of *Lady Stair* (1882, 19 S.L.R. 618). The estate had been disentailed since the money was consigned; and the petition to uplift was served upon the three next heirs who would have been heirs of entail in possession. The Auditor having disallowed the expense of serving the petition upon these heirs, objection was taken by the petitioner and was sustained by the Lord Ordinary (Lord Kinnear), who said—'I think this is not a petition under the Entail Amendment Acts at all, but under the Lands Clauses Act, and I do not see how it would have been possible for me to grant the prayer without ordering intimation and service on some party interested in the matter. These next heirs of entail were the proper parties for such service, being the proper contradictors of the petitioner in this particular matter. I have no doubt therefore that I should sustain these objections, without, however, in any decree interfering with the general rule that the expenses in proper entail applications of this sort would not fall on the Railway Company.' This result was arrived at notwithstanding that the petition to uplift in that case is described in the report as having been laid under the Lands Clauses Acts 'and the various Entail Acts from 1848 downwards.' Regard was had to the substance of the thing, and it being in substance a Lands Clauses Act petition the charges were allowed.

"It is said that that case was overruled in the later case of *Lady Willoughby de Eresby* (1885, 13 R. 70); that was a petition to uplift money consigned under the Lands Clauses Act and to apply it in terms of sec. 26 of the Rutherfurd Act in repayment of certain improvement expenditure which had in a previous application been found to have been expended in permanent improvements on the entailed estate. That case certainly creates some difficulty; but the Court treated it as a petition under both sets of statutes and primarily under the Rutherfurd Act. The Lord President stated the rule thus—'When a petition to uplift and apply consigned money is presented under the Entail Amendment Act, the Railway Company is to bear all the expenses they would have had to bear had the application been made under the provisions of the Lands Clauses Act.' Applying this test the Court disallowed the charges incident to the advertisement of the petition, to the service on the three next heirs, and to the appointment of a curator *ad litem* to two of them,—these being all essential and characteristic parts of entail proceedure, and following as matter of course upon a petition which bore to be founded on sec. 26 of the Entail Amendment Act. But this can have no application to a petition which is not founded on the Entail Acts at all, and which, so far as I can see, would have been a competent petition as it stands before the Rutherfurd Act was passed. I leave out of account the further questions decided in *Lady Stair's* case, and the argument of the Railway Company here that, as to these, that case cannot stand with the later decision. The only question before me is, whether in a petition by an heir of entail laid wholly upon the Lands Clauses Act, the expense of service upon the next heir is to be allowed against the Railway Company. I think it is, as being a step of procedure sanctioned by long continued practice in such a petition, and as such a reasonable charge incident to obtaining the order for payment of the consigned money."

Counsel for the Petitioner—Wilson, K.C. —Maxwell Fleming. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Railway Company—Cooper. Agents—Hope, Todd, & Kirk, W.S.

Friday, July 17.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

KROG & COMPANY *v.* BURNS & LINDEMANN.

Ship—Charter-Party—Demurrage—Lay-Days—Commencement of Lay-Days—Delay in Providing Cargo—Vacancy Out of Turn—Exception Clause in Charter-Party.

A charter-party provided that the s.s. "Avis" should proceed to Methil Dock and there load a cargo of coal from such colliery or collieries as the charterers might elect. The vessel was "to be loaded in seventy-two running hours, commencing to count when ready to receive cargo, reported at Custom-House, berthed, and written notice given to the charterers. . . . If longer detained" demurrage was to be paid at a stipulated rate per hour, "unless such delay is caused by general and colliery holidays, Sundays, . . . idle days, strikes of any description, lock-outs, idle time, or restriction of output at the colliery with which the steamer is booked to load, . . or any other cause beyond the control of charterers, whether specified herein or not, which may prevent the obtaining or providing of cargo." . . .

