist of square pitch pine sawn timber, merchants to supply timber and/or deals and/or boards at their option for beam fillings and broken stowage," and "being so loaded shall therewith proceed to any safe port in the United Kingdom . . . and deliver the same (always afloat) on being paid freight as follows—

	£	s.	d.
For Timber for Cargo, . . .	4	7	6
For Sawn Timber for Cargo, . .			
For Deals and/or Boards for Cargo, .	4	7	6
For Timber and/or Deals and/or Boards used for Beam Fillings and Stowage, } Two-thirds above rates.			

p. St. Petersburg Standard Hundred of 165 cubic feet.

. . . 3. Freight to be paid as follows—One-third in cash on arrival, and the remainder after unloading and on right delivery of the cargo by a good and approved bill payable in London at four months' date following, or in cash, less two per cent. at owner's option. Freight upon deals and/or boards to be paid upon intake measure of quantity delivered. . . . 6. Twenty-two working days are to be allowed the merchants in which to deliver the cargo at port of loading . . . and the cargo to be unloaded as customary at port of discharge, at such wharf or dock as the charterers or their agents may direct, and ten days of demurrage over and above the said lying days, at Eighteen pounds per day. . . . 11. The custom of the wood trade of each port to be observed in all cases when not specially expressed. 12. . . . The master or owners to have a lien on cargo for all freight, dead freight, and demurrage."

In the bill of lading dated at Pensacola 21st January 1891 it was stated that the cargo of timber and deals had been shipped in good order and condition, and were to be delivered in the like good order and condition at the Port of Glasgow. The bill of lading, which incorporated the conditions of the charter-party, was indorsed to Messrs M'Dowall & Neilson, timber merchants, Glasgow, as purchasers or assignees of the cargo.

On 15th May 1891 the vessel arrived at Glasgow. Messrs M'Dowall & Neilson directed the shipmaster, Abraham Thorsen, to discharge at the Queen's Dock. As the state of traffic at the Queen's Dock at that time was such as to forbid the unloading of timber, the harbourmaster refused to allow the vessel to discharge there, and assigned the vessel a berth for the discharge of her cargo at Yorkhill, near the foreign animals wharf, where there was only a narrow passage between the slaughterhouse and the wharf, and no appliances for unloading timber and deals upon the quay. To this arrangement Messrs M'Dowall & Neilson submitted and the shipmaster berthed the vessel at Yorkhill and commenced discharging the cargo into the water. Over a third of the whole freight had been paid before the ship arrived in the Clyde, but on 29th May, after a portion of the cargo had been discharged in excess of that for which freight had been paid, the shipmaster demanded payment from the consignees of the sum of £190, being the freight still unpaid for delivered cargo. He further demanded either security for payment of the balance of freight to become due or payment of the freight applicable to each standard as it was delivered. The consignees refused to accede to these demands and the ship-

master stopped discharging the cargo. After negotiations between the parties the consignees paid the sum of £190 and gave security for the balance of the freight.

On 2nd June the shipmaster recommenced discharging. The timber was discharged into the river and floated down to Port Glasgow. The deals also were discharged into the river, and after they had lain about a fortnight in the river, the shipmaster, at the request of the consignees, caused them to be towed up to the Queen's Dock and placed on the quay there, where the consignees took delivery.

On account of the immersion of the deals for a fortnight in the river Clyde, they were injured by water and by the sewage and filth of the river. The consignees estimated the damage thus done at £56, 4s. 7d., and as they held that the deals should have been delivered by the shipmaster at once on to the wharf, and not allowed to remain in the river for some days, they deducted the above sum before paying the freight which they still owed to the shipmaster.

In these circumstances Abraham Thorsen, the shipmaster, as representing the owners of the "Theodor Korner," and Lietke & Company, shipbrokers, Glasgow, their mandatories, raised two actions in the Sheriff Court at Glasgow against M'Dowall & Neilson, the consignees.

In the one action the pursuers sued for £56, 4s. 7d. as balance of freight. In the other action the pursuers sued for £36 as two days' demurrage alleged by them to have been incurred by the fault of the defenders in delaying to pay the freight due on 29th May, whereby the ship was obliged for her own protection to stop delivery.

