and he continues—"It seems to me that the scheme you propose in your letter of 3rd August as to disentailing the estates and re-settling them is unnecessary for the raising so small a sum. Could not the money (£4000) be raised on the estate in the same manner as before, and I could agree to pay half the interest, which would be, I suppose, £200. Please let me know if this could be done, and if not, what other scheme you would propose." On the 25th August 1885 the pursuer had long meetings with Mr Jamieson at Edinburgh, of which Mr Jamieson gave an account to Sir Robert in a letter of the 26th—"We discussed the matter very fully. . . . He was extremely averse to any re-settlement of the estate, and pointed out that he would have the power of dealing with the estate as he chose should he happen to survive you as things are. This I of course admitted, but I said that did not alter the matter, because you might and probably would live for many years, and during that time he would have no income, and I did not see how he could pay the debts except with your assistance and upon your terms. . . . In making the proposal which I did make to him, I had in view your position and interest and also his. . . . When he came back after an interval of some hours, he said he was prepared to entertain the proposal of a re-settlement of the estate provided a reasonable provision was made for him during your life."

This letter, together with the *viva voce* evidence of the pursuer and Mr Jamieson, satisfied me that the pursuer gave his consent to the re-settlement of the estates believing and relying on the statement of Mr Jamieson that he did not see how he could pay his debts unless with his father's assistance and upon his terms. Having regard to Mr Jamieson's professional reputation, and his position with reference to the pursuer and his father, the pursuer was justified in treating this as a representation that no other course was practically open to him but to accept his father's terms.

As a matter of fact the evidence establishes that there was another course open to him, by which, without difficulty, by charging his expectant succession with £25,000, he might have obtained all the pecuniary benefits which the arrangement arrived at gave him while charging his succession with £22,700.

What is Mr Jamieson's excuse for making the statement he did to the pursuer? He says that he was acting solely as the agent of Sir Robert Menzies, that it was not his duty in that capacity to advise the pursuer, and that he never applied his mind to the question whether there was an easier mode for him to get out of his difficulties than the one he suggested. In this lies the solution of the case. I think that Mr Jamieson led the pursuer to believe that he had applied his mind to the question above stated, and that he saw no alternative course open to the pursuer. Mr Jamieson was not justified in making the statement he did without applying his mind to the facts, and the pursuer was justified in relying on that statement made by a professional man who had led him to believe that he was acting in his interest as well as in that of his father.

I think that the misrepresentation into which Mr Jamieson was unfortunately led by the difficulty of the position he had assumed as between the father and the son, was the underlying foundation of the whole arrangement embodied in the deeds under reduction, that it was recklessly and therefore culpably made by Sir Robert Menzies' agent, and that he (Sir Robert) cannot maintain a transaction based upon it. I am of opinion therefore that the pursuer is entitled to succeed on this appeal.

The Lords reversed the interlocutor appealed from, restored the interlocutor of the Lord Ordinary, and found the respondents liable in the costs of this appeal and in the Court below.

Counsel for the Appellant — Sol.-Gen. Asher, Q.C.—Sir Horace Davey, Q.C.—M'Clure. Agents—Lowless & Company, for Smith & Mason, S.S.C.

Counsel for the Respondents—Sol.-Gen. Sir John Rigby, Q.C. — Graham Murray, Q.C. Agents—Grahames, Currey, & Spens, for Tods, Murray, & Jamieson, W.S.

COURT OF SESSION.

Friday, February 24.

SECOND DIVISION.

[Lord Low, Ordinary.

GARDINER AND OTHERS *v.* MACFARLANE, M'CRINDELL, & COMPANY.

Ship—Charter-Party—Construction—Customary Manner of Loading—Hindrance Beyond the Charterer's Control.

A charter-party dated 12th March 1888 provided that a sailing vessel should proceed to Sydney, N.S.W., and there receive from the charterers a full and complete cargo of coal from such colliery as the charterers should direct, (2) that the coal should be loaded as customary, (3) that sufficient stiffening should be supplied at Sydney when required by master on due and sufficient notice, and (4) that the charterers should not be liable for the non-fulfilment of their contract on certain grounds, including "strikes, lock-outs, or accidents at the colliery directed . . . or any other hindrances of what nature soever beyond the charterers' or their agents' control." No lay days were specified. There was provision for ten days on demurrage at 4d. per registered ton per day. The charterers informed their Sydney agents of the charter-party, and on 8th May the agents wrote to a colliery, instructing them to book the vessel for a cargo of coal. They took no precautions to secure that the vessel should receive

the cargo in good time. The vessel arrived on 15th August. The master notified his arrival, and on forty-eight hours' notice demanded a supply of stiffening coal, which was obtained after a delay of ten days. In consequence of a strike at neighbouring collieries, there was an unusual demand on the Sydney collieries, and although the vessel was ready for cargo on 14th September, she was not loaded till 29th November. Of this period of seventy-six days, thirty-two running days were required for loading the vessel, which was accordingly detained for forty-four days.

In an action by the shipowners against the charterers for damages for undue detention, the defenders maintained that the clause as to loading imported into the charter-party all the customs of the port, including a custom of loading steamers before sailing ships, and accordingly extended the time a charterer might detain the vessel without liability for demurrage, or damages for undue detention; and further, that they were protected by the clause excepting "hindrances beyond their control."

Held, 1, that the clause as to loading only referred to the manner of loading customary at the port of Sydney, and even supposing it had included all customs in use at that port, there was not sufficient evidence of a custom of giving priority to steamers in loading; 2, that the detention arose because the cargo was not ready. The obligation to provide a cargo was not an obligation under the charter, which presupposed the existence of a cargo, and therefore the exception clause did not cover the failure. Even assuming that the obligation to provide a cargo fell under the charter the defenders could not claim the benefit of the exception, for (1) their agents could, in May, have contracted for delivery of the coal to the vessel by a certain day, and (2) the fact that a charterer could not procure in the market the commodity he had engaged to ship was not a "hindrance over which he had no control." 3. That as forty-eight hours' notice for stiffening coal was sufficient, the defenders were liable for the delay of ten days in supplying it, and that the amount of damage for undue detention for which the defenders were liable fell to be assessed at the rate of 4d. per registered ton per day on the whole period of fifty-four days.

This was an action by Frederick C. Gardiner and others, owners of the sailing vessel "Lismore," against Macfarlane, M'Crindell, & Company, merchants, Liverpool, charterers of the vessel, and G. G. Macfarlane, the only known partner of the firm residing in Scotland, for £5000 damages for undue detention of the "Lismore" at Sydney, New South Wales.

The charter-party was dated 12th March 1888, and provided, *inter alia*, that the ship should proceed to Sydney "and there receive from the factors or agents of the said charterers a full and complete cargo of coal from such colliery as charterers or their agents may direct, which the said merchants bind themselves to ship, to be brought to and taken from alongside at the merchants' risk and expense, charterers to have the option of cancelling this charter-party if vessel do not arrive at Sydney on or before 30th September 1888: Dangers and accidents of the seas, rivers, and navigation, strikes, lock-outs, or accidents at the colliery directed, or on railways, or any other hindrances of what nature soever beyond the charterers' or their agents' control throughout this charter always excepted . . . to be loaded as customary at Sydney, N.S.W. . . . and ten days on demurrage over and above the said laying days at 4d. per register ton per day." A marginal note stipulated "sufficient stiffening to be supplied at Sydney when required by master, on due and sufficient notice being given, owners paying extra cost." No lay-days were specified.