The "Avis" arrived in Methil Roads on Monday, July 28th. The custom of the port was that vessels were entitled to be berthed in the order of their arrival, provided a certain proportion of the cargo was ready for shipment. On the arrival of the "Avis" ten vessels were before her and all the berths were occupied. A chance vacancy occurred on July 29th, and a berth might also have been got out of her turn on July 30th in consequence of a place being vacated by a vessel whose cargo was not ready. The "Avis" finished loading on August 5th. She was unable to take advantage of these chance vacancies because a sufficient proportion of her cargo was not ready for shipment. Monday, July

28th, was a miners' holiday, and on July 29th very little work was done at the colliery which was to supply the coal. On July 18th the Coal Company had intimated to the charterers that they could not book coal for July 28th or July 29th, to which intimation the charterers replied that the "Avis" must "take turn with the rest."

Held (1) that the charterers, by the use of reasonable despatch, should in the circumstances have had sufficient cargo ready to enable the "Avis" to avail herself of the second vacancy at the berths on Wednesday, July 30th, and (2) that the delay in loading not being due to any of the causes in the exception clause the lay-days were to be reckoned from Wednesday, July 30th, and therefore that demurrage was due at the stipulated rate from noon on Saturday to the hour at which the "Avis" finished loading on Tuesday, August 5th, excluding Sunday, August 3rd.

This was an action brought by Kommanditbolaget J Fenger Krog & Company, merchants, Gottenburg, Sweden, against Burns & Lindemann, coal and coke exporters, 104 West George Street, Glasgow, for demurrage or damages for the detention of the steamship "Avis" at Methil.

Krog & Company held the "Avis" on a time charter, and by charter-party dated July 18th 1902 it was agreed between them and Burns & Lindemann that the "Avis," then trading, and expected to be ready for loading about the 27th or 28th July, should with all convenient speed proceed to Methil Dock or Burntisland Dock as ordered before leaving last port of discharge, "and there load as customary at a crane-loading berth or berths, in one or more lots as ordered by charterers' agent, a full and complete cargo of coals from such colliery or collieries as charterers may elect."

The charter-party further stipulated, *inter alia*, as follows:—"Steamer to be loaded in 72 running hours, commencing to count when ready to receive cargo, reported at Custom-House, berthed, and written notice given to charterers or their agents within office hours (say between 9 a.m. and 5 p.m.), but time not to count between 2 p.m. on Saturdays and 6 a.m. on Mondays, unless used. . . . If longer detained demurrage to be paid at the rate of 12 shillings and sixpence for every hour employed beyond the time allowed for loading and discharging, unless such delay is caused by general and colliery holidays, colliery pay days, idle days, strikes of any description, lock-outs, idle time, or restriction of output at the colliery or collieries with which the steamer is booked to load, frosts, storms, floods, detention on or by railway or cranes, accidents to machinery, or any other cause beyond the control of charterers, whether specified herein or not, which may prevent the obtaining or providing of cargo, or impede the ordinary loading and discharging of the vessel. No time at loading port to count while discharging or bunkering, and no bunker coal to be shipped in any of the holds without the consent of charterers." . . .

The "Avis" arrived in Methil Roads, to which port she had been ordered by the defenders, on Monday, July 28th, at 12·15 a.m., and was docked about 6 a.m., whereupon the master gave notice in writing to the defenders' agent that she had arrived and was ready to receive cargo. She completed her loading at 9 p.m. on August 5th, and sailed on the following morning.

The pursuers averred that at the time of the ship's arrival in Methil Dock a crane-loading berth was available there for her loading, but that the defenders failed to provide and load a cargo in terms of their obligations under the charter-party, in consequence of which she was unduly detained beyond the time allowed for loading; that the seventy-two hours allowed for loading expired at 9 a.m. on Thursday, 31st July; that she was then on demurrage from that time till 9 p.m. of Tuesday, August 5th, a period—deducting five hours for bunkering in terms of the charter-party—of 127 hours, and that the defenders, being responsible for this detention, had incurred demurrage at the rate of 12s. 6d. per hour, amounting to £79, 9s. 6d.

