charge he was tried, with the result that he was convicted and fined £5 with the alternative of 30 days imprisonment. That conviction is signed "John J. Calder, Magistrate." It is now sought to set it aside on the ground that John J. Calder was not the sole magistrate who tried the case, but that in fact there were three magistrates, and that the case having been tried by three magistrates the conviction required to be signed by all the three or by one of them as *preses*, and that this conviction was not so signed. The question therefore is whether it was not the fact that John J. Calder was the sole magistrate who tried the suspender. If it was the fact, then there is no ground of objection to the conviction. It is not said that the suspender suffered any injustice or oppression. It is said that this matter of the signing of the conviction is one of substance and not of form, but I do not see how it could involve any practical injustice to the suspender here.

To see who it was that tried the case we must go to the minutes of procedure. They bear that the suspender was tried "in presence of John Joseph Calder, Esq., one of the magistrates of the burgh of Alloa." Therefore, as far as the minutes show, Mr Calder was the magistrate, and the only magistrate, who tried the case. That is in conformity with the usual practice in the police court. One bailie is appointed to sit in the court for a certain period. I never heard of two or three sitting at once. I have no doubt that in this case Bailie Calder sat alone and tried the case by himself.

It is said that there were other bailies on the bench. Suppose there were, that does not make them magistrates who tried this case, and even if, happening to be present, they were consulted by the magistrate who was trying the case, that would not make any difference. The presence of other magistrates on the bench does not come to much.

But then it is said that all the three magistrates and the clerk retired together after the case had been heard. Suppose they did, and suppose the judge who was trying the case did consult the other magistrates who happened to be present, I do not think that supports the suspender's contention. Then the suspender goes on to say that they came back and Bailie Calder announced the conviction and the sentence. There is nothing in this to show that Mr Calder was not the sole magistrate who tried the case. It is not said that the other magistrates interfered in any way with the conduct of the trial. All that is said is that they "were present at the hearing" and "took part in the deliberations thereon." There is nothing here to justify inquiry or the disturbing of this conviction and sentence.

This case is quite different from the case of *Williamson*, 3 Irv. 295, where the record bore that the case was tried by more than one magistrate and the conviction was only signed by one of them, whereas here the record bears that the case was tried by one magistrate only.

I see no ground for interfering with the conviction.

LORD KINNEAR—I quite agree for the reasons stated by your Lordships, and I should only add that the judgment proposed seems to me to be entirely consistent with the previous cases of *Williamson* v. *Thomson* and *Simpson* v. *Reid*, and at the same time it is not inconsistent with the opinions of the Judges who dissented in these cases. In the case of *Williamson* v. *Thomson* the record bore that the trial took place in the presence of two magistrates while the conviction bore to have been pronounced only by one. There was nothing to show whether the other magistrate had concurred in the sentence pronounced. In *Simpson* v. *Reid* the record was exactly in the same terms. It bore that the accused appeared in the presence of James Scott and David Patrick Donald, magistrates of the burgh of Johnstone, whereas the conviction was signed by one only of these magistrates. In that case there was a difference of opinion. Lord Kyllachy, who was one of the majority, held that the Court must proceed on the record, and could not go behind it to inquire as to whether the magistrate who did not sign the conviction was on the bench merely as a spectator. In the present case we must take the record as it stands. The objection is purely technical, and I see no reason in the cases cited for disturbing the conviction.

The Court refused the bill.

Counsel for the Complainer—Orr. Agents—Clark & Macdonald, S.S.C.

Counsel for the Respondent—Younger. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

COURT OF SESSION.

Thursday, December 15.

SECOND DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

TURNBULL, SCOTT & COMPANY *v.* CRUICKSHANK & COMPANY.

Ship — Charter-Party — Demurrage — "Working Day of Twenty-four Consecutive Hours."

A charter-party provided that a cargo was to be loaded and discharged "at the rate of 500 tons per working day of twenty-four consecutive hours (weather permitting), Sundays and holidays always excepted."

Held that, excepting Sundays and holidays, each period of twenty-four consecutive hours, including night and non-working hours, after loading or discharging began was to be reckoned as a "working day of twenty-four consecutive hours"—the Court rejecting the construction that working hours only were to be counted as part of such a day.

