as for rent "due to us as trustees and executors, in consequence of your illegally selling, or causing to be illegally sold and removed, of this date, 3d September 1877, under decree of the Sheriff Court of Midlothian, dated at Edinburgh 1st November 1876, at your instance against John Docherty, book-agent, 3 Tennant Street, Leith, and others, the household furniture and effects of said John Docherty in said house, 3 Tennant Street, Leith, belonging to us as trustees and executors, without first asking us or our factor whether the rent of it were paid, and while it was not paid, whereby the hypothec of us as trustees and executors foresaid was dilapidated and scarcely anything left in said house." Therefore the trustees claimed £4, 5s. 6d. as balance of the rent of Docherty's house, due from Whitsunday 1876 to the same term of 1877, and £7 as the rent from Whitsunday 1877 to Whitsunday 1878. The appellants moved for decree for the whole or part of the amount, or alternatively for an investigation into facts, but the Sheriff-Substitute, on 12th December 1877, dismissed the complaint, with 10s. 6d. of expenses.

The pursuers appealed, for the following reasons:—"(1) The debt sued for is due and resting-owing by the respondent to the appellants, and the grounds of debt are relevantly and properly set forth in the summons and relative account, and the Sheriff-Substitute was bound to entertain and consider the claim and to have investigated the facts; but the Sheriff-Substitute declined to hear the appellants or to investigate the facts, and he maliciously and oppressively at once pronounced judgment without hearing the appellants or considering the case, or giving any reason for his judgment. (2) The Sheriff-Substitute wilfully deviated in point of form from the statutory enactments with reference to such cases. The Sheriff-Substitute was bound by statute as well as at common law to hear the parties, and upon such hearing to pronounce judgment, but he proceeded in defiance of the statute under which the action was brought, and, as already explained, dismissed the case; *separatim*, and in any view, the Sheriff-Substitute so deviated in point of form as to prevent substantial justice from being done. In the circumstances, he was bound to hear parties and to have investigated the facts, and then to have pronounced judgment. (3) It was incompetent for the Sheriff-Substitute to pronounce the judgment which he did without hearing the parties or making inquiry into the facts alleged in the summons and relative account, and the judgment ought to be set aside."

Argued for them—It was quite competent to appeal where the judgment had decided, for example, against the relevancy. A creditor must regard the landlord's right of hypothec. [Lord Justice-Clerk—Must he do so without any notice?]—If he denuded the property, and so destroyed the preferential right, he rendered himself liable.

Authorities quoted—*Scottish North-Eastern Railway Company* v. *Matthews*, April 20, 1856, 5 Irv. 237; *Murray* v. *Mackenzie*, April 21, 1869, 1 Couper 247; *Jackson* v. *Gorgie and Falla*, M. 6245; Stair, i. 13, 15.

The respondent's counsel were not called upon.

At advising—

Lord Justice-Clerk—The Sheriff-Substitute has dismissed this action. I am very far from saying that he was not right in doing so; the fact stated, that the appellants, who are the landlords, permitted a diligence to proceed and to be executed against their tenant's furniture without notice to the poinding creditor that the rent was not paid, or that they had a right of hypothec, was very peculiar. The question raised would seem to come to an inquiry whether the Sheriff had gone wrong in law, and I do not think this Court can go into that, however the facts might stand. But apart from this, the rent, on the facts as averred, is not yet due. Manifestly the Sheriff exercised his own judgment here, and he was entitled under the statute to do so. I think the appeal must be dismissed.

Lord Young—The counsel for the appellants said that this case was decided by the Sheriff upon the relevancy. Now, the word relevancy may be equally applied to a case where there is a question whether the facts are sufficient to warrant the conclusion drawn from them, and where there is a question whether they are such as ought to be remitted to probation. But whether the facts are sufficient or not is not a question for this Court in appeals like that before us. The mere suggestion that the Sheriff-Substitute here was in error is not a sufficient ground for appeal, even were such error established, about which I am by no means clear.

Lord Craighill concurred.

The Court dismissed the appeal, with £5, 5s. of expenses.

Counsel for Appellants—Robertson. Agent—A. Morison, S.S.C.

Counsel for Respondent—Black. Agent—D. Forsyth, S.S.C.

COURT OF SESSION.

Friday, February 8.

FIRST DIVISION.

[Lord Young, Ordinary.

HOLMAN & SONS *v.* THE PERUVIAN NITRATE COMPANY.

[Lord Craighill, Ordinary.

BIRD *v.* THE PERUVIAN NITRATE COMPANY.

Ship — Charter-Party — Demurrage — "Working-Day"—Local Custom.

Held (*diss.* Lord Deas—*rev.* Lords Craighill and Young), in a claim for demurrage on a charter-party made in London, containing a provision that the ship was to be discharged at a certain rate per "working-day" on her arrival at Iquique, in Peru, that the risk of detention by "surf-days" (*i.e.*, days on which the surf ran so high that it was thought

dangerous by the captain of the port for boats to unload ships in the bay, and on which by the custom of the port no work was done) was taken by the charterers, and that they were therefore liable in demurrage for the detention caused by these "surf-days."

