correspondence and the pleadings, that Mr John Mackenzie's actings are to be explained by the circumstance that all along he has been under an entire mistake as to his legal rights in the matter.

He seems to have thought that the letter of 24th April 1879 conferred on him the absolute right of disposing of this library. I agree with your Lordship in thinking that this is an entirely mistaken view of this letter. It really amounted to nothing more than this, a suggestion to his executors, which they might act upon or not as they thought best for the benefit of the executry estate.

That being so, the state of matters here is just this—One executor and a beneficiary desires to realise a portion of the trust-estate in one way, while his two co-executors propose to realise it in another. If we were to adhere to this interlocutor we would be affirming the proposition that an executor was to be found entitled so to act merely because matters are not in the position in which they were at first.

I think that these two ladies are entitled to have a voice in deciding how this library is to be disposed of, all the more as it is not suggested that what they are proposing will in any way prejudice the executry estate.

LORD ADAM—I concur in the construction proposed by your Lordship of the letter of the deceased Mr Mackenzie.

I do not think that under it the respondent had the right of disposing of this library apart from his sisters. They have fixed upon Mr Chapman as the proper person to dispose of these books, and they are confirmed in their selection by their father's letter. Mr John Mackenzie, on the other hand, thinks differently, and he says that after taking advice he has decided to employ Mr Dowell. Now, in that state of matters I do not see that any case has been presented for departing from the rule stated by your Lordship, all the more so as no case of prejudice to the executry estate has been established.

The Court recalled the interlocutor of the Lord Ordinary, and remitted to him to pass the note and grant interdict as craved.

Counsel for Complainers — Asher — Low. Agent—John T. Mowbray, W.S.

Counsel for Respondents—D.-F. Balfour, Q.C.—Jameson. Agents—Waddell & Mackintosh, W.S.

Friday, February 5.

FIRST DIVISION.

[Sheriff of Lanarkshire.

JOHN & JAMES WHITE *v.* THE STEAMSHIP "WINCHESTER" COMPANY.

*Shipping Law — Charter-Party—Demurrage—Specified Number of Lay-days—Quarantine—*Vis major

It is an implied condition of the running of the lay-days under a charter-party that the ship shall not only be at the place of loading, but also that the owner shall be in a position to place her at the disposal of the charterer to receive cargo; if, therefore, a ship on entering at the port of loading is put into quarantine, this is a *vis major* which impedes the shipowner in fulfilling his contract, and the lay-days do not begin to run.

In a charter-party by which the shipowner was to load a cargo of "say about 2800 tons," there was this clause—"Cargo to be supplied at the rate of not less than 140 tons per running day, Sundays excepted," after which demurrage was to become due at a stipulated rate. The vessel under charter was to proceed from Port Said to different ports on the Turkish coast in order to load the cargo. At that time vessels from Egypt were subjected to quarantine in all Turkish ports. The shipowner and charterer were ignorant of this fact when the charter-party was entered into. The ship sailed to the first of her ports of loading and was there allowed to take on board part of the cargo; she then went on to the next port, distant a few hours sail, but was prevented from loading any cargo until she had undergon etwenty days' quarantine. The loading thus occupied eighteen days more than the stipulated lay-days. *Held* that the shipowner could not maintain an action for demurrage against the charterer.

Paterson & Company, merchants, Smyrna, in November 1883 chartered the s.s. "Winchester" from Blindell, Dale, & Company, who represented The Steamship "Winchester" Company, Limited. The charter-party was concluded in behalf of owners and charterers by J. & R. Young & Company, Glasgow, and contained the following provisions:—"That the said ship being tight, staunch, and strong, and every way fitted for the voyage, shall (after discharge of present cargo, if any), with all convenient speed sail and proceed to *Ikinjik and Gulf of Macri* (*say in Gulf of Macri at Macri &/or Conjek*), or so near thereunto as she can safely get, and there load from the said merchants, or their agents, a full and complete cargo of *ore, say about* 2800 *tons*, . . . and being so loaded, shall therewith proceed to *Glasgow, and discharge cargo*, . . . on being paid freight at and after the rate of (12/) *twelve shillings stg. per ton of* 20 *cwts. delivered.* (The Act of God, the Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, navigation, steam, boilers, and machinery, of whatever nature and kind soever, during the said voyage, always excepted.) . . . *Cargo to be supplied at the rate of not less than* 140 *tons per running day, Sundays excepted*, are to be allowed the said merchants (if the ship is not sooner despatched) for loading, *and to be discharged on berthing as customary as fast as steamer can deliver.** And ten days on demurrage, over and above the said lay-days, at *eight*pence per nett register ton per day. . . . The cargo is to be brought to and taken from alongside at merchants' risk and expense."

