

meaning of section 49 of the Companies (Consolidation) Act 1908 shall be entitled to object to the proposed reduction of the company's capital; and to fix the date on or before which the creditors of the company not entered on the list of creditors to be made up in terms of the said section are to claim to be entitled to object, or are to be excluded from objecting to the proposed reduction, and to appoint advertisement of the petition, and of the dates so fixed, to be made once in each of the *Edinburgh Gazette* and *Glasgow Herald* newspaper; to settle the said list as the list of creditors entitled to object to the proposed reduction of capital, to find that they have either consented to the reduction, or that their debts have either been settled, discharged, or provided for, and to confirm the reduction of capital as resolved on by the special resolution passed at an extraordinary general meeting of the company held on 27th March 1916, and confirmed at an extraordinary general meeting of the company held on 18th April 1916, to fix the date until which the company shall add to its name the words 'and reduced,' to approve of the minute set forth in the petition, and to appoint the said minute, and the final deliverance of your Lordships to follow hereon, to be registered by the Registrar of Joint Stock Companies, and to appoint intimation of such registration to be made in the *Edinburgh Gazette*, and to decern; and to do further or otherwise in the premises as to your Lordships shall seem proper."

Objection was taken by the Court to the terms of the prayer in respect that it did not distinguish the various steps of process indicated in the Companies (Consolidation) Act 1908, sec. 49. The petitioners thereupon proposed to amend the prayer to read as follows:—"May it therefore please your Lordships to appoint intimation of this petition to be made on the walls and in the minute-book in common form, and to be advertised once in the *Edinburgh Gazette* and once in the *Glasgow Herald* newspaper, and to allow all concerned to lodge answers within eight days after such intimation and advertisement, and on resuming consideration of this petition, to fix the date with reference to which the list of creditors of the company within the meaning of section 49 of the Companies (Consolidation) Act 1908 shall be made up, to appoint the petitioners to lodge in process a list of such creditors entitled to object to the proposed reduction of the company's capital; and to fix the date on or before which the creditors of the company not entered on the list of creditors to be made up in terms of the said section are to claim to be so entered, or are to be excluded from the right of objecting to the proposed reduction, and to appoint advertisement of the petition, and of the dates so fixed, to be made once in each of the *Edinburgh Gazette* and *Glasgow Herald* newspaper; to settle the said list as the list of creditors entitled to object to the proposed reduction of capital, to dispense with the consents of creditors entered on the list whose debts or claims are not discharged or determined and who do not

consent to the reduction, and that, in terms of section 49 (3) of the said Act, to find that the consent of every creditor entitled to object to the reduction has been obtained, or that their debts or claims have been discharged or have determined or have been secured, and to confirm the reduction of capital as resolved on by the special resolution passed at the extraordinary general meeting of the company held on 27th March 1916, and confirmed at the extraordinary general meeting of the company held on 18th April 1916, to fix the date until which the company shall add to its name the words 'and reduced,' to approve of the minute set forth in the petition, and to appoint the said minute, and the final deliverance of your Lordships to follow hereon, to be registered by the Registrar of Joint Stock Companies, and to appoint intimation of such registration to be made in the *Edinburgh Gazette*, and to decern; and to do further or otherwise in the premises as to your Lordships shall seem proper."

The Court allowed the proposed amendment, fixed the 30th day of June as the date with reference to which the list of creditors of the company within the meaning of section 49 of the Companies (Consolidation) Act 1908 should be made up at the sight of Sir George M. Paul, C.S., and remitted to him to inquire into and report on the regularity of the procedure and the facts set forth in the petition; appointed the petitioners to lodge in process on or before the 21st July 1916 a list of such creditors entitled to object; also fixed the 2nd day of August 1916 as the date on or before which the creditors of the company not entered on the list of creditors to be made up in terms of the said section were to claim to be so entered, or were to be excluded from the right of objecting to the proposed reduction. The Court also appointed advertisement of the petition and of the dates above fixed.