The defenders wrote to their agents in Sydney, Messrs Cowlishaw Brothers, and upon 8th May 1888 Cowlishaw Brothers wrote to the Osborne Wallsend Colliery office in these terms—"We beg to stem with you the following vessels, 'Lismore,' &c." The expression "stem" meant that Cowlishaw Brothers had a running contract with the colliery to load such ships as they desired. On same day the colliery owner replied—"I will load the following vessels, 'Lismore,' &c., with best screened Wollongong coal, at 10s. 6d. per ton." The Osborne Wallsend Colliery sends its coal to Wollongong, a port about forty-five miles from Sydney. The coal intended for shipment at Sydney is there put on board steam colliers, in which it is taken to Sydney and loaded from the colliers into the vessel in Sydney harbour. The Osborne Wallsend Colliery have two steam colliers.

The "Lismore," arrived at Sydney upon 15th August and commenced discharging the general cargo she had brought out. Upon 27th the captain gave notice to the agents that he would require stiffening upon the 29th. He got none until the 4th September, and the stiffening was not completed until 11th September. Upon 12th September the captain gave notice that he would be ready to load the full cargo upon the 14th September, but he got none until the 22nd November, and the loading proceeded steadily until the evening of the 29th, when it was completed. Of this period of seventy-six days, thirty-two running-days were required for loading the vessel, which was accordingly delayed for forty-four days. It appeared that there was a great strike at the Newcastle district of collieries at this time, and that a great many steamers came to get both bunker coal and cargo coal at Sydney while the strike lasted.

At Sydney on 15th August a number of steamers were lying to load coal at higher rates than those for which the charterers' agents had contracted, and the Osborne

Wallsend Colliery declined to load the "Lismore," as they declared it was their custom to give priority to steamers. Messrs Cowlishaw did not make any attempt to procure coal from another colliery. It was proved that although there was a large quantity of coal at Wollongong from the named colliery, no particular share of it was kept for the "Lismore," and that the ship was kept waiting until the wants of the steamers were supplied.

The shipowners brought this action to recover the loss they had sustained by the undue detention of their vessel.

The pursuers pleaded—"(1) The defenders having failed to supply a cargo in terms of said charter-party, they are liable for the extra cost and loss thereby incurred and sustained by the pursuers. (2) The pursuers having, through the defenders' breach of contract, *et separatim*, by the defenders' fault or negligence, suffered loss and damage to the extent of £3000, they are entitled to decree for that amount. (4) The custom averred by the defenders, even if established to exist in fact, is unreasonable and contrary to law, and *separatim*, does not apply where there is a charter which does not provide for the vessel being loaded in regular turn."

The defenders pleaded—"(3) The ship having been loaded as customary, in terms of charter, the defenders ought to be assoilzied. (4) *Separatim* — The alleged detention of the ship having been due to causes excepted in the charter-party, the defenders are not responsible therefor."

The Lord Ordinary (TRAYNER) allowed a proof, the greater part of which was taken on commission at Sydney, and the evidence in which is fully treated in the opinion of Lord Trayner, who delivered the judgment of the Court.

Upon 22nd October 1892 the Lord Ordinary (LOW) pronounced the following interlocutor:—"Finds that the pursuers' ship the 'Lismore' was unduly detained at the port of Sydney, New South Wales, through the fault of the defenders, for a period of forty-four days, and that the pursuers have thereby sustained loss and damage to the amount of £1171, 17s. 4d., for which the defenders are liable: Therefore decerns and ordains the defenders to make payment to the pursuers of the said sum of £1171, 17s. 4d., with interest, as concluded for: Finds the pursuers entitled to expenses in so far as the same have not already been disposed of, &c.

"*Opinion.*—In the charter-party under construction in this case the pursuers agreed that the 'Lismore' should proceed to Sydney, 'and there receive from the factors or agents of the said charterers a full and complete cargo of coals from such colliery as charterers or their agents may direct, which the said merchants bind themselves to ship, to be brought to and taken from alongside at the merchants' risk and expense.' The stipulation in regard to loading is—'To be loaded as customary at Sydney, N.S.W.'

"I do not think that it is disputed that under the last-mentioned clause the charterers were bound to load the vessel in the manner customary at the port of Sydney, and within a reasonable time. The parties, however, are at issue as to what is the custom of the port of Sydney in regard to loading, and as to what, in the circumstances of this case, was a reasonable time.

"It is admitted that coals are loaded at Sydney from colliers brought alongside the vessel, but the defenders maintain that there is also a custom in regard to the order in which vessels are loaded. In my opinion it is proved that it is the invariable practice at Sydney to give steamers the preference over sailing ships in the loading of coal, and this is the important part of the custom, so far as the order of loading is concerned, because the delay in loading the 'Lismore' was to a great extent due to steamers taking the preference. It is, however, also proved that sailing ships are loaded in their turn after they give notice that they are ready to receive cargo. Further, a sailing ship requiring coal for stiffening is preferred to a sailing ship which has received her stiffening coal, and is ready for or actually taking in the remainder of her cargo.

"The pursuers argued that a custom or practice as to the order in which ships are loaded cannot be taken into consideration in this case, (1) because a stipulation that a ship is to be loaded 'as customary' refers only to the manner of loading—as for example, by crane or by lighters; and (2) because the practice of giving steamers a preference and of loading sailing ships in the order in which they are entered in the colliery books is not a custom of the port but of the collieries.

"I do not think that it was disputed that the words 'as customary' refer to the customary manner of loading as distinguished from the customary time occupied in loading. I see no principle, however, and I know of no authority, for construing an agreement to load 'as customary' as limited to the method of actually putting the cargo on board, and as excluding all harbour regulations in regard to such matters as the order of loading. To load 'as customary' at a port is to load according to the custom of the port, and if the custom of the port is to give steamers the preference over sailing ships, I do not see upon what principle that custom can be altogether left out of view. In the case of *Adams* v. *Royal Mail Steam Packet Company*, 28 L.J. C.P. 331, Lord Chief-Justice Cockburn construed a stipulation to load in the 'customary manner' as applying to the order in which the ships were to be brought up to be loaded; and in *Postlethwaite* v. *Freeland*, 5 App. Cas. 599, where the provision in the charter-party was that the cargo should be discharged 'with all dispatch according to the custom of the port,' the House of Lords held that the charterers were not liable for delay caused by the ship waiting for her turn, according to the custom of the port, of the warp and lighters, by means of which the cargo had to be discharged. I am therefore of

opinion that the customary order of loading is part of the custom of the port which must be taken into consideration in this case.

