to put as many of its fighting men out of action as you may, but you have also to take every means at your hand to cripple the commerce of that state, and you frustrate that object as much by supplying goods which do not belong to you as supplying goods which do belong to you to the foreign state. Nor has the Royal Proclamation, nor have the statutes, anything to say to the conditions of the supply or to payments for the supply. It signifies absolutely nothing whether the man who supplies goods to the enemy receives payment for them or makes conditions subject to which he is willing to supply them and does supply them. It has nothing to do with payment or conditions. Nor have we anything to do with the precise relation of the person through whom you supply, to the person who supplies them. He may be your servant, he may be your agent, he may be a total stranger—if he has been selected by you as the intermediary through whom you supply the goods to the enemy, then it signifies nothing what his relationship to you otherwise may be. Nor finally does it signify what permission you may have received to send your goods to a neutral country in determining the question whether you have broken the law or not. It is of no importance whatever. Nothing short of the Royal Licence will enable a man resident and carrying on business in this country to supply or to attempt to supply goods—it matters not what the character of the goods is—to a person resident and carrying on business in Germany.

To apply these general propositions to the present case, I have to tell you that it is of no moment in this case whether the goods which were supplied, if they were supplied —and it is for you to determine whether they were supplied—belonged to the Nova Scotia Company, or to Jacks & Company, or to Van Uden, or to Krupp, or to the Rheinische Company, or to Phœnix. It is not of the slightest moment to whom they belonged. The question which you have to consider is, Whether the accused supplied them to the enemy? For, I repeat, a man may supply goods which are not his. A man may give the enemy property to which he himself has no title whatsoever. He may have acquired it by false pretences. He may have acquired it by fraud. If he supplies it to the enemy, then an offence is committed. And further, once more applying general propositions to this case, it is of no moment whether Van Uden was the ordinary mercantile agent of Messrs Jacks & Company or not. If Van Uden's was the hand which Messrs Jacks & Company employed to supply the goods to these three German firms, then for the purpose of this transaction Van Uden is their hand and agent, even although up to that moment they had never heard of his existence and may never have had any business relations with him before. In the same way, and still applying the general propositions to the case before you, it signifies nothing whether payment was made in advance for these goods or whether payment was made for past deliveries. It signifies nothing what the conditions were under which the goods were supplied if you find as a matter of fact—and it is for you to find it—that the prisoners supplied the goods to the enemy through the medium of Van Uden.

In short, gentlemen, this case, this proclamation, and this statute really present for your consideration questions of fact. What did the prisoners do? That is what you have to consider and determine—not what they were entitled to do or what they had a right under contracts to do, not what they were bound to do. If a man supplies goods to the enemy which he is bound by his contract to supply, and only supplies them in fulfilment of the stipulations of his contract after war is declared, he has committed a crime.

If these views regarding the meaning of the proclamation and the statute are correct, it will be quite unnecessary for you to consider, or for me to consider, the legal question which was raised by Mr Clyde in his extremely able address to you. I have no material sufficient before me to enable me to solve that legal question, even if I were able to do it and thought it desirable to solve it for your benefit, and accordingly I turn now to the facts of the case in order that I may direct your attention to their salient features . . . .

The jury by a majority found the panels guilty as libelled, and they were each sentenced to imprisonment for six calendar months, and in addition each was fined £2000, and in default of payment by either of the panels the panel so defaulting to be imprisoned for a further period of six calendar months.

Counsel for the Panels—Clyde, K.C.—MacRobert—Lippe. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Crown—The Lord Advocate (Munro, K.C.)—Mitchell, A.-D. Agent—Sir W. S. Haldane, Crown Agent.

COURT OF SESSION.

Saturday, June 19.

SECOND DIVISION.

[Lord Anderson, Ordinary.

JOHN MILLIGEN & COMPANY, LIMITED *v.* AYR HARBOUR TRUSTEES.

Harbour—Reparation—Contract—Rights and Obligations of Harbour Trustees—Duty to Afford Facilities for Loading—Harbours, Docks, and Piers Clauses Act 1847 (10 *and* 11 *Vict. cap.* 27), *sec.* 33.

The Harbours, Docks, and Piers Clauses Act 1847, section 33, enacts—"Upon payment of the rates made payable by this and the Special Act, and subject to the other provisions thereof, the harbour, dock, and pier shall be

open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers." Sections 52 and 83 confer powers respectively on the harbour-master to give directions for the regulation of the harbour, and on the undertakers to make bye-laws for certain purposes.

The cranemen employed by harbour trustees having declined to load a certain vessel, the trustees, fearing a general strike, refused to permit the owners of the vessel to import labour to load it. In an action of damages by the owners against the trustees for loss caused by the delay in loading, the defenders pleaded that they had a discretionary power under the Act to refuse to allow the pursuers to import labour, and even if the Act imposed an obligation on the defenders to permit the pursuers to do so, the defenders were absolved from the obligation because under the circumstances it was "practically impossible" of fulfilment.

Held that the obligation was not discretionary but absolute, and was not set aside because of the serious nature of the consequences which might ensue from its fulfilment,

Opinion per Lord Dundas (*dub.* Lord Salvesen) that even absolute impossibility of fulfilment did not absolve from an obligation imposed by a private Act of Parliament, in respect that such an Act was truly of the nature of a contract sanctioned by Parliament between the promoters and the public.

Trade Union — Contract — Reparation — Trade Dispute—Act Done in Contemplation or Furtherance of a Trade Dispute —Trade Disputes Act 1906 (6 *Edw. VII, cap.* 47), *sec.* 3.

The Trade Disputes Act 1906, section 3, enacts—"An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment, or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills."

The owners of a ship had a dispute with their employees at the home port. On the ship coming into another port, where she was to load, the harbour employees there refused to load her, and threatened, if free labour was imported for that purpose, to strike. The harbour trustees, in consequence, refused to allow the shipowners to import labour.

In an action of damages by the shipowners against the harbour trustees, *held* that the trustees' refusal was not "an act done by a person in contemplation or furtherance of a trade dispute."

Opinion per Lord Salvesen that the claim of damages being based on breach of a statutory obligation and not *only* on interference with business, the Trade Disputes Act 1906, sec. 3, could not apply.

The Harbours, Docks, and Piers Clauses Act 1847 (10 and 11 Vict. cap. 27), section 33, is quoted *supra in rubric.*

The Ayr Harbour Amendment Act 1866 (29 and 30 Vict. cap. 208), section 3, enacts—"The Harbours, Docks, and Piers Clauses Act 1847, with the exception of sections 25 and 26, and except where expressly varied by this Act, is incorporated with and forms part of this Act."

