

be not personally present, then by an entry in the book or books, signed by some person thereunto lawfully authorised by letter of attorney or factory, under hand and seal, attested by two or more witnesses, in the words or to the effect following, viz.—*I, A B, this day of*

, in the year of our Lord , *by virtue of a letter of attorney or authority, under the hand and seal of* , *dated the day of* , *in the said year* , *do, in the name and on the behalf of the said*

, assign and transfer , *being all the interest or share or (as the case may be) part of the interest or share of the said*

in the capital stock or fund of The Royal Bank of Scotland, and all benefits arising thereby, unto his executors, administrators, and assignees.—Witness my hand,

Under which transfer the person or persons, bodies politic or corporate, to whom such assignment or transfer shall be made, or some other person by him or them lawfully authorised thereunto, shall sign his or their name or names, attesting, *that he or they do freely and voluntarily accept of the same.* . . . Provided always, That any person having any share or interest in the said capital stock or fund, may dispose or devise the same by his or her last will and testament. But, however, that the executor or administrator shall not transfer the same, or be entitled to receive any dividend, until an extract of the testament be delivered to the company, and until an entry or memorandum of so much of the said will as relates to the said stock or fund be made in the book or books to be kept by or by order of the said corporation for that purpose."

The Royal Bank of Scotland Act 1873 (36 and 37 Vict. cap 217), sec. 7, provides—"The stock of the Royal Bank (subject to its right of lien or retention for any debt due to it by the transferrer), may be assigned or transferred either in the form and manner prescribed by the first recited charter or by a separate transfer, duly stamped, in the form as near as may be of the schedule to this Act annexed; and every such transfer shall be prepared by the Royal Bank at their head office in Edinburgh, and shall be signed by the transferrer and transferee before being presented to the bank for registration."

The question for the opinion and judgment of the Court was—"Is the said *interim* act and decree of itself a good and sufficient title to the said bank stock, and is the bank entitled and bound to recognise the same as a sufficient warrant under which to register the second party as proprietor in the books of the bank? or is the said *interim* act and decree a good and sufficient warrant to authorise the bank to prepare a transfer or memorandum or deed of transfer of the said stock in favour of the second party, and upon execution thereof to register him as proprietor of the said stock in the books of the bank?"

Argued for the first party (the Royal Bank)—The bank considered they would not be in safety if they transferred the stock from the name of Samuel Greenlees to that of James Greenlees. There were only three methods of transferring stock allowed in the charter, two of which were transfers *inter vivos*, and the third was by presenting the testament of the deceased party to the bank. None of these methods could

be followed here. The only way that the stock could be transferred was by an action of adjudication, as prescribed in the case of *Royal Bank v. Fairholm*, M. App., *voce* Adjudication, No. 1. The act and decree appointing the second party gave him only a right to make up a title but did not confer on him a title, and there was no provision in the 15th section of the Trusts Act 1867 that the act and decree should be equivalent to an assignation of moveables.

Argued for the second party (the judicial factor)—The act and decree of a judicial factor was a sufficient warrant to the bank to register the second party as proprietor of the stock. The property was really held by the Court by the hands of the judicial factor, and therefore there was no difficulty when one factor died in transferring it to his successor.

At advising—

LORD YOUNG—In my opinion, the estate of which the bank stock in question forms part is being administered by the Court, and that through the hands of an officer, not indeed a permanent official, but one appointed for the special purpose. The officer whom we first appointed died, and we supplied the loss by appointing another. He will receive all that was in the hands of his predecessor, and will have to show his title to the bank before the stock can be transferred, and all we are asked to do is simply to authorise the bank to put the name of the new officer in their books as the proprietor of the stock. It is a simple question, and in my opinion there would be no difficulty or risk in acting in this way. It is not a matter of completing a title at all. I think we should answer the first part of the question in the affirmative.

LORD RUTHERFURD CLARK and the LORD JUSTICE-CLERK concurred.

LORD CRAIGHILL was absent on circuit.

The Court answered the first part of the question in the affirmative.

Counsel for the First Party—Fleming. Agents—Dundas & Wilson, C.S.

Counsel for the Second Party—Dundas. Agents—M'Neil & Sime, W.S.

