instructed by the trustees to state that in future this estate is to be managed by us." If Mr Adam had acted in the spirit of his agent's letter, he would have been content to leave the management where it was, and I confess I think the rest of the correspondence which follows is quite satisfactory, and there does not seem to me to be sufficient ground for the presentation of this petition.

Some observations have been made upon the subject of the deposit-receipts which are now lying in bank. To have this large sum lying there at small interest is not a prudent course, but it is quite a secure one, and under the deed it is the widow who is entitled to the liferent interest of the estate, and it is she who is the sufferer. Under Forsyth and Stewart's management I have no doubt this arrangement will be altered, but I do not think it is for the Court to direct the trustees what they should do, seeing that that would not be for the benefit of the beneficiaries, inasmuch as the trustees would then be relieved of their responsibility.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

The Court refused the prayer of the petition.

Counsel for Petitioners — M'Laren—Pearson. Agent—J. Duncan Smith, S.S.C.

Counsel for Respondents—Asher—Mackintosh. Agents—Boyd, Macdonald, & Lowson, S.S.C.

Friday, February 4.

FIRST DIVISION.

[Lord Craighill.

FRANCESCO DALL' ORSO *v.* MASON & CO.

Ship—Charter-party—Lay-days—Demurrage.

It was agreed by charter-party that a ship should "with all convenient speed sail and proceed to a loading berth in Leith Docks, as ordered, and then load in 10 working days, as customary, a full and complete cargo," &c. The vessel entered the docks on 16th April, but application having been made for a crane berth, the loading was not commenced until 3rd May, when the vessel got her turn at the crane. The loading was completed within ten days of the vessel getting into the crane berth. It appeared that a berth at which vessels were loaded by hand, could easily have been obtained. — *Held*, in an action for demurrage on the charter party, that the lay days commenced at the time when the vessel got into the dock, and not when she got to the crane berth.

This was an action for demurrage by the owner of the vessel "Presidente Washington" against the charterers thereof. The terms of the charter-party were that the vessel called the "Presidente Washington" should, with all convenient speed sail and proceed to a loading berth in Leith Docks, as ordered, and there load in ten working days, as customary, a full and complete cargo of steam coals." The vessel proceeded to Leith and discharged her cargo. She finished discharging on 14th April. On 15th all was made ready for receiving cargo, and on the 16th notice was given to the charterers that she was ready and lying in the dock. On the 13th April the defenders had entered the vessel's name in the harbour books for a turn for loading at a crane berth, but as a number of ships had been previously entered for their turn, she did not get under the crane until 3d May, and the loading was finished on 12th May. The question was, when the lay days began to run.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 12th July* 1875.—The Lord Ordinary having heard parties' procurators on the closed record, proof, and productions, and having considered the debate and whole process—In the first place, finds as matter of law that, according to the sound construction of the charter-party sued on, No. 6 of process, by which it was contracted that the vessel called the 'Presidente Washington' should, 'with all convenient speed, sail and proceed to a loading berth in Leith Docks, as ordered, and there load, in ten working days, as customary, a full and complete cargo of steam coals,' the lay-day did not begin to run till the ship had reached the loading berth chosen, and to which she was ordered by the defenders, the charterers: In the second place, finds, as matters of fact—(1) That the said vessel was ready to take in the stipulated cargo on 16th April last, and of this intimation was given by the master to the defenders; (2) That there are crane berths, and also other berths at which vessels are loaded by hand, at Leith Docks; but though coal is frequently loaded, and gas-coal is almost always loaded, at these other berths, by much the greater part of the coals shipped at Leith are loaded at crane berths; (3) That though the "Presidente Washington" was, as aforesaid, ready to take in cargo on 16th April, and though on 13th April, in anticipation of this, the defenders entered the vessel's name in the harbour books, that she might obtain from the harbour authorities a turn for loading under the crane, she, in consequence of the number of vessels which had previously been entered for their turn, did not get under the crane till 3d May; and (4) That upon that day a part of her cargo was taken in, and, notwithstanding interruptions in the course of loading, her loading was completed on 12th May, which was within ten days from the day on which she entered her loading berth: Therefore sustains the defences, assoilzies the defenders from the conclusions of the summons, and decerns: Finds the defenders entitled to expenses, of which allows an account to be given in, and remits that account when lodged to the Auditor for his taxation and report.