The Trade Disputes Act 1906 (6 Edw. VII, cap. 47, section 3, is quoted *supra in rubric.*

John Milligen & Company, Limited, Belfast, the registered owners of the steamship "Eveleen," of Belfast, *pursuers*, brought an action against the Ayr Harbour Trustees, *defenders*, for declarator—"(*Primo*) That upon payment or tender by the pursuers of the rates appropriate to the steamship 'Eveleen,' and exigible under the said Acts in respect of her obtaining a loading berth, the defenders are bound to give or assign to the said steamship a berth or position in the harbour of Ayr, for the purpose of shipping or unshipping cargo or goods in the rotation in which she enters the said harbour, when the pursuers are prepared and willing to ship or unship cargo or goods, and when the same is provided and free to be shipped or ready to be unshipped; (*secundo*) that the pursuers are entitled, on obtaining such berth, to employ the services of their own employees in the loading or discharge of their said vessel, and for the purpose of loading or discharge to obtain the use of the cranes and other necessary plant belonging to the defenders and provided for such purpose, either on the pursuers making payment or tender of the appropriate rates, dues, and charges legally exigible by the defenders for the use of the said berth or position and the said cranes and plant, or their finding security therefor; and (*tertio*) in any event it ought and should be found and declared that in the event of the defenders being requested to work the loading or discharge of the said steamship, and them or their employees refusing to do so, the defenders are bound, on being requested by the pursuers, to permit the loading or discharge thereof to proceed by labour provided by the pursuers, and for that purpose to permit the use of the cranes and other necessary plant belonging to them on payment as aforesaid;" for reduction of certain of the Ayr Harbour bye-laws and regulations; and for £500 damages for loss caused to the pursuers by delay in unloading the 'Eveleen.'

The following narrative of the *facts* is taken from the opinion of the Lord Ordinary (*infra*)—"The pursuers, who are shipowners and coal merchants carrying on business in Belfast, are the registered owners of the coasting steamship 'Eveleen,' trading between Ayr and Ireland, and carrying for its principal cargo coal from Ayr. In April 1913 the pursuers were involved in a trade dispute with certain of their employees in Belfast, who were members of the Irish Transport Workers' Union. In connection with this dispute the officials of the Irish Union invoked the sympathy and aid of the Scottish Union of Dock Labourers,

and suggested that when the 'Eveleen' arrived in Scotland for cargo, the Scottish trade unionists should refuse to load the 'Eveleen.'

"On 16th April 1913 the 'Eveleen' arrived at Ayr Harbour at 10 a.m. for a cargo of coal which the pursuers had contracted to carry to Dublin, and which was at said harbour ready to be loaded. The harbour at Ayr is a tidal harbour, consisting of quays on each side of the river Ayr near its mouth. A portion of the quays on the north side of the river is reserved for loading coal cargoes, and there are railway lyes for this purpose along the quays. The railway of the Glasgow and South-Western Railway Company is on the north side of the harbour. At the coaling berths on the north side there are steam cranes for lifting the loaded waggons and tipping their contents into the ship's hold. There are no facilities for loading coal on the south side of the harbour.

"The harbour of Ayr is administered by the defenders, who are incorporated as the Ayr Harbour Trust under the Ayr Harbour Acts 1855 to 1893, and the Ayr Harbours Orders Confirmation Act 1901. The chief executive official of the defenders is the harbour-master.

"The mode in which the loading of coal cargoes is effected is as follows—The coal waggon is brought by rail to the ship's side and brought forward by means of a rope and capstan into a cage where it is spragged. The cage and waggon are hoisted by the crane over the ship's hold; the waggon is then tipped and its contents discharged into the hold to be dealt with there by the trimmers. The cranes employed in this work are the property of the defenders, who, under statutory provision, charge shippers 1d. per ton for their use. The labour necessary to get the coal from the railway lye into the ship is provided by cranemen, capstan-men, and rope-runners, who are all servants of the defenders. The work of trimming the coal in the ship is undertaken by independent contractors known as stevedores or master trimmers, who employ gangs of trimmers or labourers to do this work. The master trimmer must, in terms of the defenders' bye-laws, have a licence from the defenders, but this is the only connection the defenders have with the work of trimming the coal. At Ayr Harbour all the workers referred to—both those employed by the defenders and those employed by the master trimmers—are members of the Scottish Union of Dock Labourers.

"On the arrival of the 'Eveleen' at Ayr Harbour on 16th April the defenders assigned her a loading berth at the appropriate part of the north quay. Shortly thereafter, and before any loading had been done, the 'Eveleen' was removed on the orders of the harbour-master to a berth at the south side from which coal is not loaded. The Irish Union had been successful in getting the Scottish Union to take up the existing quarrel, and, in consequence, the employees at Ayr Harbour refused to load the 'Eveleen.' The pursuers thereupon offered to provide adequate labour for the loading of the ship, including the handling of the cranes, and tendered payment of the harbour dues which were exigible, but the defenders refused to allow them to import labour to the harbour. The 'Eveleen' was thus detained for a time at Ayr in an endeavour to get a cargo loaded, and ultimately had to leave the harbour without a cargo. The pursuers have brought the present action to obtain damages for the loss thereby sustained, and for declarator of their rights of user of said harbour."

The pursuers pleaded, *inter alia*—"(4) The pursuers being entitled to have their ship loaded in said harbour, they are entitled, on the defenders' refusal or failure to load, to perform the work at their own hand, and decree should be pronounced in terms of the third conclusion of the summons."

The defenders pleaded, *inter alia*—[*Added by amendment at the hearing in the Second Division*]—"(5) In respect of the provisions of the Trades Dispute Act 1906, the defenders are entitled to absolvitor."

On 29th May 1914, after a proof led, the Lord Ordinary (ANDERSON) pronounced this interlocutor—"Finds that in the circumstances disclosed in the evidence it was the duty of the defenders to provide the pursuers with a coaling berth for their ship, and with cranemen, capstan-men and rope-runners for loading said ship with a cargo of coal which was ready to be loaded: Finds that the defenders without lawful excuse failed to discharge said duty, and that the pursuers in consequence sustained loss and damages: Assesses the damages due by defenders to pursuers at the sum of £110 sterling, for which decerns in full of the sum of £500 sued for in the summons: Finds it unnecessary to deal with the declaratory and reductive conclusions of the summons, dismisses the same, and decerns."

Opinion.—[*After the narrative supra*]—"The conclusions of the Summons are for declarator, reduction, and damages.

"The reductive conclusion is directed against certain of the defenders' bye-laws. Under section 83 of the Harbours, Docks, and Piers Clauses Act 1847 (10 and 11 Vict. cap. 27) the defenders are authorised to make bye-laws for the purpose of regulating the use of the harbour, &c. The matter of the reasonableness of the bye-laws is, by section 85, for the determination of the Sheriff, and accordingly the pursuers make no attack on the bye-laws on the ground that they are unreasonable. They maintain, however, that the bye-laws which they challenge are *ultra vires*.

"The pursuers can only be successful in this attack if they make out that the bye-laws in question exceed the function of regulation — *Dick* v. *Badart*, 10 Q.B.D. 387. I am of opinion that none of the defenders' bye-laws exceeds this function, and I therefore decide that the byelaws are all *intra vires* and not open to reduction.