One proof was taken in both actions before the Sheriff-Substitute (GUTHRIE) which disclosed the facts above narrated. The evidence showed that it was unusual for a cargo of timber and deals to be brought to Glasgow, such cargoes being generally discharged at Greenock or Port Glasgow. There was also evidence that cargoes of timber and deals had been discharged directly on to the quay from vessels berthed at Queen's Dock, but there was no evidence of such a thing having been done at Yorkhill.

On 23rd December 1891 the Sheriff-Substitute pronounced the following interlocutor in the action for the balance of the freight—"Finds that the pursuers, as owners of the barque 'Theodor Korner,' failed to deliver the deals loaded under the charter-party and bill of lading, in like good order and condition, at the Port of Glasgow, as contracted for: Finds that the deals were damaged to the amount of £40 sterling, and to that extent sustains the defences; decerns against the defenders in favour of the pursuers for the admitted balance of freight due, viz.—£16, 4s. 7d., with interest, as craved: Finds the defenders entitled to expenses;" And the following interlocutor in the action for demurrage—"Finds that the detention of the ship 'Theodor Korner,' for which the pursuer asks demurrage or damages, was caused by their own act and not by the defenders: Therefore assoilzies the defenders, and decerns: Finds the defenders entitled to expenses."

The pursuers appealed to the Second Division of the Court of Session, and argued—(1) *In action for Freight*—The ship was ordered by the harbourmaster to a berth where it was impossible to land the cargo on the quay. This order was acquiesced in by the defenders. The defenders therefore acquiesced in the cargo being discharged in the only way in which it could be discharged at that particular place, viz., into the water. They had therefore no right to refuse payment of the balance of freight due. (2) *In action for Demurrage*—There were three clauses in the charter-party dealing with the mode in which freight was to be paid. Two of these clauses, viz., the first and twelfth, agreed with one another, and being in a majority they should prevail. That being so, the pursuers were entitled to get a proportion of the freight for the cargo on delivery of each standard. The shipmaster asked for this on 29th May, or alternatively for security that the freight would be paid, and on the defenders refusing this just demand he stopped delivery for his own protection. The ship was therefore detained by the fault of the consignees, who were liable for demurrage —*Lamb* v. *Kaselack, Alsen & Company*, January 31, 1882, 9 R. 482.

Argued for the defenders—(1) *In action for Freight*—The bill of lading required the shipowners to deliver the cargo in as good condition as when they got it on board. This they had not done when they put the deals upon the quay and the defenders took delivery; the deals were much deteriorated by the filth of the Clyde. When the ship got to Glasgow the defenders had directed the master to discharge her at the Queen's Dock. This he had not done. The ship went instead to Yorkhill and discharged her cargo into the water by reason of which the deals were damaged. Even if the shipmaster was bound to obey the harbourmaster, he should either have discharged the deals directly on to the quay at Yorkhill or made a raft of timber and placed the deals on that, and then towed them to the nearest quay and lifted them thereon. But instead of doing so he discharged the deals into the dirty river and allowed them to lie therein a fortnight. The shipowners were therefore bound to make good the damage caused to the deals by their protracted immersion. (2) *In action for Demurrage*—No demurrage was due. The mode of payment of freight was expressly laid down in the third clause of the charter-party. This mode of payment had been carried out by the defenders. When on 29th May the demands of the master were not complied with, even if he believed that his demands were justified, he ought to have gone on unloading, at the same time holding possession of the cargo till freight was fully paid. But he had no right in any event to turn his ship into a

warehouse and keep possession of the cargo without unloading it at all—Bell's Comm. i. 558.

At advising—

LORD TRAYNER — There are here two actions to be disposed of, first an action for for freight, and second an action for demurrage.

In the first action the pursuer claims decree for £56, 4s. 7d. as the balance of freight due to him in respect of a cargo of timber and deals carried in his ship the "Theodor Korner" from Pensacola to Glasgow. The defenders admit the balance of freight claimed to be correct, but plead in compensation that the cargo was damaged to that extent through the fault of the pursuer. The fault alleged against the pursuer out of which the damage to cargo arose is this, that whereas the pursuer was bound under his charter-party to deliver his cargo at such wharf or dock as the defenders might direct, and there, according to the custom of the wood trade in Glasgow, he, in disregard of the custom of trade and the defenders' directions to him to discharge in the Queen's Dock, discharged his cargo into the Clyde at Yorkhill. The Sheriff-Substitute has affirmed that there was fault as alleged on the part of the pursuer; he has assessed the damage thence arising at £40, and has given the pursuer decree for £16, 4s. 7d. I am of opinion that the Sheriff-Substitute's conclusion is erroneous.