"As to the objection that the alleged custom is a practice of the collieries and not of the harbour, I do not think that it is well founded. No doubt the practice of one or two out of a number of shippers at a port will not make a custom of the port. But I think that it is proved that all the collieries which ship coal at Sydney recognise the same rules as to the order of loading, and, what is more important, that these rules are actually carried into effect in the harbour. The settled and established practice of the port is to give steamers preference over sailing vessels, and to load sailing vessels in their order, and that, in my judgment, constitutes a 'custom' within the meaning of the charter-party.

"I am therefore of opinion that the contract was that the vessel should be loaded in her turn according to the established practice of the port from colliers brought alongside, and that within a reasonable time.

"The question now arises, what was a reasonable time? Is the time to be fixed in view of the normal and ordinary state of matters at the port, or in view of the circumstances which actually existed?

"The latest authorities establish the rule that the actual circumstances must be taken into consideration in the case of discharging cargo, where no special time is stipulated, and a reasonable time is implied. The principle of the rule apparently is, that the duty of delivering the cargo falls both upon the shipowners and the merchant; that in the absence of express stipulation the law implies that each party shall use reasonable diligence in performing his part of the delivery; and that if neither party is in default, neither can complain of the other—*Postlethwaite* v. *Freeland*, cited above, and *Hick* v. *Rodocanachie*, 1891, L.R., Q.B. 626.

"But the pursuers contend that the rule is different in the case of loading, because the obligation to supply cargo is upon the charterer alone, and is absolute, and it is not sufficient for him to say that he has done his best in the circumstances which existed; he must show that the cargo has been loaded in a reasonable time in the sense of the usual or ordinary time.

"In *Harris* v. *Dreesman*, 23 L.J. Ex. 210, the Court seem to have taken the view that the obligation of the charterers was to load within a reasonable time in the circumstances which existed, but in that case the contract was framed in view of a particular state of things known to both parties, viz., the breakdown of the boiler of the colliery from which the coal was to be obtained.

"In *Adams* v. *The Royal Mail Steam Packet Company*, 28 L.J., C.P. 33, where the 'customary manner' of loading was referred to, but no stipulation was made for a specific time for loading, the Court held that the charterer's obligation was to load in what in ordinary circumstances would be a reasonable time. The delay complained of in that case, however, did not occur in the loading, but in obtaining a cargo, the cargo not having been obtained, in the first place, on account of a dispute between the charterers and the railway company which was to bring the coals to the port; and, in the second place, on account of a strike at the colliery. A clear ground of judgment, therefore, was that the charterer was in default in not having a cargo ready to load, and the question of the circumstances to be taken into consideration in determining what is a reasonable time to occupy in loading did not truly arise.

"The case of *Ford* v. *Cotesworth*, 4 Q.B. 127, related to delay in unloading. The charter-party provided that the cargo should be delivered in 'the usual and customary manner,' but no time was specified. Owing to the threatened bombardment of the port the authorities refused for some time to allow the cargo to be landed. It was held that the shipowner had no claim against the charterer for the delay so caused. So far as the point raised for decision goes, the case has no bearing upon the present question, but Lord Blackburn in delivering the judgment of the Court (consisting of himself, Chief-Justice Cockburn, and Lush, J.) said (p. 134)—'When the charter-party is silent' (*i.e.*, as to the number of lay-days for putting the cargo on board), 'as it rests exclusively on the merchant to procure the cargo, the law would imply a contract to do so within a reasonable time after the vessel is ready to receive cargo. And we agree that, in estimating what is the reasonable time within which the cargo is to be provided, we are to consider what is a reasonable time under ordinary circumstances, and not to take into account any peculiar difficulty which may have arisen from the mode in which the merchant has chosen to procure the cargo—*Adams* v. *Royal Mail Steam Packet Company; Kearon* v. *Pearson*, 7 H. and N. 386. It may be different if the contract is framed with reference to any peculiar state of things—*Harris* v. *Dreesman*.'

"Again, in *Postlethwaite* v. *Freeland*, in the House of Lords, Lord Blackburn said—'I am not aware of any case contradicting the doctrine that, in the absence of something to qualify it, the undertaking of the merchant to furnish a cargo is absolute. And if the obtaining of lighters or other customary appliances for the discharge of a ship on its arrival was, like the procuring a cargo for loading a ship, a matter which fell entirely on the merchant, so that he might choose his own mode of fulfilling it, I am not prepared to say that on the same principle he ought not to be held to undertake without qualification to provide those appliances. . . . But I do not think that the undertaking to supply lighters or other appliances to assist in discharging the ship does fall within the same principle as the undertaking to supply a cargo.'

"These are, I think, all the authorities bearing upon the point, and I am of opinion that they do not affirm the proposition for

which the pursuers contend. The cases of *Harris* and *Adams* were special cases, in which it was not necessary to lay down a general rule, and the dicta of Lord Blackburn in *Ford* and in *Postlethwaite* appear to me hardly to meet the present case. What his Lordship says is that (in the general case) the obligation to procure a cargo rests entirely upon the merchant, and that he must therefore do so within what is a reasonable time in ordinary circumstances. But the procuring or furnishing of a cargo is a different thing from loading it. That is very clearly established by the judgment of the House of Lords in *Grant* v. *Coverdale*, 9 App. Cas. 470. The loading does not begin until the cargo is furnished; and it may quite well be that, although the obligation upon the merchant to furnish a cargo is absolute, whatever the circumstances may be when the obligation comes to be fulfilled, yet when the cargo has been furnished, no more is required than that it should be put into the ship within a reasonable time in the circumstances which then exist. The owner having nothing to do with, and no control over, the procuring of the cargo, untoward circumstances rendering the procuring of a cargo a matter of difficulty cannot be allowed to prejudice him. But when a cargo is procured, and the loading begins, it seems to me that there are counter obligations on owner and merchant, just as there are in the case of unloading. No doubt in the charter-party in this case the merchants 'bind themselves to ship' the cargo. But the owners bound themselves to receive the cargo, and it was their duty to give every facility for loading. In *Grant* v. *Coverdale* Lord Selborne clearly recognised that in the operation of loading there are counter obligations on the part of owner and merchant. He there said (9 App. Cas. p. 475), 'The business of both parties meets and concurs in that operation of loading. When the charterer has tendered the cargo, and when the operation has proceeded to the point at which the shipowner is to take charge of it, everything after that is the shipowners' business; and everything before the commencement of the operation of loading—those things which are so essential to the operation of loading that they are conditions *sine quibus non* of the operation—everything before that is the charterers part only.' I am therefore unable to see any sufficient reason for applying a different principle to the case of loading (the cargo having been duly furnished) and to the case of unloading. As I have already said, it appears to me to be settled that where the charter-party is silent as to the time to be occupied in unloading, the rule is that each party shall use reasonable diligence in the circumstances. In my judgment the same rule should be applied to the case of loading when there is no stipulation in regard to the time within which the operation is to be completed. I am therefore of opinion that upon the one hand the obligation of the charterers to supply a cargo was absolute, and that the responsibility for delay in furnishing a cargo is upon them alone. On the other hand, if and when the charterers brought forward a cargo, their liability for delay in getting it on board must depend upon whether or not they used reasonable diligence in the circumstances which existed.