"The declaratory conclusions of the summons are of a sweeping character and are expressed in terms which are applicable to all circumstances. I do not think that the pursuers, because of what happened in exceptional and abnormal circumstances,

are entitled to crave a declarator which would be regulative of the defenders' administration in all circumstances. Nor do I think I am bound in the circumstances to pronounce a declaratory judgment which might fetter the administrative action of the defenders on occasions to which the judgment might not be properly applicable. It is plain, too, that these conclusions could not be granted as framed. Thus, with regard to the second declaratory conclusion, under which the pursuers claim right to employ the services of their own employees in connection with the cranes, section 22 of the Act of 1847 has evidently been overlooked by the pursuers. This section directs the defenders to provide the necessary labour for the cranes.

"Although, however, it may not be open to the pursuers to crave a general declarator because of what occurred on a special occasion, they are in my opinion entitled to demand and obtain the judgment of the Court on the legal effect of the occurrences of April 1913. I propose, in deciding this question, to treat the case as if it had originated in an ordinary petitory summons claiming damages as for a wrong.

"I apprehend that the whole ground is covered by propounding and endeavouring to find the appropriate answers to the following questions:—(1) Had the defenders on the occasion in question a duty towards the pursuers? (2) What was this duty? (3) Were they in breach of this duty? (4) If so, were they excused from performance? and (5) If not, were the pursuers damnified, and to what extent?

"(1) *Had the defenders a duty towards the pursuers?* I had an elaborate and interesting argument from Mr Clyde as to the common law doctrines of public carrier, including those of free port—his general point being that members of the public had unrestricted right to the services of the carrier and the use of the free ports, and that the carrier and the grantee of the right of free port were bound to mete out equal treatment to all who craved the services of the carrier or the use of the port. Mr Clyde maintained that the Harbours Act of 1847 is just declaratory of the common law as to right of user on the part of the public. On this part of his argument he cited Macnamara on Carriers by Land, 2nd ed., chaps. 3 and 4; Rankine on Land Ownership, 4th ed., pp. 286, 287; and the well-known case of *Colquhoun*, 16 D. 206, 18 D. 108, and 21 D. 996. I do not, however, propose to recapitulate his arguments on this point as I conceive I must go to the provisions of the statute for a statement of the rights and obligations of the parties. The defenders are a statutory body whose powers and duties are prescribed by the Act of 1847, and it is conceded by both parties that section 33 contains the leading provisions on this point. That section provides that 'upon payment of the rates made payable by this and the Special Act, and subject to the other provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods and the embarking and landing of passengers.'

"It is common ground that nothing in the defenders' Special Acts is of assistance in the determination of any of the points falling to be decided.

"I must take the case on the footing that the pursuers performed what was incumbent on them under this section because the rates payable were tendered and rejected by the defenders. The counterpart to which the pursuers were entitled was to have the harbour made open to them by the defenders for the shipping of goods. This part of the section has been explained in a judgment of Mr Justice Cave which is recognised as authoritative in such standard treatises as Carver on Sea Carriage. This judgment was pronounced in the case of *Dick* v. *Badart* to which I have already referred (see also *Somerville* v. *Leith Docks Commissioners*, 1908 S.C. 797).

"But I do not require to labour this part of the case as it was conceded by the defenders that they were, in ordinary circumstances at all events, under the obligations to the pursuers which are expressed in the above quoted section. The defenders further admitted that in granting facilities they were bound to treat all shippers with equality. They urged, however, that in granting facilities they had to regulate the whole matter, and that what was the whole matter depended on the particular circumstances.

"(2) *What was the duty of the defenders towards the pursuers?* The defenders admitted that they were bound, under section 22, to provide labour to work the cranes, and they also conceded that they were responsible for the capstan-men and rope-runners. They contended, however, that the extent of their obligation was to provide a staff, and that if their servants refused to work or were prevented from working the defenders were under no further obligation. I am unable to accept this contention. The pursuers, under section 33, are entitled to have the goods shipped, and if the defenders' servants refuse to put the goods on board it is the duty of the defenders to replace the recalcitrant servants with employees who will perform their duties. It seems to me to make no difference that the dislocation of labour was due to no fault on the part of the defenders but to external causes. Their statutory duty is, under section 22, to provide 'proper' servants for the cranes.

"(3) *Were the defenders in breach of their duty towards the pursuers?* The pursuers complain of two things—(1) being deprived of a coaling berth, and (2) being unsupplied with the necessary labour for the shipping of the coal. If the defenders were bound (as I think they were) to give the pursuers in their due turn a coaling berth and to supply proper servants for loading the cargo, it is plain that they failed in both the respects complained of in performing the duty they owed to the pursuers.

"This brings me to the most difficult part of the case, to wit—

"(4) *Were the defenders in the circumstances excused from performing their statutory duties?* I hold it proved on the evidence that if the pursuers had been allowed to import labour there was a likelihood of two things happening—(1st) violence by the Scottish trade unionists towards the imported labourers, and it may be towards the defenders' property, and (2nd) a general strike at the harbour, to the detriment of the other ships which were then loading and unloading there. It was a difficult situation for the harbour-master to deal with. The defenders under their Special Acts are charged with the duty of maintaining the harbour, and they urge that there was a probability, if they acceded to the pursuers' request, of the harbour being destroyed. The defenders were also under obligation to the other shippers, who might be damnified if the pursuers' ship were loaded by imported labour. It is further established by the evidence that the defenders' officials did what they could by way of persuasion to induce their own employees and the trimmers to load the pursuers' ship. I am far from saying that in the difficult situation with which he was faced the harbour-master did not follow the most judicious course. But the defenders may nevertheless be liable in damages to the pursuers. In contract it is almost always open to a contracting party to choose between specific performance and payment of damages for breach of contract. It is only in exceptional cases that the Court will compel specific performance. The same principles, in my opinion, are applicable to statutory obligations. The refusal of the harbour-master to give specific performance of a statutory obligation may have been in the circumstances expedient and judicious, but if the defenders cannot make out that these circumstances excused them from performing, they are liable in damages for non-performance.

"The defenders contended that the circumstances did excuse them from performing. If this question had arisen under contract, as with a stevedore under obligation to load the ship, it would probably have been regulated by a strike clause in the contract. There is no equivalent of a strike clause in any of the statutes which have been referred to, nor in the defenders' bye-laws, but the defenders' counsel argued that in a case of statutory obligation release or excuse is implied if the statutory duty cannot be performed—*Paradavine*, 1648, Aleyn 26, referred to in Addison on Contracts. I incline to agree with this argument, but to make it applicable impossibility of performance must be made out. The defenders' counsel would not go this length. The phrase which he again and again used in this part of his argument was that it was 'practically impossible' for the defenders to discharge their statutory duties. I am unable to determine the legal significance of this phrase. A thing can either be done, although it may be only with inconvenience and difficulty, or it cannot be done at all. In the latter case there is impossibility of performance, in the former case there is not. The defenders are foreclosed from maintaining that they could not get labour to load the pursuers' ship, because the pursuers offered to supply that labour, and I hold they have made out that they could implement that offer. I must also hold, against the defenders, that if this offered labour had been imported the power of the law would have duly protected it while engaged in loading the pursuers' ship. Again, I must determine against the defenders that if a general strike at the harbour had taken place the resources of the labour market of this country would have furnished non-union labour for the conduct of the business of the harbour, and that the defenders would have been duly protected by the police, and if necessary by the military, in carrying on the business of the harbour by means of this non-union labour.