The Forest S.S. Co. v. *Iberian Ore Co.*, 1899 (H.L.), 16 T.L.R. 59, *distinguished.*

Ship—Charter-Party—Demurrage—Exception—"Cause beyond Personal Control" of Charterers—"Stoppage of Trains"—Detention Caused by Want of Waggons.

By a charter-party the charterers were bound to discharge a cargo at the port of destination "as customary," at the rate of so many tons in every period of twenty-four consecutive hours after discharging began, night and non-working hours included. By a clause of exception they were exempted from liability for demurrage if the delay was occasioned by, *inter alia*, "stoppage of trains . . . or any cause beyond their personal control." The customary mode of discharge at the port of destination was into waggons which the railway company was in the habit of supplying only during "working" hours. No request was made by the charterers for waggons during night or non-working hours.

Held that the charterers were not liable for demurrage for any delay occasioned during the currency of the lay days by a deficient supply of railway trucks (for which the railway company alone was responsible) during ordinary "working" hours, in respect that want of trucks, being a cause *ejusdem generis* with "stoppage of trains," was within the terms of the clause of exception in the charter-party.

By charter-party dated 16th December 1902 Messrs William Cruickshank & Company, iron ore merchants, Glasgow, chartered from Messrs Turnbull, Scott, & Company, steamship owners, London, the s.s. "Eastgate" to proceed to Aquilas, Carthagena, or Almeira, as ordered by the shippers, and load a cargo of iron ore, and thereafter "proceed to Glasgow or Ardrossan and there deliver the same as customary where and as directed by consignees . . . The cargo to be shipped at the rate of 500 tons per working day of 24 consecutive hours (weather permitting), Sundays and holidays always excepted; and to be discharged on same conditions. (Except in the case of strikes of miners or workmen, accidents or stoppages caused by frost at any mine or mines from which shippers may receive part or whole cargo, epidemics, riots, insurrections, quarantine, stoppage of trains, interventions of sanitary, customs, and other constituted authorities, or any cause beyond the personal control of shippers, charterers, or consignees, which may hinder the loading or discharge of the said vessel.) In these cases lay-day hours not to count and demurrage not to accrue. Days to be averaged to avoid demurrage. In case charterers can arrange to load or discharge ship on Sundays or holidays, captain to allow work to be done, half such time to count. Time not to count at port of discharge between the hours of 5 p.m. on Saturdays and 7 a.m. on Mondays, unless used. Loading time to count from 6 a.m. after ship is reported at Custom House and ready, unless work should have commenced earlier, and for discharging when ship is in every respect ready in berth, and in free pratique, as per custom of port; written notice of such readiness being given to consignees during usual office hours. The ship to unload barges sent alongside with all possible despatch (should this mode of shipping be used); and captain to be responsible for any delay incurred by not doing so. Ship to work day and night if requested to do so, and to give use of winches, with necessary steam power and hands, charterers paying all extra expenses. Ship to keep the steam winches in good working order. Demurrage (if any) at the rate of 16s. 8d. per hour."

The "Eastgate" as instructed proceeded to Aquilas, loaded a cargo, and reached Ardrossan on 22nd January 1903, where she discharged. Thereafter Messrs Turnbull, Scott, & Company brought an action against William Cruickshank & Company in the Sheriff Court of Lanarkshire at Glasgow, concluding for £80, 8s. 4d. of demurrage incurred during the discharge.

A proof was taken by the Sheriff-Substitute (A. O. M. MACKENZIE).

The case involved two separate questions—(1) Had there in fact been demurrage? (2) If there had been, were the defenders liable? Upon the first question the parties were agreed as to the time actually occupied in discharging, but differed as to the time allowed by the charter-party, the question depending solely upon the different interpretations they gave to the expression in the charter-party "working day of twenty-four consecutive hours." If the pursuers' interpretation was the correct one, admittedly there had been demurrage, whereas if the defenders were right there had been none. The respective contentions of the parties upon this point are set forth by the Sheriff-Substitute in the note appended to his interlocutor.