Assuming that damage was done to the cargo by discharging it into the river to the extent allowed, I think the defenders have failed to shew that the damage arose in any way through the fault of the pursuer. The pursuer was undoubtedly bound by the terms of the charter-party to deliver his cargo at the wharf or dock selected by the defenders, if the defenders had secured a discharging berth for the vessel (as was their duty) at that wharf or dock. They directed the pursuer to discharge in the Queen's Dock, but the harbourmaster refused to allow the vessel to discharge there. Accordingly, the pursuer was not in fault for not discharging in the Queen's Dock. No order or direction by the defenders to discharge there was of any avail, seeing that the harbourmaster forbade it. The harbourmaster assigned a discharging berth to the pursuer at Yorkhill, at which, there being no facilities for landing the cargo on the wharf, the cargo was discharged into the river. The harbourmaster says—"The 'Theodor Korner' was put there to discharge her cargo in the water." This was known to the defenders and acquiesced in by them. Any damage therefore which arose through discharging the cargo into the water, was damage for which the pursuer is not responsible. It was the only mode of discharging possible at the berth assigned to the vessel, and it was a mode of discharging assented to by the defenders, although unwillingly. But it is said that even if the discharge into the water was right, at all events not involving fault on the part of the pursuer, he should without delay have transferred the cargo or part of it from the water to the nearest wharf and delivered it there. I think there was no such duty on the part of the pursuer. He was bound to deliver his cargo over the ship's side at Glasgow, at whatever discharging berth was assigned to him. But he was bound to deliver the cargo at one place only, and it was the defenders' duty at that place to take delivery. The pursuer had no concern with the future destination of the cargo after delivery over the ship's side, and was no more bound to tow it in rafts to the Queen's Dock than to put it on railway trucks for delivery in some other town. Whether therefore the damage arose from putting the cargo into the river, or from its being allowed to lie there for several days, it is equally damage for which the pursuer is not responsible.

The alleged custom of the port, said to have been disregarded by the pursuer, does not really affect the question. I think the alleged custom is not proved, but if it had been proved that it was the custom to deliver cargoes such as that in question on a wharf or quay, and only there, the defenders acquiescing in a different mode of discharge as they did, absolves the pursuer from any consequences arising from the discharge in a manner other than customary. I am accordingly of opinion that the pursuer is entitled to decree for the full balance of freight claimed, and that the counterclaim for damage should be repelled.

In the second action the pursuer claims two days' demurrage under these circumstances. After a portion of the cargo had been discharged in excess of that for which freight had been received, the pursuer demanded payment of the freight still unpaid for delivered cargo, and security for payment of the freight due or to become due for the cargo still in the ship—alternatively with the demand for security, he proposed to deliver the balance of his cargo in return for freight to be paid as cargo was delivered—as he termed it "to deliver on *pari passu* payments."

These demands or proposals were at first declined, but after some negotiation the defenders paid the amount due in respect of cargo already delivered, and gave the security for the balance of the freight which had been asked. During these negotiations, however, the pursuer stopped the discharge of cargo for two days, and for these two days he claims demurrage at the rate stipulated in the charter-party, on the ground that the discharge of the ship was thus delayed beyond the time which was necessary or reasonable for her discharge through the fault of the defenders in refusing what the pursuer was entitled to demand and the defenders bound to grant. Whether the pursuer was entitled to make this demand and the defenders in fault in refusing to comply with it, depends on the terms of the charter-party.