"It is therefore necessary to consider what precisely were the circumstances under which the alleged undue delay in loading the 'Lismore' took place.

"The charterers selected the Osborne Wallsend Colliery as the colliery from which the cargo was to be supplied. That colliery sends its coal to Wollongong, a port about forty-five miles from Sydney. The coal intended for shipment at Sydney is there put on board steam colliers, in which it is taken to Sydney, and loaded from the colliers into the vessel in Sydney harbour. The Osborne Wallsend Company have two steam colliers.

"The 'Lismore' arrived at Sydney on the 15th of August 1888, and thereafter proceeded to unload the outward cargo from London. On the 27th of August a considerable part of the cargo having been put out, coal was required for stiffening, and the captain gave notice that he required stiffening coal on the 29th August. No stiffening coal was supplied until the night of the 3rd September, when 200 tons were put on board. Unloading then proceeded for some time, when the captain had to stop unloading for want of stiffening coal, and to secure the ship by means of stays from the masts. The remainder of the stiffening coal was put on board on the 10th September, the discharge was completed on the 13th September, and the ship was ready to load the cargo of coal on the 14th September. No cargo was supplied until the 22nd November, when loading commenced, and was completed on the 29th November. The pursuers complain not only of the delay in supplying the cargo after the 14th of September, but of the delay in furnishing stiffening coal, which retarded the discharge of the outward cargo, and prevented the ship being ready to load so soon as she would otherwise have been. I shall consider the question as to the stiffening coal afterwards.

"The cause of the long delay in furnishing the cargo was that there was a strike, which extended from August until November, in the Newcastle collieries, and consequently a number of vessels which would otherwise have taken in coal at Newcastle came to Sydney and Wollongong. A very large number of steamships came to Sydney for coal, and in accordance with the custom of the port they were given priority over sailing ships. Further, a number of sailing ships went directly to Wollongong and loaded from the quay there. These ships would, if they had gone to Sydney, have been postponed not only to the steamers, but to the 'Lismore,' which would have come in her turn before them. The defenders contend that the pursuers suffered no prejudice by and cannot found upon the fact that sailing vessels arriving after

the 'Lismore' were loaded before her at Wollongong, because such loading at Wollongong never detained the steam colliers which were plying between Wollongong and Sydney, and which could not have brought more coal to Sydney if no vessels had been loaded at Wollongong.

"It thus appears that there was a supply of coal at Wollongong, but that there was not a sufficient number of colliers to get to Sydney. It is indeed said (and this is a point which I may dispose of at once), that although there was a good deal of available coal at Wollongong there was not so much as there would have been in ordinary circumstances, as the output of the colliery was at the time restricted by repairs which were going on in the pit. I am of opinion that difficulty in obtaining a cargo on account of the output at the colliery which the charterers had selected being restricted, is a matter with which the shipowners are not concerned, and that the consequences of any delay arising therefrom must fall on the charterers.

"I am also of opinion that the charterers must bear the consequences of the appliances for bringing the coal from Wollongong being insufficient. The state of matters at the time at the port of Sydney was altogether abnormal. There was an extraordinary demand for coal, and an unusual number of steamers, and it must have been evident that unless special means were taken to meet the pressure, sailing ships would be kept waiting for an indefinite time, it might be for months. In such circumstances it appears to me that the charterers were not entitled simply to go on bringing what coal they could to Sydney by means of their two colliers—which although sufficient in ordinary times, were quite insufficient to meet the unusual demand—and then to shelter themselves behind the custom of the port in regard to the order of loading. In my opinion, the special circumstances made it incumbent upon the charterers to employ special means to get a cargo forward, and if they did not do so they are liable for any delay which might thereby have been avoided. And, indeed, I think that this is the view taken by shippers of coal at Sydney who were examined as witnesses for the defenders. They all recognise that, notwithstanding the custom of the port as to the order of loading, it is their duty to see that a sailing ship is not detained beyond a reasonable time. Mr Cowlishaw, for example, puts sixty days as the utmost limit of reasonable detention in any case. Here the 'Lismore' was detained in all for ninety days. But whatever may be regarded as a reasonable time, the witnesses are agreed that the custom of the port of giving preference to steamers does not entitle a merchant to detain a sailing ship indefinitely, and that if, from there being an unusual number of steamers, a sailing ship is likely to be detained for an unusual time, he must make arrangements, by a special purchase of coal or otherwise, to give her a cargo. Now, in the present case, it appears to me that no effort was made by the charterers to bring forward an additional supply of coal so that the 'Lismore' might receive a cargo, although it must have been obvious that, unless such an effort was made, and successfully made, the detention would be very serious. Mr Cowlishaw and Mr M'Cabe, indeed, say that they were unable to get additional colliers. Even if that was the case, I am not at all sure that it is a good answer in a question with the shipowners. But I think that it is plain that no serious effort was made to get additional vessels to bring coal from Wollongong. I am therefore of opinion that great delay arose from the charterers' failure to supply a cargo, and in my judgment they have not proved—even assuming that it would be a relevant defence—that, owing to causes over which they had no control, it was impossible for them to obtain a cargo.

"There are also special circumstances in this case which appear to me to be very unfavourable to the defenders. The Messrs Cowlishaw, who are commission agents in Sydney, were the sellers to the defenders of the cargo of coal for the 'Lismore,' and it was their duty to see it shipped. The contract between Messrs Cowlishaw and the defenders, which is dated in May 1888, fixed the price of the coal to be supplied to the 'Lismore' at 10s. 9d. per ton nett. The Messrs Cowlishaw, on their part, purchased the coal from the Osborne Wallsend Colliery Company at the price of 10s. 6d. per ton, they receiving a commission of 10 per cent. When the Newcastle strike came, and the demand for coal at Sydney and Wollongong was correspondingly increased, the price of coal at the latter places rose greatly. It seems to have gone as high as £2 per ton. In these circumstances the admitted fact is that all the steamers which came into Sydney, and sailing vessels which went to Wollongong, were loaded at the higher prices, while the 'Lismore' was kept out of her cargo. When the Newcastle strike came to an end, and the high prices ceased, the 'Lismore' got her cargo at once, and it was actually put on board in seven days after the loading was commenced.

"I think that it is impossible to read the evidence of Mr M'Cabe, the secretary of the colliery company, without coming to the conclusion that he might have given the 'Lismore' her cargo, if he had chosen to do so, a great deal sooner than he actually did. He admits, as I read his evidence, that the loading or not loading of the 'Lismore' within a reasonable time was a mere matter of what was most advantageous to his company. For example, when he is asked if he could not, if he had chosen, have given coal to the 'Lismore,' although steamers had unexpectedly arrived, he says—'The steamers that I coaled were our old customers. If we had not supplied them at that time they would not have taken coal from us after the strike was over. It was politic for us to do so.'