Counsel for the Petitioners—R. C. Henderson. Agents—Tods, Murray, & Jamieson, W.S.

HOUSE OF LORDS.

Tuesday, July 25.

(Before Lord Parker, Lord Sumner, and Lord Wrenbury.)

ROWTOR STEAMSHIP COMPANY,
LIMITED v. LOVE & STEWART,
LIMITED.

(In the Court of Session, December 7, 1915,
53 S.L.R. 280, 1916 S.C. 223.)

Ship—Charter-Party—Lay-Days—Demurrage—Construction of Printed Charter-Party with Written Interlimitations as Affecting Lay-Days and the Exceptions to the Running thereof.

The lay-day and demurrage clause of the charter-party of a ship chartered for the carriage of pit props ran as fol-

lows, the words in italics being written interlineations on a printed form—
“The cargo is to be loaded *at the rate of 125 fathoms daily*, and discharged *at the rate of 125 fathoms daily, reversible*, with customary steamship dispatch as fast as the steamer can receive and deliver, during the ordinary working hours of the respective ports, Sundays, general or local holidays (unless used) in both loading and discharging excepted. . . .”

Held, in an action for demurrage, (1) that the charter-party was for a fixed number of days for loading and discharging, known as soon as the amount of cargo was known, and that the printed words so far as inconsistent therewith must be read as referring only to the manner of loading and discharging, and (2) that time lost owing to wet weather and Saturday half-holidays, when according to the custom of the port of discharge work was suspended, could not be read into the exception.

Ship-Agent and Principal—Bill of Lading—Charter-Party—Dispatch in Loading Added to Lay-Days Actually Used, and Total Noted on Bill of Lading as Days Used for Loading.

The charterers of a vessel were entitled to thirteen days for loading and thirteen days for discharging “reversible,” i.e., to twenty-six days for both operations. The shipper of the cargo, who was to deliver f.o.b., also acted as the charterers’ agent to load a full cargo and to make disbursements on account of freight for ship’s disbursements, and also as the ship’s agent to report and clear her at the custom-house and to do her business generally, including the engagement of her stevedores. By arrangement with the captain the shipper by working overtime loaded the cargo in nine instead of thirteen days, and took credit in the ship’s disbursements for the amount so earned, viz., £31, 10s. On the bill of lading was noted the amount of the ship’s disbursements, and on the margin—“Thirteen days used for loading.” The shipper included the amount of the ship’s disbursements in his invoice and in his bill, which was duly met by the charterers on taking up the bill of lading. In the knowledge that there had been an arrangement for dispatch, though not of its extent, and of the total of the ship’s disbursements, though not of how they were made up, the charterers took delivery of the cargo under the bill of lading.

In an action for demurrage, *held* that the charterers were entitled to seventeen days for unloading.

This case is reported *ante ut supra*.

The defenders, Love & Stewart, Limited, appealed to the House of Lords.

At delivering judgment—

LORD PARKER—In this case I have had the advantage of reading, and I agree with, the opinion about to be read by my noble

and learned friend Lord Sumner. To that opinion I desire to add nothing.

LORD SUMNER—The defenders Messrs Love & Stewart, Limited, by a contract dated 21st October 1911, bought from Erland Grankull, of Kristinestad in Finland, a large parcel of pit props for delivery in the following season, f.o.b. at Kristinestad, by steamers which they would provide for the purpose. Payment was to be by bill at sight in Glasgow for the invoice amount against endorsed bills of lading. There was a further term for Grankull’s benefit, that the ship should clear with him or his agents and also employ his stevedores, paying him for the services rendered.