The defenders averred that when the vessel arrived in the dock there was no crane-loading berth vacant for her, and she was not an arrived ship until she had got into a berth. There was no available berth till Wednesday, 30th July, at 12.30 p.m. At that date the miners at the Bowhill Colliery, with which the "Avis" was booked to load, were on holiday, and had been for some time prior to said date, and the defenders, owing to said holidays and to idle time, restriction of output at said colliery, and other causes beyond their control, were unable to get delivery of their coal and provide a cargo for the "Avis;" that these causes of delay were exceptions within the charter-party; that there was no berth vacant for the "Avis" after the miners resumed work until 5 a.m. on Monday, the 4th of August, when she got into berth, and from which time her seventy-two hours for loading began to count; and that the loading was duly proceeded with thereafter, and was completed at 9 p.m. on Tuesday the 5th August, having thus occupied forty hours.

The pursuers pleaded—"(1) The said vessel having been detained on demurrage through the failure of the defenders to provide and load a cargo in terms of the charter-party condescended on, or otherwise through the fault of the defenders, the pursuers are entitled to decree therefor at the agreed-on rate."

The defenders pleaded—"(1) The said vessel not having been detained through the failure of the defenders to provide and load a cargo in terms of the charter-party condescended on, or through the fault of the defenders, they should be assoilzied. (2) The said vessel having been detained through causes excepted in the charter-party, the defenders should be assoilzied with expenses."

Proof was allowed and led. The following narrative of the facts proved is taken from the opinion of the Lord Ordinary (STORMONTH DARLING)—"Methil is almost entirely a coal port, and the work of loading goes on almost continuously from midnight on Sunday to midnight of the following Saturday. When the 'Avis' got into dock ten vessels were already lying there, and according to the custom of the port, were entitled to be berthed before her, but this practice as to 'turn' applies only if the cargo of a particular vessel or a substantial proportion of it (generally about one-fourth) is ready for shipment. The 'Avis' did not get a berth till Sunday, 3rd August, at 10·30 a.m., but she was ordered out at 11 a.m. on the 4th for want of cargo. She went in again at 1 a.m. on Tuesday the 5th, and after another short expulsion finished loading at 9 p.m. on the 5th, and sailed early the following morning. With regard to cargo, the defenders had two contracts for the supply of shipping coal with the Bowhill Coal Company, whose colliery is situated within two or three hours of Methil by rail. On 18th July they had intimated to the colliery that the 'Avis' would be ready on the 28th or 29th for 1300 tons, but the Coal Company had replied that they could not book any steam coal for these dates as their pits would not be working. The defenders then wrote on the 21st—'It will be impossible for us to change 'Avis,' as the boat is definitely fixed. She must just therefore take her turn with the rest, and we must kindly ask you to prepare a full cargo for her.' They repeated this request on the 25th, and the books of the colliery show that the 'Avis' was entered on the 26th for 1350 tons. No coal was actually sent down from Bowhill to Methil after the pits re-opened till Monday, 4th August, but twenty-two waggons of coal raised before the holidays had been lying for the 'Avis' on the wharf at Methil on the 28th, and 13 waggons were forwarded for her early on the 29th out of a lot of some 450 tons which had been procured from another colliery to supplement the Bowhill order. This delay arose first from the miners' holidays having ended only on the night of 28th July, then from the 29th having been practically an idle day, with an output so restricted in amount that it was not entered separately in the books of the colliery, but was simply lumped with the output of the 30th, and, latterly, from there being two ships at Burntisland which had arrived there on 27th July, and which the Coal Company therefore thought they were bound to load before the 'Avis.'"

It was proved further that after the arrival of the "Avis" on the morning of July 28 there was a vacancy at No. 5 berth at 5 a.m. on July 29, which vacancy was got by the "Christian," which ship was not in turn before the "Avis." The "Christian" got this vacancy before the "Avis," because there were coals down for the "Christian," but the quantity of coals down for the "Avis" was not sufficient under the practice of the dock to entitle her to a berth. No. 5 berth was not a suitable one for the "Avis," and she could not have finished her loading there. No. 1 berth was occupied by the "Louis Krohn" from 1·30 p.m. on July 29 until 11·40 a.m. on July 30. The evidence of the harbourmaster at Methil was to the effect that No. 1 berth was vacant from 11·40 a.m. until 2·25 p.m., when the "Rabenstein" was berthed. If the "Avis" had had sufficient coal down for her at 11·40 a.m. upon the 30th of July she would have got in there. The "Rabenstein" which got that berth had arrived at 7·30 p.m. on the 28th of July, later than the "Avis," and was in turn after her. The "Rabenstein" was not a regular steamer entitled to a preference. The "Rabenstein" got that berth out of turn because she had cargo down for her. The "Avis" would have got in at 11·40 a.m. if she had had cargo there for her.