"Now, I do not think that the defenders can be distinguished in a question with the pursuers from the colliery company. The

pursuers contracted with the defenders, and with the defenders alone, and the obligation of the defenders was to furnish a cargo. The defenders contracted with the Messrs Cowlishaw, and the Messrs Cowlishaw contracted with the colliery company, but the pursuers had nothing to do with these contracts. If, therefore, the cargo was not furnished because those whom the defenders employed to furnish it found it to be to their advantage to load other vessels before the 'Lismore,' or to take no steps to obtain a cargo for the 'Lismore' notwithstanding the pressure which had arisen, the defenders must, in my opinion, be held responsible for the delay. They cannot shelter themselves behind their agents.

"The defenders further founded upon the exceptions in the charter-party to the liabilities of the charterers. The exception clause is certainly very wide, and applies 'throughout this charter,' and if the defenders could show that it was impossible, on account of circumstances of the kind specified in the clause, for them or their agents to procure a cargo sooner than they did, it might be a good defence to the present claim. But if the view which I have taken of the evidence is sound, the failure to furnish a cargo in reasonable time was not rendered impossible on account of hindrances beyond the control of the charterers or their agents, and therefore the defenders derive no benefit from the exception clause.

"The next question is, what, in the circumstances, would have been a reasonable time for loading the ship. The 'Lismore' was admittedly ready to receive her cargo on 14th September, and by that time I apprehend that the charterers' agents must have seen that the strike was to be of a serious and prolonged nature. They must therefore have known that they could not load the 'Lismore' with the ordinary appliances within anything like the usual time, and that if they were to do so they must make special arrangements. If they had made special arrangements, as I think they ought to have done, and might have done, either by putting on additional vessels from Wollongong, or by purchasing the same quality of coal as that ordered from another colliery, which they might have obtained the charterers' authority to do, I do not see why they should not after all have loaded the ship within twenty-seven working days. In ordinary circumstances it appears that a ship may expect to be detained for loading for about twenty working days, or perhaps a few days more, and with due and reasonable diligence I think that arrangements might have been made for meeting the exceptional circumstances and loading a cargo in the time which I have named.

"The question then arises whether the calculation of time must not be made upon the footing that the 'Lismore' was ready to load sooner than the date upon which she had actually completed the discharge of her outward cargo, on the ground that the discharge was delayed by the failure of the charterers to supply stiffening coal in due time. The stipulation in the charter-party in regard to stiffening coal is as follows:—'Sufficient stiffening to be supplied at Sydney when required by master on due and sufficient notice being given.' In regard to the stiffening coal, therefore, a duty was laid both upon the owners and the charterers. The latter were to supply the coal, while the former were to give 'due and sufficient' notice. I therefore think that the rule to which I have already referred as being now settled in regard to the discharge of a cargo, applies here, viz., that the rights and liabilities of parties must be determined in view of the circumstances which actually existed.

"In ordinary circumstances from two to three days is sufficient notice for stiffening coal, but the defenders say that in the existing circumstances it was impossible for them to supply it upon that notice. When stiffening was first asked for, on the 27th August, the strike had just commenced, and in such circumstances, when the bulk of the Newcastle coal trade was suddenly thrown upon Sydney, I can well imagine that coal traders there found themselves in great difficulties. They had not then had time (as they had later on when the question of loading the 'Lismore' arose) to make special arrangements as to the supply of stiffening coal, and accordingly they asked the master—quite reasonably, I think—to give them a long notice for stiffening. Now, no doubt it is a difficult thing for a master to give notice very long before he actually requires stiffening, because the exact time depends upon the progress of the discharge of cargo, and such a thing as wet weather may upset all calculations. I think, however, that the master of the 'Lismore' would have acted only reasonably if, as requested, he had given longer notice than he did of the probable time when he would require stiffening. The defenders' witnesses say that they supplied stiffening coal the first moment it was possible for them to do so. I see no reason in this instance to doubt their evidence, and although the time taken to provide the stiffening coal was long, I am unable to say that the defenders did not use reasonable diligence, which, in my judgment, was all that they were bound to do—*Ford* v. *Cotesworth*, 4 Q.B. 127, and 5 Q.B. 544.

"I am therefore of opinion that the damages must be assessed upon the footing that the 'Lismore' was ready to load on the day on which she was in fact ready, viz., the 14th September, Twenty-seven working days from that date leads on to the 16th of October, and as the loading was not in fact completed until the 29th November, the ship was, in the view which I have taken, unduly detained for forty-four working days.

"As to the amount of damages, I think that a reasonable course is to allow fourpence per ton per day during the period of detention, which gives a total sum of £1171, 17s. 4d.

"The pursuers also claim a sum of £139,

19s. 8d., being the expense incurred by being obliged to dock the 'Lismore' in Sydney and scrape and repaint her bottom. They say that if the ship had not been unduly detained at Sydney she would have been able to complete her voyage back to London without having her bottom cleaned. There is no doubt that lying at anchor in Sydney harbour caused her bottom to become rapidly foul, but the question is whether, even if the cargo had been loaded within what I have held to be a reasonable time, the bottom would not have become so foul that docking would have been necessary, or at all events prudent? Now, it appears from the evidence of Mr Gardiner that the captain telegraphed to the owners before the middle of September that the ship's bottom was getting foul, and on the 11th October he wrote:—'I am sorry to say the ship's bottom is getting very foul; grass, no shells yet. She was quite clean on arrival here, but the paint is worn very thin; it was thinned to much with kerosine when putting on.' The bottom was therefore very foul early in October, and even if the cargo had been furnished by the 16th of that month, I cannot believe that the captain would have started upon the very long voyage which he had to undertake without having the bottom cleaned. I am, therefore, of opinion that the pursuers are not entitled to the expense of docking and cleaning the vessel."

The defenders reclaimed, and argued—The defenders were within the exception clause of the charter-party. This charter-party did not stipulate for any specific lay-days, and the obligation upon the charterer was to ship a cargo of coal within a reasonable time in the circumstances. The charterer had pointed out the colliery from which the vessel was to obtain her cargo, and had given an order to the colliery to supply the "Lismore." They had therefore done their duty in providing a cargo, and any delay that arose was from the custom of the port in loading. The defenders were therefore (2) relieved from the claim for damages under the stipulation in the charter-party—"To be loaded as customary at Sydney, N.S.W. There were no lay-days stipulated, and the customary mode of loading was by putting the coal in lighters at Wollongong and sending it down to the ships at Sydney harbour. But there was a custom of the port of Sydney which extended to Wollongong, that steamers which came in requiring coal were served before sailing ships. This custom was proved by the evidence led. The charterers had given their order, and were willing to carry out their contract if it could be done. On account of a strike, however, at some neighbouring collieries, a great many steamers came to Sydney to load with coal, both for bunkers and cargo, and the collieries, according to the custom of the port, were bound to supply their wants before giving any coal to sailing ships. If it was said that the charterers ought to have had a cargo of coal in lighters ready to be put over the ship's side at Sydney harbour, it must be remembered that the effect of the custom of loading fell upon both parties, the ship and the charterer. If the process of loading was by putting the cargo into lighters, and so sending it to the ship at a distance from the actual port of embarkation, the charterer was relieved from responsibility if it was not possible for him to send the lighters down—*Hudson* v. *Ede*, June 29, 1867, L.R., 2 Q.B. 566—*aff.* May 11, 1868, L.R., 3 Q.B. 412. In that case the lighters were stopped by the ice; in this case it was the want of lighters that caused the delay. It was proved by the evidence that coal could not have been got from any other colliery than the one named by the charterers except at a ruinous expense, and that no other lighters could have been hired. That was sufficient excuse, as no given number of days was allowed for loading—*Wyllie* v. *Harrison*, October 29, 1885, 13 R. 92; *Letricheux & David* v. *Dunlop & Company*, December 1, 1861, 19 R. 209; *Thiis* v. *Byers*, March 6, 1876, L.R., 1 Q.B.D. 244. The case of *Hudson* v. *Ede* had been doubted in *Postlethwaite* v. *Freeland*, 1880, L.R., 5 App. Cas. 599, but it had been accepted in the case of *Good* v. *Isaacs*, April 2, 1892, 2 Q.B. 555. The number of days allowed for demurrage by the Lord Ordinary was excessive, assuming that any damages were due. The rate per diem also was excessive; the amount in which the defenders could be found liable was £176.