"The defenders submitted an argument under this head on a point which was not raised in the pleadings, to wit, that they were excused from performance, or freed from liability, by virtue of the provisions of section 3 of the Trades Disputes Act 1906 (6 Edw. VII, cap. 47). I am of opinion that the terms of this section refer only to disputants in a trade contest, and are not applicable to the circumstances with which I have to deal. I therefore decide that the defenders have not made out justification or excuse for non-performance of their duty to the pursuers.

"(5) *This leaves for determination only the matter of damages.* I hold that the pursuers sustained damages in consequence of the aforesaid breach of duty on the part of the defenders. I think it is proved that the 'Eveleen' was wrongously detained for eleven days in Ayr Harbour. It seems to me that the damages due may reasonably be assessed as if this was a claim for demurrage at a time rate. So assessing the damages, I decide that the pursuers are fairly compensated by a rate of £10 per day, or £110 in all."

The defenders reclaimed, and argued—(1) The defenders had not failed in any common law duty. (2) They had given full implement of their statutory duties. Their liability arose under a public Act, viz.—The Harbours, Docks and Piers Clauses Act 1847 (10 and 11 Vict. cap. 27), and even if the Ayr Harbour private Acts were treated as contractual, they had no other effect than to put the defenders under the public Act. Under section 33 of the public Act the defenders were not bound to render special services—*Somerville* v. *Leith Dock Commissioners*, 1908, S.C. 797, 45 S.L.R. 590. Indeed section 67 positively forbad it. Under section 22 the limit of the obligation on the defenders was to provide sufficient and suitable labour. The duty was a qualified not an absolute duty. Sections 52 and 83 showed that modifications were inferred in the liability. The duty was to offer "servants" not "service," and to offer them only at "reasonable times." The defenders had not failed to offer men, and to do their best to induce them to work. Accordingly their offer was a good offer. There must be read into the obligation a condition to the effect

that if the men were unwilling to work the obligation did not apply. The vessel must arrive in harbour free from any disqualification which might prevent the men from working—*Whites, &c.* v. *Steamship Winchester Company*, February 5, 1886, 13 R. 524, *per* Lord Shand at 538, 23 S.L.R. 342, at 348. (3) Even if there were a statutory duty to unload the vessel, the defenders were in the circumstances of the case excused from performing it. The law recognised three excuses for non-performance of the duty, viz., (1) where it was physically impossible, (2) where it was a breach of the law, and (3) where it was difficult owing to circumstances for which the debtor was not to blame—*Paradine* v. *Jane*, 1648, Aleyn 26; Addison on Contracts (11th ed.), p. 148; Anson on Contracts (13th ed.), p. 371; *Embiricos* v. *Sydney Reid & Company*, [1914] 3 K.B. 45. (In that case performance was not absolutely impossible—*see* Scrutton (J.) at 51.) The present case fell under and was *a fortiori* of the third class of exceptions, because here the difficulty was due to the creditors themselves. Moreover, the pursuers were not the sole creditors, and the action of the defenders, by preventing a strike, preserved the rights of other creditors to whom the defenders were equally under obligations. (4) The defenders were absolved from fulfilment of the obligation in respect of the provisions of the Trades Disputes Act 1906 (6 Edw. VII. cap. 47), section 3—*Conway* v. *Wade*, [1909] A.C. 506, *per* Lord Loreburn, L.C., at 511; *Vacher & Sons, Limited*, v. *London Society of Compositors*, [1913] A.C. 107, *per* Lord Atkinson at 123. In the present case the dispute was a dispute between the defenders and their whole employees at Ayr as to whether or not National Union labour should come into the harbour, and it was in contemplation of this dispute and in order to avoid a strike that the defenders acted as they did. *Stewart* v. *Kennedy*, February 17, 1890, 17 R. (H.L.) 1, *per* Lord Watson at 9, 27 S.L.R. 386, at 391, was also referred to.

Argued for the respondents—(1) At common law the pursuers had the right to use the pier. If a pier was put down it was free to all and sundry—*Colquhoun* v. *Paton*, December 15, 1853, 16 D. 206, *per* Lord Justice-Clerk (Hope) at 211; Bell's Principles (10th ed.), section 657. (2) The pursuers also had a right under sections 22 and 23 of the Harbour, Docks, and Piers Clauses Act 1847 (*cit.*) to have the ship berthed for a sufficient time to permit of its being loaded, and the Harbour Trustees were bound to assist with appliances and workmen, or else to use those which the pursuers were willing to supply. A body of statutory trustees could not by passing a bye-law deprive a member of the public of his statutory rights—*Oswald* v. *Ayr Harbour Trustees*, January 24, 1883, 10 R. 472, 20 S.L.R. 327, *affd.* July 23, 1883, 10 R. (H.L.) 85, 20 S.L.R. 873; *Somerville* v. *Leith Docks Commissioners*, *cit.*, *per* Lord Ordinary (Dundas) at 1908 S.C. 802, 45 S.L.R. 594; *Dick* v. *Badart*, (1883) L.R. 10 Q.B.D. 387. The word "all" in section 33 meant "each"—*Burnett* v. *Great North of Scotland Railway Company*, February 24, 1885, 12 R. (H.L.) 25, *per* Lord Fitzgerald at 35, 22 S.L.R. 456, at 461. Under section 22 the defenders were bound to provide competent servants, and they were not competent servants unless they were "willing." Section 67 did not apply to the present case, because its object was to prevent favouritism by the company to one of its own servants. It had nothing to do with partiality shown to outsiders. The Court could ordain specific implement or give damages according to its discretion—*Moore, &c.* v. *Paterson, &c.*, December 16, 1881, 9 R. 337, 19 S.L.R. 236; *Mersey Docks Trustees* v. *Gibbs*, 1866, L.R., 1 H.L. 93, *per* Lord Westbury at 127; *Virtue* v. *Commissioners of Police of Alloa*, December 12, 1873, 1 R. 285, 11 S.L.R. 140. (2) The defenders could not escape their liability on the ground of the difficulty of the performance of the obligation—*Hong-Kong & Whampoa Dock Company, Limited* v. *Netherton Shipping Company, Limited*, 1909 S.C. 34, *per* Lord Dundas at 40, 46 S.L.R. 35, at 39; Pollock on Contracts (8th ed.) p. 432. *Paradine* v. *Jane* (*cit.*) was a case where the obligation had been created by a contract and not by statute. The obligation in the present case was also really contractual, because it was created by a private Act, and a private Act was just a contract sanctioned by Parliament—*Herron* v. *Rathmines and Rathgar Improvement Commissioners*, [1892] A.C. 498. (3) The defenders were not absolved from fulfilment of the obligation in respect of the provisions of the Trades Disputes Act 1906. The object of the Act was to further the interest of trade unions against employers, and its purpose was not to stifle but to further trade disputes. The present action was not laid on the grounds specified in the section. There was no averment as to what was the trade dispute, and what was the action done in contemplation of it. The section did not apply to an action done towards a third party with regard to a trade dispute—*Conway* v. *Wade* (*cit.*), *per* Lord Loreburn, L.C., at 509 and 511; *Long* v. *Larkin*, [1914] 2 Ir. R. 285, *per* Gibson, J., at 304, and Kenny, J., at 329. Moreover, the Act did not give protection where, as here, there were threats of violence.