Upon the second question the pursuers averred that it was customary to discharge iron ore at Ardrossan not only into trucks but also on to the quay, and that at the time when the "Eastgate" was unloading there was ample quay space and trucks available to have enabled the defenders to discharge her within the lay-days had they used all the available means.

The defenders averred that the only customary mode of discharge at Ardrossan was into trucks, and that if any delay had occurred it was due to a deficient supply, for which they were not liable, and which was covered by the clause of exception in the charter-party. They further averred that while the "Eastgate" was discharging there was no available space upon the quay where cargo could have been discharged.

It was proved that the customary method of discharge at Ardrossan was into waggons, and that it was only in exceptional circumstances and under special arrangements that cargoes of iron ore were put on to the quay. The customary hours of working were from 6 a.m. to 6 p.m., but sometimes for special reasons ships discharged during the night. The "Eastgate" did not obtain a full supply of waggons,

and this was due to the fact that the Caledonian Railway Company, which alone had direct access to the quay, had not sufficient waggons to supply. The defenders endeavoured to prove that the Caledonian Railway Company withheld their waggons because of a block at the Clyde Ironworks, the destination of the cargo, which made it useless to give a full supply. There was a conflict of evidence as to whether the defenders had applied to the Glasgow and South-Western Company for trucks when the Caledonian Company failed them, and as to whether the former could or would have supplied them; also as to whether at the time there was room for the cargo on the quay.

The Sheriff-Substitute on 6th April 1904 decerned against the defenders for £69, 11s. 6d. In his interlocutor he found in fact, *inter alia*, as follows:—"(1) That the defenders chartered the steamship 'Eastgate' from the pursuers as per charter-party to proceed to Aquilas, there load a cargo of iron ore, and being so loaded to proceed to Ardrossan, and there deliver the same as customary; . . . (3) that the said ship duly proceeded to Aquilas in terms of the charter-party, and there loaded a cargo of 2241 tons of iron ore, and that the time occupied in loading was six working days of twenty-four consecutive hours each; (4) that the ship reached Ardrossan on Thursday, 22nd January 1903, and was ready to discharge cargo on Friday, 23rd, at 10 a.m., and that the discharge of cargo was finished at 10·30 a.m. on Saturday 31st January; and (6) that the detention of the 'Eastgate' beyond the lay-days specified in the charter-party is not proved to have been due to any of the causes enumerated in the charter-party as exceptions to the charterers' liability to pay demurrage." He accordingly found in law that the defenders were liable in demurrage.

Note.—"This is an action by shipowners against charterers for payment of demurrage, and the first point in dispute between the parties is as to the meaning of the provision in the charter-party — 'The cargo to be shipped at the rate of 500 tons per working day of 24 consecutive hours (weather permitting), Sundays and holidays always excepted, and to be discharged on same conditions.' The pursuers submit that the words 'consecutive hours' are used in their ordinary sense, and that, excepting Sundays and holidays, each period of 24 consecutive hours elapsing after loading or discharging should have begun must be reckoned as a working day in terms of the clause. The defenders on the other hand maintain that the meaning of 'working day of 24 consecutive hours' is working day of 24 consecutive working hours, and that non-working hours of working days—that is, hours during which, in accordance with the custom of the ports of loading or discharging, work did not proceed—were not to be counted as part of the '24 consecutive hours' which go to make up each 'working day.' I am of opinion that the construction put upon the clause by the pursuers is the right one. It appears to me that the defenders' construction denies all proper effect to the word 'consecutive.' I cannot read 'consecutive hours' as equivalent to consecutive working hours, or as meaning anything else than hours following one another immediately and without interval of time. This construction is entirely consistent with the other provisions of the charter-party as to the time to be allowed for loading and discharging, and, it may be added, with the interpretation which the defenders themselves put upon the charter-party while the contract was being carried out, as is shown by the letters from the defenders to John Craig, Captain Evans of the 'Eastgate,' and the pursuers' agents, Robert Mackill & Company, dated respectively January 24th, January 27th, and February 13th 1903.

