Now on turning to the old titles to the disposition of 1859, and to the previous disposition of 1826, and to the previous titles to the property, all of which were before the pursuers' agents when the final disposition was prepared, it is at once apparent that the defenders' title to the different lots or pieces of ground stood in different positions. In particular, it became apparent that the sellers the Glass Company had no feudal or heritable title at all to the open or waste piece of ground marked No. 7. That piece of ground had never been conveyed to the sellers, the Glass Company. It was not their property in the strict sense of the word. The only right to or in that waste piece of ground, including the roadway which was part thereof, was a minute of the Town Council of Edinburgh dated 3d September 1788, by which minute it appears that the town council of that date agreed to feu to the Glass Company's predecessors that piece of ground upon certain conditions. No feu-charter, however, and no conveyance of any kind had ever been granted by the town council.

In these circumstances, this piece of waste ground and roadway was in the defenders' titles, and in particular in the disposition of 1852 referred to in the agreement, dealt with quite differently from the other plots of land marked upon the plan. It was not conveyed simply as the property of the Glass Company, but was described by its boundaries with this descriptive addition, "with all right, title, and interest I, as sole surviving trustee foresaid, have therein in virtue of an Act of Council of the Lord Provost and Magistrates of Edinburgh, bearing date the 3d day of September 1788, or otherwise, but that under the burdens and conditions therein mentioned, my said disponees being to stand in my place." I cannot read this very special clause as a mere conveyance of the granter's right, title, and interest in a subject absolutely conveyed. There is a general clause of right, title, and interest following the description of the whole subjects, and applicable to all of them, and this special clause must be something different. It seems to me to give the purchasers special warning that this minute of council of 1788 is the only title which the sellers hold to, or in virtue of which they have any claim upon the piece of waste ground in question, and it contains an express declaration that as to this piece of waste ground the purchasers are to stand in the sellers' place and to use their rights, but that nothing more is given. The sellers virtually say—Our right to No. 7 is a mere minute of council—not a disposition, not an infeftment—and you, the purchasers, are simply to stand in our place. In short, I think, reading minute and disposition together, the thing given under the 7th head of description is not property warranted at all hands, but a mere claim or right of action against the Town Council of Edinburgh to implement their minute of 1788, and if on any grounds not imputable to the sellers, it should turn out that, either on the ground of the long prescription, or on the ground of Sir William Rae's Act, or on any other ground, the town council are not now bound to grant a feu-charter of this piece of waste land, the purchasers must take their chance of this, for I do not think that the absolute warrandice either in the minute of sale or in the disposition warrants or guarantees to the purchaser that the claim for a charter shall be successful.

In an action of damages for breach of warrandice or for breach of contract (and breach of warrandice is just breach of contract) I agree with the Lord Ordinary that the Court is not bound by any technical words in the final deed of conveyance, but are entitled to look to the whole contract, and to the circumstances in which it was entered into, in order to reach the real meaning and understanding of the parties, and to determine what the true bargain was for breach of which damages are now claimed, and I concur in the result which the Lord Ordinary has reached.

The other Judges concurred.

The Court adhered.

Counsel for Pursuers—Asher—Begg. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Defenders—Dean of Faculty (Watson)—Balfour—Low. Agent—John T. Mowbray, W.S.

Friday, June 9.

FIRST DIVISION.

[Lord Craighill, Ordinary.

MOON AND OTHERS *v.* THE CALEDONIAN RAILWAY COMPANY.

Ship—Harbour—Demurrage—Regulation of Harbour—Bye-Laws.

Circumstances in which it was *held* that the owners of a harbour were entitled to alter a practice as to preference in loading at certain cranes in the harbour without notice to the public.

Opinions, that the harbour-master himself might in the circumstances have made the alteration without authority from the owners of the harbour.

This was an action brought by the pursuer and others, as owners of the steamship "Nellie," against the Caledonian Railway Company, as owners of the harbour of Grangemouth, concluding for £275 as damages for the loss sustained by the detention of the "Nellie" for eleven days outside the docks at Grangemouth.

The Lord Ordinary ordered a proof, and thereafter pronounced the following interlocutor:—

"*Edinburgh, 7th December* 1875.—The Lord Ordinary having heard parties' procurators on the closed record, productions, and proof, and having considered the debate and whole process, In the first place, Finds, as matters of fact, (1) That the defenders are now, and since 1867 have been, the owners of the harbour of Grangemouth; this part, as well as the other parts of the undertaking of the company of proprietors of the Forth and Clyde Navigation having been transferred to the defenders' company by virtue of 'The Caledonian Railway and Forth and Clyde Navigation Companies Act, 1867' (30 and 31 Vict. c. 106): (2) That for four years or thereby prior to October 1874, steamers were allowed a