The "Winchester" at the date when the charter-party was signed, was lying at Port Said. On 21st August 1883 the following notice had appeared in the *London Gazette*:—"Vessels from Egypt, including those which come through the Suez Canal or from Cyprus, will, if they have had suspicious incidents on board during the voyage, be subjected to twenty-five days' quarantine in Turkish ports."

* See this sentence explained *infra* in Sheriff-Substitute's note.

The "Winchester" proceeded to Ikinjik, a Turkish port on the open coast, where there were no sanitary authorities, and was allowed to load 1200 tons of cargo, but on arriving at Macri, the next port of loading, she was put into quarantine for twenty days by the Turkish authorities. The facts in connection with the loading at Ikinjik and the detention in quarantine are stated in the opinions of the Sheriff-Substitute and Lord Shand, *infra.*

The shipowners, in consequence of the vessel's detention in quarantine, made a claim against the charterers for £1152, 6s. 8d., being ten days' demurrage at £47, 16s. 3d., the stipulated rate, eight days over-demurrage at £71, 15s., quarantine dues, and other expenses incurred through the quarantine.

On the vessel's arrival in Glasgow, J. & J. White, as agents and attorneys for Paterson & Company, took delivery of the cargo, on payment of the stipulated freights, and they consigned in bank the above-mentioned sum of £1152, 6s. 8d. to await the decision on the owners' claim above stated.

This was a multiplepoinding in the Sheriff Court at Glasgow, the fund *in medio* being the sum consigned, and the claimants being the Steamship "Winchester" Company as owners, and J. & J. White, representing Paterson & Company, as charterers of the vessel. Messrs Blindell, Dale, & Company having entered into the charter-party on behalf of The Steamship "Winchester" Company, lodged a minute concurring in the claim made by the company.

A proof was taken. The facts disclosed are fully stated in the opinions printed below.

On 8th June 1885 the Sheriff-Substitute (Erskine Murray) pronounced this interlocutor:—"Finds (1) that Messrs Paterson & Company of Smyrna, now represented by the claimants J. & J. White, chartered from the claimants Blindell, Dale, & Company, representing the owners of the 'Winchester' Steamship Company, Limited, that vessel, then at Port Said, for a voyage to certain ports on the Turkish coast, to load there a cargo of ore for Glasgow, all in terms of the contract of charter-party as specified in the note annexed hereto: Finds (2) that after partially loading at one of the ports, and proceeding to a second port, she was sent by the Turkish authorities into quarantine, owing to no fault of either party, and thus detained twenty days: Finds (3) that the shipowners now plead that the vessel was delayed eighteen days more than the period stipulated for in the charter-party through causes for which the charterers are responsible, and therefore demand £1152, 6s. 8d. for demurrage, over demurrage, and other damages: Finds (4) that the charterers have consigned in bank, in the joint names of the nominal raisers, the above sum, which forms the fund *in medio* in the present multipleponding: Finds on the whole case and in law, that for the reasons assigned in the annexed note, it must be held that the claimants Blindell, Dale, & Company are entitled to the sum of £944, 11s. in respect of their claim: Therefore finds the nominal raisers liable only in once and single payment of the fund *in medio*: Ranks and prefers the claimants Blindell, Dale, & Company to the fund *in medio* to the extent of £944, 11s., and the claimants J. & J. White to the balance of the said fund: Decerns against the nominal raisers in favour of the said claimants Blindell, Dale, & Company for said sum of £944, 11s. out of the fund *in medio*, and in favour of the claimants J. & J. White for the balance of said fund; and on the nominal raisers making payment of the contents of said decree as aforesaid, exoners and discharges them from all claims under the action: Finds the claimants J. & J. White liable to the claimants Blindell, Dale, & Company in two-thirds of their expenses as taxed, &c.