"*Note.*—The meaning of that clause of the charter-party quoted in the foregoing interlocutor is really the only thing which is in controversy. If the pursuer's reading is to be taken, the defenders do not dispute that the demurrage claimed is due; and, on the other hand, should that of the defenders be adopted, the pursuers admit that the claim must be disallowed.

"The pursuers' reading is this—They say that

once notice was given that the ship was ready for cargo, the defenders were bound to find the berth at which she was to be loaded; and if from any cause—even a cause resulting from harbour arrangements, over which the defenders had no control—the berth 'as ordered' could not be obtained at the time, they must be answerable for the consequences. The defenders, on the other hand, say that they had the selection of the berth, and that, till the ship entered that for which she was ordered the time for loading had not arrived.

"The Lord Ordinary's first impressions of the case were in favour of the pursuer's view of the contract, but he has seen cause not to adopt the opinion which originally he was disposed to entertain. What was done and said in *Tapscott* v. *Balfour*, decided 23d November 1872, and reported in Law Reports, 8 Common Pleas, p. 46, are the things to which this result is mainly to be ascribed. There the charterers had a choice of docks, as here the defenders have of loading berths; one was chosen in due time, but into that chosen the chartered vessel could not enter till after an interval, because the coal agents employed by the defenders to supply the cargo 'had three vessels already in the dock, and two others in turn to go in.' In an action for demurrage on the charter-party, the Court held that the lay-days did not commence at the time when the ship was ready to enter the dock, but at the time when she got into the dock. If the words 'loading berth' be substituted for the word 'dock,' that case and the present, so far as the language of the charter-party is concerned, will be identical; and the actual variance, the Lord Ordinary thinks, is not a difference necessitating or warranting a different decision as to the meaning of the clause which is now the subject of controversy. Were it otherwise, there would, so far as the Lord Ordinary can see, be a denial of the stipulated option, because, though a particular berth might be that desired, and be in consequence the one at which the vessel was ordered to load, that possiby or probably could not be selected unless under the penalty of incurring demurrage, not being open on the day on which it was expected she would be ready for cargo. Hardship has, as usual, been suggested on both sides, but the true view is that there is hardship on neither. The matter is simply one of contract; and, if the consequences of what has happened are in future not to fall on the ship, this must be prevented by a change in the provisions of the charter-party.

"The pursuer has here led evidence of an alleged usage at the port of Leith, but the Lord Ordinary thinks, in the first place, that the proof upon this point is not very strong, and, in the second place, that, even if it were much stronger, it could not control the words of the contract. These words are not ambiguous, and their plain, ordinary meaning, whatever others may think, is that to which effect must be given by the Court."

The pursuers reclaimed, and argued—The true import of *Tapscott* v. *Balfour*, and also of *Brown* v. *Johnston*, which *Tapscott's* case followed, was against the view taken by the Lord Ordinary. It was clearly settled that once in the dock the lay-days began to run. The words "as ordered" gave the selection of loading berth as to place, but not as to time. The respondents, according to their argument, might keep the ship waiting a year.

Argued for defenders — The contract provided when the lay-days were to begin, *i.e.*, when the vessel had proceeded to a berth, as ordered. She was ordered to a crane berth, and therefore till she got there the lay-days could not begin. The berth here corresponded to the dock in *Tapscott's* case.

Pursuers' authorities—Abbott on Shipping, p. 268 *et seq.*; *Brown* v. *Johnston* 10 Meeson and Wellsby, 331; *Tapscott* v. *Balfour*, L.R. 8 C. P. 46.

