to make out such a claim, and when the whole evidence is considered the contention of the appellants is satisfactorily established. For a case of this sort it will not do to show merely that a piece of town land was unused for commercial purposes and was resorted to by the classes who frequent vacant spaces. In a genuine case of the class into which this case is sought to be intruded there is sure to be, or to have been, some congruity between the nature of the ground and those purposes of which recreation is the leading one, and something to show that it was not merely the worthlessness of the subject that accounts for the abstention of the authorities from disposing of it for the pecuniary advantage of the town. Otherwise the ideas of reservation and appropriation, expressed in the respondent's averment on which this question turns, never arise. In my view of the facts those ideas are entirely excluded from the present case.

LORD LINDLEY (read by LORD DAVEY)—I also have carefully examined the evidence in order to see if it justified the inference that there had been forty years' user as of right of the piece of land in question by the public as alleged by the respondent. I have come to the conclusion that the evidence falls far short of what is necessary to establish any such user. I entirely concur in thinking that there is no law or settled practice of this House to prevent it from differing even from two concurrent findings of fact if on a careful consideration of the evidence this House comes to the conclusion that those findings are wrong. In this particular case the evidence relating to the structure of the bridge, the ice-worn appearance of the third arch, and the natural soil near it and beneath it, all convince me that in early times that arch was over the bed of the river, although it may have been more or less dry in the summer when the water was low. I infer from the evidence that by the deposit of sand and gravel and some softer soil brought down by the river, its bed near and under the arch gradually rose and became more and more dry and firm enough to bear brick rubbish and other material carted upon it. The use made of the piece of land in question, when it became of any use at all, appears to me to be quite inconsistent with any dedication of it to the public for recreative purposes as contended by the respondent. It was worth nobody's while to object to such use as was made of it by boys and persons who dried clothes on it when they could, but any use of small portions of it for such purposes for forty years as of right is not only not proved but is in my opinion clearly disproved by the clear and frequent acts of ownership of the rest of it which are placed beyond dispute.

The appeal ought in my opinion to be allowed with costs in the usual way.

Interlocutors appealed from reversed, and appeal allowed with costs in the House of Lords and in the Courts below.

Counsel for the Complainer and Respondent—Lord Advocate (Dickson, K.C.)—Wilson, K.C.—Lawrie. Agents—A. & W. Beveridge, Westminster—Patrick & James, S.S.C., Edinburgh.

Counsel for the Respondents, Reclaimers, and Appellants—Clyde, K.C.—Constable. Agents — John Kennedy, W.S., Westminster—T. S. Paterson, W.S., Edinburgh.

COURT OF SESSION.

Friday, December 11.

SECOND DIVISION.

[Sheriff Court at Glasgow.

OWNERS OF "LADY PALMER" *v.* OTTMANN.

Ship — Charter-Party — Demurrage — Lay-Days — Length of "Working Day."

A charter-party provided that the ship was to be loaded in nine "working days" and to be discharged as customary per like working day. It further provided that at the port of discharge the steamer should work day and night if required to do so.

Held that in calculating the time at which demurrage should begin to run, the working day at the port of loading must be taken as consisting not of 24 hours but of 12 hours.

Ship—Charter-Party—Demurrage—Exceptions—Detention by Railways—Scarcity of Waggons—Discharge of Cargo.

A charter-party provided that the charterer was "not to be responsible for detention by railways, scarcity of waggons . . . or other causes beyond his control."

Upon the arrival of the ship at the port of discharge the charterers instructed the Caledonian Railway Company, who promised to forward the cargo with all possible despatch to the consignees, but notwithstanding this promise they did not provide any waggons until thirteen days after the ship was berthed. The cause of this delay was (1) the congestion of the harbour, and (2) the fact that the Caledonian Railway Company thought that the consignees were unduly detaining waggons at their works. The charterers continued to press the Caledonian Company, and received several repeated promises from them. Two days after the ship was berthed the charterer applied for waggons for part of the cargo to the North British Railway Company and these were supplied, but on his applying five days later for more waggons they were unable to undertake the further order. The discharge was ultimately completed by the Caledonian Company but not until 16 days after the ship was berthed.

Held that the delay in discharging was due to scarcity of waggons and detention by railways, and was not attributable to any extent to the fault or neglect of the charterer, and that therefore the charterer was not liable in demurrage.

Observed that even if the delay in the discharge had been proved to be due to the consignees unduly detaining waggons at their works, and to a consequent refusal of the Railway Company to supply waggons, the charterer, under the exceptions clause in the charter-party, would not have been liable in demurrage for delay so caused.