"*Note.*—Under the charter-party between Blindell, Dale, & Company for the owners of the 'Winchester,' and Paterson & Company of Smyrna, now represented by Messrs J. & J. White, it is agreed that the s.s. 'Winchester,' now at Port Said, should 'proceed to Ikinjik and Gulf of Macri (say in Gulf of Macri at Macri and/or Conjek), or as near thereunto as she can safely get, and there load from the said merchants or their agents a full and complete cargo of ore, say about 2800 tons.' The charter-party is partly in print and partly in writing. A clause in writing, 'Cargo to be supplied at the rate of not less than 140 tons per running day (Sundays excepted)' is followed by the words in print 'are to be allowed the said merchants (if the ship is not sooner despatched) for loading.' As they stand these words are neither grammar nor sense. The print was clearly intended to be filled in with a specified number of days for loading. This has not been done, and a provision as to the rate of supplying cargo per running day is substituted. None of this printed clause can be read with the writing except the closing words 'for loading' and the rest must just be held as *pro non scripto*. If it can be read at all, it can only be taken as implying that it was the intention of parties to fix a time for loading, but that instead of doing it by a slump time, they preferred to do it by a rate. Nor is the reason far to seek. The vessel was to be loaded not at one port alone, but at two at least, and possibly three. In these circumstances a slump number of lay-days, beginning at a certain date and finishing at another, would be inapplicable, for there might be three distinct periods of loading separated by the intervals occupied in sailing from the one place to another. But although no slump number of lay-days is given the result is a simple matter of calculation. The time taken at each of the three places falls to be added together, and it has then to be seen whether it exceeds 20 days *plus* the Sundays. For 140 tons per day of 2800 tons is just 20 days. The shipowners contend that the 20 days should count from the commencement of loading at the first port and run even on without intermission. Of course the reason of their contention is to enable them to argue that a break of quarantine at the second port was in the middle of a fixed period, which would certainly make the case much more clear in their favour. But the Sheriff-Substitute cannot adopt this contention, and must hold that the time spent at each port must be taken separately. This view also prevents the time taking in sailing between the stipulated ports from being counted against the charterers, which however is a small thing, not amounting to one day altogether, and not affecting the result. The charter-party specifies 'ten days on demurrage over and above the said lay-days at 8d. per nett register ton per day.' This would be £47, 16s. 3d. per day.

"The next thing to be remarked is that, as

appears from the *London Gazette*, the Board of Trade had, on August 20th 1883, received information that vessels from Egypt would, if they had suspicious incidents on board during the voyage, be subjected to twenty-five days' quarantine in Turkish ports; and gave notice accordingly. Neither of the parties nor their joint-broker seem to have known anything of this matter. The 'Winchester' came from Egypt, but according to the evidence had had no suspicious incidents on board, and so did not rightly fall under the rule. Such being the bargain of parties, the 'Winchester' came to Ikinjik on 12th November 1883. At Ikinjik there are only a few houses, and the Turkish officials are of an inferior description. The charterers had an agent and labourers ready with ore, and the Turkish officials making no opposition, 1200 tons ore were shipped out of lighters. From thence the 'Winchester' steamed a distance of four hours to Macri, taking with her the agent and Turkish officials and the lighters in tow with the labourers. Macri is a larger place with higher Turkish officials. These ordained that the 'Winchester' before loading must go and lie in quarantine at a place called Marmoritza, farther along the coast. She had to go with the agent, pilot, and officials on board, and lie at Marmoritza twenty days before she was allowed to return and complete her loading at Macri and Conjek. She seems to have taken eighteen days altogether in loading, over and above the quarantine delay. In these circumstances the shipowners claim (1) demurrage as per charter-party for ten days at £47, 16s. 3d. per day, amounting to £478, 6s. 8d.; over demurrage for the next succeeding eight days at £71, 15s. per day; besides quarantine and other expenses—their claim being in all £1152, 6s. 8d. The charterers have lodged this sum in the joint names of the nominal raisers in bank, and it forms the fund *in medio* claimed by the respective parties.

"There is really no disputed question of facts; the only question is, whether in law the loss occasioned by the quarantine is to fall on the charterers or the owners?

"In the first place, it falls to be remarked that there is no fault attributable to either party. Neither knew of the quarantine rule; but had they known of it, it would not have been otherwise. For on the evidence it must be held that the rule did not properly apply to the 'Winchester,' and that the enforcement of it in her case was an unjust exercise of *vis major* on the part of the Turkish authorities, perhaps with an eye to backsheesh.