The respondents argued—The appellants could not rely upon the words "to be loaded as customary at Sydney, N.S.W.," by asserting that it was a custom of the port that steamers should be loaded before sailing ships. (1) It was not proved that this was a custom of the port. It might be proved that some collieries insisted for their own ends in supplying steamers before sailing ships, but that could not make the practice a custom of the port. Again, the words "as customary" did not relate to any such custom as was here alleged, but only covered the customary method of loading at the port of embarkation, either by lighters going off to the ship, by steam winch from the quay, etc. The words had nothing to do with any practice of the merchants or shippers at the port as to the preference they would give to steamers over sailing ships—*Gardiner* v. *Macfarlane, M'Crindell & Company*, March 20, 1889, 16 R. 658; *Dunlop*, February 23, 1892, 1 Q.B. 518; *Adams and Others* v. *The Royal Mail Steam Packet Company*, November 4, 1858, 28 L.J., C.P. 33. Even if this was a custom it was not imported into the charter-party by the word "customary" to enable the appellants to plead it—*Hicks* v. *Rodicanachie*, 1891, L.R., 2 Q.B. 636. All the cases cited by the appellants referred to the case of ships unloading, but this was a case of a ship loading, and that made a great difference. In unloading, the ship could not begin until the consignee was ready to take delivery, but in loading the charterer was bound to have a cargo ready, and if he failed in that he was liable for detention of

the vessel beyond a reasonable time. It was admitted that as no lay-days were mentioned in the charter-party the charterer was entitled to detain the vessel a reasonable time, but only according to the usual time and manner at the port of loading in ordinary circumstances, and not in extraordinary circumstances. If coal could not have been got from the mine originally selected the charterers ought to have made special exertions and got the coal from other collieries, or at least have provided a cargo of coal as they had agreed to do in the charter-party—*Tatcombe* v. *Balfour*, L.R., 8 C.P. 852; *Castlegate Steamship Company* v. *Dempsey*, May 3, 1892, 1 Q.B. 854; Abbot's Law of Shipping, 298, 299; *Wright* v. *New Zealand Shipping Company*, June 28, 1879, L.R., 5 Ex. D. 165. The circumstances in the case of *Hudson* v. *Ede*, *supra*, were not analogous, as there the cargo was ready at the port of embarkation, but owing to the ice in the river the lighters could not come alongside the vessel; the ground of complaint here was that the charterers had not a cargo ready, and there was an absolute obligation on them to provide a cargo—*Elliot and Others* v. *Lord and Others*, March 8, 1883, 52 L.J. Privy Council 23; *Ashcroft* v. *The Crow Orchard Colliery Company*, July 5, 1874, L.R., 9 Q.B. 540. The part of the exception clause upon which the appellants relied was "any other hindrances of whatever nature soever beyond the charterers' or their agents' control." They must fail again on that point—First the exception upon which they relied must be *ejusdem generis* of the other exceptions specifically mentioned, but in this case it was merely a press of ships at the port at which the "Lismore" was to be loaded; and then it was not beyond their own control, because they could have made a specific contract with the colliery to supply the "Lismore" within a certain time, or when their agent saw that she could not be loaded within a reasonable time from that particular colliery he ought to have got coal from wherever he could, and it was proved he did not. As regarded the time for which damages for loss of time was asked it amounted to ten days delay for stiffening and forty-four days delay in loading. The rate for demurrage was 4d. per register ton per day; that was the rate at which demurrage was to be given in discharging, and was a fair test of what ought to be given; besides, it was the recognised rule in such cases—*The "Argentino,"* February 14, 1888, L.R., 13 P.D. 61; "*Star of India*," August 1, 1876, L.R., 1 P.D. 466.

At advising—

LORD TRAYNER delivered the opinion of the Court:—

This is an action at the instance of the owners of the "Lismore" for damages on account of the undue detention of that vessel by the defenders, the charterers, in loading a cargo of coals at Sydney. The Lord Ordinary has found that the defenders unduly detained the "Lismore" for a period of forty-four days, and in respect thereof has decerned against the defenders for payment of a sum of £1171, 17s. 4d., reaching that sum by estimating the damage at the rate of 4d. per registered ton per day. Both parties have reclaimed against his Lordship's conclusion, and we are now to decide upon the contentions presented to us *hinc inde*.

As I cannot concur in all the views expressed by the Lord Ordinary, I shall state as briefly as I can the opinion which I have formed on the case.

By the charter-party entered into between the parties it is provided (1) that the "Lismore" should proceed to Sydney and there receive from the charterers a full and complete cargo of coals from such colliery as the charterers should direct; (2) that the coals should be loaded as customary; (3) that sufficient stiffening should be supplied at Sydney when required by master on due and sufficient notice being given; and (4) that the charterers should not be liable for the non-fulfilment of their contract on account of the dangers of navigation, &c., or from "strikes, lockouts, or accidents at the colliery directed, or on railways, or any other hindrances of what nature soever beyond the charterers' or their agents' control." These are the only provisions of the charter to which I need at present advert; they are the clauses concerning the meaning and effect of which the parties are chiefly at variance.

1. Under the first of these clauses the obligation of the shipowner is clear. He was bound to take his vessel to the place at which the "colliery directed" usually shipped coals, but this clause imported no other or greater obligation than that. It certainly did not bind the ship to wait at the "colliery directed" for her cargo, as long as the colliery desired or required to keep her. This clause need not further be considered as bearing upon the detention of the vessel — it not being disputed that the place where the "Lismore" lay at Sydney was the place where coals from the directed colliery were usually loaded.