Observed that a local custom of the kind stated above cannot control a written contract unless it can be shown (1) that it is known to both parties thereto, and (2) that it has been previously recognised in practice by charterers and shipowners in similar cases.

Held, that a strict national holiday, such as St Jose's Day in Iquique, should, like Sunday, not be reckoned as a working-day.

Ship — Charter-Party — Demurrage — Lay-Days — Power of a Captain to alter Contracts made by the Shipowner.

A charter-party made in London provided that a vessel should "proceed to the port of Iquique, where, and at two adjacent ports," she should take a cargo on board for her homeward voyage. Twenty-five lay-days were allowed, but it was stipulated that the time taken in shifting ports was not to count as lay-days.—*Held* that it was in the power of the captain to vary this contract to the effect of allowing four additional lay-days on condition that all the cargo was put on board at Iquique.

Ship—Charter-Party—Discharge of Cargo.

Terms of a charter-party held to bind shipowners to deliver a cargo in dock, and to make them liable for dock dues.

These were two actions against the Peruvian Nitrate Company by different shipowners for payment of demurrage, and also in the one case—that of Holman & Sons—for recovery of certain dock dues. The claim for demurrage arose in respect of detention on the outward voyage in discharging the ships, and also on the homeward voyage in loading them. The principal question raised in both actions was this—Whether in estimating "working-days," the term used in the charter-parties to denote the time allowed for discharge and reloading, there were to be included "surf-days," *i.e.*, days on which the surf ran so high in the port of Iquique, the port of discharge, that it was dangerous for boats and lighters to go on with the work of unloading? A record of these days was kept by the captain of the port, and it was stated in evidence by him that such days were not counted as working-days.

The circumstances in which both this and the subsidiary claims in Holman's case arose, as brought out in the proof, partly taken on commission, are very fully and sufficiently narrated in the opinions of the Judges, especially of Lord Shand, as are also the various stipulations of the charter-parties, and the import of the evidence as to the practice observed in the port of Iquique on surf-days. Lord Young in Holman & Sons' case, and Lord Craighill in the case of Bird, held that "surf-days" were to be excluded. Lord Craighill added this note:—

"*Note.*—The pursuer contends that inasmuch as the charter-party sued on is an English contract, the working-days for which it provides must be those alone which are recognised in England. But the Lord Ordinary is of opinion that this is an erroneous contention. A charter-party may not be controlled by the usage or custom of a foreign port in which the ship under contract is to be loaded, and no more can it be so by the usage or custom at home. The contract which has been made must as made be fulfilled, whether it has been made in conformity with or in opposition to the usage or practice of the country in which it was concluded, or of any other country in which something provided for was to be accomplished. Here nothing is to be controlled by usage or custom. Working-days, what are they? The charter-party gives no definition, and so that must be otherwise ascertained. May working-days not be counted according to the usage or custom of the place where the work for the doing of which so many are allowed is to be done? This is the question presented for decision. The Lord Ordinary thinks they may. Indeed he thinks it the natural arrangement. No doubt this result might have been provided for expressly, and the pursuer contends that as it was not, the only usage or custom by reference to which the words can be construed is that of England. But the answer is plain. If the usage or custom of this country was intended to be the only interpreter, that also could have been expressed, but it was not. In this situation the Lord Ordinary thinks that the usage or custom at Iquique not only may but must be taken into account in determining whether the time of loading has exceeded the stipulated number of working-days. Days in which work cannot be done are of course not to be confounded with days not "working-days" as defined by the usage or custom of the port. The former are not fixed, and would be the source of endless dispute; the latter are fixed in a recognised way, and so are easily ascertained.

"The case of *Cochran* v. *Retberg*, 3 Espinasse, p. 121, and which since its date has always been referred to as a leading authority, appears to the Lord Ordinary to be a decision directly in point. No doubt the words in the contract to be construed were not working-days but lay-days. This, however, leaves unaffected the ground of judgment. Professor Bell, it may be added, cites this authority in his Commentaries (7th ed. p. 623) as authority for his statement of the law. which, as the Lord Ordinary reads it, is that which the Lord Ordinary has adopted." . . . .

The pursuers argued on the question of surf-days—(1) Surf-days were nothing more than unfavourable weather. It was settled that the risk of that after the arrival of the ship at the port of discharge fell on the charterers—*Thiis and Others* v. *Byers*, March 6, 1876, L.R., 1 Q.B. 244; Abbott on Shipping, 10th ed. 268. Unless the delay was caused by the shipowner himself, the freighter must pay demurrage—*Hill* v. *John*, 4 Campbell, 357. (2) Local custom, such as was alleged here, that labourers were in the habit of being excused from working on surf-days, could not be admitted to vary the terms of the contract where one party was ignorant of it, and the shipowners were in ignorance of it—*Tapscott* v. *Balfour*, 8 L.R., C.P. 46; *Hansen* v. *Donaldson*, 20th June 1874, 1 R. 1066; Bell's Pr. 524; Chitty on Contracts, 106; Maclachlan on Shipping, 488. The party who ought to know the local peculiarities should be liable for the consequences of any delay arising therefrom. That must always be the charterer

who is in use to trade with that port—*Hudson* v. *Ede*, 11th Nov. 1868, L.R., 2 Q.B. 566, 8 Best and Smith, 631; *Barker* v. *Hodgson*, 3 M. and S. 267 (Lord Ellenborough's opinion).