Friday, October 28.

SECOND DIVISION.

[Sheriff of Aberdeenshire.

CLACEVICH *v.* HUTCHESON AND COMPANY.

Shipping Law—Demurrage—Mixed Cargo—Discharge in Separate Lots—Custom of the Port.

Circumstances in which held that the consignees of a mixed cargo had failed to prove that by the custom of the port they were entitled to delivery in separate lots, and that therefore they were liable for demurrage in respect of delay caused by their insisting on this mode of discharge.

On 19th January 1886 Andrea Clacevich, for himself and the owners of the Austrian barque

"Una" of the port of Dabrota, entered into a charter-party with Messrs Diaz & Viadomonte, merchants and charterers at Buenos Ayres, to load at Rosario, in South America, a full and complete cargo of fifty tons of ash, sixty tons of kitchen bones, and the remainder of country bones, such as she could carry, and therewith should proceed to Queenstown, Falmouth, or Plymouth for orders to discharge at a safe port in the United Kingdom, or on the Continent, and that the discharge of the cargo should be according to the custom of the port of discharge.

By the bill of lading the master declared that he had received on board his vessel four hundred and seventeen English tons of bones and thirty-three English tons of ash. There was also the ordinary declaration that the weight and contents were unknown.

In terms of the charter-party the "Una" loaded up at Rosario and sailed for Plymouth, where she arrived on 7th July, and received orders to discharge her cargo at Aberdeen. The "Una" arrived at Aberdeen on 15th July 1886 with her cargo, consigned to Messrs Hutcheson & Company. On 16th July she began to unload, and that work continued until 12th August inclusive. As several Sundays and a public holiday were included in that space of time, there were only 22 working days. The amount of bones discharged varied from two to thirty tons per diem. The total amount of the cargo was four hundred and fifty tons.

This was an action in the Sheriff Court of Aberdeen at the instance of Andrea Glancevich, the captain of the vessel, and R. A. D. Cononn, shipbroker in Aberdeen, his mandatary, against Hutcheson & Company, commission merchants, Aberdeen, concluding for payment of £28 as demurrage for four days for unreasonable delay in unloading the ship, at £7 per day. The pursuer averred that the cargo in accordance with the custom of the port ought to have been discharged in eighteen days, or at a rate not less than twenty-five tons per working day; that the defenders had through their own fault and negligence exceeded the usual time for discharging the cargo by four days, and that they had thus become liable to the pursuer for demurrage for the said four days.

The defenders averred that by the bill of lading they understood they had purchased four hundred and seventeen tons bones, and thirty-three tons ash, but that when they came to unload the vessel at Aberdeen they found not only bones and ash, but also horns, hoofs, and piths mixed up in the cargo; that in consequence of this admixture it was necessary to separate the various classes of goods before landing them, and that the captain allowed them to be piled upon his deck for the purpose of separation.

The pursuers denied this, and produced letters showing that the captain had protested against these goods being divided into classes upon the deck of his ship. The defenders averred that they discharged the cargo as expeditiously as possible, and according to the custom of the port of Aberdeen.

The pursuer pleaded—"(1) The defenders, having through their own fault and negligence exceeded the time allowed by the custom of the port for discharging similar cargoes, are liable to the pursuer in demurrage in terms of the charter-

party and bills of lading. (3) The defenders having detained the said vessel without discharging her cargo, beyond a reasonable time, by the period of four days, are liable to the pursuers in demurrage as craved with expenses."

The defenders pleaded—"(1) The delay having been occasioned by the pursuer's own fault, the defenders should be assolized. (2) The question of demurrage in the discharge of said cargo being by the charter-party solely referable to the custom of the port of discharge, pursuer must abide by that custom. (3) The cargo not being a general one, and the defenders being sole consignees, the claim for demurrage did not arise till the cargo, which was omitted from the bill of lading, was first cleared."