"A thorough review of the authorities leads to the conclusion that where in a charter-party there is a fixed number of days for loading, there must be held to be an implied contract by the charterer that after the ship has actually reached the usual place of loading he will take the risk of vicissitudes that may occur to prevent his releasing her, including such delays as quarantine. See *Thiis* v. *Byers*, 1876, L.R., 1 Q.B.D. 244; Lord Blackburn in *Hudson* v. *Ede*, 1867, 2 L.R., Q.B. 566; *Barker* v. *Hodgson*, 1814, 3 Maule & Selwyn, 270; *Bessey* v. *Evans*, 1815, 4 Camp. 131; *Gibbons*, 1 Bingham, N.C. 283, or 1 Scott, 133; Abbot, 246. And where, though the number of days is not specified, the rate per day is given, and the number of days allowed is thus just a matter of calculation, as in the present case, the same rule falls to be applied. See *Tapscott*, 8 L.R., C.P., 46; *Holman* v. *The Peruvian Nitrate Company*, 8th February 1878, 5 R. 657. The words 'running days,' moreover, which are used in the present case, point to such an obligation, as they include days in which, through no fault of either party, it is impossible to work. On the other hand, if there is neither a fixed time nor a fixed rate by which the time can be fixed, the charterer is only bound to load or discharge in reasonable time; there being no absolute hard and fast time contract on his part, he is not responsible in the case of a *vis major* or stormy weather interfering. See *Postlethwaite* v. *Freeland*, 1880, 5 App. Cas. 599; *Ford* v. *Cotesworth*, 1868, L.R., Q.B., iv. 127, and 1870, L. R., Q.B., v. 544. In the case of *Cunningham* v. *Dunn*, 1878, L.R., C.P., iii. 443, it had been agreed by the charter-party that the ship after loading dead weight (known to mean military stores) at Malta for the owners was to proceed to Spain and load a cargo of fruit. The charterer knew, and the shipowner did not know, that by the law of Spain a vessel containing military stores would not be allowed to load in Spanish ports. She arrived in the Spanish port; the Spanish authorities prohibited the loading, and the vessel sailed away. The charterer sued the shipowner for damages. The Court assoilzied, holding that the case of *Ford* v. *Cotesworth* ruled. In Maude and Pollock, i. 324, this case is quoted as laying down that where the act to be done is such that both must concur in doing it (the reference being to loading), and an unexpected event prevents each doing his part, neither can maintain an action against the other. But this is too broadly laid down. In the case of *Cunningham* there was no absolute bargain excluding the consideration of reasonableness, and the Court went on the further reasons (1) that there was no warranty by the shipowners that the dead freight was such as to allow the vessel to be loaded in Spain; (2) that if the shipowners were bound not to disable themselves, they did not know that they would disable themselves; and (3) that the charterers had, knowing the Spanish rule, given the ship license to sail with military stores on board. The case of *Cunningham* cannot therefore be taken as an absolute authority that in all cases, whether there is a fixed time contract or not, the rule as quoted from Maude and Pollock must apply. In *Nelson* v. *Dahl*, 1879, 12 L.R., C.D. 581, and 1880-1, 6 App. Cas. 38, the vessel was bound to proceed to London S.C. Docks, or as near thereto as she might safely get; the cargo to be delivered as fast as the steamer could deliver. She was prevented from entering the docks owing to what was held to be a cause attributable to the charterer, or if not so, at anyrate a permanent obstacle, but lay as near as she could. The charterer not interfering, the ship discharged by lighter into the dock. The Courts held the charterer liable in demurrage. This case apparently falls more, though not entirely, under the rule laid down in *Postlethwaite*, the question of the permanency of the obstacle being, however, the main ground of judgment.

"Altogether, applying these principles, it must be held in the present case, that if the delay took place after the ship had reached the usual place for oading at one or other of the specified ports, the

charterers, as the charter-party is one with a fixed rate enabling a fixed time to be stated, must be held liable for loss occasioned by the delay. Now, the evidence shows that the 'Winchester' had reached her place of loading at Macri. The time spent in quarantine must therefore be included in the time taken in loading at Macri. The charterers must therefore be held liable for the eighteen days taken in all above the stipulated days.

"As to the amount of damage, the demurrage of the first ten days is regulated by the contract. For the remaining eight days the Sheriff-Substitute prefers much to continue the contract rate than to take as a basis the rate got for a Government contract this year, a much more doubtful authority. The fifth item of the account—[a charge for extra stores consumed in quarantine]—seems to fall under the demurrage charge; the other items seem chargeable. There therefore falls to be deducted £207, 15s. 8d. from the shipowners' account, leaving a balance of £944, 11s. To the former sum the charterers, and to the latter sum the shipowners, fall to be preferred. In the circumstances the shipowners seem entitled to two-thirds expenses."