preference over sailing vessels at the cranes at which coals are shipped in the said harbour; but, irrespective of this preference, steam vessels arriving at the dock gates had not 'a preference in entering them over vessels already arrived:' (3) That on 12th October 1874 the defenders resolved that the preference over sailing vessels at the cranes, which, as aforesaid, had previously been allowed, should not be continued, and on and after the 13th October 1874 all steamers not already 'upon turn,' or not regular traders, were in consequence put on an equality with sailing vessels requiring the use of the cranes: (4) That the intention of the defenders to change the existing usage was not communicated, nor was there any publication of the order by which this change was effected before it was brought into operation: (5) That this change of usage was not an act of capricious administration, but, on the contrary, was resolved on and ordered in good faith, and in the belief that it would operate beneficially upon the trade of the port: (6) That the screw steamer 'Nellie,' of which the pursuers are the owners, was, on the 9th of the said month of October 1874, chartered to Messrs Hugh MacLean and Company of Glasgow, by the charter-party No. 6 of process, whereby it is, *inter alia,* provided that she should, 'with all convenient speed sail and proceed to a loading-berth at steam crane at Grangemouth, or as near thereunto as she may safely get,' and there take in a cargo of steam coal: (7) That in terms of this charter-party the 'Nellie' was subsequently taken to Grangemouth, where she arrived after five o'clock, and after Custom-house hours, on 17th October 1874: (8) That on arrival the master desired to take his vessel into the wet dock, on the quays of which the coal cranes are placed, but his requests to be allowed to enter at that time was refused by the harbour-master, on the ground that, as alleged, the space available for vessels in which coals were to be loaded was already filled with vessels which, under the new regulations, were entitled to a preference over the 'Nellie' at the cranes: (9) That the reason thus assigned was true in point of fact: (10) That the 'Nellie' lay at the entrance to the dock till the morning of the Monday, 19th October 1874, when she was taken to and moored at the Ballast Quay, where, though put on turn for a crane berth on said 19th October, she was kept till the afternoon of the 28th of October, when her turn for the crane arrived, and when accordingly she was taken into dock and berthed at the crane No. 2, which is the larger of the two steam cranes in the harbour of Grangemouth, and at which vessels of the size of the 'Nellie' are in use to be loaded: (11) That the 'Nellie' was, by the operation of the new regulations, detained at Grangemouth, and outside the dock, for eight days longer than she would have been so detained had her turn at the crane been regulated by the usage which was thereby changed: And (12) that this detention was the cause of loss or damage to the pursuers. In the second place, Finds, as matter of law, that the defenders were entitled to fix the conditions on which the cranes in question were to be used, and the change made as aforesaid on the order or turn in which vessels were to be served having been resolved on and carried out in good faith, and, as the defenders believed, for the benefit of the trade of the port of Grangemouth, the loss and damage for which reparation is now sued for is not loss or damage resulting from fault on the part of the defenders, and consequently is not loss or damage for reparation of which the defenders are liable: Therefore sustains the defences, assoilzies the defenders, and decerns."

The substance of his Lordship's note appended to this interlocutor will be found in the opinion of the Lord President.

The pursuers reclaimed, and argued—(1) The defenders had no right to make this alteration in their practice. In the defenders' bye-laws for the regulation of the port it is provided that vessels "shall be put on turn for steam cranes when ready to use them, and load as ordered." These bye-laws could only be altered by the Sheriff, and without his authority the defenders could not alter their existing practice as to loading. (2) Even if they could have done so, they must have given reasonable notice, which they had failed to do. If the contention of the defenders was sound, they were entitled to change their regulations without an hour's notice, and that was plainly absurd.

Authorities quoted—Browne on Carriers, 84; *Wiggins* v. *Boddington,* 3 Carrington and Payne, 544; *Lawson* v. *Burness,* 1 Hurlstone and Coltman, 396.

The defenders argued—(1) The bye-laws referred to were not intended to bind the defenders to any existing usage, but to insure by the imposition of penalties that masters and others resorting to the harbour observed the rules in force there. These bye-laws were mere police regulations—not measures for working the harbour—and there was not any contract between the parties constituted by them; besides, the bye-law referred to could not be interpreted as referring to the practice of giving steamers a preference over sailing vessels, as contended for by the pursuers. (2) It was absolutely necessary to make some alteration, and to make it at once for the conduct of the harbour, and what the defenders did was reasonable and fair to all parties. If any notice was to be held necessary, it must be notice to the whole world, and that would have caused intolerable delay and inconvenience.

At advising—

LORD PRESIDENT—I so entirely concur, not only in the result of the Lord Ordinary's findings, but in the reasons he assigns for them, that I shall not trouble your Lordships with more than a very few remarks.

The defenders here—the Caledonian Railway Company—are owners of the harbour of Grangemouth, and they manage that harbour in the ordinary way, through a harbour-master, to whom is committed the conduct of all arrangements in connection with the admission and berthing of vessels, discharging and loading their cargoes, and various other matters.