To provide for the carriage of part of this parcel Messrs Love & Stewart, Limited, chartered the pursuers’ steamship “Glamorgan,” by a charter dated 11th June 1912. It was in the well-known “Scanfin” form with some manuscript alterations. In particular, clause 3, the lay-day and demurrage clause, was altered by interlineating after “loaded” the words “at the rate of 125 fathoms daily,” and after “discharged” the words “at the rate of 125 fathoms daily, reversible.” None of the printed words as to loading were struck out and no question of mistake or of rectification was raised. The ship loaded and discharged a quantity of pit props, which at the agreed rate gave thirteen days each at the ports of loading and discharge respectively. She was ordered to Newport, Monmouth, and there discharged her cargo to Messrs Love & Stewart, Limited.

The question which arises on this clause relates to wet days and Saturday half holidays. The pursuers admitted that “according to the custom of the port at Newport, Monmouth, the discharge of Baltic pit props is suspended during wet weather and during the half of each Saturday.” The question is whether on the words of the charter the time when the discharge of the “Glamorgan” was suspended for these reasons counts as laying time against the receivers of the cargo.

I think that the parties have manifested a clear intention in the charter to contract on the basis of a fixed number of lay-days, for discharge at a daily rate enables the number of lay-days to be fixed as soon as the quantity of the cargo is known and is equivalent to fixing the number of lay-days beforehand. The clause, having begun with the expression of such a stipulation, then proceeds in the words of the form, words which refer to the customs of the port and to the circumstances of the shipowner and his ship and of the receiver and his appliances as they happen to exist at the particular port at the time of loading or discharge as the case may be. Your Lordships’ House placed an interpretation on these printed words in *Hulthen v. Stewart*, 1903 A.C. 389, which is not only final in law but is exceedingly well known among all persons concerned in chartering steamers in this trade. That decision was in accordance with the earlier decision in *Postlethwaite v. Freeland*, 5 A.C. 599. In view

of those cases I think it is so clear that these printed provisions for lay-days based on a time which is reasonable under all the circumstances, stand in antithesis to lay-days based on a number of days fixed or capable of being fixed, such as the written words provide for, as to make it impossible in the present case to give effect to both sets of words as measures of the time allowed for loading and discharging. The intention to have fixed lay-days is clear and must prevail. Furthermore, the days, which are to be excepted in computing the lay-days are the subject of an express provision which is complete in itself. Accordingly, as I think that in view of this circumstance neither the ordinary working hours nor the custom of the respective ports can be availed of to introduce into the fixed lay-days further exceptions of days or parts of days, it is sufficient to say that these printed provisions must refer to the manner of discharge for any effect they may have, and that matter need not further be considered.

I think that time during which the weather is wet, which is time that may be measured by minutes or by hours, and the half of each Saturday, which though half of a calendar day may not be the same as a moiety of the number of working hours on an ordinary day, cannot be brought within the exception of "Sundays, general or local holidays." They are not days within the exception in the clause. A wet day, even if it rains all day, is not a day in the sense in which Sunday or Monday or Bank Holiday is a day. Consecutive days are running even though rain may prevent the receiver from getting any benefit from them. Saturday afternoons are the more plausible case of the two, but the exception in the charter is clearly based on days, not on parts of days. I do not think the term extends to the latter part of a week-day, on which it is usual not to work, although we all call it and enjoy it under the name of a Saturday half-holiday. Really it is a half day, which while it lasts is wholly holiday, and I do not think that "general or local holidays" cover it. No case to that effect was cited out of the many cases decided on lay-days, and one must remember that this form of words was meant to apply to the varying conditions of a great variety of foreign ports as well as to those of ports in the United Kingdom.

At Kristinestad the whole cargo was loaded in nine days, and the effect of the word "reversible" in the charter is that the receivers were entitled to seventeen lay-days under the charter for discharging the ship at Newport. The pursuers claim (and the burden is on them) to be able to show that in the circumstances only thirteen days were available for the receiver. The circumstances are these. By a memorandum written in the margin of the charter the captain was instructed to apply for cargo to a Mr Easton, of Wiborg. Mr Easton was the defenders' general agent in Finland, though what the precise limits of his authority may have been we do not know. By him the captain was referred to Mr Grankull. In loading the cargo Mr

Grankull partly acted on his own account to deliver the pit props on board of a ship of the purchasers' providing in accordance with the contract of sale, partly as the charterers' agent to fulfil their charter obligations to load a full cargo and to make advances on account of freight for ship's disbursements, and partly as the ship's agent to report and clear her at the custom house at Kristinestad, and to do her business generally, and particularly to engage her stevedores, all for some moderate fees to himself.