On February 18, 1903, the Lord Ordinary (STORMONTH DARLING) pronounced an interlocutor decerning against the defenders for the sum of £26, 14s. 5d., with interest, in full of the conclusions of the summons, and found the pursuers entitled to expenses.

Opinion.—[*After narrating the leading stipulations of the charter-party and the material facts*] — "Now, the question whether, and if so what, demurrage is due depends upon the time when the lay-days must be held to have begun. According to the charter-party, the 72 running hours do not commence to count till the ship is ready to receive cargo, reported at Custom House, and berthed, with notice to the charterers or their agents. She was not actually berthed till the morning of 3rd August. But all the other conditions were fulfilled long before that date, and the delay in berthing was caused solely by her cargo not being ready. In cases where the delay arises from the crowded state of the port, or from any circumstance connected with the particular berth selected by the charterer, it may seem rather hard on the shipowner that the loss of time should fall on him although he is in no way responsible for it. Still, the tendency of decision, from *Tapscott* v. *Balfour* (L.R. 8 C.P. 46) downwards, has been to hold that if the selection of the place of loading is left to the charterer it is the same as if it were named in the charter, and that the lay-days cannot be counted till the vessel is an arrived and intimated ship. This rule, however, by no means relieves the charterer under a contract in terms like the present from the duty of doing any act that is necessary on his part, according to the custom of the port, to enable the vessel to get a berth. That was fully recognised by the House of Lords in the case of *Little* v. *Stevenson & Co.* (1896), App. Ca. 108. And the only qualification of that duty which the House recognised was that the charterer was not bound to have cargo ready in anticipation of a remote and improbable contingency.

"In this case it seems to me that the charter-party itself provides a sufficient excuse for a portion of the delay which occurred, but not for anything like the

whole of it. The day on which the vessel arrived (the 28th) was a 'colliery holiday,' and that is one of the stipulated excuses for delay. On the 29th a very small number of miners were at work, and although this fact might hardly make it an 'idle day' in the sense of the contract, the quantity of coal raised was so insignificant as fairly in my opinion to bring the case within the clause as to 'restriction of output.' But after the 29th the output became reasonably normal, and if the colliery had sent its supply of shipping coal to Methil instead of Burntisland on the Wednesday, Thursday, and Friday (in addition to the 35 waggons which were already lying on the wharf), it is plain that the loading might easily have been completed within the lay-days, counting them as beginning on the 30th. Mr Ure argued that because the charterers had the selection of the colliery the shipowner must take the risk of anything which prevented the colliery from supplying cargo, as being a cause beyond the control of the charterers. That argument, however, seems to me to prove a great deal too much, for it would excuse any delay on the part of the colliery, however unreasonable. Unless the delay can be brought within one of the specified causes the charterers must, I think, be held responsible for the acts or omissions of the colliery. In this particular instance they knew that there would be a difficulty in providing cargo, and they took the risk of it with their eyes open. On the other hand, I cannot doubt that by the express words of the contract the excuses therein specified apply just as much to delay in obtaining a cargo as to delay during the period of actual loading.

"The question then comes to be at what hour on the 30th could the ship have obtained a berth according to the custom of the port if cargo had been ready with which to begin the loading and there had been a reasonable prospect of the loading being steadily proceeded with? I answer that question by taking the hour of noon, at which time, according to the evidence of the harbourmaster, she might have got the berth which was left vacant by the 'Louis Krohn,' and which remained vacant for two-and-a-half hours. I reject the suggestion that she ought to have been enabled to take the berth which the 'Christian' got at 5 a.m. on the 29th, because it would have done her no good if she had got it. She would merely have loaded the coal in the 35 waggons lying on the wharf, and then she would have been turned out until a further supply was possible on the 30th.