Letricheux & David v. *Dunlop & Company*, December 1, 1891, 19 R. 209, 29 S.L.R. 182, *approved*.

In April 1903 the registered owners of the s.s. "Lady Palmer" of Newcastle-on-Tyne raised an action against H. Ottmann, Glasgow, in the Sheriff Court at Glasgow. The action concluded, *inter alia*, for payment of £210 as demurrage under a charter-party between the pursuers and the defender dated 8th December 1902. The £210 was made up of £40, being demurrage for two days, at 16s. 8d. per hour, at the port of loading, and £170, being demurrage for eight and a half days, at the same rate, at the port of discharge.

By the charter-party it was agreed that the "Lady Palmer" should proceed to Aguilas and there load 3000 tons of iron ore, and should then go to Oran and fill up with esparto grass, and after being loaded should proceed to Glasgow and deliver the cargo in good order to the charterer or his assigns.

The charter-party contained the following clauses:—"The ship to be loaded in nine working days, weather permitting, Sundays and holidays excepted, and to be discharged—after obtaining the usual quay discharging berths—as customary per like working day, Sundays and holidays excepted. Charterer not to be responsible for detention by railways, scarcity of waggons, strikes, lock-outs, epidemics, quarantine, or other causes beyond his control. Time employed in shifting from port to port not to count. Loading time to count from six a.m. after the ship is reported at Customs House and ready, whether work commenced or not, written notice to be given during usual Customs hours. . . . Demurrage over and above the said lying days at 16s. 8d. per hour. . . . The ore to be delivered free into trucks at Glasgow in full of harbour dues. . . . The steamer to work day and night if required to do so."

The two points dealt with in this report, as regards which the parties were at variance, were (1) the time at which demurrage at the port of loading commenced to run, which depended on the question whether the expression "working day" meant a period of 24 hours or of 12 hours; and (2) whether the delay in discharging the iron ore at Glasgow came within the clause of the charter-party which freed the charterer from responsibility for "detention by railways" and "scarcity of waggons"?

A proof was taken, which disclosed the following facts:—The "Lady Palmer" arrived at Aguilas on 23rd December, and her loading at that port occupied 7 out of the 9 working days allowed by the charter-party. She arrived at Oran on 6th January. The parties were agreed that the lay-days commenced at 6 a.m. on the 7th. The loading was finished at 5 p.m. on the 9th. She then proceeded to Glasgow. She arrived in Glasgow harbour on 18th January. She was berthed for the discharge of the iron ore on the 28th January, and the discharge was not finished till 13th February. The consignees were the Coltness Iron Company. On 20th January they instructed the defender to forward the whole cargo to them per the Caledonian Railway. On 22nd January the defender intimated the arrival of the ship to the Caledonian Railway Company and instructed them to forward the cargo to the consignees. On the same date the railway company intimated to the consignees that they had received the order and would forward the cargo with all dispatch. Notwithstanding this promise, which was repeated both to the consignees and to the charterer, the Railway Company delayed to forward waggons although frequently applied to both personally and by letter by the defender. The proof disclosed two reasons for this delay—(1) Glasgow harbour was congested with vessels discharging iron ore, and waggons were therefore scarce; and (2) the Caledonian Railway Company was of opinion that the consignees were unduly detaining at their works waggons supplied to them on a prior occcasion, and the Railway Company did not therefore wish to furnish more waggons till they had received back the others. This opinion was not disclosed to the charterer. On 30th January the defender, after notice to the Caledonian Railway Company, ordered waggons for 1000 tons from the North British Railway Company, and from 2nd to 9th February the latter company supplied waggons for this amount. On 31st January the defender again remonstrated with the Caledonian Railway Company, and on 2nd February they wrote assuring him that traffic was open and promising to clear the vessel as speedily as possible. No waggons, however, arrived, and on 4th February the defender again applied to the North British Railway Company for a further supply of waggons for an additional 500 to 700 tons. This additional order the North British Railway Company were unable to undertake. On 7th February, after another remonstrance by the defender, the Caledonian Railway for the first time supplied a few waggons, but it was not till the 10th that a full supply was provided by that company.