Defender's authorities—*Tapscott, ut sup.*; *Brereton* v. *Chapman*, 2 Bingham 559.

At advising—

Lord Ardmillan — This is an action brought by the owner of the vessel "Presidente Washington," which arrived at Leith and intimated her readiness to take in cargo to the defenders on April 16th. She was then to ship coal under the terms of her charter-party. The words of the charter-party are given in the record, and it came into operation, and under it she was about to start. The charter-party bears "that the said ship being tight, staunch, strong, and every way fitted for the voyage, shall with all convenient speed, sail and proceed to a loading berth in Leith docks, as ordered, and there load in 10 working days, as customary, a full and complete cargo of steam coals, not exceeding what she can reasonably stow and carry; and being so loaded, shall therewith proceed to Montreal." I think there is no doubt that the words "as ordered" mean that the vessel, when she arrives is to be under the order and direction of the charterers. She is to go where they tell her, and then she is to be loaded within 10 days. The action is for demurrage. Now, demurrage is just a substitute for freight. When the vessel is detained, and not able to earn freight, she earns demurrage. The defence is that the lay-days did not begin when she came to the dock, but only commenced when she was brought under the crane, and the question is whether the lay days commenced when she was in dock and ready to take in cargo, or not until she was under the crane. There has been no evidence adduced of other practice in the port of Leith than of loading by crane or by hand. Elsewhere lighters are employed. But in the port of Leith loading by hand was undoubtedly the old and well understood practice, while loading by crane is comparatively of recent introduction. No witness speaks of it as older than ten years. That being the case, the defenders nevertheless contend that they were entitled to keep the vessel waiting till they arranged that it could be taken to be loaded at a crane berth. The Lord Ordinary's first impression was in favour of the pursuer, but looking to the case of *Tapscott* he altered his opinion, and decided in favour of the defenders. I am of opinion that his first impression was right, and that the case of *Tapscott* does not apply to, or at least does not materially help, the contention of the defenders. When the vessel arrived and intimated her readiness to take in cargo, it was the duty of the charterers to lose no time in bringing the vessel to a place where she could be loaded, and if she was detained they must offer an explanation of the delay. A reasonable explanation may perhaps be given, but without it

they cannot expect the ship to continue waiting. The charterers can give their orders whenever intimation is made to them; after that it is for them to give them; and I can see no reason to doubt that if the defenders' argument was good they might have kept the ship waiting for two or three months, and all that time prevented her from earning anything. Snch a result would not be just, and would be contrary to the honourable practice of merchants, which must always be considered in cases of this description. Nor does the evidence bear out their contention.

The first impression of the Lord Ordinary was in accordance with equity, but he was moved by the case of *Tapscott* to alter his opinion. The true import of *Tapscott's* case I take to be this—In it two extreme pleas were maintained. The first was that the lay-days began when the vessel was ready to enter the dock. That plea was negatived, and I think very justly. But second, the other extreme plea was maintained, that the lay-days did not begin till the vessel was brought under the "spout," which is somewhat similar to the crane here, and that plea also was negatived, and it was fixed that they commenced when the vessel entered the dock. That decision was in strict accordance with equity. Now, if that is the case, it does not touch the case here. Here the vessel was not out of but in the dock, and here also we do not hold either extreme view, but hold that the lay-days began from the day on which she entered the dock. As regards the witnesses, I do not advert to usage, for the pursuers' plea on that point is not supported; but this at least is manifest—They say, "If I could not get a crane berth, I would consider whether to pay the demurrage or load by hand." If that was what the charterer ought to think, then *cadit quæstio*? They had the choice of loading by hand or paying demurrage. I go here on the broad grounds of equity, which ought to govern all mercantile transactions.