The defender argued—The shipowner must be held to have known the peculiarities of this harbour—*Harris* v. *Haywood Gas Coal Company*, 3d July 1877, 14 Scot. Law Rep. 605. If a custom was quite distinct, it was not necessary to show that both parties knew of it—*Kirchner and Others* v. *Venus*, 12 Moore's P. C. Cases 361. "Working-days" were something different from "days." "Days" meant everyday, not even excepting Sundays. Working-days meant every day except non-working-days, and to ascertain what these were evidence of the custom of the foreign port was admissible and necessary—*Niemann* v. *Moss*, 29 L.J., Q.B. 206.

At advising—

Lord Shand—This action has been instituted at the instance of John Holman & Sons, shipowners in London, owners of the barque "Constantine," against The Peruvian Nitrate Company (Limited), of Leith, to enforce payment of certain disputed claims arising on charter-parties under which the pursuers' vessel sailed from Leith to Iquique, on the coast of Peru, with a cargo of coals, and there loaded a cargo of nitrate of soda, with which she returned to this country, and which was discharged in St Katharine's Dock, London.

The charter-parties for the outward and homeward voyages respectively were both entered into in London on the 8th September 1874, and the disputed claims, which are stated in the form of an account in the condescendence, are—(1) under the outward charter-party, a claim for £110, being for eleven days of demurrage, on account of the alleged failure of the charterers to unload the outward cargo at Iquique within the time stipulated in the charter-party; and (2) under the homeward charter-party, a claim of £174 for nineteen days' detention of the vessel by the alleged failure of the charterers to load the cargo at Iquique within the time stipulated in the charter-party, under deduction of £8, 8s. 8d., being one day's demurrage paid to the captain of the vessel; and a further claim for sums amounting in all to £35, 14s. 6d., being the extra cost to the ship of discharging her homeward cargo in dock in London, as required by the charterers, a cost of which the pursuers maintain they are entitled to be relieved, because, according to their view of their rights under the charter-party, they were entitled to unload in the river, with the effect of saving them dock-dues and other extra charges.

The question under the outward charter-party is, Whether the pursuers are entitled to demurrage for eleven days, or for any smaller number of days, in respect of the defenders' failure to discharge the vessel at Iquique within the stipulated time? The defenders allege that they completed the unloading of the vessel within the time allowed to them by the charter-party for that purpose. The dispute substantially resolves into a question of law, and depends on the meaning to be given to the words "per working-day" in the charter-party. The clause provides the ship "to be discharged at the rate of not less than forty tons per working-day," and the parties are agreed that, having regard to the amount of cargo on board, this rate of discharge gives nineteen working-days.

The vessel arrived at Iquique on the 27th of February 1875, and was ready to discharge cargo by the 2d of March, but was not discharged till 2d April following; but the defenders maintain that in estimating working-days the pursuers are not entitled to reckon against them what are called "surf-days," nor holidays observed according to local custom at Iquique, and that if such days be not reckoned against them there is no demurrage due.

The main question between the parties relates to surf-days. The port of Iquique, in common as it appears with other ports on the coast of Peru, is what is called a surf-harbour. The harbour is thus described by the witness Delgado, who was captain of the port, in his evidence taken on commission, in the answer given to the fifth query, viz.:—'The harbour of Iquique where vessels lie is formed by an indent in the mainland, and an island at the distance of a cable's length, leaving a channel full of rocks between. The ships anchor at about half-a-mile from the town, and are reached through said channel. The discharge of cargo is effected by means of lighters, which receive it from the ship, and surf-boats or 'balsas' to transfer the same to the beach." The pursuers' vessel lay at the usual anchorage in the bay from the day of her arrival until the day of her sailing on her homeward voyage. The outward charter-party provided that the cargo was "to be taken from alongside, but ship's boats and crew shall render, if required, all practicable assistance in towing lighters"; and the unloading practically took place in this way—that the defenders from time to time sent lighters to the ship's side to receive the cargo of coals, and the lighters thus loaded either took the coals on shore, or towards the shore, where they were transferred to surf-boats or balsas, and so carried through the surf, running more or less heavily, and landed on the beach.

The witness Delgado (ans. 6) explains that in rough weather the surf is so heavy as to endanger the boats discharging the cargo, and (ans. 7) that "surf-days are those upon which the roughness of the sea makes it dangerous to work in the bay." It further appears from his evidence, and that of other persons examined as witnesses, that a record or register is kept in the office of the captain of the port of the surf-days, or days part of which are held to be surf-days, and that the captain of the port is the authority who determines what shall be regarded as surf-days. There are also several witnesses who say that, according to the custom of the port, surf-days as fixed by the captain and appearing on the register are not working-days; and it seems to be proved that persons who had engaged to load or unload vessels in the bay would not be bound to do so on surf-days, when according to the judgment of the local authority there would be danger to boats and cargo from the surf running high.