On 5th August 1903 the Sheriff-Substitute (BOYD) found in fact (1) that three days were occupied in loading at Oran, and (2) that the delay in discharging was occasioned by the defender in failing to ascertain if his first order to the Caledonian Railway Com-

pany to supply waggons had been implemented; and found in law that the failure to discharge "in the stipulated lay-days" did not arise from detention by railways or scarcity of waggons within the meaning of the charter-party, and that the defender was liable for demurrage for one day at the port of loading and six days at the port of discharge, which, at the rate of 16s. 8d. per hour, amounted to £140, for which sum he granted decree.

The defender appealed, and argued—*On Point* 1—A lay-day was a period of twenty-four hours. That had been held to be the measure where demurrage was payable per hour—*Laing* v. *Hallway*, 1878, 3 Q.B.D. 437. Only two and a-half and not three days had been spent in loading at Aguilas, and therefore only twelve hours' demurrage was due. *On Point* 2—It was admitted by both parties that the delay in discharging the cargo was due to the want of waggons. In that case it lay upon the shipowners, in order to prevent the plain terms of the charter-party from having effect, to show that the scarcity of waggons was directly due to the fault of the charterer—*Moes, Moliere, & Tromp* v. *Leith and Amsterdam Shipping Co.*, July 5, 1867, 5 Macph. 988, 4 S.L.R. 169. Unless such fault was proved the charterer would not have been liable in damages even if there had been no clause about scarcity of waggons in the charter-party—*J. & A. Wyllie* v. *Harrison & Co.*, October 29, 1885, 13 R. 92, 23 S.L.R. 62; *Postlewhaite* v. *Freeland*, 1880, 5 App. Cas. 599. The charterer had arranged with the Caledonian Railway Company to supply the waggons, and was entitled to rely on their promise to send them. He had done his best to secure the appliances for discharging—*The Lyle Shipping Company, Limited* v. *The Corporation of Cardiff* [1900], 2 Q.B. 638. The delay was caused entirely by the railway company. If the railway company did not fulfil their undertaking to supply the waggons, either because they had none to supply or because they had some private grievance against the consignees, the charterer was not responsible. The delay in discharging was caused by want of waggons, and this fell within the exception in the charter-party. The case was ruled by *Letricheux & David* v. *Dunlop & Company*, December 1, 1891, 19 R. 209, 29 S.L.R. 182.

Argued for the pursuers and respondents—*On Point* 1—Twenty-three hours' demurrage was due. The lay-day was a period of twelve hours. A "working day" did not include a night as well. *On Point* 2—It was for the defender to prove that no waggons could be got for the discharge of the cargo, and that therefore the exception in the charter-party applied. This he had not done. He had only shown that no Caledonian Railway waggons were available. But if instead of being put off by the unfulfilled promises of that railway he had at once applied to the North British Railway for waggons to discharge the whole of the cargo, there was no evidence that he would not have received them. Between 28th January and 4th February he could have got as many waggons as he desired from that company. The fault was therefore on his part.

LORD TRAYNER—The "Lady Palmer" arrived at Oran on the 6th January, and the parties are agreed that the lay-days commenced at 6 a.m. on the 7th. Her loading was finished at 5 p.m. of the 9th. The defender maintains that at the most only two and a-half days were occupied at Oran. His contention is that a working day means twenty-four hours, and that so reckoning only two and a-half days were occupied. In the first place, I think it is wrong to say that a "working day" consists of twenty-four hours—that period comprehends both a day and a night. Secondly, if the hours of night were to be comprehended in the "working day" I would expect that to be distinctly provided. This charter provides that if necessary at the port of discharge the steamer should "work day and night." This provision being made in regard to the discharge and not in regard to the loading, leads to the conclusion that what was specially stipulated in regard to the one and not to the other was not to be understood where it was not expressed, but was excluded. I am of opinion therefore that the two loading days which were available for loading at Oran terminated at 6 p.m. of the 8th January, and that the ship was thereafter on demurrage. The loading not having been completed until 5 p.m. of the 9th, the ship was detained in loading twenty-three hours beyond her lay-days. For each hour on demurrage the defender is by the charter-party liable for 16s. 8d., and accordingly the demurrage amounts to £19, 3s. 4d. For that sum the pursuers are entitled to decree.