Lord Mure—I have come to the same conclusion, and I concur with the Lord Ordinary's first impressions. On reading the charter-party it is quite plain that the charterer is to have the right of selection, but he must exercise it with reasonableness, and if he orders it first to go to a berth where coals cannot be put on, that is not reasonable. In the present case the charter-party is signed in March, the vessel arrives in April, and her arrival is quite well known to the defenders, as appears from the correspondence. Then, on the 16th April, the vessel having discharged her cargo on the 5th, the captain writes complaining that no cargo is yet forward, and then it turns out that they have entered her for a crane berth, and there they cannot get till the 3d of May. A claim is made for demurrage. The defenders' pleas are twofold, but evidence as to usage is not made out, and therefore the whole question goes on the exact terms of the charter-party. I think the defenders' contention is not well founded. The ship was at a birth where it is quite clear she *might* have been loaded, and it was for the defenders to make their selection, as Mr Watson, the witness says, either to pay demurrage or load by hand. They have the option, and they are responsible for the delay.

The Lord Ordinary goes on the case of *Tapscott*. I should be averse to deciding against any English case, but I do not find we are doing anything inconsistent with that decision. In *Tapscott's* case the question was who was to suffer from the delay of the agent, and it was held that the case must be decided as if it had been the charterer who ordered the vessel in. Lord Chief-Justice Bovill says:—"If it was intended to rely on anything unreasonable and improper in the selection of the agent, the defendant's counsel should have insisted on that question being left to the jury; but no such question having been submitted to them, and it being the usual course to employ an agent, we must now assume that there was nothing unreasonable and improper in the selection that was made." Here we are acting both as judge and jury, and therefore we can say whether what was done was unreasonable or not.

Lord Deas—It is not disputed that this vessel was in Leith Dock on the 16th of April ready to receive a cargo, and that the charterer was made aware that such was the case, and it is not disputed that, in point of law, in the ordinary case it was then the duty of the charterer to find the ship a berth, but the defenders maintain that under the terms of this charter-party they are to have the choice of a berth, and that, consequently, they are not liable to have the lay-days counted against them till they had not only selected but obtained the birth, and that if anything prevented them so obtaining it they were not to be liable. It is not said that anything did prevent them in an especial manner, and it is not said that the same principle would not apply for a much longer time; and the principle is stated, with which I agree, that it is not a question of hardship, but that we must only look to the terms of the contract. But to do this we must see very clearly what the contract was—(*His Lordship here read the clause in the charter-party*). The argument of the charterers is founded on the words "as ordered." They say that they entitle him to order the vessel where they liked, and till the vessel got there the ten days did not begin to run. Certainly this does not appear reasonable; but if it is sound it does not much matter if it leads to what seems unreasonable consequences. The Lord Ordinary would have been with the pursuer, but that he thought the case of *Tapscott* a decision in point. The whole question comes to be, in his view, whether that case is in point or not, and he says:—"If the words 'loading berth' be substituted for the word 'dock,' that case and the present, so far as the language of the charter-party is concerned, will be identical."

Now, the whole force of this turns on the word "if." Can the word "loading berth" be substituted for "dock." Is it the same thing? I am not prepared to hold that it is, and I think the case of *Tapscott* has no application to warrant the judgment of the Lord Ordinary. It was held that the lay-days did not commence till the vessel got into a dock, but that is quite different from getting into a berth. It appears that in Leith there are plenty of hand berths, but recently cranes came into use. Here the defenders say they wanted a crane berth. But hand loading is still quite common. Till a vessel is in dock she cannot load at all; but when she is once in, it does not follow she must wait till she gets a particular berth. The whole error arises from the word

"if." The answer is, that "loading berth" cannot be substituted for "dock," and so I think there is no ground for holding that the case of *Tapscott* countenances the decision of the Lord Ordinary.

The LORD PRESIDENT was absent.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for the pursuer Francesco Dall' Orso and mandatories against Lord Craighill's interlocutor, dated 12th July 1875, Recal the said interlocutor: Find that the ten working days stipulated by the charter-party for loading the vessel in dispute commenced on Saturday the 17th day of April 1875, and expired on the 29th of that month and year: Find that the vessel was not loaded between these dates, and that demurrage became due from and after the last of these dates: Find it admitted at the bar that the demurrage (if due at all) amounts to the sum libelled, with interest: Therefore decern against the defenders in terms of the conclusion of the libel: Find the pursuer entitled to expenses; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Pursuer—Dean of Faculty (Watson),—Trayner—Maclean. Agents—P. S. Beveridge, S.S.C.