The question to be decided is—Whether days which were wholly surf-days or partially so are to be reckoned against the defenders, the charterers of the pursuers' vessel, as working-days within the meaning of the charter-party?

The Lord Ordinary in the present case, and Lord Craighill in the similar case of *Bird* against the same defenders, to be now decided, have held that surf-days are not to be regarded as working-days within the meaning of the respective charter-parties in each case; but I am unable to adopt that view.

If the term "running-days" be used in a charter-party, it has been long settled that every day, including Sundays and public holidays of every kind, is reckoned against the charterer and in favour of the ship-owner, who has agreed to allow so many days consecutively only. And the rule is the same when the word "days" or "lay-days" only is used, apart from any proved custom which may control or explain the meaning of these words—*Cochran* v. *Retberg*, 3 Espinasse 121; *Brown* v. *Johnston*, 10 M. & W. 331; *Niemann* v. *Moss*, 29 L.J., Q.B. 206. Where it is intended to alter this common mode of stipulation, it has become usual to qualify the term "days" by prefixing the word "working," but I am of opinion that the effect of this is substantially the same as if the expression "lawful-days" had been used, and the result is merely that in place of every day being reckoned, Sundays and certain recognised holidays shall not be included.

It might be maintained that the natural meaning of the word "working-days," or as in the charter-party in this case "per working-day," is to define or include only days on which work can be done by the charterer or his servants; but if this cannot be successfully urged, I see no other satisfactory construction of the term, except that it shall denote lawful days as distinguished from days or running-days, terms which include Sundays and all holidays.

On general and important consideration, sanctioned by a long series of authorities, it seems impossible to maintain successfully that working-days means days only on which it is possible for the charterer to get work done. It is against the true conception of the nature of a charter-party that a shipowner in letting the use of his vessel for hire should take the risks of the detention of the vessel, which such a construction would infer. The charterer who has to provide the cargo alone can know or estimate the difficulties which may occur to affect the loading, and is the person properly able to ascertain and judge of the time required for its discharge. The shipowner in agreeing to let his vessel has not usually the same means of knowledge, and commonly protects himself against undue detention, and avoids speculation on the subject by stipulating that the loading and discharging of cargo shall be begun and completed within a specified number of days or of working-days as the case may be. When the particular number of days or lawful days specified has elapsed, a claim for demurrage arises. The rule laid down in the case of *Thiis and Others* v. *Byers*, 1876, L.R. 1 Q.B. Div. 249, in accordance with the authorities cited in the judgment, appears to me to be founded on principles of justice and expediency, and to be practically decisive of the present case, viz.—"Where a given number of days is allowed to the charterer for unloading, a contract is implied on his part that from the time when the ship is at the usual place of discharge he will take the risk of any ordinary vicissitudes which may occur to prevent him releasing the ship at the expiration of the lay-days. This is the doctrine laid down by Lord Ellenborough in *Randall* v. *Lynch*, 2 Camp. 352, 355, which was upheld by this Court, and it has been accepted as the guiding principle ever since. See *Lees* v. *Yates*, 3 Taunt. 387; *Harper* v. *M'Carthy*, 2 B. & P. (N.R.) 258, 267; *Brown* v. *Johnson*, 10 M. & W. 331, and the other cases cited in the argument. The obvious convenience of such a rule in preventing disputes about the state of the weather on particular days or particular fractions of days, and the time thereby lost to the charterer in the course of the discharge, makes it highly expedient that this construction should be adhered to whatever may be the form of words used in the particular charter-party."

In the case of *Thiis*, the unloading, in which, as stipulated by the charter-party, the shipowner took an important part, and which took place in the river, was delayed by stormy weather. On certain days the state of the weather entirely prevented work being done. But such days were deemed working or lawful days, and the bad weather which interfered with the loading was held to be one of those vicissitudes the risk of which attached to the charterer and not to the shipowner. The surf-days on which the work of unloading could not be proceeded with in this case were simply days on which bad weather occurred to interrupt the work. It was argued that because according to the law of the port surf-days were not working-days in the sense already explained, it followed that such days were not working-days under the charter-party. It appears to me that the action of the authorities at the port can make no difference in this question. In the case of *Barker* v. *Hodgson*, 3 Maule and Selwyn, 267, it was held by Lord Ellenborough to be no defence to an action of damages for failure to furnish a cargo at a foreign port that in consequence of a malignant disease having broken out the authorities had prohibited all public intercourse and communication from the shore. The interference of local authority to prevent or to delay the loading or unloading of a ship is a contingency for the consequence of which it appears to me the charterer and not the shipowner is responsible.