For about four years prior to October 1874 there had been a practice—no regulation, but a mere practice—of giving steamships a preference over sailing vessels at the cranes at which coals were loaded; but in 1874 it was found that in consequence of the extension of the trade of the harbour, and the number and size of the steamers resorting to it, that this preference was incon-

venient and unjust, and it is obvious that unless it had been altered the consequence would have been that steamers would have ousted sailing vessels from the coal trade of this port altogether. Accordingly Mr Malcolm, who is manager of the Forth and Clyde Canal, wrote to the harbour-master telling him that this rule of preference must come to an end—"Therefore in future these other steamers (which do not trade regularly to and from Grangemouth) and sailing ships must be treated exactly alike, according to their turn, in getting the use of the steam cranes at Grangemouth for the loading of coal, without preference, prejudice, or partiality." To that the harbour-master, in a reply dated 14th October 1874, answers—"It was absolutely necessary that something of this sort should de done, for we are about blocked up with empty vessels, and cannot get them loaded for steamers, some of them so large that the dock has to be kept half empty to work them." An immediate change was made after the exchange of these two letters, and it is also a matter of fact that this change was not advertised; it was made known to shipping agents, and men in that line of business at Grangemouth, but it was not advertised in the newspapers or made public in any similar way.

In these circumstances the ship "Nellie," chartered by Messrs Robertson & Company of Grangemouth and Glasgow, arrived at the harbour gates on the 17th October, and found that the old practice had been altered, and she was not to have the preference that steamships had hitherto enjoyed. The consequence was that she was delayed for eight days longer than she would have been had she received that preference. The owners now claim demurrage from the defenders as owners of the harbour; the ground for their claim, as I understand it, being that they had no right to alter this preference, or at least no right to do so without notice. Now, as to their right to alter it, I have not the smallest doubt; it was for the convenience of the ships frequenting the port that it was done, and the owners might change it at any time and apply any other rule of rotation, and I cannot doubt that the owners acted both in the interest of the harbour and of traders. But, then, it is said that they had no right to make the change without notice to the public. This is, at first sight, a very plausible objection, but if it is fully considered it is seen to be unreasonable. To whom was notice to be given. Notice at Grangemouth would not have reached the "Nellie," nor the other traders frequenting the harbour. The trade of the harbour is not a local one, but extends all over the globe, and if notice was to be given at all, it must be given to the whole world. I cannot see where the limit is to be. Charters may at this moment be in course of being concluded in any of the the British colonies in reliance on this practice. Again, supposing the notice to have been given, how long is the harbour-master to wait before he adopts the new order? It will be a very long time before the intelligence reaches the uttermost parts of the earth, and therefore, upon inquiry, this becomes a most unreasonable view of the case. In short, this alteration, which put the "Nellie" in a most disadvantageous position, was quite within the power of the defenders to make, and was for the interest both of the harbour and the traders to it. Indeed, I have little doubt that the harbour-master, unless restrained by the terms of his appointment, could himself have made this alteration at any time.

Lord Deas—I am of the same opinion as your Lordship. I think that with the bye-laws we have nothing to do; they relate to matters involving criminal responsibility. As regards the matter in question here, there was merely a custom, introduced so lately as 1871, of giving steamers a preference over sailing vessels, and it was found to be attended with great inconvenience. The change was a *bona fide* attempt to make a rule more equitable than it had been before. They certainly were entitled to make it; on that I have no doubt. The whole question is, whether notice was required, and if so, what notice. The harbour-master makes the express statement that he gave it to all within his reach. Mr Miller, a member of the firm who had chartered the "Nellie," admits that he knew of the alteration on the 15th October, which shows that all reasonable means were taken to make it known, and if anything more were needed it must be intimation to the whole world. Besides that, any notice would merely have been increasing the evil, continuing, that is to say, the inequality between steamers and sailing ships. I am of opinion that this was not only within the defenders' power, but that it was most properly done.

Lord Ardmillan—I also agree with your Lordship. I do not think this change required any notice, and I agree also in thinking it was in the power of the harbour-master to have made it.

Lord Mure—I concur in thinking that this alteration was competent and necessary. When the "Nellie" arrived at Grangemouth there was a complete block in the harbour, and I think it would have fallen within the ordinary duties of the harbour-master to have remedied this by keeping ships out, as he kept the "Nellie." It may be hard for the pursuers in one view, but I observe that Mr Lindsay, the agent in Leith for the "Nellie," was aware that she might have been loaded in Granton at an extra expense of 3d. per ton, which could not have amounted in all to more than £10.

The interlocutor of the Lord Ordinary was affirmed.

Counsel for Pursuers—Asher—Innes. Agents—Boyd, Macdonald, & Lowson, S.S.C.

Counsel for Defenders—Dean of Faculty (Watson)—Johnstone. Agents—Hope, Mackay, & Mann, W.S.