At advising—

LORD JUSTICE-CLERK — The pursuers' claim in this case is now reduced to one of damages. They demand damages from the defenders in respect that when they brought a vessel to the defenders' harbour the defenders failed to provide what was necessary in the way of service at their cranes to enable the cargo to be loaded, and that when the pursuers proposed to have the work done by persons employed by them the defenders refused to permit them to bring men to use the plant necessary for the loading. The defenders by their statute, under which they are owners of the harbour, are required either to supply personnel for the working of their cranes, or to suffer the work to be done by those interested themselves.

It is not matter of dispute that the de-

fenders did neither of these things, and therefore *prima facie* they are liable in damages for failure to fulfil the contract imposed on them by statute. The question therefore is, can the defenders state any legal ground which will excuse them for their failure to provide the required service and their refusal to allow the pursuers, on their failure, to provide it for themselves? I am of opinion that the reasons they state are not sufficient to exonerate them. They are not entitled to exercise any discretion as to whether they themselves will or will not either do what is necessary or allow it to be done. The obligation upon them to take the one course or the other is absolute.

But then it is said that the circumstances of the case made it impossible for them to fulfil their statutory contract. They aver that the pursuers were engaged in a trade dispute with their employees in an Irish port, and that the trade unionists at this port intimated refusal to do work for this ship—in other words, that they were in sympathetic strike with the trade unionists at the Irish port. They therefore maintain that it was not possible for them to supply the personnel themselves. They further maintain that they were warned on behalf of the workers at their harbour that if they allowed the pursuers to do the work themselves their servants at the harbour would all strike work, and so the whole work of the port would be stopped. And they again say that this made it impossible for them to allow the pursuers to bring their own men to the cranes. It is no doubt the case that they entertained apprehensions that the peaceful picketing might develop, as it so often does, into violence, by which their crane plant and other appliances might be injured.

The question is, whether such circumstances will relieve the defenders from having to compensate the pursuers for the damage caused to them by the fact that they were unable to get their vessel's cargo loaded, as they were entitled to have it loaded, on paying the harbour dues and expenses. I cannot think so. In the first place, what is termed an impossibility was a prospective impossibility only. The defenders thought that certain things might happen, and on that ground they refused to fulfil their contract themselves or to allow the pursuers to execute what was necessary for the work. But even if it were granted that there was a state of matters which could be held to constitute an impossibility, would that free the defenders from a claim of damages? I cannot think so. It appears to me to be clear that a plea of impossibility is no answer to a claim for damage for failure to fulfil a contract. This is well established by decision, and is no longer a doubtful matter in the law.

A further point was made, however, viz., that the Trades Disputes Act of 1906 applies to the circumstances of this case to free the defenders from liability. In my opinion, the defenders have set forth no case upon record which would entitle them to a judgment on this question. This appears to have been an afterthought, and certainly if it was to be pleaded, it called for statement in the record. But no such statement appears, and no motion was made for leave to amend the record so as to enable the defenders to set it forth relevantly. This I consider to be a sufficient ground for excluding it from consideration. Were it otherwise, I am satisfied that the terms of the Act of 1906 would not apply to the present case. Lord Dundas, in an opinion which I have seen, has gone into this matter fully, and I content myself with expressing concurrence in his views.

LORD DUNDAS—In this interesting and important case I have come to agree with the Lord Ordinary, though not exactly upon the same grounds, in thinking that the pursuers are entitled to recover damages. The defenders make no objection to the sum awarded by the Lord Ordinary if damages are due. The pursuers' counsel do not insist in the declaratory and reductive conclusions of their summons, and these are only interesting as indicating the grounds upon which damages are claimed. The facts of the case are sufficiently set forth by the Lord Ordinary and need not here be resumed.

I do not think that the defenders were in fault merely because they failed to supply cranemen willing to load the pursuers' ship. By section 22 of the general Act (10 and 11 Vict. cap. 27) undertakers are bound to "provide proper servants and labourers for working such cranes at all reasonable times for the use of the public." But the defenders' Special Acts (42 and 43 Vict. cap. cxl, Sched. F, and 56 Vict. cap. li), sec. 47, make it optional to them to supply such labour. If they do so they are entitled to charge for it over and above the statutory rates, but the clear implication is that if they do not choose to supply the labour, shippers (to whom under section 33 the harbour is to be open for the shipping and unshipping of goods) are entitled to supply competent labour for the loading or discharging of their ships. This point, however, is not of practical importance in the case, for as soon as it became apparent that the cranemen would not load the "Eveleen," the pursuers offered to supply men (against whose competency and fitness no suggestion is made) to carry out the work of loading.

The real ground of fault maintained by the pursuers is that the defenders refused to permit the entrance of these men to the harbour. I think this ground of action is well founded. By section 33 of the general Act it is provided that upon due payment of rates "the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods." The attitude broadly assumed in the harbour-master's telegram to the pursuers on 16th April was—"Will not on any account allow strangers work our cranes." Next day he telegraphed—"Regret cannot load 'Eveleen.' Men refuse to work her. She remains in Ayr Harbour at your risk." This uncompromising attitude was in effect maintained in the defences

and in the arguments of counsel. The defenders' position is that the "Eveleen" was not to be loaded at Ayr. Union men refused to load her, and the trustees refused to allow any men to come in from outside to do so. I think this attitude was illegal.

The defenders argued that they ought in the circumstances to be absolved from the duty of loading the "Eveleen" or allowing her to be loaded, because (*a*) they had a reasonable discretion as regards their obligation, and (*b*) it was impossible for them to fulfil it. So far as point (*a*) is concerned the answer seems to me to be that one finds nowhere any provision in the statutes which constitute and empower these undertakers giving them any discretion of the kind their counsel claim. It is true that section 33, which provides an open port to all persons for loading and unloading vessels, is subject to the provisions of the general and special Acts, and counsel referred us to sections 52 and 83 of the general Act which confer powers respectively on the harbour-master to give reasonable and proper directions for the regulation of the harbour, and on the undertakers to make bye-laws for certain purposes. But the broad obligation imposed upon the Trustees by section 33 is to provide an open port for shippers. I do not find either in the general Act or in the defenders' special Acts anything which would warrant us in implying a discretionary relaxation of the defenders' duty in circumstances such as have here arisen. There is not anywhere, so far as I see, a provision in the nature of or analogous to the strike clause common in charter-parties and elsewhere, and I am unable to see how we can treat the defenders upon the footing that such a provision is implied in their favour. As regards the other point (*b*) it was urged for the defenders that if the performance of a duty imposed by public statute is rendered impossible, the obligee is free from liability in respect of its non-performance. Assuming, for the sake of argument, the soundness of that proposition, I do not think it would here be applicable, for the duty is imposed, not by the public Act, but by the special Acts (incorporating certain of its provisions) which the defenders have obtained from Parliament. Such Acts are truly of the nature of contracts, sanctioned by Parliament, between the promoters and the public, and according to the general law of contract emerging impossibility is not a defence to a claim of damages for non-performance. But the conclusive answer to the defenders upon this head appears to me to be that their duty was alternative, either to supply the labour necessary, or in their option to permit the pursuers to supply (or attempt to supply) it for themselves, and that whatever degree of difficulty might attach to the former of these alternatives, the latter at least—the mere permission to the pursuers to load their own ship if they could—cannot have been impossible whatever might have been the consequences of their attempt to do so. It was said that the serious nature of the consequences which might legitimately be apprehended from such permission rendered it "practically impossible" for the defenders to give it. The answer seems to me to be that such qualifying adjectives as "practical," "commercial," and the like, are not in the eye of the law to be introduced in a question of possibility—*Hong Kong, &c., Dock Company, Limited*, 1909 S.C. 34.