"In support of their contention the defenders founded on the case of *Rhymney S.S. Co.* v. *Iberian Ore Co.*, 79 L.T. 240, affirmed *sub nomine The Forrest S.S. Co.* v. *Iberian Ore Co.*, 16 T.L.R. 59, but there is a material difference between the terms of the charter-party in that case and this. In the first place, the words which had there to be construed were 'working day of 24 hours,' and not as here 'working day of 24 consecutive hours.' In the second, the charter-party in that case, after providing that the ship was to work at night if required, provided further that such time was not to count unless used, which, in effect, limited the 'working day' in the ordinary case to the hours usually worked, whereas here the charter-party, while providing that the ship is to work at night if requested, does not contain the further provision that the time is not to count unless used, except in regard to the period between 5 p.m. on Saturday and 7 a.m. on Monday, and the fair inference is that hours not worked on working days were intended to count whether used or not. . . .

"The only remaining question is whether the detention of the ship beyond the stipulated time was due to any of the causes specified in the charter-party as exceptions to the defenders' obligation to pay demurrage. The defenders submit that it was, and it is for them to establish this. They contend that by the terms of the charter-party the cargo was to be delivered 'as customary'; that this provision is to be read into the clause of exceptions; and therefore that they are exempt from liability if by reason of any of the excepted clauses they were prevented from discharging the cargo in the customary manner within the stipulated time. They allege that by the custom of the port of Ardrossan iron ore is discharged into railway trucks, which was the mode of discharge they adopted, and that the detention of the ship was due to the insufficiency of the supply of waggons given by the Caledonian Railway Company. This they say was within the meaning of the clause of exceptions a 'stoppage of trains,' or, at any rate, 'a cause beyond the personal control of the charterers' hindering the discharge of the ship.

"In considering this argument I assume that the defenders would, as they contend, not be liable for the detention of the ship beyond the time stipulated, if owing to any of the excepted causes its discharge 'as customary' within that time was rendered impossible. But even making this assumption I am of opinion that it is not enough for the defenders to show that the mode of discharge which they adopted, namely, into trucks, was the most usual method of discharging iron ore at Ardrossan. They must, I think, show further that it was the only mode of discharging ore recognised by the practice of the port which it was within their power to adopt. They bound themselves to load and discharge the vessel at a certain rate per day, and the clause of exceptions only frees them from liability for failure to fulfil their engagement if the impediment arising from the excepted cause be one hindering the discharge of the ship, and I do not think the insufficiency of the waggon supply could be regarded as such an impediment if they could have resorted to another method of discharge recognised by the custom of the port, although not so commonly used or so convenient as that which they adopted.—*Granite Steamship Co.* v. *Ireland & Son*, 19 R. 24, 29 S.L.R. 115.

"It is necessary, therefore, to inquire whether there was any other mode of discharging ore than into trucks recognised by the custom of the port of Ardrossan, and on this point the result of the evidence is clear. On the one hand it is clearly proved that much the most usual mode of discharging ore at that port is into trucks, but on the other it is proved just as clearly that if quay space is available the Harbour Company are glad to allow it to be put on the quay, and that this is a recognised method of discharging ore at the port when necessity arises, although it is not generally adopted except where a cargo arrives which has not been sold, or in the case of a sold cargo, where there is a special desire to get the ship away and its departure can be accelerated by discharging part of its cargo in this manner. It is true that only a small proportion of the total iron ore brought to Ardrossan is discharged on to the quay, and that most of the witnesses who speak to the point deny that it is the customary method of discharge, but all I think admit that it is a known method permitted by the harbour authorities, which can be resorted to in cases of emergency, and in this state of the evidence I am unable to hold that the method in question is not in accordance with the custom of the port. It is quite possible that there should be more than one customary method of discharging cargo at a port, and where the charterer's obligation is to discharge 'as customary,' his engagement will not, in my opinion, be fulfilled unless he use all the usual methods of dispatch.

"The defenders further argued that in the case of the 'Eastgate' the cargo could not have been put on the quay, because there was no quay space available at the time, but I do not think they succeeded in proving this. The only witnesses to the point are Captain Evans of the 'Eastgate,' and Mr Craig, who took charge of the unloading of the ship. Captain Evans states that there was ample room on the quay alongside the ship to accommodate the cargo. Mr Craig's recollection is to the contrary, but it is certain that no application was ever made by the charterers to have the cargo put there, and that being so I cannot regard Mr Craig's evidence, founded as it is upon his recollection of the condition of the quay at a time more than a year past, and contradicted, as it is, by that of Captain Evans, as proving that there was no room on the quay for the 'Eastgate's' cargo.