J. & J. White appealed to the Court of Session, and argued—The question was, which of the parties had been impeded in fulfilling his part of the contract? Here it was the shipowner, because he did not place the ship at the disposal of the charterer at Macri until after the expiry of the quarantine days. The principle of *vis major* was applicable—*Ford* v. *Cotesworth*, 1868, L.R., 4 Q.B. 127, *aff.* 1870, L.R., 5 Q.B. 544; *Cunningham* v. *Dunn*, 1878, L.R. 3 C.P. 443. The owner was bound to bring his vessel into port so that the cargo might be loaded—*Tapscott* v. *Balfour*, 1872, L.R., 8 C.P. 46; *Postlethwaite* v. *Freeland*, 1880, 5 Ap. Ca. 579, 1 Bell's Com., 7th ed., 622. The cases cited on the other side were not applicable, because the ship had never come to port. Even if it were held that she had come to port, there was not in the charter-party any contract to keep the ship merely for a specified time, and therefore this was not a case where the charterer had undertaken an absolute obligation, and was liable in any event for non-fulfilment. Even if the charterer was liable for damage he could not be liable for the expenses incident to quarantine.

Argued for the respondents—The charterer was bound by the charter-party to load in twenty days, and in such a case all hazards fell on the charterer. It was sought to take the case out of this general rule, but there was no sufficient reason for doing so. The owner tendered his vessel at Macri, and but for the intervention of the Government he would have fulfilled his part of the contract. By the charter-party the owner was to bring the ship to Macri "or so near thereunto as she can safely get." The argument in law might be taken on the assumption that neither party knew that the ship would have to undergo quarantine. It was maintained, however, that there was but one presentation and one acceptance, and that was at Ikinjik, and that the vessel was never thereafter out out of the charterer's hands until she was loaded up. That was the way in which the parties dealt with the matter, because the charterer's servants took passage for themselves and towage for their lighters from Ikinjik to Macri. But even if that view was not correct, it was submitted the owner had fulfilled his contract by bringing his vessel as near to Macri as she could get. If that were done, and yet a disability arose which prevented the cargo from being put on board, that raised the question of law, who was to be made responsible for that disability? The principle was, that as the charterer told the vessel where to go, and presumably knew about the port, then, when he undertook to load in twenty days, that was an unqualified obligation on his part. This was a purely local disability—a "port regulation;" *cf.* Lord Shand in *Holman's* case, *infra.* There was no disease or "suspicious incident" on board. If this was a *vis major*, then the charterer was responsible for it. The expenses incident to the quarantine should be paid by the charterer, because, according to the argument submitted, the vessel was then on the charterer's voyage—*Hudson* v. *Ede*, 1867, L.R., 2 Q.B. 566, Blackburn, J., 578; *Thiis* v. *Byers*, 1876, 1 Q.B.D. 244; *Holman* v. *Peruvian Nitrate Company*, February 8, 1878, 5 R. 657; *Barker* v. *Hodgson*, 1814, 3 Maule & Selwyn, 267; *Barrett* v. *Dutton*, 1815, 4 Campb. 333; *Bessey* v. *Evans*, 1815, 4 Campb. 131; *Ogden* v. *Graham*, 1861, 31 L.J., Q.B. 26; *Nielsen* v. *Watt*, 1884, 14 Q.B.D. 576; Maude & Pollock (4th ed.) 410.

At advising—

Lord Shand—This case presents a question of importance and difficulty for decision. The steamship "Winchester," the property of the respondents in the appeal, was detained in quarantine for a period of twenty days when in the course of performing her voyage under the charter-party entered into with the appellants as agents and attorneys for Paterson & Company, merchants in Smyrna, and the question between the parties is—whether the shipowners are entitled to have the time occupied in quarantine treated as lay-days under the charter-party, so as to give them a claim to a sum which they estimate at upwards of £1100 for demurrage, or whether the shipowners must themselves bear the loss occasioned by the detention of the ship in quarantine? It is remarkable that—so far as can be discovered—in no previous case either in England or in Scotland has the question now raised occurred for decision.