As is very commonly done, the captain and Grankull made an arrangement for a payment to the latter if he gave the ship dispatch. Accordingly he worked overtime, saved four days on the total of thirteen which the ship was bound to allow him under the charter, and earned £31, 10s. If the captain had carried £40 or £50 about with him in cash he might have paid the money then and there. Instead the amount was by agreement included in the ship's disbursements and brought up the sum of £436, 5s. 6d. disbursed for customs and port dues, stowage, and so forth, to a total of £467, 15s. 6d. The captain was to acknowledge this sum to have been received by him under the charter as an advance on freight to be earned on the voyage. In substance, having to pay Grankull £31, 10s. for himself, he did so by borrowing the money for the purpose from Grankull as the charterers' agent under the charter to advance money for ships' disbursements at the port of loading. He then enabled Grankull to obtain the money for himself from the defenders by including it in the sum acknowledged by him on the bill of lading as advance freight, and Grankull in due course included in his invoice for the timber sold the sum of £467, 15s. 6d. advanced for disbursements, and his bill for the total amount was duly met by the defenders on taking up the bill of lading.

What is the effect of this? The captain, using a familiar phrase, says that Grankull "sold" him the four days, and when the bill of lading came to be made out he wished to write in the margin "thirteen days left for discharging," pursuant to instructions from his owners to "try and get under the bill of lading the days left for discharging inserted in the margin." A Mr M'Kerrachar, a clerk of Mr Easton's, whose business had been to superintend the loading in the interest of the defenders, was present when the bill of lading was completed and successfully stood out for the words "thirteen days used for loading." They were written seemingly by M'Kerrachar himself in the margin of the bill of lading but not among the words which express a contract of carriage. The bill of lading incorporated the charter, of which the captain had a copy.

There is no evidence that M'Kerrachar had any authority or purported to have or to exercise any authority to bind the defenders in this matter. The insertion of the note in the bill of lading evidenced no new bargain with the captain. His bargain for dispatch-money had been made with Grankull some days before. Grankull had

no authority to make any variation of the terms of the charter so as to bind the defenders, and as far as we know he purported to act on his own behalf. The captain says he looked on him as the defenders' agent, but having the charter before him which showed the scope of the authority, such as it was, he could not rely on any ostensible authority *ultra*, even if Grankull had purported to act for the defenders in the matter, which was not the case. It is said that if the days "bought" from Grankull were to be added to the defenders' days at Newport, the captain was throwing his owners' money away, for they might have to "buy" them over again at the port of discharge, and that was plain to the captain, to Grankull, and to M'Kerrachar at Kristinestad, and must have been plain to the defenders too at Newport. There is some truth in this. If the defenders had insisted on their pound of flesh they might have detained the ship at Newport for seventeen days, when thirteen would have sufficed, or have extorted more dispatch-money as the price of earlier discharge, but there is no evidence that this was feared on the one side or intended on the other. If they did not do so, then four days' dispatch at Kristinestad was worth money to the ship, for this might be the saving of another open water voyage to the Baltic in the autumn, and in any case four days of the steamship's time somewhere were saved. The bargain itself evidently did not purport to include as a term that there should only be thirteen days for discharging, for the captain was only to "try" to get this on the bill of lading. He failed, and the statement put on it was incorrect to the knowledge of all parties, nor did it operate as an admission against the defenders, for M'Kerrachar had no authority to admit anything.