The delay which took place in the discharge of this vessel was very considerable, but in my opinion it is proved that the whole delay was attributable to causes for which the defender is not responsible. The vessel was duly berthed in the Princes Dock, there, as the charter-party provides. to deliver the ore into trucks as customary. The defender had according to custom intimated to the Caledonian Railway Company (who "work the whole traffic in the Princes Dock; it is entirely under their control") that waggons were required for discharging the cargo. They accepted this intimation, and wrote to the Coltness Company (the consignees of the ore) that the vessel had arrived, and was "being received by us on your account." Waggons, however, were not supplied by the Caledonian Company, for a reason to which I shall afterwards advert. The defender becoming aware of this complained to the Caledonian Railway Company of their delay, and said he had heard that they were refusing waggons for the ore. The reply he got was—"We have not refused to supply waggons for the 'Lady Palmer;'" and this was more than once repeated. The railway officials now say that this was an error; that in fact they had refused waggons for the discharge of the "Lady Palmer;" but they did not tell the defenders of this alleged error until

long afterwards. After some days the defender gave the North British Railway Company an order for waggons, which they supplied, but a second order for more waggons sent to the same company a few days later was declined. Now, it appears to me to be fully established that there was no neglect on the part of the defender in getting the vessel discharged. He appears to have done all that he could in this respect. Mr Scott, who has charge of all the traffic at Princes Dock, says—"I believe defender's representative was down at the docks practically every day and making efforts to get waggons;" and this evidence seems amply corroborated by the letters and telegrams despatched by the defender urging the Caledonian Railway Company to supply waggons. That there was a scarcity of waggons at the time is abundantly proved. Craig (the stevedore employed at the discharge, and called as a witness by the pursuers) says — "I know there was a general scarcity of waggons at this time in the Princes Dock;" and Mr Carson (a witness for the defender) says—"At this time the discharge was slow all over the harbour of Glasgow. I made frequent verbal complaints to the Railway Company's agents about the supply of waggons. One of the reasons for the scarcity of waggons was the short winter day. Glasgow harbour was congested at that time by iron ore steamers." I have quoted the evidence of these two witnesses because it fairly represents what was the fact in regard to the scarcity of waggons during the period of the "Lady Palmer's" discharge —evidence which is corroborated by other proof ,written and parole, in the case. I think it, as I have said, quite established that the delay in the discharge of the "Lady Palmer" arose from scarcity of waggons. I now advert to what occasioned this scarcity in the case of this particular vessel. It appears, contrary to what was told and written to the defender by the officials of the Caledonian Railway Company, that that company did withhold waggons from the "Lady Palmer," because, as they said, the Coltness Company had already too many waggons which they were unduly holding up or detaining at their works. The Coltness Company deny that they were doing so, or that there was any good reason for the course which the Caledonian Railway Company pursued. Whether the Railway Company or the Coltness Company was right in this controversy is not a question for us to decide. But the fact is not open to dispute that through the conduct of the Railway Company there was a scarcity of waggons for the discharge of the "Lady Palmer," and a scarcity in no way due to the fault or negligence of the defender. In these circumstances I think the case of *Letricheux* is here applicable, and that, having regard to the terms of the charter-party, the defender is not responsible for demurrage on account of the delay which took place in the discharge.

My opinion on the whole matter is that the interlocutor of the Sheriff-Substitute should be recalled, decree for £19, 13s. 4d. granted in favour of the pursuers, and *quoad ultra* that the defender should be assoilzied.

LORD MONCREIFF—I am of the same opinion. In regard to the demurrage claimed at the port of loading I have only to add that I think it is to be regretted that so much time and expense has been spent upon that part of the case. At most the pursuers claimed in respect of two days' detention, and I must say that I think that was a matter parties should have been able to settle by reasonable compromise without litigation. As matters stand, the pursuers have succeeded in holding the Sheriff's judgment on that head.

The claim for demurrage at the port of discharge is of larger pecuniary amount, and in my opinion is attended with some difficulty. It is certainly a hard case for the pursuers, beause, although the vessel was berthed on the 28th January, she was not finally discharged until the 13th of February, a period of seventeen days. This long delay was due to want of waggons. But in the charter-party the charterer is protected by a clause to the effect, "Charterer not to be responsible for detention by railways, scarcity of waggons, or other causes beyond his control." Now, in order to deprive the charterer of the benefit of this exception it was necessary for the pursuers to prove that the want of waggons and the consequent delay were due to his fault and negligence, and I am unable to say that they have succeeded in establishing this with sufficient clearness to free them from the exception.

Except in one respect, so far as I can judge from the evidence and correspondence, the charterer could not with any plausibility be charged with negligence or remissness in trying to get waggons forward. He was instructed by the Coltness Iron Company, the consignees, on 20th January 1903 to forward the whole cargo *per* Caledonian Railway. Accordingly on 22nd January he gave notice to the Caledonian Railway Company, and on the same day the Caledonian Railway Company intimated to the Coltness Iron Company that they had received the order and that the cargo of iron ore would be forwarded with all despatch.