The Sheriff-Substitute (DOVE WILSON) allowed a proof. The result was to show that the Messrs Hutcheson were the only merchants in Aberdeen who dealt at all largely in cargoes of bones; that they were in the habit of having mixed cargoes separated on board the ships which had brought them; that on this occasion the various items comprising the cargo were mixed up, and that in consequence of their determination to have the separation of the different classes effected, it was necessary to have the cargo divided into eight lots, the storage of which filled up the "Una's" deck and one of her boats. That this operation of separating the goods delayed to some extent the unloading of the ship, but that the captain did not actively interfere to prevent it being carried out although he remonstrated against it being done; that it had been the Messrs Hutcheson's custom so to deal with mixed cargoes of bones consigned to them formerly, and that the rate of delivering the cargo varied much as the necessity of sorting the different classes was more pressing on one day than another.

On 5th March 1887 the Sheriff-Substitute pronounced this interlocutor—"Finds in fact (1) that a portion of the cargo carried in the pursuer's vessel consisted of horns, hoofs, and piths, but that this portion was tendered and loaded as part of a cargo of bones, and that both the bones and it were loaded in bulk without being separated from each other; (2) that in unloading in Aberdeen the consignees extended the necessary time for so doing by four days, which were occupied in separating from each other the two portions of the cargo already named; and (3) that the defenders have failed to prove that they were entitled by the custom of the port to use the ship for making this separation: Finds in law that the cargo of bones, horns, hoofs, and piths having been shipped as bones, the pursuer was entitled to deliver it in bulk, and is entitled to demurrage for the time occupied in the separation: Finds further that £7 per day is a reasonable rate, and therefore decerns against the defenders for £28: Finds the pursuer entitled to expenses, &c.

"*Note.*—By the charter-party the pursuer bound himself to load a full and complete cargo of fifty tons of bone ash, sixty tons of mess bones, and the remainder of country bones, There were actually shipped by the affreighters thirty-three tons of bone ash, and four hundred and seventeen tons of what were entered on the bill of lading as bones. Whatever may be the value of the distinction between mess and country bones, none was made between them in

tendering the cargo for loading, but after nearly four hundred tons had been loaded of what came undoubtedly under the general description of bones, the shippers ran short of them, and somewhere about twenty tons of "hoofs, horns, and piths" were shipped to complete the cargo. No new agreement was made for their shipment. They were shipped for the convenience of the freighters in order to complete a cargo, and the pursuer rather lost than gained by the change, as the substituted materials were lighter than a corresponding bulk of bones would have been. They were thrown in on the top of the bones, the affreighters making no provision or arrangement for their being kept separate. As far as the pursuer was concerned, they were tendered to and received by him exactly as if they were bones. Whether under his charter-party he might have refused to take them is a question which I have no materials for deciding, and which it is unnecessary to decide. The holder of a bill of lading, under which they are described as bones, is not entitled to complain of his own title. When the bones and the horny materials arrived in this country it was necessary to separate them, as they have different trade values and are used for different purposes. The question then arose whether the pursuer was bound to deliver them separately, or whether he was entitled to deliver the cargo as it came, and to leave the merchant after delivery to separate for himself. There is some confusion in the proof as to whether the pursuer contended that he was not bound to deliver the bone ash separately, but the letter of the pursuer written on the morning of the fourth day of the delivery shows clearly that what he complained of was the time occupied in separating on board his vessel, and before delivery, the bones from the horny materials. It is a question of fact how much time was thus occupied, and a question as to the construction of the contract, whether the time so occupied was to be given at the cost of the ship. Apart from any question of the custom of the port, it seems to me to be clear that if a party chooses to ship two articles as one, his consignee must take delivery as it was given, and is not entitled to use the ship as a warehouse for sorting the cargo. The charter-party provides that 'the discharge shall be according to custom of port of discharge,' and the question thus arises whether the defenders have proved that it is a custom of the port of Aberdeen to sort such a cargo on board the ship. Some evidence of such a custom has been tendered, but it is not of the clear and distinct kind which is necessary to make it a part of a contract. The words 'discharging according to custom' in their ordinary sense apply to the facilities for discharge which the port offers, and not to the sorting of the cargo on the ship prior to discharge, and it would require very distinct evidence to convert an obligation to 'discharge' into one to 'sort and discharge' in the customary way. I think there is no such evidence. The evidence as to sorting is confined to this particular trade, and to a comparatively few instances, and it does not appear to have been acquiesced in. A good deal of the evidence is not to the purpose, as being given by persons who purchased from the consignees. These persons of course were entitled to have delivery of what they bought, and were in no way concerned