2. The ship was to be loaded as customary. It is said that this clause imports into the charter-party all the customs of the port having reference to the loading of a ship there. I dissent from that view. In my opinion it refers only to the manner of loading customary at the port of loading. It bound the ship to receive the cargo from the charterer, either by lighter, at a wharf, under a crane, or by hand, or in any way in which such cargoes are usually, or according to custom, loaded at that port. It did not, in my opinion, include an obligation to wait a regular turn, although that may be a matter on which different opinions may be entertained. It was said for the defenders that this clause—loading as customary—affected the time which the charterer might detain the vessel without being liable for demurrage or damages for undue detention — that if there was a customary time taken or allowed for loading cargoes, that this clause would entitle

the charterer to that time. I again dissent. The clause, in my opinion, affects the question of time only in so far as it might happen that the customary manner of loading occupied more time than some other manner of loading would occupy. For example, if the customary manner of loading is by lighters or barges floated off to the ship's side, the loading of the cargo would occupy more time than would be taken if the cargo was loaded at a wharf by steam crane, or by waggons being brought down to the ship's side and the coal tilted into the hold directly from the waggons. The time necessary for the loading of the cargo in customary manner must be submitted to although other means of loading occupying less time might or could be employed. In this sense the clause "to be loaded as customary" affects the time to be allowed for such loading (where, as here, no lay-days for loading are specified), but in no other sense.

3. The exception clause in this charter is a very broad one, but the defenders cannot defend this claim or excuse the detention of the ship on any of the special grounds set forth in the clause. They rely on the concluding general words "or any other hindrances of what nature soever beyond the charterers' or their agents' control." Those general words, however, do not appear to me to afford the defenders the defence they found upon them. Words of a general nature such as these now under consideration are generally restricted in their application to causes of a like kind to those previously specially enumerated, and so reading them, they will not in this case, cover the cause of the ship's detention. But reading them in the widest sense they only cover causes which conduce to the failure of the charterers' obligations under the charter. In the present case it has been clearly shown, that the direct cause of the "Lismore's" detention was that the charterers had no cargo to give her. Now, the obligation to have or provide a cargo is not a charter obligation. The contract of charter-party presupposes that the charterer has a cargo, or will have a cargo ready for the ship when the ship is ready for it, and accordingly the charter-party provides that the ship shall proceed to a certain port, and there "take on board," or (as in this case) there "receive," a cargo from the charterer. Under the charter-party the ship is bound to receive and carry a cargo; the charterer's obligation is to give a cargo in a certain manner at the port of loading, within a certain fixed or within a reasonable time. But all this proceeds, as I have said, upon an obligation existing outwith the charter to have or provide a cargo for loading—a cargo which the charterer is presumed to have, and which he charters the vessel to convey. If, therefore, the providing of the cargo is not a charter obligation, the exception clause does not cover it, nor afford any exemption from liability in respect of its non-performance. But assuming that the providing of the cargo is an obligation within the charter-party, and one to which the exception clause applied, have the defenders brought themselves within the benefit of the exception? I think not. The charter-party was entered into in March 1888 at Glasgow, and (from the clause authorising the charterer to cancel it) it may be inferred that the "Lismore" was expected to be at Sydney at latest before the end of September. The charterers appear to have informed their agents at Sydney without any loss of time that the charter-party had been entered into, for on 8th May the agents wrote to the colliery instructing them to book the "Lismore" for a cargo of coals. But having thus ordered the coals for the "Lismore," as well as for two other vessels which were named, the agents seem to have thought that they had done all that could be required of them. And in ordinary circumstances perhaps no more would have been necessary to enable them duly to fulfil their obligation to load the "Lismore." They took no precautions, however, to secure that they would get coals for the "Lismore" in due time, and took the risk of anything occurring which would prevent this. It is the chance so risked that has occurred.

For when the "Lismore" arrived, the workmen in the Newcastle district collieries had come out on strike, which occasioned an unusual demand for coals from these collieries near Sydney which continued working, including the colliery from which the cargo for the "Lismore" had been ordered. The result was that that colliery supplied other vessels with coal at a higher price than that at which they had contracted to supply the "Lismore's" cargo, and kept the "Lismore" and her charterers without the coal which had been ordered in May, as long or almost as long as the unusual demand continued. The defenders say that the non-loading of the "Lismore" was thus occasioned by a hindrance "beyond their control;" that they could not get the cargo they had ordered, and could not procure coal elsewhere. I cannot adopt this view. In the first place, the charterer's agents could in May have contracted for the delivery to them of the coal ordered for the "Lismore" by a certain day, or within a certain number of days after the "Lismore's" arrival. Nothing hindered their doing that; and if that course had been adopted it is to be presumed that the colliery so bound would have fulfilled its obligation, and no delay in loading the "Lismore" would have occurred. In the second place, the fact (if it be a fact, which in this particular case is more than doubtful) that the charterer could not procure the commodity in the market (it not being there for sale), which he had bound himself to put on board the chartered vessel when that vessel was ready to receive it, is no excuse, on the ground of "hindrance over which he had no control," for the non-performance of his obligation, any more than would be the excuse that having become bankrupt he had no money to purchase the commodity, it being procurable in the market. Nor can the defenders maintain that they were unable to put the

cargo alongside the "Lismore," even if they had had it under their control, because the necessary colliers or lighters could not have been procured. It is plain from the evidence that they made no effort in this direction any more than they did for the purpose of procuring the coal itself. I come therefore to the conclusion that the defenders cannot bring themselves in the circumstances within the protection of the exception clause.

The only other matter of any importance to be considered in connection with the question whether the defenders are liable for the undue detention of the "Lismore" is the defence that the "Lismore" was duly loaded, taking into account the fact that, as is alleged, she was loaded in regular turn, the only vessels loaded before her being steamers, which, according to the custom of the port, have a preference in loading to sailing vessels. I have already said that such an argument is excluded by what I regard as the meaning and effect of the clause "to be loaded as customary." But I will now assume, contrary to my own opinion, that that clause imports into the charter-party every custom of the port of Sydney relative to the loading of vessels. The question remains, have the defenders established that it is a custom of that port that steamers shall always have preference over sailing vessels in loading? On this question the evidence is conflicting. The pursuers' witnesses say they never heard of such a custom—that no such custom exists. The defenders' witnesses are at variance among themselves. Two of them say that there is such a custom, and that it is so absolute that sailing vessels could, in respect of it, be kept "forever" waiting for their cargo if there were a sufficient number of steamers to bring about such a result. One witness thinks the custom, which he says exists, would not warrant a sailing vessel being kept forever. He says "Steamships take preference. . . . There is a recognised custom not to keep a vessel more than 60 or 70 days. We cannot keep vessels an unlimited time." Another witness speaks to the custom, but adds that "all charter-parties contain a specification that steamers under contract shall take precedence of sailing vessels." And lastly, other witnesses say that the preference which steamers have by custom over sailing vessels only applies to bunker coals, not cargo. Such being the state of the evidence, I cannot hold it to be established that there is any custom of the port of Sydney entitling steamers to load coals for cargo before sailing vessels. Any custom to be binding must be at least generally known and observed; and this cannot be said on the evidence to be the case with the alleged custom on which the defenders found. The preference given to steamers over sailing vessels may be a practice of the collieries, but it is certainly not proved to be a custom of the port.