A further argument was maintained for the defenders, based upon the provisions of the Trade Disputes Act 1906 (6 Edw. VII, cap. 47), which is to my mind attended with more difficulty. The point was, it seems, argued in the Outer House, although it had not been pleaded on the record. The defenders' counsel asked and obtained at our bar leave to add a plea (in an informal way, as if it had been stated prior to adjustment of the pleadings) to the effect that—"4. In respect of the provisions of the Trade Disputes Act 1906 the defenders are entitled to absolvitor." Counsel stated distinctly that he did not desire or propose to add any averments to his record in support of the plea-in-law thus baldly stated. The pursuers' counsel complained that the mere addition to the record of the plea quoted did not afford relevant or sufficient material for the disposal of the line of defence thus vaguely indicated. They urged that the defenders were bound to specify on record the precise sections of the Act upon which they desired to found, and also to disclose as matter of averment a particular "act done by some particular person" in "contemplation or furtherance of a" particularly specified "trade dispute," which should bring the circumstances of the case definitely within the purview of the statute. I think there is very great force in this complaint, which is more than merely formal and technical. One cannot be sure that if the record had been properly framed the proof might not have contained relevant and helpful evidence bearing upon the alleged trade dispute. If the defenders' arguments upon this point had been to my mind more convincing than they are, I think it would have been a matter for grave consideration whether, upon the record as it stands, the defenders' plea ought to be entertained. But as the question was fully argued at our bar, and as I have come to the conclusion that the defenders' argument fails upon its merits, I shall proceed to deal with the various contentions which they advanced in its support.

The Lord Ordinary disposed of the question by expressing the opinion that the terms of section 3 of the Act of 1906 "refer only to disputants in a trade contest." I should have been disposed to concur in that view, but I do not feel that I am free to do so, for I find that Lord Loreburn, L.C., in *Conway* v. *Wade*, [1906] A.C. 506, at p. 512, agreeing with the Master of the Rolls, said that "the section cannot fairly be confined to an act done by a party to the dispute." Moreover, the defenders' argument, at least in some of its phases, postulated that they were themselves parties to a trade dispute. The defenders' counsel put their case upon this point in a variety of ways. They suggested —not, I think, very strenuously—that the "trade dispute" was that between the pur-

suers and their employees at Belfast; but in that case I do not see how the "act done" by the defenders—their refusal to admit free labourers at Ayr—could be properly said to have been "in contemplation or furtherance" of the dispute at Belfast. Then it was argued, as I understood, alternatively, that the "trade dispute" was one between the defenders and certain of their cranemen and others in connection with the loading of the "Eveleen" at Ayr. I cannot accept this view. The refusal of their own servants to load the vessel would by itself have been rather a reason for than a reason against the permission to others to do it. But the most plausible mode in which the defenders' counsel sought to avail themselves of the Act was by maintaining that the defenders' refusal to admit outside workers was an "act done" by them "in contemplation or furtherance of a trade dispute," viz., a dispute between them and their whole employees at Ayr, "connected with the employment of" outside labourers; and, as such, was "not actionable on the ground only" that it interfered with the trade or business of the pursuers. I do not, however, think that this is a legitimate application of the terms of the statute. I do not find the statute an easy one to understand and to construe. An "act done in furtherance of a trade dispute" seems to me to imply that a trade dispute is already established and afoot. An act done "in contemplation of a trade dispute" seems to me to refer to (certainly to include) a dispute not yet in action. And it seems to me that in the latter case, in order to bring the statute into application, the trade dispute must be one "contemplated" in a reasonable sense by both parties to it. I am not sure that something of this sort was not present to Lord Loreburn's mind when he said in *Conway's* case, [1909] A.C. 506, at p. 509, that the jury "have explicitly found that there was no trade dispute either existing or contemplated by the men, which has been properly taken to mean that the act complained of was not done in contemplation or furtherance of a trade dispute." Now I do not think that the present defenders have proved that, at the time when they refused to allow outside workers to enter the harbour, the men at Ayr contemplated a general strike, and certainly no such strike existed. No man had left the harbour on strike, nor had the men been invited or commanded by the Union officials to a general strike. I do not think that contemplation or fear on the part of the defenders of the occurrence of such a strike would be sufficient to bring the situation within the scope of section 3 of the statute unless the strike was also contemplated by the men. Mr M'Donald, the branch secretary at Ayr of the Scottish Union of Dock Labourers, says that he "assumed" (perhaps rightly) that he would get all the men at the harbour to cease working if the "Eveleen" was loaded up by imported labour; that he would first have called a general meeting of the branch at the dock, and would then have consulted his executive council. It is true that he also says that "our members had decided at that time that in the event of the pursuers importing Federation men into the harbour, the men engaged with the rest of the firms working there would be prepared to support the question regarding the trouble in Belfast." The proof, however, does not disclose what is meant by the words "our members," nor how their "decision" was arrived at or expressed. And the evidence of Mr Houghton, the general secretary of the Union at headquarters in Glasgow, seems to show at least that the head office had in no way decided or even contemplated at the time in question a general strike. He says, "If the defenders had allowed outside labour to come in and work the cranes and load the 'Eveleen' on this occasion, I would have stopped the harbour probably; I think I would have stopped the harbour; I think I should have been forced into that position." I find nowhere any sufficient proof that at the time when the defenders refused to admit outside labour to load the "Eveleen" a general strike was in contemplation by the men, and it certainly was not in existence. It seems to me, therefore, that the defenders have failed to establish that the circumstances of the case are such as to make the Act of 1906 applicable so as to exempt them from liability in damages.

One feels, of course, some sympathy with the defenders. They were placed in a very difficult position, and they acted with care and thought, and in perfect good faith. But they are not the only persons to be considered; and the question must after all be decided not by sympathy but in accordance with law.

Upon the whole matter, I think we should recal the findings contained in the first part of the Lord Ordinary's interlocutor, which seems to me to be unnecessary and (as already explained) not strictly accurate; find that the pursuers have sustained loss and damage for which the defenders are responsible; *quoad ultra* adhere to the interlocutor; and find the pursuers entitled to additional expenses.