whether the consignee or the shipowner did the sorting, and probably paid no attention to it. In the case also of many of the ships as to which evidence was given, it appeared that the consignees had stipulated for a specified number of days in which to unload, and it would follow that if these were not exceeded the shipowners had little ground of complaint. Accordingly I do not think that either at common law or by the custom of the port the defenders had the right to sort, and the question which now remains is simply how many days additional were occupied in unloading in consequence of their having exercised it. Some evidence was led to show that the mixing of the cargo was greatly and unnecessarily increased by the way in which the pursuer gave delivery. It is said that if he had taken out the horny materials first from off the top of the bones, and then the bones afterwards, the delay would not have been nearly so great. It is not likely, however, that the pursuer's stevedore would not set about the delivery in the easiest way, especially seeing that the defenders were actually paying him for assisting in the sorting; and his evidence is that it was necessary to proceed as he did, and in order to get a footing to dig at once from the hatch to the bottom of the hold, and then work the cargo out. This of course involved a more thorough mixing of the cargo than was made at the loading, but it is apparently a thing which should have been foreseen when the two sorts were loaded together in bulk. The defenders also contend that some of the time was lost in separating the ash from the bones, and also in separating (unnecessarily for the consignee's purpose) the different kinds of bones and horny materials into different subclasses. Who was to blame for this latter separation is disputed, but it seems beyond doubt that much delay was caused by the sorting, and that for a large proportion of it the defenders alone were responsible. The amounts delivered per day prove this. They vary from two to thirty tons, and there is no explanation of what was done on the days of the small deliveries except that the men were detained by the sorting. An estimate of the amount of the extra time is all that is possible, and the pursuer's estimate that the delivery was unnecessarily spun out four of the twenty-three days actually used appears not unreasonable. If anything at all approaching the maximum had been given out on each day nineteen working days would easily have delivered the whole 447 tons. The four extra days, at £7 a day of demurrage, which was admitted to be a reasonable rate, makes the sum sued for."

On 18th April the Sheriff (GUTHRIE SMITH) recalled this interlocutor, found that the pursuer had failed to prove that the time allowed by the custom of the port of Aberdeen for discharging similar cargoes was exceeded, and absolved the defenders from the conclusions of the action.

"*Note.*—The 'Una' arrived in Aberdeen from the River Plate with a cargo of bone-ash, and finished discharging in 22 working days. This, the captain says, was four days too long, and was caused by the method adopted by the defenders of first assorting the cargo into bones, horns, hoofs, and piths before beginning the unloading, which he maintains was unreasonable. The quantity of cargo which a ship has to deliver *per*

diem depends (1) upon the terms of the contract, (2) in the absence of any stipulation as to output, on the custom of the port, and (3) where no custom exists, in reasonable despatch. It does not seem to me that in this case there is any question of custom but the one—the customary time for discharging a ship of this size laden with a cargo of this description, for if the merchant takes no more than the usual time, he may adopt whatever method appears to him most expedient for the delivery of the cargo. The 'Una's' cargo weighed, according to the bill of lading, 450 tons, which divided by 22 days gives an average of 20 tons 9 cwt. a day. A statement has been produced of the time occupied in unloading all the ships (sixteen in number) which arrived at Aberdeen with bones and bone-ash from the River Plate between January 1883 and July 1886. The rate per day runs from 15 tons to over 26 tons. The average of the whole is just the same—20 tons 9 cwt. A witness for the pursuer regards 20 to 25 tons as a fair rate, and Mr Hutcheson (to whose firm almost every ship has been addressed) states that in eight cargoes similarly mixed to the 'Una's,' the average rate of delivery was 17 tons 11 cwt. per day. Eight cargoes not so mixed averaged 24 tons. On these facts he thinks that the discharge of the 'Una' was fair, and I agree with him. A master who gets his ship cleared in the average time has nothing to complain of. As it thus appears that the customary time was not exceeded, the question whether the method followed was reasonable or unreasonable does not arise; but I may observe, that as the question does not turn on any facilities or non-facilities for unloading consignments of bones peculiar to Aberdeen, and the trade is not more than thirty years old, the question is rather one of reasonable mercantile practice than of local custom. Lord Eldon once regretted the subtlety to which the application of usage in the construction of contracts had given rise, and seemed to think that it would have been better had parties been left to express their meaning in their own terms—*Anderson v. Pilsker*, 2 Bos. & Pull. 164. Local custom will govern when the point is whether the merchant is entitled to refuse delivery except in railway trucks alongside (*Wylie v. Harrison*, Oct. 29, 1885, 13 R. 92), or in lighters (*Postlethwaite v. Freeland*, 5 Ap. Ca. 599), or such matters as the part of the river or harbour to which the vessel should proceed, the implements to be used, the staff to be employed, the days on which work may not be carried on. On all such points evidence of local usage or custom is admissible, because they are governed by regulations with which the charterer is bound to comply, and he has no option in the matter. But when he claims that in taking delivery of a cargo composed of articles of different mercantile value, and shipped promiscuously, they shall first be subjected to some kind of assortment, the question does not seem to me to be one of local custom at all, but of reasonable mercantile convenience as understood in the trade, and which must be determined by a consideration of the usage prevailing at different ports. I think that the merchant might fairly claim some reasonable power of assortment, provided it does not lead to the undue detention of the ship out of all proportion to the benefit gained."