"My calculation therefore is this—The lay-days ought to have commenced at noon on Wednesday the 30th, and to have finished at noon on Saturday 2nd August. That leaves for demurrage twelve hours on Saturday, twenty-four hours on Monday, twenty-one hours on Tuesday (up to 9 p.m.), in all fifty-seven hours, from which must be deducted five hours as the time admittedly occupied in bunkering, leaving fifty-two hours at 12s. 6d., or £32, 10s. But from this again there is the further deduction to be made of £5, 15s. 7d., admitted in condescendence 5, leaving the sum of £26, 14s. 5d. as the sum for which decree will be given."

The defenders reclaimed, and argued—Under the charter-party the seventy-two running hours did not begin to count till the ship was, *inter alia*, "berthed." "Berthed" meant brought alongside the quay ready for loading. Until that time the "Avis" was not an arrived ship, and the lay-days could not be reckoned prior to that time The "Avis" found a series of ships waiting to be loaded in turn. In these circumstances the defenders were not bound to have a cargo down so as to be ready to seize a "snap chance," arising out of the unexpected contingency of a berth being open to her out of her regular turn—*Little* v. *Stevenson & Company*, June 26, 1895, 22 R. 796, 32 S.L.R. 575, March 19, 1896, 23 R. (H.L.) 12, 33 S.L.R. 514. The obligation on the part of the defenders was simply to use all reasonable means, according to the custom of the port, to enable the vessel to get a berth, and it was unreasonable to hold the defenders bound to have waggons standing ready with coal to meet the quite unexpected chance of the failure of a ship in front of them. The delay after a berth became available was due to causes covered by the exception clause in the charter. That clause covered colliery holidays, idle days, restriction of output at the colliery with which the steamer was booked to load, or any other cause beyond the control of the charterers, &c. July 28 was a holiday at the Bowhill colliery, and that day fell within idle time. Little or no coal was raised on July 29. Even on July 30 there was "restriction of output," and these causes, all of them within the exception, explained the delay. The defenders had the selection of the colliery, and therefore the pursuers had to take the risk of anything which prevented the selected colliery from supplying cargo or the Railway Company delivering it at the quay. *Wyllie* v. *Harrison & Company*, October 29, 1885, 13 R. 92, 23 S.L.R. 52; *Letricheux & David* v. *Dunlop & Company*, December 1, 1891, 19 R. 209, 29 S.L.R. 182. The custom of the port and all hindrances beyond the defenders' control must be regarded in determining whether there was unreasonable delay—*Gardiner* v. *Macfarlane*, *M'Crindle & Company*, February 24, 1893, 20 R. 414, 30 S.L.R. 541.

Argued for the pursuers and respondents—The "Avis" could have got the vacant berth which was got by the "Christian" on July 29, and also the vacant berth left by the "Louis Krohn" on July 30. The sole reason why she did not get these berths was that the defenders did not have coal down. These were not "snap chances;" they were such opportunities as reasonable men might have expected to be available. In *Little* v. *Stevenson* (*supra*) Lord Herschell expressly laid it down that a charterer is bound to do everything reasonable to get the ship berthed and have a cargo ready to enable her to obtain a berthing. The question as to taking chance vacancies was a question of what was reasonable in the circumstances—*Lilly & Company* v. *Steven-*

son & Company, January 19, 1895, 22 R. 278, 32 S.L.R. 212; *Machan* v. *Mackie, Keith & Company*, February 25, 1900, 7 S.L.T. 397. There was no difficulty or hindrance on the part of the railway. The real reason for the delay was that the coal was not ready, and the reason for this was that the Bowhill colliery was fully booked up when the defenders sent their order. The defenders had notice of this, and in spite of this notice they chartered the "Avis," not knowing when they could get a cargo for her. It was an instance of what was known in the trade as "reckless chartering." The defenders had simply put the ship at the convenience of the colliery. The general words at the end of the exception clause in the charter could only cover causes conducing to the failure of the charterers' obligations under the charter, and the obligation to provide a cargo was not a charter obligation (*per* Lord Trayner in *Gardiner* v. *Macfarlane, M'Crindle & Company* (*supra*), at p. 426. It was the duty of the charterer to have his cargo ready to load when the chartered ship arrived—*per* Lord Trayner in *Stephens, Mawson, & Goss* v. *M'Leod & Company*, October 29, 1891, 19 R. 38, at p. 45, 29 S.L.R. at p. 35.

