and every impediment arising from that practice which the charterers could not have overcome by the use of any reasonable diligence, ought to be taken into consideration. Thirdly, that the respondents must be presumed to have known the custom of the port of Sydney relating to precedence, &c. Fourthly, that if the delay was caused by any deficiency of the appliances in use at the port, the appellants could not be held liable.

Dunlop, for the respondents: By the terms of the charter party it was agreed that the Gresham was to proceed to Sydney, and there load from the agents of the appellants a full cargo. She did proceed there, but no cargo was ready for her. This was not owing to a crowd of steamships loading before her in turn, but, as sworn by Gisborne, owing to the production of the mines not being sufficient to provide a cargo for the vessel with prompt despatch, and owing to the coal companies not having sufficient cars to forward what was produced to the pier. There is no proof whatever that owing to a crowd of steamships, each loaded in turn, it was impossible to load the Gresham in less than twenty-six days, and that this was a reasonable time. On the other hand, the respondents have proved that the Gresham could easily have been loaded at Sydney in five or six days under ordinary circumstances. Other steamers were loaded in much less time. The Hibernia received 1,901 tons in six days; the Alpha 1,959 tons in nine days; the Kangaroo 761 tons in five days, while it took twenty days to give the Gresham 1,830 tons. The usages of the port apply, but not the rules of a particular colliery. It is unreasonable to extend the custom of the port to the mine whence the supplies are drawn. The appellants, in fact, entered into an improvident contract. They brought large and expensive steamers from England and the cargoes were not ready for them. The coal had to be dug out of the mines.

RAMSAY, J. This is an action for damages by way of demurrage. There is no stipulation for a limited number of lay days,— what the freighter undertook to do was to give "prompt despatch." It seems to be well established that when the charter-party fixes certain lay days, all delays beyond those days until the ship is loaded and ready to sail, are at the charge of the freighter, unless directly attributable to the act of the owner. Smith's Merc. Law, 371. Abbott, 310. But when prompt despatch is alone promised, the freighter only warrants diligence, (Abbott, 312-3,) and diligence evidently means such proceedings as are usual in the port. (Ib. 313.) Now whether that diligence has been used here is almost purely a question of fact. Want of diligence—that is negligence, has to be established by the plaintiff. In this case I do not see that any negligence has been proved. It is pretended that the coal had to be procured after the vessel was ready to load, and that this was a cause of delay; but it is evident that Sydney is a coaling port, and that the coal is brought straight from the pit and is entered on board. Again, it does not appear that the steamer lost her turn, and certainly it does not appear she lost it by the fault of appellants or their agents. I am to reverse with costs, and that is the judgment of the majority of the Court.

The judgment is as follows :—

"The Court, etc.

"Considering there is no sufficient evidence to establish that the appellants did not use prompt despatch in procuring cargo for and loading the steamship "Gresham";

"Considering that there is error in the judgment appealed from, to wit, the judgment rendered by the Superior Court at Montreal on the 21st day of May, 1880; doth reverse the said judgment, and proceeding to render the judgment which the said Court below ought to have rendered, doth dismiss the action of the plaintiffs now respondents in this cause with costs as well in the Court below as in appeal, (The Hon. Mr. Justice Cross dissenting.)

Judgment reversed.

Kerr, Carter & McGibbon for Appellants.
John Dunlop, for Respondents.

SUPERIOR COURT.

MONTREAL, March 31, 1882.

Before MACKAY, J.

MACDONALD v. THE MERCHANTS BANK OF CANADA.

Contract—Notarial deed.

The plaintiff, being indebted to a Bank, wrote to the manager proposing a compromise. The Bank stated that they had agreed to accept the proposal "with some slight modifications." A