The result I have reached on the case, so far, is, that the defenders are responsible for the undue detention of the "Lismore;" and it remains now to be considered how long the "Lismore" was unduly detained, and what is the amount due to the pursuers in respect of such detention.

In dealing with this branch of the case I take for granted (1) that the defenders were bound to have had a cargo ready for the "Lismore" when she was ready to receive it; (2) that the defenders were not in any way excused for their failure to have and load such cargo by reason of the unusual demands for coal made on the "directed colliery" during the time that the "Lismore" lay at Sydney; or (3) by any custom of the port which entitled steamships to cargo before sailing vessels. The undue detention arose from a failure to supply (1) stiffening coal, and (2) cargo. With regard to the delay in supplying coals for stiffening, it is enough to say that the defenders conceded that if the alleged custom of the port, and the unusual demand for coals at Sydney on account of the Newcastle strike did not excuse them, then the delay in affording stiffening must be answered for by them. Without any such concession, I would hold the defenders liable for the delay in supplying stiffening coal. I think the evidence shows that forty-eight hours' notice for stiffening was sufficient, on the assumption that the cargo was under the control of the defenders. According to the evidence of the master of the "Lismore" (and there is none to the contrary), the vessel was detained for ten days by the delay in supplying the stiffening, which came in two parcels on different occasions. For this delay I think the defenders are responsible. The ship was ready for cargo on 14th September, and was not loaded till the 29th November, a period of seventy-six days. Of this period the Lord Ordinary allows thirty-two running-days—or twenty-seven working-days—for loading the vessel, and although I think this is a day or two more than even a favourable view of the proof would entitle the defenders to, yet I am not disposed to interfere with the result which the Lord Ordinary has reached. In loading the cargo, therefore, the "Lismore" was unduly detained for forty-four days, which, added to the ten days detained from want of stiffening, makes the entire detention for which the defenders are answerable fifty-four days.

I agree with the Lord Ordinary that the amount of damage for the undue detention of the "Lismore" should be assessed at the rate of 4d. per registered ton per day. That rate has been regarded, so far as my experience has gone, as almost a fixed and invariable rate of damage for undue detention of a sailing vessel. But it has also been a very common practice to allow the same rate as damages for undue detention as has been fixed (if fixed at all) by the charter-party for proper demurrage. In the present charter-party the rate of demurrage stipulated for days beyond the lay-days for discharging is 4d. per registered ton. The rate fixed by the Lord Ordinary is thus in accordance with the practice I have referred to. At this rate the amount due by the defenders for each day's detention is

£26, 12s. 8d., and for fifty-four days amounts to £1438, 4s. I think the pursuers are entitled to decree for this sum instead of the sum decerned for by the Lord Ordinary.

The Court recalled the finding in the Lord Ordinary's interlocutor that the defenders were liable in the sum of £1171, 17s. 4d., which they altered to £1438, 4s., and otherwise adhered.

Counsel for Reclaimers—C. S. Dickson—Ure. Agents—Hamilton, Kinnear, & Beatson, W.S.

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

Tuesday, March 14.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

MILNE'S TRUSTEES *v.* ORMISTON'S TRUSTEES.

Promissory-Note—Joint Obligants—12 *Geo. III. cap.* 72, *sec.* 37—*Sexennial Prescription—Interruption of Prescription.*

A, B, and C, in return for a loan of £1000, granted to D a promissory-note, dated 15th May 1877, whereby they bound themselves, conjunctly and severally, to pay the said sum one day after date. A and B each paid one-half of the interest on the sum in the note down to 15th May 1880. In 1883 D raised an action, with general conclusions, against A, B, and C, for the sum of £1000, contained in the said promissory-note, with interest thereon from 15th May 1880, and decree in absence was pronounced against them therefor. In 1892 A and B each paid to D one-third of the principal sum of £1000 and interest, and expenses of process. Thereafter D raised an action against A for the remaining third. A admitted the debt, but averred that the only debtor now bound for the sum sued for was C, as the promissory-note had been prescribed, and the decree against each of the debtors obtained in 1883 was only for one-third of the debt. *Held* that A was liable to D for the sum sued for.

Opinions—per Lord Justice-Clerk and Lord Trayner, *diss.* Lord Young, and *dub.* Lord Rutherfurd Clark—that where an action has been commenced upon a bill within six years from the date of its maturity, whether against the whole or any one of the obligants under the bill, such action will exclude the statutory limitation.

By section 37 of the Statute 12 George III. cap. 72, it is enacted "that no bill of exchange, or inland bill, or promissory-note, executed after the 15th day of May 1772, shall be of force or effectual to produce any diligence or action in that part of Great Britain called Scotland unless such diligence shall be raised and executed, or action commenced thereon, within the space of six years from and after the terms at which the sums in the said bills or notes became exigible."

On 15th May 1877 William Thomas Ormiston, John Ord, and Samuel Swan, in return for a loan of £1000, granted a promissory-note for that amount in favour of Miss Marion Milne, whereby they bound themselves one day after date, conjunctly and severally, to pay to her within the office of the Royal Bank of Scotland in Jedburgh the said sum of £1000. The interest on the said note was to be at the rate of 5 per centum per annum.

William Thomas Ormiston died on 24th July 1878, Samuel Swan on 30th January 1880, and John Ord on 30th September 1880. They all left trust-settlements.

Until 15th May 1880 the interest on the sum in the note was duly paid, one-half by John Ord, and the other half by William Thomas Ormiston, and after his death by his representatives.

In 1883 Miss Milne brought an action in the Sheriff Court of Roxburghshire against the trustees and executors of the three granters of the promissory-note, in which she prayed the Court "to grant decree against the above-named defenders as trustees foresaid, ordaining them to pay to the pursuer the sum of £1000 sterling, with interest thereon at the rate of 5 per cent. per annum from the 15th day of May 1880 until payment, with expenses." In the condescendence she averred—"(5) The said promissory-note is still unpaid, and is due to the pursuer; and as the said trustees of the said William Thomas Ormiston, Samuel Swan, and John Ord now represent the granters thereof, the several estates entrusted to the management of the said respective trustees are thus jointly and severally liable in payment of the said sum of £1000 sterling, with interest thereon at the rate of 5 per centum per annum from the 15th day of May 1880 (since which date no interest has been paid) until payment thereof."

On 26th April 1883 the Sheriff-Substitute (RUSSELL) pronounced the following interlocutor—"In respect of no appearance for the defenders, holds them as confessed, and decerns against them in terms of the prayer of the petition, with £7, 1s. 8d. of expenses." Extract decree followed thereon, in which the Sheriff-Substitute in absence decerned and ordained the defenders as trustees and executors foresaid to make payment to the said Miss Marion Milne, pursuer, of £1000 sterling, with interest thereon at the rate of 5 per centum per annum from the 15th day of May 1880 till payment, with £7, 1s. 8d. of expenses of process as taxed, and 4s., being dues of extracting and recording this decree."

On 5th September 1890 Miss Milne died, leaving a trust-settlement.

In 1892 Mr Ormiston's trustees and Mr Ord's trustees each paid to Miss Milne' trustees one-third of the principal sum of £1000,