Its provisions bearing upon this question are these—freight was to be paid on the cargo at a certain rate per 165 cubic feet, and was to be paid as follows "one-third in cash on arrival, and the remainder after unload-

ing and on right delivery of the cargo" by approved bill, or cash subject to discount in the pursuer's option—"the master or owners to have a lien on cargo for all freight, dead freight, and demurrage." These provisions do not follow each other consecutively in the charter-party as I have stated them, but they are the whole provisions bearing upon the payment of freight. Now, under these provisions, what were the pursuer's rights? The only difficulty in answering this question arises from a seeming conflict between the clauses of the charter-party which provide for the payment of the remainder of the freight (deducting the one-third payable on arrival, which was admittedly paid) after "unloading and on right delivery of the cargo," and at the same time provide that the pursuer should have a lien on the cargo "for all freight." In construing this charter, effect must be given to all its stipulations, if that be possible; none of them can be disregarded unless a direct conflict between them makes it impossible to give effect to each. If the clauses of this charter were in direct conflict, so that one clause must yield if the other is to have effect, I think it would be a difficult question whether the express provision as to the payment of freight, or the equally express provision as to a lien "for all freight," should prevail. But I am of opinion that there is no such conflict necessarily here; the clauses may be read so as to give effect to each. If the freight clause "after unloading and on right "delivery of the cargo" is read as meaning delivery to the consignee, the lien would be destroyed; there could be no lien over the cargo after delivery to the consignee. The words lien "for all freight" would thus simply be deleted from the charter-party. I therefore reject that reading of the freight clause, although I admit that in the ordinary case "delivery of the cargo" does mean delivery to the consignee. But if the freight clause is read as meaning "after unloading and on right delivery over the ship's side," then the lien is preserved, for the whole cargo may be put out of the ship and still remain in the custody of the shipowner. I therefore adopt this reading, which at once fulfils the condition in favour of the consignee under the freight clause, and the condition as to lien in favour of the ship. This reading of the charter-party is favoured by what may in this case be fairly conjectured to have been the intention of the parties. The freight here was to be ascertained by measurement of the cargo. That could not be done while the cargo was in the ship's hold. It had to be unloaded for the purpose of measurement, and as payment of freight was farther conditional "on right delivery of the cargo"—that is, on delivery of the cargo in the same good order and condition in which it was shipped, this again required the cargo to be put in such a position as to admit of its examination. I read the charter-party therefore as providing that after payment of the one-third payable on arrival no farther freight was payable or demandable until the cargo—that is, the whole cargo—had been unloaded, and found to be in good condition as when shipped, damage or deterioration caused by perils of the sea, &c., always excepted; while on the other hand the ship should have a lien on the cargo so unloaded and delivered over the ship's side "for all freight" until the consignee had satisfied the ship's demands in that respect.

Another view of the charter-party may be taken which leads to the same practical result. Assume, in favour of the pursuer, that the words in the freight clause "and on right delivery of the cargo" are in direct conflict with the lien clause, and that the latter must prevail, there still remains the provision that the remainder of the freight is only payable "after unloading" of the cargo, and that provision, as I have shown, does not conflict with the clause. Both may be read together, and both must therefore receive effect. And giving effect to both puts the pursuer in this position, that he could not demand the remainder of his freight until after the cargo had been unloaded, while the consignee could not demand delivery of the cargo to himself until the claims for freight had been settled.

It was suggested, by way of reconciling the clauses supposed to be conflicting, that the lien clause might be read as affording a lien only in so far as this was not taken away by other express stipulations of the charter-party. But the difficulty of accepting that view seems to me to be that it imports into the lien clause a restriction or qualification which is not there. The lien clause is absolute in its terms, and must be read as expressed; and the view I am now considering would not be a reconciliation of the clauses by which effect was given to each, but making the one clause surrender to the other.

The view which I take of the charter party excludes the pursuer's claim for demurrage. The stoppage of the delivery of the cargo arose from the pursuer's demand for something to which under his contract he was not entitled. The delay thus occasioned was attributable to him, and for that the defenders are not liable. The Sheriff-Substitute's judgment assoilzieing the defenders from this claim should in my opinion be affirmed.

I would propose to deal with the expenses of this litigation thus: The proof as regards both claims was led in the first action, but I find on examination that out of a proof of over 50 pages not more than 6 or 7 pages have reference to the claim for demurrage. I would therefore find the pursuer entitled in the first case to expenses in the Sheriff Court and here, as the same shall be taxed, under deduction of a sum of £10; and find the defenders entitled to expenses in the second case in both Courts, but excluding therefrom the expenses incurred in connection with the proof.