The pursuers appealed, and argued—The charter-party in this case gave the affreighters the sole charge of loading the vessel with a cargo of bones. If there was any mistake in the cargo, it was due to their fault and not to the fault of the captain of the vessel. The bill of lading was for a cargo of bones which had been delivered in bulk on board the "Una" at Rosario. The merchant was bound to take delivery of them as he could, and was not entitled to use the deck as his warehouse for the division of his goods into separate parcels. According to the charter-party, the cargo was to be discharged according to the custom of the port, but that meant a reasonable time and not according to the caprice of a single merchant.

Argued for the respondents—According to the custom of the port of Aberdeen, a certain number of tons of this description of cargo could be discharged per day on the average. Applying this rule here, then it could be shown that the cargo was discharged in the usual way, and in accordance with the custom of the port. There was an obligation upon the captain of a trading vessel to see that his cargo was loaded properly. In this case the cargo was not properly stowed, and a number of things that should have been separated from each other were allowed to be mixed up. There was no delay occasioned in the unloading of the ship, considering the kind of cargo that had to be unloaded.—*Rodgers v. Forresters*, 2 Camp. 483.

At advising—

LORD JUSTICE-CLERK—In this case the two Sheriffs have differed in their judgments, and both explain the grounds upon which their decisions depend, but upon consideration I have come to agree with the judgment of the Sheriff-Substitute.

The action is one for damages by the owners of the ship "Una," because she was detained longer in the unloading of her cargo than was required. When she arrived at Aberdeen the bill of lading which was referable to the cargo, was one for a cargo of bones and ash, but the bones and ash were mixed with horns and other things. The course then followed was one which had been taken more than once before; the consignees requested the captain to separate the cargo. The whole cargo had been mixed throughout, and no separation had taken place of the different classes when the cargo was loaded. The master did separate the cargo, but he protested that he was not to be held bound to make separation of the cargo, and that he would make a claim for demurrage. After a delay of some days the cargo was separated and delivered, and this action is one in which the captain has followed up his protest. The Sheriff-Substitute found that the master was right—that is, that he was not bound to allow the use of his vessel for the purpose of separation, and that he was not responsible for the cargo being mixed, as that was the action of the merchant's correspondents at the port of loading. He held that the separation was for the ease and convenience of the merchant, and that he must be responsible for the delay so occasioned. The Sheriff on the other hand found that the pursuer had failed to prove that the time taken for discharging the cargo ex-

ceeded the time allowed by the custom of the port of Aberdeen for discharging similar cargoes.

I am of opinion that the master was not bound to allow the use of his ship for the separation of the cargo; if there was anything wrong in the mixture of the cargo, it was the fault of the persons who loaded it.

Next, I think that the shipowners, the carriers of the goods, were entitled to carry and deliver the goods as they were given to them. The cargo was said to be one of bones, and as such was received by the shipowners. I think they were entitled to deliver it in bulk, and that the captain was not bound to allow the separation on board his ship. I therefore think his claim for demurrage should be allowed.