It has been further maintained that the defenders are bound by the usage of the port of Iquique, according to which it is said that surf-days are not reckoned working-days within the meaning of the term as used in a charter-party. I am, however, of opinion that there is not satisfactory proof of such a usage. It is no doubt proved that in fact surf-days are not working-days in the sense of days on which work is done because of the danger arising from the state of the sea, though, as appears from the evidence (and particularly from the evidence of the witness Francis Eck in the case of *Bird*), working does take place at times notwithstanding the fact that the captain of the port has decided that a particular day is to be held a surf-day. But as to the usage of deducting surf-days from the number of working-days specified in a charter-party, it appears to me there is no satisfactory evidence of such a practice as between merchants in settling claims of demurrage or damages for detention. It is proved no doubt that captains of ships have been induced in settling such claims sometimes

to yield to the wishes or pressure of the charterers' agents, as indeed it is said the captain in this case did, but it does not appear they had their owners' authority for this, or that such a general usage exists as can be held to control or explain the term working-days in a charter-party entered into between parties in this country and to be enforced according to the law of this country, so as to give that term a meaning different from its ordinary legal signification. Even, however, if such a local usage had been proved, I may add that it would not, I think, avail the defenders, for it is not said, and it is not proved, that the pursuers had any knowledge of such a custom—*Kirchner and Others* v. *Venus*, 12 Moore's P.C. Cases, 361. On these grounds, I am of opinion that the defenders are not entitled to have surf-days, or parts of days called surf-days, deducted from the nineteen working-days stipulated for unloading.

During the currency of the working-days, viz., on March 19, a holiday occurred, being the patron saint's day of the country—St Jose. In point of fact no work was done on that day, which was observed as a strict national holiday in accordance with the law of the country, and it appears to me that St Jose's day is not to be regarded as a working-day or lawful day, but, like Sundays, ought to be deducted from the days running against the charterers. If surf-days were to be similarly treated, then the defenders claim credit for several other days as holidays; but I may observe that in any view there are several of the days so claimed which I think could not be so treated, because work was allowed in return for a payment made to the authorities or the church, and in point of fact, as appears from the log-book, the work of unloading in fact went on. Work having been done on these days, the defenders cannot properly refuse to hold them as working-days under the contract.

The result as regards the outward voyage, if effect be given to the views now stated, is this—The vessel having arrived on the 27th February, the captain intimated his readiness to receive cargo on the 1st of March, and the charterers' agents admit receipt of the notice on that day. The nineteen days for unloading thus began to run on the 2d of March. Allowing nineteen days brings the date to March 20th. There must be added, however, St Jose's day and three Sundays, viz., the 7th, 14th, and 21st, which brings the date to March 24th. The unloading was not, however, completed till 2d April, and the vessel was thus on demurrage for eight days at £10 a-day, for which the pursuers are entitled to £80.

So much for the questions which have arisen upon the charter-party in reference to the outward cargo. But various questions—some of them different from those I have now noticed—have been raised in regard to the homeward cargo. The charter-party in reference to that cargo contains these provisions in articles 1, 2, and 3—in the first place, that the ship being in every respect fit "to perform the voyage hereinafter mentioned, shall with all convenient speed proceed to the port of Iquique, where, and at two adjacent by-ports, she shall receive and take on board a full and complete cargo of nitrate of soda in bags. (2) The cargo to be placed by the shippers alongside of the ship's boats, clear of the surf, and in them to be conveyed on board by ship's crew free of expense, but at shipper's risk. (3) For the loading of the said cargo twenty-five working lay-days shall be allowed, to be reckoned from the day the ship is ready to receive cargo at the respective ports to the day of her despatch, and ten running-days, or demurrage at the rate of fourpence per ton register per day, to be paid daily, for each and every day's detention. Time occupied in shifting ports not to count as lay-days."

The first question that arises under these clauses has reference again to surf-days. The lay-days began to run on 3d April, because notice that the ship was ready to receive cargo was given and received on the 2d, and it appears that the loading was not completed till a considerable period after the lay-days had elapsed—until the 20th of May. The defenders maintain that they are entitled to credit for a number of surf-days, and that claim has already been disposed of so far as my opinion is concerned.

But in regard to the claim of demurrage, the defenders further say that they are entitled, not merely to twenty-five days, but to four additional working lay-days, because of an arrangement which they say was entered into between their agents and the captain that such days should be allowed. This claim arises in this way—It has been already shown the charter-party provides that the charterers had the power to send the vessel after she had reached Iquique, the outward port of her destination, to two adjacent by-ports to receive part of her cargo, if they thought fit, and if they had done so the time occupied in shifting ports were not to count as lay-days, but were, if I may say so, to be placed to the debit of the ship-owner; and it appears from the evidence of Moir, and the protest which the captain left in the hands of the charterers' agent—the captain having died, and his evidence not being available to the parties—that an arrangement was made by which the charterers gave up this option to send the vessel to by-ports, which would have occupied several days, in consideration of four additional lay-days being allowed at Iquique. The evidence is not very full upon the matter, but I think we may take it that the captain must have been fully satisfied that this arrangement was advantageous to his owners, for while in the protest to which I have already referred he declines to recognise the claims of the charterers' agents for surf-days he recites that he "voluntarily added four working-days on the condition that the whole of the nitrate should be delivered in this port, thus making twenty-nine working-days to which the charterers were entitled."