LORD SALVESEN—On the questions presented on this record I agree with the opinion of Lord Dundas, and I prefer his ground of judgment to that which has been adopted by the Lord Ordinary. Not even impossibility of performance will in general absolve a person from a contract obligation; but on the question of whether the obligation imposed by this statute is to be treated as of the nature of a contract obligation, in view of the fact that it is a private Act, I express no opinion, although I incline to the view that under a statutory obligation—as distinguished from a contract obligation—the body upon which it is imposed is always absolved from the performance of it if it has become physically impossible. It is not, however, necessary to decide that point, because here there was no difficulty whatever in the defenders permitting outsiders to come in and load this vessel, although they had very real grounds for apprehension as to the consequences if they gave the permission that was asked.

The defence raised on the Trade Disputes Act 1906 raises a difficult question if we are entitled to consider it on the pleadings as they are now before us. The broad facts as disclosed in the proof are that the defenders took up the position of refusing to permit the pursuers to load the "Eveleen" by means of imported labour because they were threatened by the local secretary of the Dockers' Union with a general strike in the docks if they did so. It is noteworthy that this was not the position taken up by the defenders in the correspondence. Their refusal was based on the ground that they could not allow strangers to work their cranes, and proceeded on the assumption that they were under no obligation to afford facilities for the "Eveleen" being loaded if their own craneman refused to work the cranes. In this assumption I agree with Lord Dundas they were wrong. But it was contended that their illegal refusal was an act done in contemplation of a trade dispute within the meaning of section 3 of the statute, and such an act is declared not to be actionable on the ground only that it is an interference with the trade of some other person. The pursuers' complaint does not in my opinion fall under this description. The refusal did of course result in an interference with the pursuers' business as shipowners, but their claim is based on a pre-existing statutory obligation, and not merely on the fact of interference with their business. It is for the breach of this obligation that they sue. Were it otherwise, the scope of the statute would be extended beyond anything to which it has yet been applied. A railway company is bound to carry goods for each and every member of the public who tenders the legal dues. If the defenders' view were well founded, such a company could refuse to carry goods which have become known in trade union parlance as "tainted," on the ground that it was threatened with a general strike of its own employees if it did so. Or again, a consignee of goods who had contracted to unload a vessel within a fixed number of lay-days and had not protected himself by a strike clause could on the same reasoning escape his contract liability if he could show that some trade union official had threatened to call out the dock labourers if he endeavoured to fulfil his obligation. An actual strike would not protect him, but if he refused to unload his cargo because of a threatened strike the suggestion is that he would be protected because his refusal was an act done in contemplation of a trade dispute. I think this argument does not give due weight to the word "only" which is the keynote of section 3, and that it cannot accordingly receive effect.

Even if this view is not sound, there remains the question of fact whether the trade dispute founded on was imminent—as there is high authority for holding it must be if section 3 of the Act is to apply. Now the person to whose threats the defenders deferred was the local secretary of the Dockers' Union at Ayr. He himself had no power to order a general strike, but he was in touch with the general secretary, Mr Houghton, who approved generally of the attitude he was taking up. Mr Houghton's evidence is summed up in the passage of his evidence already quoted by Lord Dundas. This statement implies that a strike had not actually been resolved on, even if Mr Houghton could have ordered it without consulting his executive, who were not asked to consider the matter until five weeks later. It merely goes to show that such a strike was probable, and it is not by any means certain that it would have taken place had the defenders taken up their true legal position and explained it to the trade union leaders. Their view was that they could lawfully exclude outsiders from using their cranes, and it is reasonable to suppose that the dissatisfaction which might have led to a strike, if they were believed to be aiding the shipowners, might have been modified when it became known that they could not lawfully prevent what the trade union officials regarded with disfavour. On this separate ground therefore I hold that the action is not excluded by the Trade Disputes Act of 1906.

LORD GUTHRIE—If the reclaimers are found wrong on the merits, they acquiesce in the amount of damages found due by the Lord Ordinary. On the other hand, the respondents do not reclaim against the Lord Ordinary's refusal to pronounce the declaratory conclusions contained in the summons. The Lord Ordinary finds "that in the circumstances disclosed in the evidence it was the duty of the defenders to provide the pursuers with a coaling berth for their ship, and with cranemen, capstan-man, and rope runners for loading said ship with a cargo of coal which was ready to be loaded: Finds that the defenders without lawful cause failed to discharge said duty, and that the pursuers in consequence sustained loss and damages."

But the respondents did not ask the Lord Ordinary to hold that it was the defenders' duty to provide the pursuers with the men necessary for loading their ship, and it was unnecessary for him to do so in order to find the respondents entitled to damages. As appears from the Lord Ordinary's narrative, when the reclaimers' union employees refused to load the respondents' steamship "Eveleen," the respondents did not demand that the reclaimers should provide non-union men willing to do the work. They did not take that ground at the time, nor did they do so on record, at the proof, or, as I understand, at the discussion before the Lord Ordinary. They obviated any such question by offering themselves to supply the requisite labour, and the present dispute has arisen through the reclaimers' refusal to allow the men tendered by the respondents to load the "Eveleen." The reclaimers raised no question as to the respondents' ability to supply timeously a sufficient number of competent men for the work, including the safe handling of the reclaimers' plant. The reason for their refusal was expressed in the harbour-master's telegram of 16th April 1913—

"Will not on any account allow strangers to work our cranes;" and in the harbour clerk's letter of 19th April 1913—"The trustees are quite entitled to decide who are to work their cranes." And it was maintained in the debate before us that the trustees were right in this contention. The reclaimers' minutes show that although this was the attitude taken up by the reclaimers in dealing with the respondents there was another reason. I refer to the minute of standing committee on 21st April 1913, wherein it is reported "that the owners had requested permission to import their own men to work the cranes—that after a consultation with Mr Bain (one of the reclaimers) and the harbour-master this permission had been refused, as, apart from the trustees' position with regard to the working of the cranes, the harbour-master had verbal intimation that the result would be a general strike at the harbour and a stoppage of all work." It appears from the minute that the reclaimers were advised by their solicitor that they had taken the proper course "as the result of agreeing to the suggestion of the owners would be to inconvenience a larger body of the public, towards whom the trustees also had obligations."

The question therefore is not whether the trustees were bound to provide labour, but whether, finding their then employees unwilling to load the respondents' ship, they were entitled to refuse the respondents' offer to supply the necessary labour, either on the ground that they had an absolute discretion to accept or refuse such an offer, or on the ground that, having at least a reasonable discretion, they were justified in refusing an offer the acceptance of which might or would involve, first, a general strike at the harbour and the necessity for the reclaimers discharging the union workmen whom they employed and engaging non-union men, and, second, violence on the part of the discharged union men towards the non-union men who might replace them, and damage to the reclaimers' property.

I do not differ from the views expressed by the Lord Ordinary and by your Lordships on the larger topic, but I confine my attention to the question actually raised between the parties.