"I was referred by the defenders to the cases of *Wyllie & Co.* v. *Harrison & Co.*, 13 R. 92, and *Letricheux & David* v. *Dunlop & Co.*, 19 R. 209, in which charterers were held not liable for detention arising from an insufficient supply of railway trucks, but I do not think these cases are applicable as authorities in the present case, as in neither was there any method of discharge available except that which was adopted, viz., into trucks.

"For these reasons I am of opinion that the defenders have failed to show that the detention of the 'Eastgate' beyond the stipulated time was due to any of the causes specified in the clause of exceptions, and that I must give decree for the sum sued for in the summons as restricted."

The defenders appealed to the Court of Session, and argued—(1) There had been no demurrage, the time occupied in loading and unloading not having been in excess of that allowed by the charter-party. The respondents' interpretation of "working day of 24 consecutive hours" adopted by the Sheriff-Substitute was wrong. The true meaning was a day made up of twenty-four consecutive "working" hours, and non-working hours of working days were not to be counted as part of the "24 consecutive hours" which went to make up each "working day." That neither party contemplated periods of twenty-four consecutive hours was indicated by the exception clause in the charter-party, which provided for breaks due to bad weather, &c., and by the provision — "Ship to work day and night if requested," which showed that night work (*i.e.*, work in non-working hours) was abnormal. The provision "days to be averaged" meant that the number of days occupied in the work was to be arrived at by adding up odd hours of work, and then dividing by twenty-four. The respondents' interpretation conveyed no meaning beyond what might have been conveyed by the single word "day." The expression was practically identical with that in the "*Forrest*" *S.S. Co.* v. *Iberian Ore Co.*, 1898, 79 L.T. 240, *aff.* by H.L., 1879, 16 T.L.R. 59, which ruled the present case. (2) If there had been demurrage the appellants were not responsible, as it was due to a cause covered by the clause of exceptions, viz., scarcity of waggons, a cause *ejusdem generis* with "stoppage of trains"—*Mein* v. *Ottmann*—"*The Lady Palmer*," December 11, 1903, 6 F. 276, 41 S.L.R. 144; *Letricheux & David*

v. *Dunlop & Co.*, Dec. 1, 1891, 19 R. 209, 29 S.L.R. 182; *J. & A. Wyllie* v. *Harrison & Co.*, October 29, 1885, 13 R. 92, 23 S.L.R. 62. Discharge into trucks was the only customary method at Ardrossan, and therefore the only one they were bound to adopt—*Ardan Steamship Co. Limited* v. *Weir & Co.*, Jan. 19, 1904, 6 F. 294, 41 S.L.R. 230. But even had it been customary to discharge on to the quay, it was proved that in the present case that method was impossible owing to lack of room. The respondents' suggestions that the Caledonian Railway had withheld trucks because of a block at the Clyde Ironworks, for which the appellants were responsible, or that trucks could have been supplied by another railway company, were unfounded. They were entitled to deduct all the time, night as well as day, during which trucks were not supplied.

Argued for the respondents—(1) There had been demurrage, for the interpretation of "working day of twenty-four consecutive hours" adopted by the Sheriff, viz., each period of twenty-four consecutive hours elapsing after loading or discharging had begun, was the correct and natural one. Otherwise no meaning was given to the word "consecutive," for there never could be twenty-four consecutive "working" hours. The evidence showed that night-work was done at Ardrossan, and night-work was treated as normal in the charter-party, no special rate of remuneration being provided. The expression "days to be averaged" meant merely that the times occupied in loading and unloading the cargo were to be looked at together and any time saved over the one operation could be added to the time taken over the other. 2. The appellants were liable, because (1) on the assumption that the delay was caused by want of trucks (*a*) that was not a cause covered by the clause of exceptions, want of trucks and "stoppage of trains" not being *ejusdem generis*, the latter referring only to detention or stoppage *en route*—*Granite Steamship Company* v. *Ireland & Son*, November 20, 1891, 19 R. 124, 29 S.L.R. 115; *Kruuse* v. *Drynan & Co.*, July 9, 1891, 18 R. 1110, 28 S.L.R. 958. (*b*) Even if it were, it was not a cause beyond the personal control of the appellants, as the want of trucks was due to the block at the Clyde Ironworks, for which they were responsible—*Holman & Son* v. *Harrison*, 29 S.L.R. 47, and also to the fact that they made no effort to get trucks from other railway companies. (2) The delay was caused by the failure of the appellants in the absence of trucks to unload on to the quay—*Gardiner* v. *Macfarlane, M'Crindell, & Co.*, February 24, 1893, 20 R. 414, 30 S.L.R. 541 Unloading on to the quay was one of the customary methods at Ardrossan. In any event the appellants were not entitled to deduct the night hours, during which it was not customary to supply trucks.