In dealing with this question I think it must be taken that it is sufficiently proved that the arrangement thus made was an advantageous one for the owners—that it was better for his owners that he should give these days instead of having the vessel sent to by-ports, which would have caused a greater loss of time "in shifting ports." And the question arises, Had the captain power to make such an arrangement? That question is not free from difficulty. In regard to a captain's power in a foreign port, I find it laid down by the Court in the case of *Grant* v. *Norway*, 1851, 10 Scott's C.B. Reps. 687-8, quoted with approval by Lord Blackburn in the case of *Reynolds*, 34 L.J., Q.B. 255, that "the authority of the master of a ship is very large, and extends to all acts that are usual and necessary for the use and enjoyment

of the ship, but is subject to several well-known limitations. He may make contracts for the hire of the ship, but cannot vary that which the owner has made." It is said by the pursuers (the shipowners) that the arrangement to give four additional lay-days was beyond the power of the captain, because it was a direct variation of the terms of the charter-party, and if it could be so regarded, at least in any matter that was material, I think the pursuers must succeed in their contention.

But it appears to me that what the captain did cannot be regarded as of this nature. I think that this charter-party was substantially performed as between the parties, and that what occurred was a variation to the advantage of the owners in the mode of performance of what had been stipulated by the charter-party; and, viewing it as of that special character, and not as a material or substantial variation of this contract, I think it was within the captain's power as the owners' agent. The result is, that instead of twenty-five loading days the charterers have twenty-nine.

There is a point, again, taken by the defenders, with reference to this claim of demurrage, founded upon an alleged transaction or arrangement entered into by the captain, and a receipt given by him as in full of all claims. I observe in the record that this transaction is treated, judging from the defenders' pleas, as a discharge of all claims arising either on the outward or homeward voyage. But I do not think it is possible to represent it as a discharge of claims with reference to the outward voyage, because the terms of the receipt limit it to the homeward voyage—"Received from the Peruvian Nitrate Company (Limited) the sum of forty-six soles in full of demurrage in the loading of homeward cargo of nitrate of soda under charter-party dated 8th September 1874." We are very much in the dark as to what was precisely intended by the captain when this transaction took place. I observe from the correspondence produced that the captain seems to have been quite unaware that any document had been granted by him which could be construed as a discharge by him even in reference to the loading of the homeward cargo, for I see in a letter which he wrote to his owners he says it was impossible that he could have granted any such document, and he refers to the receipt itself, saying it will be found to discharge one day's demurrage only. Again, within a day or two of the date which the receipt bears he lodged a protest written by Mr Nairn, the agent for the charterers, asserting that he was entitled to a great deal more.

I think it very difficult in these circumstances to say that the defenders have satisfactorily proved anything like a transaction between the charterers and captain, though the terms of the receipt are no doubt very particular. But apart from that question, I am of opinion that the captain had no power to grant any such discharge. I have already referred to the powers of a shipmaster as agent of his owners in a foreign port. It may often be that a claim for demurrage may be as large or almost as large as the claim for freight itself. If a vessel be detained waiting for a cargo, there may arise very large claims indeed. These are claims stipulated for in the charter-party as between the shipowner and the charterer. The right to payment arises to the shipowner, and I do not think the captain in a foreign port has power in ordinary circumstances to discharge that right. Such a power is not necessary in the ordinary use of the ship or performance of the voyage, and it would be a serious matter for shipowners if a captain in a foreign port should be entitled to discharge a large claim of demurrage for a comparatively small sum. The demurrage in this case was to be paid daily, and that shows that the captain had power to receive and discharge the demurrage actually paid. I think he had not authority, however, to grant a discharge binding his owners for demurrage that he never received.

That disposes of the question which is raised with reference to the loading at Iquique, and the result seems to be that the lay-days begin on the 3d of April. There were twenty-five days stipulated by the charter-party, and four days added by the captain, making twenty-nine, which I think just exhausts the month of April. By that time there have elapsed five Sundays, which brings the dates to the 5th of May. The vessel was not despatched till the 20th, so that there are in all, I think, fourteen days of demurrage, which, taken at the rate of £8, 8s. 8d., gives £118, 1s. 4d., from which there falls to be deducted the one day which the captain received, viz., £8, 8s. 8d., leaving due, as appears to me, a balance of £109, 11s. 8d. I may notice that in the argument by the counsel for the shipowners it was pleaded that the sum of £8, 8s. 8d. should only be taken for ten days, for which it was agreed that the ship was on demurrage, and thereafter a claim of damage at a larger rate emerged. It is quite true that the claim after the expiry of ten days on demurrage is one of damage, but it has not been shown that damage to a larger amount than £8, 8s. 8d. per day has been incurred.

The case still presents another question for consideration, arising out of what occurred when the vessel arrived in London. The shipowners' claims on this head, as appears from article 11 of the condescendence, consists of three sums:—dock dues in London, £25, 6s.; extra cost of discharge in dock, £9, 13s.; cost of protest, 15s. 6d.—making in all £35, 14s. 6d.