The reclaimers' first ground of refusal to allow the respondents to supply the labour necessary in connection with the "Eveleen" seems to me inconsistent with the position of statutory trustees, bound to treat all members of the public equally, and with the terms of the statutes, public and private, under which the reclaimers act, and with the opinions expressed in such English cases as *Dick* v. *Badart Freres*, 10 Q.B.D. 387, *per* Cave, J., and such Scots cases as *Somerville* v. *Leith Docks Commissioners*, 1908 S.C. 797, *per* Lord Dundas.

The second ground of defence raises the real question in the case. The reclaimers say that their refusal was at least in part induced by a fear of a general strike and consequent violence. But the question would have been the same had the refusal been induced by a threat that, if the respondents' offer was accepted, injury, partial or complete, would be inflicted by burning or otherwise on the reclaimers' warehouses or other property necessary to carry on the business of the harbour. The question is therefore an important one. And the right of the respondents to claim damages is not affected by any opinion the Court may have as to the expediency or judiciousness of the reclaimers' proceedings. That consideration in a breach of contract—breach of promise of marriage, for instance—does not disentitle the person willing to perform from claiming damages. No more will it do so in a case of breach of statutory duty, although it may be that it would be held sufficient to warrant the Court, in the exercise of its equitable powers, to refuse the remedy of specific performance to which the injured party is ordinarily entitled, and to limit his claim to damages.

The Lord Ordinary inclines to the assumption that the reclaimers could have avoided the respondents' claim to damages by proof that acceptance of the respondents' offer would have necessarily brought the business of the harbour to a standstill. I am unable to assent to this assumption either in law or even on considerations of public policy. Such interruption to traffic could only have been temporary, and performance of their statutory duty by the reclaimers, while it might have led to a temporary loss of harbour revenue, would have been in the general and permanent interests of harbour administration. But it is enough to say that this question does not arise, because, for the reasons given by the Lord Ordinary, it is clear that no case of impossibility arose either in regard to supply of labour for the general purposes of the harbour or in regard to apprehended violence.

The reclaimers founded a belated argument on the terms of the Trade Disputes Act of 1906. They have now added a plea founded on the third section of that Act, without, however, any addition to the condescendence defining the nature of the "trade dispute" alleged by them, or between whom they say it arose, or when it took place or was contemplated. It seems to me sufficient to say that in a question with the respondents the reclaimers are not entitled to repudiate the sole reason given by them at the time, and still maintained to be sound (namely, their absolute right to exclude strangers from their works), and to say that the act complained of was done for a different reason altogether, namely, in contemplation of a trade dispute.

I am therefore of opinion that, subject to the necessary modification of the Lord Ordinary's findings contained in Lord Dundas's opinion, his interlocutor awarding the sum of damages fixed should be affirmed.

The Court pronounced this interlocutor—

"Recal the findings in said interlocutor other than the finding in regard to the declaratory and reductive conclusions of the summons and the finding in regard to expenses: Find that the pursuers have suffered loss and damage, for which the respondents are responsible: *Quoad ultra* adhere to the said interlocutor, and decern."

Counsel for the Respondents (Pursuers)—Dean of Faculty (Scott Dickson, K.C.)—Carmont. Agents—Beveridge, Sutherland, & Smith, W.S.

Counsel for the Reclaimers (Defenders)—Moncrieff, K.C. — Graham Robertson. Agents—Gordon, Falconer, & Fairweather, W.S.

Tuesday, June 29.

SECOND DIVISION.

[Lord Dewar, Ordinary.

"STRATHLORNE" STEAMSHIP COMPANY, LIMITED *v.* HUGH BAIRD & SONS, LIMITED.

Ship—Affreightment—Charter-Party—Bill of Lading—Reference to Charter-Party—"Average Accustomed General Average, if any, and All other Conditions and Exceptions as per Charter-Party"—"Delivery with Dispatch according to Custom at Port of Discharge."

A charter-party between the owners of a steamship and the charterers of the vessel bore that the vessel should receive on board at the loading-place a full cargo of wheat, barley, or flour in sacks, and should proceed to discharge at such port and at the rates of freight set out on the endorsement to the charter-party "according to the custom at the port of discharge for steamers except as otherwise provided, cargo to be delivered at ship's tackles." The bills of lading held by the consignees, which formed the contract between them and the shipowners, provided that freight for the goods should be "payable as per endorsement on charter-party, with average accustomed general average, if any, and all other conditions and exceptions as per charter-party." In an action at the instance of the shipowners against the consignees for a balance of freight and demurrage due to failure of the latter to take delivery according to the custom of the port, *held* that the provision of the charter-party was incorporated into the bills of lading, and that the terms of the latter did not limit it to conditions *ejusdem generis* of payment of freight or average.

Ship — Affreightment — Custom of Port — Delivery of Grain Cargo — Custom Limited to Particular Cargoes in Steamers from Particular Ports—Charter-Party—Bill of Lading.

Bills of lading of a cargo of grain acknowledged that the master had received in good order and condition a number of sacks said to contain barley "to be delivered in the like good order and condition . . . weight and contents unknown." The charter-party, to which the consignees were not parties, contained a clause that the vessel should "discharge afloat with dispatch according to the custom at port of discharge for steamers except as otherwise provided, cargo to be delivered at ship's tackles," and this clause was imported into the bill of lading. In an action at the instance of the shipowners against certain consignees, who were buying the grain for their own use, for a balance of freight and demurrage due to failure of the latter to take delivery according to the custom of the port of discharge, the pursuers averred that a custom had existed at the port, for a period of twenty years, in the case of grain cargoes in steamers from North Pacific ports, to bulk the cargo in the hold before delivery. It was proved that this practice, which did not apply to cargoes of grain except those in steamers from North Pacific ports, not many in number, originated at the instance of and in the interest of consignees who were dealers, and who desired delivery in larger sacks than those in which the cargo was shipped, and that it was subsequently claimed as matter of right by them though the shipowners throughout disclaimed responsibility for the number of sacks. Their letters, however, were invariably written after discharge had commenced, and the condition they sought to annex to delivery was repudiated by the consignees. *Held* (*rev.* judgment of Lord Dewar, Ordinary) that the alleged custom had been proved, and that it was not inconsistent with the contract between the parties.

The "Strathlorne" Steamship Company, Limited, *pursuers*, brought an action against Hugh Baird & Sons, Limited, *defenders*, for payment of three sums which the pursuers alleged to be due to them by the defenders (1) for freight on a cargo of barley carried by the "Strathlorne" from Portland, Oregon, to Leith, (2) for demurrage in consequence of the defenders' refusal to take discharge of their barley in accordance with the custom of the port of discharge, in breach of the charter-party and bills of lading, and (3) for extra expense incurred in the discharge owing to such refusal.

The defenders pleaded, *inter alia* — "(4) There being no such custom of discharge as that alleged, *et separatim* any such alleged custom being inconsistent with the terms of the contract, and contrary to the defenders' rights by law, the defenders ought to be assoilzied from the second conclusion of the summons. (5) In any event, the custom alleged being unknown to the defenders, and not being uniform and universal in the discharge at Leith of cargoes from North Pacific ports, ought not to receive effect."

The *charter-party* of the s.s. "Strathlorne" provided that the "Strathlorne"