At advising—

LORD TRAYNER—The parties to this case are practically agreed, or nearly agreed, on all the facts which are material. They differ in regard to the construction to be put on the clauses of the charter-party, which provide (1) for the lay-days allowed the charterers for loading and discharging cargo, and (2) for the exceptional circumstances which absolve the charterers from liability for demurrage.

1. The charter-party provides that the cargo is to be loaded and discharged "at the rate of 500 tons per working day of twenty-four consecutive hours, weather permitting, Sundays and holidays always excepted." The Sheriff-Substitute has stated in the note to his interlocutor appealed against the interpretation which the parties respectively put upon this clause, and has done so with such clearness and precision that it is quite unnecessary for me to repeat what he has so well said. He is of opinion that the view contended for by the pursuers is the right one, and I agree with him. It was argued by the defenders that the judgment of the Sheriff-Substitute was in conflict with the decision pronounced in the case of the *Forrest S.S. Co.*, a decision they maintained which was favourable to them, and pronounced in a case not distinguishable from the present. But I think, with the Sheriff-Substitute, that that case is distinguishable. In it the provision was that the cargo should be loaded and discharged at a certain rate "per working day of twenty-four hours," and that was interpreted to mean not twenty-four consecutive hours but twenty-four working hours. That decision was not arrived at without hesitation (and was dissented from by one judge), but of course I take it as a just construction of the instrument then under consideration. But the very difficulty which in that case stood in the way of the pursuer's success has been removed in the present case by the unambiguous language of the contract. The working day is said to be a day of twenty-four consecutive hours, and in each of such days 500 tons of cargo was to be loaded or discharged. In the clause before us there is the exception that hours when the weather did not permit of loading or discharging were not to be reckoned against the charterers, nor were holidays nor Sundays. But in every twenty-four consecutive hours from the commencement of the loading or discharging, 500 tons were to be loaded or discharged if the weather did not hinder it or a holiday or Sunday intervene. And in my opinion the words "working day" in the clause before us are used only in antithesis to the days which were Sundays or holidays.

2. On the second question I differ from the Sheriff-Substitute. The charterers are taken bound to discharge the cargo at the port of destination "as customary," and are not to be liable for demurrage where delay in the discharge is occasioned by, *inter alia*, "stoppage of trains . . . or any cause beyond the personal control" of the charterers. I take it as proved that the customary mode of discharging ore (such as the cargo in question) at Ardrossan is to discharge it into railway trucks or waggons brought alongside or nearly alongside of the ship. To discharge such a cargo