These claims are founded on the view that the shipowners were entitled to unload the ship in the river, and it is plain that if they had been allowed to do so they would have been saved these payments which were made for dock dues and other expenses. I think the shipowners' contention on this point is not sound. There are three articles in the charter-party which relate to the discharging of the cargo in this country—10, 12, and 16. The conclusion of article 10 is to this effect—that the master shall "deliver the cargo, which is to be discharged according to the custom of the port, and as fast as the usages of the port will admit;" article 12 provides that "the charterers shall have the option of ordering the ship, on signing bills of lading, to a direct port of discharge in the United Kingdom or on the Continent (as above), in which case the freight shall be reduced two shillings and sixpence per ton;" and by article 16 the ship is "to be addressed to charterers' agents in Europe, paying 2½ per cent., who have the option of naming the discharging dock, pro-

viding they avail themselves of such option of the term of forwarding orders for port of discharge." The charterers did not avail themselves of this option—the option mentioned in article 16. They simply directed the vessel to proceed to London for her discharge, and it is contended that as this option was not declared when the port of London was named as the port of discharge, the shipowners were entitled to have the vessel discharged in that part of the harbour most economical for them, viz., in the river.

But taking the charter-party as a whole, and having in view especially the terms of article 16, I think that the fair meaning of the contract was that the cargo was to be discharged in a dock, assuming that the vessel was ordered to a port where there were docks. The provision is that the charterer shall have the option of naming a particular dock where there are several. If he does not avail himself of that option timeously, the shipmaster may resort to the dock which he prefers. The fair construction of the clause is, I think, that the vessel was to be discharged in a dock, and the charterer not having availed himself of his right to name the dock, the shipmaster had the option, and accordingly took his vessel to St Katharine's Dock on his own account. It appears to me that the expense must therefore fall upon the ship. Even if this were not the true effect of the special stipulation in the charter party, it is contended by the charterer that it is the invariable custom or usage of the port of London that this particular kind of cargo should be discharged in dock, and that under the charter-party (sec. 10) this is binding on the owners. The evidence is, I think, sufficient to prove this usage. There have been numerous vessels during the last three years arriving in London with this particular cargo, and in every case, without exception, it has been shown that the cargo was discharged in dock, a circumstance accounted for in the proof from the particular nature of the cargo. London being the place of business of the owners, the master must have known that the custom was to discharge such cargoes in dock, and having in view that the charter-party provides that the cargo was to be discharged according to the custom of the port, I think there is a second defence good in point of law to the claim for dock charges and expenses. On the whole, I think the interlocutor of the Lord Ordinary should be recalled, and that decree should be given to the effect I have now stated.

Lord Deas—I concur in the reasoning and in most of the observations of Lord Shand, except as regards two points. It is only necessary therefore for me to explain why I differ on these points. The first and the most important of these is about surf-days. The charter-party was entered into in London, and bears—"Ten days to be allowed the said charterers for loading the ship, and to be discharged at the rate of not less than forty tons per working-day."

One party contended that in the question, What are working-days? the charter party is to be construed according to the custom of the country where it was entered into. The other party contended that it is to be construed according to the custom of the port of Iquique. There is certainly no evidence to be found in the words of the charter-party to show that in entering into it there was any knowledge of a particular custom at the port of Iquique; but I am disposed to think that if there was any particular custom at Iquique as regards surf-days, it must be held that the risk was taken by the shipowners of that custom coming into operation. I am not disposed to think that personal knowledge of that custom is necessary; and I cannot doubt that surf-days are by the custom of the port of Iquique non-working-days. The reason for that lies in a physical necessity that is insuperable, and the proof discloses that the custom is absolute and universal that leave to discharge on such days will be withheld. I find this description of the port—"The harbour of Iquique, where the vessels lie, is to the north of the town, and is partly protected by an island, which forms a channel, full of rocks. The discharge of vessels is effected by lighters and surf-boats, and in some cases from the lighters to such private piers as exist in said channel. The difficulty is rough weather; in such, the channel is so full of broken water, and the surf on the beach so heavy, as to endanger any loaded lighter attempting to pass through, or any surf-boat attempting to work from the lighter to the shore."

That is a very peculiar state of matters. It is quite plain that if any one were to insist on going out on these days and prosecuting his work, and by his conduct anyone else were drowned, he would be guilty beyond doubt of what we call culpable homicide. That is a remarkable instance of a local custom. I do not dispute that the risk of bad weather is taken by the charterer, and I do not think that it follows from what I have said—in holding that surf-days are not working-days—that I am going against that other rule of law. It would be a very strange thing if surf-days were held to be working-days. I would almost say it was contrary to common sense.

The other point is as to St Jose's Day. I cannot discover any difference between it and the innumerable other holidays mentioned in the proof, or what are called national feast-days.

Lord Mure—A surf-day is merely a state of weather; it is an aggravated ground swell, producing such a heavy sea as to make it dangerous to land. It must therefore fall under the rule applicable to exceptional states of weather. That is laid down authoritatively in Bell's Comm. i. p. 575 (p. 622 of M'Laren's edition)—"When there is a special contract for a certain number of lay-days or demurrage, this is an absolute engagement by the freighter not to detain the ships beyond these periods, and if such detention should take place, the owners of the ship will be entitled to indemnification for the delay, not merely on the express contract, but in the nature and on the principles of a claim of damage. To this demand the freighter will be liable, not only where the delay shall have been occasioned by his fault, but where it shall have arisen from circumstances over which he has no control, provided they are not such as to dissolve the contract." Under that general rule I think this case comes. Again, at page 577 (623 of M'Laren's ed.) Mr Bell says, in speaking of the distinction between running-days and working-days.—"In settling the lay-days, or the days of demurrage, the contract generally specifies

'working-days' or 'running-days.' The former stipulation excludes Sundays and custom-house holidays. Under the latter the days are reckoned like the days in a bill of exchange. Where the expression is general—"days,"—the legal construction is for running-days; but if usage should settle it otherwise, it rules the construction." That doctrine is taken from an opinion of Lord Eldon, to which Mr Bell refers. On that point I concur with Lord Shand and with the opinions referred to by him in the case of *Thiiss* v. *Byers*; that is quite a distinct rule.