My doubt on the subject was whether the master of the vessel by separating the cargo into different classes at the request of the merchants, though no doubt under protest, had not abandoned his contention and acquiesced in their demand. But I think this would be too stringent a view to take. The real foundation of the merchant's defence was that this separation of cargo was according to the custom of the port. I do not think that any such custom of the port was proved. In the first place, the trade in bones has grown up lately, within the last thirty years. Then there is only one merchant in Aberdeen who deals largely in bones, and that is the defender Mr Hutcheson, and his practice cannot raise up such a custom of the port as would be sufficient to bind traders. I think that the captain was entitled to deliver his cargo in bulk, any practice to the contrary not being binding.

LORD YOUNG—I concur in the judgment. I can only express regret that there should have been so much litigation about so small a matter. The action is one for the payment of £28 only, and I do not see that the case presents any general question which it would be for the public use and benefit to decide. I concur on this ground only. I cannot hold that the Sheriff-Substitute who took the evidence and disposed of the case arrived at a wrong conclusion in construing the evidence. If I had been the Sheriff I think that I should have affirmed the Sheriff-Substitute's decision. The import of the evidence according to that decision was that there had been undue delay in discharging the cargo, and that that was occasioned because the party who took delivery separated the cargo into no less than eight separate classes, and so delayed the discharging of the cargo by four days. The Sheriff-Substitute thought that that was an undue delay, and therefore gave decree for demurrage for these four days. I am not prepared to decide any more general question than that here—that the four days' demurrage was properly given. *Prima facie* it looks unreasonable that the ship should be detained while the cargo is being sorted out in the hold or on deck, but everything depends on the nature of the cargo and the circumstances of the case. The kind of cargo may be such that it cannot just be thrown out of the ship, but must be discharged with care, but I see no sufficient reason for differing from the Sheriff-Substitute on the question of the separation of the cargo. The custom of the port is only the

custom of this merchant. It appears that he was in the habit of insisting in separating the cargoes consigned to him on board the ships which brought them, but that is not a custom of the port within the meaning of the charter-party. It is not the practice of merchants to use the ship thus for their convenience.

The chief hesitation in my mind was whether we should not discourage appeals for such small values as this by adhering to the judgment of the Sheriff, but then I think that he ought not to have interfered with the judgment of his Substitute. With regard to a remark made by your Lordship as to the remonstrance of the captain, I think that the captain was powerless, and that he could only submit with a remonstrance. I think that he could not have resisted the wishes of the merchant. All he could say was, "I object to this separation, and you must pay for the delay occasioned, but I cannot actively interfere to prevent it." His remonstrance was sufficient, and in giving the judgment we do now, we are merely giving effect to that remonstrance.

LORD RUTHERFURD CLARK concurred.

LORD CRAIGHILL was absent on circuit.

The Court pronounced this interlocutor:—

"Find in fact (1) that a portion of the cargo carried in the pursuer's vessel consisted of horns, hoofs, and piths, but that this portion was tendered and loaded as part of a cargo of bones, and that the whole cargo was loaded in bulk without separating one portion from another; (2) that in unloading at Aberdeen the consignees extended the time necessary for doing so by four days, which were occupied in separating the said portion from the rest of the cargo; (3) that the defenders have failed to prove that they were entitled by the custom of the port to use the ship for such separation: Find in law that the cargo having been shipped as a cargo of bones, the pursuer was entitled to deliver it in bulk, and is entitled to demurrage for the time occupied in separating it, and that £7 per day is a reasonable rate: Therefore sustain the appeal, recal the judgment of the Sheriff appealed against, and affirm the judgment of the Sheriff-Substitute: Of new ordain the defender to make payment to the pursuer of the sum of £28 sterling, with interest thereon at the rate of £5 per centum per annum from the 5th day of March 1887 till paid: Find the pursuer entitled to expenses in this Court, and of new find them entitled to expenses in the Inferior Court," &c.

Counsel for Appellants—Baxter. Agents—Henry & Scott, S.S.C.

Counsel for Respondents—J. A. Reid—Alvesen. Agent—R. C. Gray, S.S.C.

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