on the quay is not customary, although sometimes comparatively small quantities of ore are under special circumstances allowed by the harbour authorities to be so discharged. If it were necessary to the decision of the question before us I should hold it established—and this I think is the only fact regarding which the parties are at variance—by the best evidence (that, namely, of Mr Craig, the superintendent of Ardrossan harbour) that, to use his own words, "There was no room to put any of the 'Eastgate' cargo on the quay." The Sheriff-Substitute scarcely does justice to this evidence, which he says is not corroborated, overlooking the fact that the captain of the "Eastgate" admits that Mr Craig told him practically the same thing as stated by him in evidence. But I do not think it necessary to say whether there was room for the cargo of the "Eastgate" on the quay or not. It was to be discharged "as customary," and that I think the evidence clearly shows was into railway trucks. That being so, the question arises, what was it that delayed the discharge, and the answer to that question is given by the captain of the "Eastgate"—"My evidence comes to this, that after the first day the delay was caused through want of trucks so far as I know." This is also proved by other witnesses. The pursuers maintain that "want of trucks" is not within the excepted cause of delay, and this leads me to notice the terms of the clause of exception. If I read that clause in its broadest and most literal sense I should hold that it exempted the charterer from liability for demurrage if the delay in discharging the cargo arose from any cause whatever over which they had not "personal control." It might fairly be read as excluding liability in any and every case except where the delay arose from the neglect or fault of the charterers. But I am willing to read the clause in a more restricted sense, and to hold that the general words of exemption with which the clause concludes must be limited to causes not under the charterers' control which are *ejusdem generis* with those causes specified. Even then I think the clause must be read as the defenders contend it should. One of the specified causes is "stoppage of trains," and it appears to me that want of railway trucks is *ejusdem generis* with that. Stoppage of trains just means the want of railway accommodation for taking and carrying the ore to the consignee; the want of trucks is practically the same thing. If there were no trucks to receive the cargo, then the train of which they would have made a part if not the whole was stopped. The conveyance of the ore by trains was necessarily stopped if there were no trucks to make the train. In my opinion, therefore, the defenders are not liable for demurrage for the delay occasioned by the want of trucks, and to this extent I think the present appeal should be sustained. The hours, however, which are not to be charged against the charterers do not, in my opinion, include more than the hours of the ordinary working day during which trucks were usually supplied, but when, in point of fact, they were not supplied. The defenders say that the hours of night when no trucks were available should also be deducted. I think not. If the charterers had asked for trucks at an unusual hour (wishing to work night and day), and had been refused them, there would have been something to say for their contention. But this is not the case. The hours of the night, therefore, are not to be deducted from the pursuers' claim. The parties applying these views to the facts of the case will be able to fix the amount for which the pursuers are entitled to decree.

LORD MONCREIFF—At the close of the debate it appeared to me that the Sheriff was right upon the first point and wrong upon the second. On the first point, that is, as to the proper mode of ascertaining the time to be allowed for loading and unloading under the charter-party, I agree with and adopt the reasons given by the Sheriff.

On the second question, however, I cannot agree with him. I think it is proved—(1) that the customary mode of discharging a sold cargo at Ardrossan was to discharge it into waggons. (2) That it was only in an emergency that any part of a cargo of ore was allowed to be put and remain on the quay, and that in order to get this done the ship had to arrange with the charterer and also with the harbour authorities. (3) That through no personal fault of the charterers there were not sufficient trucks forward to receive the cargo. And lastly, that the balance of the evidence is in favour of the view that on the occasion in question there was no room on the quay for the cargo. John Craig, the traffic superintendent of the Ardrossan Harbour Company, says this distinctly; and although Evans, the master of the 'Eastgate,' says that there was room on the quay for the cargo, he admits that, in his conversation with Craig, Craig said that there was too much on the quay already, and he does not say that he suggested to Craig that the cargo should be landed on the quay.

In regard to the insufficiency of trucks, it is sufficient to refer to the cases of *Letricheux* v. *Dunlop*, 19 R. 209, and the recent case in this Division "*The Lady Palmer*," 41 S.L.R. 144.

I understand that with findings to the above effect the parties will have no difficulty in ascertaining how the accounts stand between the ship and the charterers.

The result, I understand, will be that taking it that 6 days were required for loading, the defenders, if they have brought themselves within the exception, have not exceeded 8 days and 23 hours unloading and discharging.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