However, the Caledonian Railway Company did not furnish any waggons, and although they were repeatedly applied to by the charterer, they put him off with excuses, one of which was that the Coltness Iron Company's sidings were blocked, which was not the case. Having tried in vain to get waggons from the Caledonian Railway Company, the charterer on 30th January ordered waggons for 1000 tons from the North British Railway Company.

At the same time he again remonstrated with the Caledonian Railway Company on 31st January, and they replied that they had not refused to supply waggons. Still they sent none, although on 2nd February they assured the charterer that traffic was

open and that they would do their best to get the vessel cleared as soon as possible. The charterer not unnaturally expected that they would keep their word. But when he found that they did not do so, he on 4th February applied to the North British Railway Company for waggons for an additional 500 to 700 tons. By that time, however, the North British Railway Company were unable to furnish him with what he required, and in the end on 7th February the Caledonian Railway Company for the first time supplied some waggons, and from that time onwards supplied waggons for the greater part of the remainder of the cargo.

Now the only stateable ground on which the charterer could be accused of negligence was that he had been too confiding in believing that the Caledonian Railway Company would supply waggons according to their promise. It is said that when the Caledonian Railway Company failed to supply waggons by 30th January he should have ordered waggons for the whole of the cargo from the North British Railway Company. But at that time I do not think that considering the assurances he had received from the Caledonian Railway Company he was to be blamed for taking them at their word and trusting to the waggons being forthcoming.

The pursuers endeavoured to make out that the charterer was responsible for the fault of the Coltness Iron Company. In answer to this I would observe in the first place that there is no proof of any fault on the part of that company; but even supposing there had been a serious question between the Coltness Iron Company and the Caledonian Railway Company, in consequence of which the Caledonian Railway Company refused to furnish trucks, the case of *Letricheux and David* v. *Dunlop & Co.*, 19 R. 209, is an authority against the pursuers. It was there held that the proximate cause of the delay being the act of the Railway Company, it alone should be regarded, as the opposite view would involve an inquiry into the dispute between the Railway Company and the consignees. Now without saying that there can never be a case in which the charterer can be held responsible for the delay or fault of the consignees, I think it may safely be said that in order that the shipowner may free himself of the exception in the charter-party he would require to prove this to demonstration.

In the present case, however, it is not proved that the failure to supply waggons was due to any block at the Coltness Iron Company's work, and the Caledonian Railway Company even deny that any such statement was ever made by them.

Therefore the detention being due to the Railway Company's acts, whether justifiable or not, the exception must receive effect; the result is that the pursuers have failed to make good their claim for demurrage at the port of discharge.

The LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

"Recal the interlocutor appealed against: Find in fact (1) That by the charter-party entered into between the parties and referred to on record, the defender was allowed nine working days, weather permitting, for loading the cargo on board the 'Lady Palmer' at Aguilas and Oran; (2) That the loading of said cargo was not completed within nine days, but occupied twenty-three hours beyond that period; (3) That by said charter-party the defender is taken bound to pay in name of demurrage the sum of 16s. 8d. for every hour the said vessel was detained in loading beyond the stipulated lay-days: Find in law that the defender is liable to the pursuers in the sum of £19, 3s. 4d. sterling in name of demurrage accordingly: Find further in fact (1) That the said vessel was duly berthed according to said charter-party in the Princes Dock, Glasgow, for the purpose of there discharging her cargo of iron ore, on 28th January 1903, and that the discharge thereof was not completed until the 13th February thereafter; (2) That the delay in discharging said ore was due to scarcity of waggons and detention by railways, and was not attributable to any extent to the fault or neglect of the defender: Find in law (1) That on a sound construction of said charter-party the defender is not liable for the consequences of any delay in the discharge of said iron ore or arising from scarcity of waggons or detention by railways; and (2) That the defender is not liable to the pursuers in demurrage for the detention of said vessel during the period occupied by the discharge of said iron ore. . . . Therefore decern against the defender to make payment of the foresaid sum of £19, 3s. 4d. . . . sterling with interest as concluded for: *Quoad ultra* assoilzie the defender from the conclusion of the action."

Counsel for the Pursuers and Respondents—Clyde, K.C.—Spens. Agents—J. & J. Ross, W.S.

Counsel for the Defender and Appellant—Salvesen, K.C.—Younger. Agent—Campbell Faill, S.S.C.