Then comes the question—Has there been proof of a local custom? We have no intimation on record that that question is to be raised, but putting that aside, I think that parties should have stipulated, being in full knowledge of the peculiar nature of this port, that surf-days should not be reckoned as working-days. In the absence of any such stipulation I think they are not entitled to found on this custom. Then I find that on some of these surf-days the log-book shows that cargo was discharged, and therefore I cannot think there was any absolute prohibition by the master of the port of all working on those days. On that point also I agree with Lord Shand.

Then as to the homeward voyage—There may have been circumstances which made it desirable that the ships should be altogether loaded at one port, and as to that point I again concur with Lord Shand. The captain unfortunately is dead, and his evidence, which might have cleared up the matter, is lost. We have this item of evidence however, that in his protest he distinctly allows four days on the understanding that he was not to proceed to these other ports.

LORD PRESIDENT—I concur so entirely in the able and distinct opinion of Lord Shand with regard to every point that it would be unnecessary for me to say anything were it not for the difference of opinion on what is by far the most important question raised in this case, viz., Whether surf-days are to be reckoned as working-days or not?

The rule for construing charter-parties cannot be doubted, in so far as it is not affected by any custom to the contrary. From the time that notice is given to the charterer's agent of the arrival of the ship at the port of discharge till the discharge is completed, the charterer takes the risk of the weather—at all other times the risk is with the shipowner. This is a rule so clearly established by all the authorities, and founded on such clear principles of equity and expediency, that I should be very sorry if any of your Lordships intended to throw any doubt on it. I do not, however, understand Lord Deas to dissent from this rule of law unless there is proved to be a contrary custom tending against this rule. But it is said that there is a custom at Iquique which would prevent us from holding that surf-days can be reckoned as working-days. Now, we must see what that custom is that we may understand what effect it is to have on written instruments. That there is a custom of not working on dangerous or improper days is not peculiar to Iquique, and I daresay that there are local regulations made for determining when it is safe to work and when it is unsafe. But the custom must go a great deal further than that before we can recognise it as affecting such a contract as this. It must be a custom that charterers should demand that such days should be allowed to them, and that shipowners should yield to them. There is no proof at all, or at least very unsatisfactory proof of that, but even if there were proof of it, I do not think it would be sufficient. The contract is made in London; the shipowners are not said to have had any knowledge of this local custom, assuming that it has been proved to exist. Now, where there is a custom peculiar to any locality, it cannot be allowed to control the terms of a contract unless it is known to both the parties to that contract. I am surprised to hear that rule called in question by Lord Deas. I shall only appeal to one authority, but that a very high one, viz., Lord Kingsdown, in the case of *Kirchner*, 12 Moore's P.C. Reps. 361. Now, it is not pretended that the shipowner who made this charter-party had any knowledge of the local custom. I think, therefore, that, even if it were proved, it cannot be held to affect the contract.

The Lords pronounced the following interlocutor:—

> "The Lords having heard counsel for John Holman & Sons, pursuers, against Lord Young's interlocutor of 18th July 1877, Recal the said interlocutor: Decern against the defenders to make payment to the pursuers of £189, 12s. 8d., with interest thereon at the rate of 5 per centum per annum from the 27th October 1875 until payment: Find the defenders liable to the pursuers in the expenses of process, under deduction of one-fifth of the taxed amount: Remit to the Auditor to tax the account of the said expenses, and to report."

Counsel for Pursuers (Reclaimers)—Trayner—Kirkpatrick. Agents—T. & W. A. M'Laren, W.S.

Counsel for Defenders (Respondents)—Guthrie Smith—A. J. Young. Agent—Thomas Dowie, S.S.C.

Friday, February 8. *

OUTER HOUSE.

[Lord Curriehill, Ordinary.

DUNCANSON *v.* GIFFEN.

Superior and Vassal — Conventional Irritancy, Whether Purgeable at the Bar.

Held (by Lord Curriehill, Ordinary, and acquiesced in) that conventional irritancies attached to obligations *ad facta præstanda*, or for payment of annual duties contained in conveyances of property, whether by way of feu-right or by contract of ground-annual, are purgeable at any time before extract of a decree of declarator of irritancy.

Review of the law relating to the purging of irritancies.

By contract of ground-annual, dated 13th March and 18th May, and recorded 26th June 1876, entered into between John Duncanson, builder, Glasgow, the pursuer of this action, and Andrew

* Decided January 18, 1878.