Counsel for Defenders — Balfour — Young. Agents—Drummond & Reid, W.S.

Thursday, February 3.

SECOND DIVISION.

[Lord Young.

MORRISON *v.* HARRISON AND THE FORTH AND CLYDE JUNCTION RAILWAY COMPANY.

Companies Clauses Consolidation (Scotland) Act, 1845 *—Trustee in Bankruptcy—Intimation of Assignation—Partnership.*

A executed a transfer of a number of shares in a railway company in favour of B. More than a year afterwards A was sequestrated. After the sequestration had taken place, a memorial of the transfer was sent by B to the secretary of the company, and entered in the register of transfers. In an action brought at the instance of the trustee on A's sequestrated estate, for the purpose of having the deed of transfer reduced and the shares entered in his own name — *held* (1) that the act of sequestration, although it might be equivalent to an intimated assignation to these shares in favour of the trustee, had not the effect of rendering him a partner in the company until he complied with the statutory provisions for completing a transfer; and (2) that as B had complied with these provisions and was entered in the register of shareholders, his right could not now be cut down by the trustee.

The pursuer in this action was Mr James Maidment Morrison, trustee on the sequestrated estate of George Merret, railway contractor, who was sequestrated in the year 1856. A considerable part of the bankrupt's estate consisted of shares in the Forth and Clyde Junction Railway. In June 1855, being more than twelve months previous to the sequestration, the bankrupt handed over fifty of these shares to Thomas Harrison, the defender, and he afterwards signed a transfer of them to him. This transfer was not delivered to the secretary of the defenders, the Forth and Clyde Junction Railway Company, in terms of "the Companies Clauses Consolidation (Scotland) Act, 1845," nor was any intimation of it made to the Railway Company previous to the bankruptcy of Mr Merrett, nor until 17th September 1857. At the date of the sequestration the shares stood in the register of the Company in the bankrupt's name. On the 17th September 1857 the transfer was received by the secretary, and on the 28th of the same month a memorial thereof was entered in the register of transfers of said Company.

The trustee brought the present action, in the first place, to have this memorial of the deed of transfer reduced, and then to have it declared that he had a right to the shares, and that the Company were bound to enter him as the owner of these shares in their register. He pleaded that he was entitled to decree on the ground that the transfer to the defender had not been delivered or intimated to the Company, or the memorial entered in their register of transfers until after Mr Merrett's sequestration.

The defender Mr Harrison maintained that as he had acquired right to these shares prior to the cedent's bankruptcy, he was empowered to complete his title by enrolment in the register of transfers. Appearance was entered for the Company, but they took no part in the question of the ownership of the shares. Upon 18th November 1875, Lord Young pronounced the following interlocutor: — "The Lord Ordinary having heard counsel for the pursuer, and considered the record and productions, sustains the defences and assoilzies the defenders from the conclusions of the summons, and decerns: Finds the pursuer liable in expenses, and remits the accounts when lodged to the Auditor to tax and report."

The pursuer reclaimed.

Argued for him—In virtue of the 102d section of the Bankruptcy (Scotland) Act, 1856, the position of the pursuer with regard to these shares was that of an assignee, of whose assignation intimation has been made, and he was therefore entitled to cut out a prior assignee whose right was not intimated. The intimation to the Company of the transfer to Mr Harrison was made after the sequestration, and therefore subsequent to the completion of the pursuer's right. The bankrupt could not be divested of these shares at the time of his sequestration, because his transfer to Mr Harrison was still unintimated. The fact that the trustee has never complied with the formalities relating to transfers provided by the statute was immaterial. The Act was not a code of transfer, and did not exclude other means of legally vesting shares. These statutory provi-