LORD M'LAREN—This is an action for demurrage at the instance of Krog & Company, who are merchants in Gottenburg, against Burns & Lindemann, on the ground, that loading of the ship "Avis" was not completed in time. Krog & Company are not the actual owners of the vessel, but they held the vessel on a time charter, and they sub-let the use of the ship to Burns & Lindemann for a particular voyage to be loaded with a cargo of coal, and therefore Krog & Company represent the interest of the shipowners in this question. The Lord Ordinary has decided that demurrage is due for the period from noon on Saturday 2nd August until 9 o'clock p.m. on Tuesday 5th August, 1902. The question of course depends on whether the excess of time occupied in loading the ship arose from circumstances for which the defenders, the charterers, were responsible, or whether it is excusable in terms of the charter-party. The Lord Ordinary has given a very full and clear explanation of the facts and legal bearings of the case, with which I concur in all respects, and I shall only briefly state the points as they present themselves to my mind.

According to the charter-party demurrage was not to count if delays were caused by holidays, strikes, and certain other things, and 72 hours were allowed for loading. The counting was to begin also from the time when the ship was able to get a berth, so that any of these causes might prevent demurrage from beginning to run, that is to say, it would not run if the delay in forwarding the cargo was due to holidays or strikes or if the ship were unable to get a berth for loading. The "Avis" arrived in Methil Roads on Monday, 28th July. It was unable to obtain a berth at that time because all the cranes were in occupation by other vessels, and in point of fact it did not get a berth until Sunday, 3rd August. But a berth might have been got on the 30th in consequence of a place being vacated by a vessel called the "Louis Krohn," whose cargo was not ready.

The contention on the part of the defenders was that they were not bound to anticipate vacancies occurring so early as the 30th, and were not bound to have cargo ready for loading until according to a reasonable expectation her turn for berthing would come. In their view the measure of what was reasonable was that the shipper was not bound to have cargo ready until all the vessels which had arrived before her had their loading completed in the order of their arrival. Counsel founded the argument very much on the decision of the House of Lords in *Little* v. *Stevenson & Company* (1896, Appeal Cases, p. 108). That case has so far a resemblance to the present that the ship in question, the "River Ettrick," did not begin to load until five days after she might have got a berth through a ship being unable to finish her loading and thus leaving a loading berth vacant. The House of Lords took the case upon the facts as stated in the interlocutor of the Second Division of the Court because it had no note of the evidence in the Sheriff Court, and no facts were before the House except those mentioned in the interlocutor. The judgment on this point is rather a hypothetical judgment, for the two law lords who delivered their opinion, Lords Hatherley and Herschell, both say that it was unnecessary to consider whether they could in any way get at the fact which they thought was essential, because even if they had the fact stated, viz., that a vacancy had occurred, it would not in the circumstances of the case have affected their judgment. They say that the charterers of the ship performed their duty if they had the cargo ready at the time when it was necessary that it should be ready and were not bound to take note of improbable contingencies. Lord Herschell goes on to say—"I do not for a moment deny that he" (that is, the charterer) "is bound to do whatever is reasonable on his part with the view of getting the ship berthed at the earliest period that is reasonably possible; and it may be that in certain circumstances, owing to the custom of the port, owing to contingencies of this kind being very common, owing to the provision that is made to facilitate cargo remaining there for a few days, and a variety of other circumstances, it would be the duty of the shipper to be prepared by having his cargo there to enable the vessel to obtain an earlier berthing than would otherwise have been obtained." So that it is clear that it was never laid down that irrespective of all circumstances the charterer is not bound to have cargo ready until a berth could be found on the assumption that all the vessels that arrived before him could be loaded. I think the circumstances supposed in the passage which I have read from Lord Herschell's judgment very aptly describe the circumstances of the present case,