The LORD JUSTICE-CLERK, LORD YOUNG, and LORD RUTHERFURD CLARK concurred.

In the action for the balance of freight the Court pronounced the following interlocutor:—

"Sustain the appeal: Recal the interlocutor of the Sheriff-Substitute, dated 23rd December 1891: Find in fact (1) that the 'Theodor Korner' arrived at Glasgow on or about 15th May 1891, with the cargo on board referred to on record, of which cargo the defenders M'Donald & Neilson were the consignees; (2) that a berth at Yorkhill was assigned to said vessel by the harbourmaster at Glasgow for the discharge of said cargo there into the water, and that the said defenders or consignees foresaid acquiesced in the discharge of said cargo at said berth into the river Clyde; (3) that the said cargo was damaged by being discharged into the river and remaining there for several days before being removed to the Queen's Dock, and that the damage so sustained was to the extent and value of £40 sterling; (4) that said damage was not occasioned by any fault or breach of contract on the part of the pursuers; and (5) that the balance of freight due to the pursuers in respect of said cargo is £56, 4s. 7d.: Finds in law that the pursuer is not liable to the defenders for the damage sustained by said cargo as aforesaid, and that the defenders are liable to the pursuers in the said sum of £56, 4s. 7d. with interest as concluded for: Therefore decern against the defenders in terms of the prayer of the petition: Find the defenders liable to the pursuers in the expenses of process, both in the Sheriff Court and in this Court, subject to a deduction of £10 sterling from the taxed amount."

In the action for demurrage the Court pronounced the following interlocutor:—

"Find in fact that there was no undue detention of the pursuers' vessel in the discharge of her cargo, and that any delay which took place in the course of the discharge of said cargo was occasioned by the pursuers and not by the defenders: Find in law that the defenders are not liable in the demurrage sued for: Therefore dismiss the appeal: Recal the interlocutor of the Sheriff-Substitute, dated 23rd December 1891, in so far as it finds the defenders entitled to expenses: *Quoad ultra* affirm the said interlocutor, and decern: Find the defender entitled to expenses both in the Sheriff Court and this Court, except the expenses incurred in connection with the proof led by parties."

Counsel for the Pursuers—W. Campbell—Salvesen. Agents—J. B. Douglas & Mitchell, W.S.

Counsel for the Defenders—Dickson—Aitken. Agents—Webster, Will, & Ritchie, S.S.C.

Tuesday, March 15.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

THE PORT-GLASGOW AND NEWARK SAILCLOTH COMPANY, LIMITED *v.* THE CALEDONIAN RAILWAY COMPANY.

Railway—Fire Caused by Spark from Engine — Damages — Negligence — Onus of Proof.

The owners of a flax store situated near a railway, which had been set on fire by a spark from a passing engine, sued the railway company for damages, alleging that they had omitted to take proper precautions against the emission of sparks in not fitting the engine with a contrivance known as the "spark-arrester." The evidence showed that the engine in question was of a new type to which the "spark-arrester" was inapplicable, and that it was fitted with the best known means for preventing the emission of sparks available in engines of that class. It was not proved that the risk of communicating fire had been sensibly increased by the new method of construction. The Court *held* that the defenders had not been negligent, and therefore *assoilzied* them from the conclusions of the action.

Observations as to the extent to which a railway company may, in improving the general efficiency of its engines, increase the risk of their discharging dangerous sparks, without incurring liability for the damage that may result.

Observed by the Lord President, that it is a rule fixed by a series of decisions, that if a fire is caused by a locomotive the railway company is not liable for the damage done unless they are proved to have been negligent.

Railway—Fire Caused by Spark from Engine—Contributory Negligence.

A flax store situated in close proximity to a railway had no windows, and when light was required it was obtained by opening the doors of the store. On one occasion when two doors were open, one on the side next to, and one on the side away from the railway, a spark from a passing engine was blown in at the former, and falling among some loose flax caused a fire which destroyed the store. In an action by the owners of the store, the Court *held* that they were not barred by contributory negligence from claiming damages from the railway company.

Damage by Fire—Title to Sue—Insurance.

Held, in an action of damages on account of a fire caused by a spark from a locomotive, that the fact that the pursuers' loss was covered by insurance formed no objection to their title to sue.