I think that what occurred at Kristinestad in itself effected no alteration of the defenders' rights under the charter. At Newport they presented the bill of lading, knowing by that time from M'Kerrachar's letters that some dispatch had been given and paid for, but not the number of days nor the price, and knowing also that the advance freight came to £467, 15s. 6d., but not how the disbursements were made up. They knew that the note on the bill of lading as to days used was wrong but not how far it was wrong. They drew no attention to the matter on presenting the bill of lading. The witness who gave this evidence was expressly accepted by the Lord Ordinary as truthful. As was natural the balance of freight was not paid in one sum but in instalments as the discharge proceeded. The first payment of £350 was on August 1st, the 12th lay-day; there were several other payments on account, and the balance, partly made up of £467, 15s. 6d., the advance of freight for disbursements at Kristinestad, was only settled on August 18th, nine days after the end of the discharge.

It is suggested by the pursuers that in some way the defenders are barred by this conduct from disputing that thirteen days were in fact used at Kristinestad, and from disputing that Grankull had authority to

sell four days for them for £31, 10s., which he kept for himself. In the alternative it is suggested that in presenting the bill of lading without protest and in taking the benefit of the amount of £467, 15s. 6d. as an advance of freight the defenders either ratified what was done at Kristinestad or approbated it in part, namely, the advance of £31, 10s. to the captain by Grankull as their agent, and must approbate the transaction in whole or not at all.

With all respect to the learned Judges of the Extra Division of the Court of Session, with whom these considerations prevailed, I think the arguments are unfounded. Grankull did not purport to act for the defenders, so there can be no ratification. If the presentation of the bill of lading could be treated as a representation by the defenders to the pursuers that thirteen days had been used at Kristinestad, it was a representation as to which the pursuers knew the truth, and they did not act or change their position on the faith of it. When the defenders took the benefit of the alleged advance of freight up to £467, 15s. 6d., the present dispute as to lay-days at Newport was in full swing. They had in fact allowed Grankull that amount as money advanced for ship's disbursements, and they declined to pay any more freight to the shipowners. Whether they need have paid Grankull or not is a matter which cannot affect the shipowner's rights. That could only be done by some bargain binding between the defenders and the pursuers. Grankull found the captain the money with which to pay for dispatch, not in a cash loan but by an entry in an account, which was intended to be available to the defenders, as in fact they have availed themselves of it, but it was not accompanied by any agreement binding on them that they should be prejudiced in respect of discharging time.

Furthermore, in presenting the bill of lading the defenders merely did what they must needs do in order to get delivery of their cargo. They received it from Grankull under the contract of sale as the symbol of the delivery of goods while afloat. Nothing had occurred by which any contract for the carriage of the goods arose between them and the shipowners other than the charter itself. No new bargain had been made under which the pursuers carried for the defenders under a bill of lading instead of a charter. The freight earned was chartered freight, and the bill of lading in the defenders' hands was only the ship's receipt for the goods. This is the ordinary effect of documents such as these under such circumstances, and the cases cited do not bear upon them.

In the result the defenders were entitled to seventeen, not thirteen, lay-days at Newport. As they cannot except days when it rained and Saturday afternoons, the ship was on demurrage but for half-a-day only, and not as the Lord Ordinary held for two and a-half days, or as the Second Division held for six and a-half. I think therefore that this appeal should be allowed with costs, that the interlocutor appealed from should be discharged, with costs here and

in the Second Division, and that the interlocutor of the Lord Ordinary should be restored with the substitution only of £23, 10s. 5d. for the sum of £117, 12s. 1d. which he awarded.

LORD WRENBURY — I agree with the opinion delivered by my noble and learned friend and I have nothing to add.

Their Lordships discharged the interlocutor appealed from, restored the interlocutor of the Lord Ordinary, with the variation of striking out the words "2½ days" and also the words "£117, 12s. 1d.," and inserting in lieu thereof the words "one half day" and also the words "£23, 10s. 5d."

Counsel for the Appellants—Condie Sandeman, K.C. — Douglas Jamieson. Agents—Dove, Lockhart, & Smart, S.S.C., Edinburgh — Borland, King, Shaw, & Company, Glasgow—Ince, Colt, Ince, & Roscoe, London.