The Court pronounced this interlocutor—

"Recal the interlocutor dated 6th April 1904 appealed against: Find in fact in terms of the 1st, 2nd, 3rd, and 4th findings in fact set forth in said

interlocutor: Find further in fact (1) that the lay-days allowed by the charter-party for loading and discharging the cargo in question amounted to 8 days and 23 hours; (2) that the loading and discharging of said cargo occupied 12 days and 10½ hours, being 3 days and 11½ hours in excess of the said lay-days; (3) that of that excess 1 day and 1¼ hours was caused by the want of trucks into which the said cargo had to be delivered: Find in law—(1) that on a sound construction of said charter-party the defenders are not liable for demurrage for any delay to the discharge of said cargo occasioned during the currency of the lay-days by the want of trucks; (2) that the defenders are liable to the pursuers for demurrage at the stipulated rate of 16s. 5d. per hour for a period of 2 days and 10¼ hours, which amounts to the sum of £48, 10s. 10d. sterling: Therefore decerns against the defenders for payment to the pursuers of said sum of £48, 10s. 10d. with interest as concluded for: Find the pursuers entitled to expenses in the Sheriff Court and in this Court, but as regards the latter only to two-thirds of the same as taxed," &c.

Counsel for the Pursuers and Respondents—Salvesen, K.C.—C. H. Brown. Agent—F. J. Martin, W.S.

Counsel for the Defenders and Appellants—Ure, K.C.—Younger. Agents—J. B. Douglas & Mitchell, W.S.

Friday, November 18.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

M'EWAN *v.* WATSON.

Reparation—Slander—Breach of Confidentiality and Defamation by Medical Man—Statements Made when under Examination in Witness-Box—Absolute Privilege of Witness.

In an action of damages against a medical man for (*a*) breach of confidentiality, and (*b*) defamation, the pursuer proposed two issues based on statements made by the defender when under examination as a witness.

Held that statements by a witness in the witness-box, pertinent to the subject-matter of the case in which he is being examined, are absolutely privileged, and *issues* disallowed.

Reparation—Slander—Breach of Confidentiality by Medical Man—Disclosure of Matters Ascertained in Course of Confidential Employment—Statement that Person is "Bent upon Inducing Premature Labour"—Desire Criminally to Procure Abortion Innuendoed—Issue on Slander Allowed—Issue on Breach of Confidentiality Disallowed.

The pursuer in an action of damages against a medical man for breach of confidentiality and defamation averred that she had confidentially consulted the defender as a medical expert with a view to an action for judicial separation to be brought by her against her husband; that two years later, in the course of the action, the defender, in spite of being reminded that he had already been consulted by the pursuer in the matter of the action, examined the pursuer as a medical expert on behalf of her husband; that the defender voluntarily told the pursuer's husband and his legal advisers, and afterwards publicly disclosed in the witness-box, certain matters which he alleged he had ascertained as the result of his prior examination of the pursuer as well as the contents of private notes taken by him at the time containing the following statement:—"It seems they" (the pursuer and her family) "are all bent upon inducing premature labour so as to free the patient of any permanent reminder of this marriage, and if possible obtain a separation"—meaning that the pursuer was desirous criminally to procure abortion; and that the defender's statements were false and slanderous, and were made in breach of confidentiality, and maliciously and without probable cause. The defender pleaded privilege.

The Court (*diss.* Lord Young) *allowed* an issue for defamation, *holding* that the statements of the defender concerning the pursuer as innuendoed were slanderous, and that malice should not be inserted in the issue; and *disallowed* an issue for breach of confidentiality, in respect that, in so far as an actionable breach of confidence was averred, the alleged wrong was covered by the issue allowed for defamation.

Opinion (*per* Lord Justice-Clerk and Lord Trayner) that it depends on circumstances whether a disclosure by a medical man to others of information obtained by him in his professional capacity as to a patient is an actionable wrong.

Mrs Jessie Prentice Jones or M'Ewan, residing at 2 Greenbank Road, Edinburgh, wife of Thomas M'Ewan, electrical engineer, residing at 14 Warrender Park Crescent, Edinburgh, on 1st March 1904 raised an action against Sir Patrick Heron Watson, Knight, Doctor of Medicine, Edinburgh, in which she sued for two sums of £2500 sterling for breach of confidentiality and slander respectively.

The pursuer averred as follows:—She and her husband were married in December 1900. She shortly thereafter became pregnant and fell into bad health, and owing to her husband's conduct towards her she in September 1901 went to reside with her father Mr James Jones at Dalmeny. Soon afterwards she instructed her agents to take the necessary steps for securing a judicial separation, and it was deemed advisable to obtain expert medical opinion upon her condition with the view of ascertaining how far it had been brought about by the treatment she had received from her husband.