because in the first place it is proved that contingencies of this kind were frequent—several berths became vacant through ships not having cargo ready at the time, and this was the second vacant berth that was at the disposal of the "Avis." Then it was proved that at the port of Methil arrangements are made to facilitate loading, because the Railway Company will at any time, and without reference to a ship having a berth, send down a quantity which is represented as about one-fifth of the total order and enough to enable the ship to go on for a day, and then the loading will proceed from day to day. In this case two vacancies had occurred out of the regular rotation, and the Lord Ordinary has not held that the charterer was bound to be ready for the first of these, and it is a circumstance in considering what would be reasonable despatch for the charterers, that they have got a warning and ought to have been ready at all events for the second vacancy. In all the circumstances I am unable to accept the view that in this case the time for loading is to be held as commencing on the hypothesis that all vessels which had arrived before the "Avis" would complete their loading in their order. I hold, on the contrary, with the Lord Ordinary, that when the second vacancy occurred the cargo ought to have been ready; and in that way two days' demurrage would have been saved, because the ship would have begun to load on Thursday instead of begining to load on Monday the 4th August—three days, not counting Sunday.

Then another point was that the coal was not there in time, and the defenders say that the delay in sending the coal was consequential on holidays. If that had been the case then the charterers would have been within one of the exceptions mentioned in the charter-party. On this subject it is important to note that when the order for coal was sent to the Coal Company on 18th July the company replied that they could not book any steam coal, because they were already booked up to the full amount by previous orders. The defenders, instead of going to another company which might perhaps have supplied them sooner, replied —"It will be impossible for us to change "Avis" as the boat is definitely fixed. She must just therefore take her turn with the rest and we must kindly ask you to prepare a full cargo for her." Now, as the sellers of the coal had given notice that they could not undertake to have the cargo ready on the date prescribed, I think it must be taken that the cargo was not in fact ready in time. That was not a circumstance due to strikes or holidays or any unexpected cause, but was the result of the charterer not having given his order in time to ensure the arrival of the coal in time for the ship—in short, that he is responsible, and is not within the exceptions.

The result, therefore, in my opinion, is that as the loading ought to have been finished at noon on Saturday 2nd August, and was not actually finished until Tuesday the 5th August at 9 p.m., the demurrage that is due is that on 57 hours, as explained in the Lord Ordinary's note under certain deductions. I therefore propose to your Lordships that the Lord Ordinary's interlocutor should be affirmed.

LORD ADAM—I am of the same opinion. I think the evidence shows that the date of arrival was the 28th, and the lay-days would have commenced on that date if it were not for the exceptions in the contract viz.—"Unless such delay is caused by general or colliery holidays, Sundays, colliery pay days, idle days, strikes of any description," and so on. Now, the 28th was, I think, the last day of the pit holidays, and that day fell within the exceptions, and therefore did not count. The next day, the 29th, was not really a working day at all—the men really went down for the purpose of clearing up the pits and so on, and that clearly was not a working day either. Therefore I think both the 28th and 29th fall within the exceptions. That being so, I think Thursday was the first working day at the pit, and the first day that did not fall within the exception. The Lord Ordinary takes the same view and says that the lay-days commenced to run at noon on Wednesday, 30th, leaving three or four hours for the cargo to reach the ship and I think he is quite right in that; and then, if that is so, the loading should have been finished in three days, that is, on the Saturday, and I agree with him that the demurrage runs from that date.

The LORD PRESIDENT concurred

LORD KINNEAR not having heard the whole of the argument gave no opinion.

The Court adhered.

Counsel for the Pursuers and Respondents —Salvesen, K.C.—Murray. Agents—Beveridge, Sutherland, & Smith, S.S.C..

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

HOUSE OF LORDS.

Monday, July 20.

(Before the Lord Chancellor (Halsbury), Lord Shand, Lord Davey, and Lord Robertson.)

GAVIN'S TRUSTEES *v.* JOHNSTON'S TRUSTEES.

(*Ante*, December 6, 1901, 39 S.L.R. 173, and 4 F. 278.)

Husband and Wife—Marriage-Contract—Provisions to Children—Effect of Divorce—Divorce—Succession—Vesting—Parent and Child—Fee and Liferent.

By an antenuptial contract of marriage the trustees were directed to pay the annual proceeds of the estate conveyed to them by the wife and her father to