Counsel for the Respondents—Horne, K.C. — Lippe. Agents—Boyd, Jameson, & Young, W.S., Edinburgh — Holman, Fenwick, & Willan, London.

COURT OF SESSION.

Tuesday, July 18.

FIRST DIVISION.

[Lord Hunter Ordinary.]

DICKSON v. LANARKSHIRE UPPER WARD DISTRICT COMMITTEE.

Local Administration—Rates and Assessments—Water—Premises Occupied by Owner and Supplied with Water by Meter—Public Health (Scotland) Act 1897 (60 and 61 Vict. cap. 38), section 126 (2).

The Public Health (Scotland) Act 1897 enacts—Section 126—"Supply of Water for Districts other than Burghs.—With respect to districts other than burghs the following provisions shall have effect:— . . . (2) The local authority, if they have any surplus water after fully supplying what is required for domestic and sanitary purposes, may supply water from such surplus . . . for trading or manufacturing and all other than domestic purposes on such terms and conditions as may be agreed on between the local authority and the persons desirous of being so supplied. Provided that when water is thus supplied from such surplus it shall not be lawful for the local authority to charge the persons so supplied both with the portion of the special water assessment applicable to the buildings or premises supplied and also for the supply of water obtained; but the local authority may either charge the said assessments leviable on such buildings or premises or charge for the supply of water furnished to the same as they shall think fit. . . ."

The local authority in a special water supply district proposed to charge the owner and occupier of a farm, which

was to be supplied with water for non-domestic purposes, with a meter charge for the water actually supplied to him, and also with a sum equal to the assessment which would have been laid upon him as owner had he been taking no water for other than domestic purposes. *Held (diss. Lord Johnston)* that in so doing the local authority was acting within its statutory powers.

The Public Health (Scotland) Act 1897 (60 and 61 Vict. cap. 38), section 126 (2), is quoted *supra in rubric.*

John Baird Dickson, Auchren, in the parish of Lesmahagow, Lanarkshire, pursuer, brought an action against the District Committee of the Upper Ward District of the county of Lanark, the Local Authority within the Lesmahagow Special Water Supply District, *defenders*, concluding for declarator "(1) that the defenders, having as Local Authority undertaken the duty of providing a supply of water for the domestic use of the inhabitants of the Lesmahagow Special Water Supply District, and for sanitary and other purposes therein, under and in terms of the Public Health (Scotland) Act 1897, are bound to afford to all inhabitants within the said district, and in particular to the pursuer, a sufficient supply of water for such purposes; (2) that the defenders, after fully supplying water required for domestic and sanitary purposes within the said district, having ample surplus water available for other than domestic purposes, are bound to afford to all inhabitants within the said district desirous of being supplied for such purposes, and in particular to the pursuer, a sufficient supply of water for such purposes, and that on equal terms; (3) that the defenders in supplying water to premises within the said district for other than domestic purposes, and in particular to the premises owned and occupied by the pursuer, are not entitled to make a special charge for the water as so supplied and also to impose the water assessments in respect of such premises exigible either from the owner or occupier thereof; (4) that it was *ultra vires* and illegal for the defenders, when requested by the pursuer to give him a supply of water for agricultural purposes at the special rate fixed by them, to demand from the pursuer, or to stipulate as a condition of such supply being given to him, that in addition to agreeing to make payment of the meter rate or special fixed annual charges when applicable, the pursuer should bind himself to pay to them for such supply a sum equal to the amount of owner's assessment on his premises that would have been exigible in respect of said premises apart from agreement or if no water had been taken by the pursuer from the defenders for other than domestic purposes; and (5) that it was wrongful and illegal on the part of the defenders, when the pursuer resisted the said illegal demand and refused to accept the said condition, to cut off the whole supply of water to the pursuer's said property of Auchren;" and for damages in the event of the defenders failing to obtemper a decree in terms