By the charter-party, which was dated 7th November 1883, and signed by J. & R. Young & Company, acting as agents both for the shipowners and the charterers, it was agreed that the steamship "Winchester," then at Port Said, should ("after discharge of present cargo, if any) with all convenient speed sail and proceed to Ikinjik and Gulf of Macri (say in Gulf of Macri at Macri and/or Conjek), or so near thereunto as she can safely get, and there load from the said merchants or their agents a full and complete cargo of ore, say about 2800 tons . . . and being so loaded, shall therewith proceed to Glasgow and discharge cargo," on payment of freight at the rate therein stipulated; and the clause of importance in the determination of the question in dispute is in these terms—"Cargo to be supplied at the rate of not less than 140 tons per running day, Sundays excepted . . . and ten days demurrage over and above the said lay-days at eightpence per nett registered ton per day, to be paid day by day as the same shall become due."

After the words above quoted "Sundays ex-

cepted" the charter-party contains the printed words "are to be allowed the said merchants (if the ship is not sooner despatched) for loading." These words, as is observed by the Sheriff-Substitute, are part of the printed form of charter-party, and it is obvious that they are superseded by the sentence in manuscript which precedes them, ending with the words "Sundays excepted," and they may therefore, be held as deleted, and as forming no part of the contract between the parties. They could only have a meaning if a specified number of days had been inserted in manuscript in the charter-party in place of the words "cargo to be supplied at the rate of not less than 140 tons per running day, Sundays excepted."

The Sheriff-Substitute is, I think, clearly right in holding that it appears from the evidence that neither Messrs J. & R. Young & Company, the agents for both parties, nor the shipowners, nor the charterers, were aware in entering into the charter-party that the vessel on presenting herself at any of the ports or places of loading stipulated was liable to be placed in quarantine before being allowed to receive cargo because of her coming from a Egyptian port. I observe that in the communications which preceded the charter, Messrs Blindell, Dale, & Company, the managing directors of the Shipowners Company, in their letter of 1st November 1883 to J. & R. Young & Company, put the question, "Would there be any quarantine for arrival from Port Said at Ikinjik?" and showing at least an apprehension or suspicion that the vessel might be detained, but no notice seems to have been taken of this inquiry, and, as I have said, on the evidence I think it must be taken that the charter-party was entered into in ignorance on that subject on the part of all the parties to the contract.

The Sheriff-Substitute has expressed the opinion that although the vessel sailed from Port Said, an Egyptian port, she was not liable under the regulations of Turkish authorities then in force to be placed in quarantine, as in point of fact she was, for he observes that the enforcement of quarantine "in her case was an unjust exercise of *vis major* on the part of the Turkish authorities, perhaps with an eye to backsheesh." It probably makes no difference in the ultimate decision of the case whether this view be correct, or whether the order to which the captain was obliged to give obedience when on the Turkish coast was in accordance with regulations then in force, but, for the reasons which I shall immediately state, I think the evidence shows that according to the regulations then in force, a vessel leaving Port Said, or any other Egyptian port, to be loaded at the ports in question within the district of Rhodes on the Turkish coast would only be permitted to take cargo on board after undergoing quarantine for twenty days, and that it was in consequence of the enforcement of that regulation that the ship was in point of fact detained.

It appears that the vessel proceeded in the first instance in accordance with the charterers' direction to Ikinjik, a place situated in an open bay on the Turkish coast in the district of Rhodes, where there was no village, but only two huts, and where there was no sanitary officer of the Turkish Government. The charterers' clerk met the vessel there, and the captain apparently believing, as the result of a conversation with a custom-house officer, that he had got pratique, and was entitled to take cargo on board, shipped nearly one-half of the homeward cargo, viz., 1200 tons of ore, which was lying on the shore ready to be put on board, and which was put on board by means of lighters and the labour of stevedores. By desire of the clerk or agent of the charterers the captain then proceeded to Macri, distant about 40 miles from Ikinjik, where he arrived after about six hours' sailing—having in tow the lighters by means of which the charterers intended to load the remainder of the cargo, partly at Macri on one side of the gulf of that name, and partly at Conjek on the other side of the Gulf of Macri, being the ports or places of loading mentioned in the charter-party. On arrival at Macri the vessel encountered the officials of the Turkish Government charged with the duty of enforcing the sanitary regulations then in force, and the captain was then informed that the vessel must go into quarantine before she could be allowed to take any further cargo on board. A question seems to have occurred as to what particular course should be followed, from the circumstances that already there had been communication with the Turkish coast in the partial loading of the vessel at Ikinjik, and the officials communicated with persons in authority at Rhodes. The result was the appearance next morning of a Turkish gunboat at Macri, and the vessel was required to go into quarantine at Marmoritza, which was some hours' sail distant from Macri. The vessel was there detained in quarantine for 20 days, having in the meantime on sailing from Macri taken the lighters and stevedores on board to Rhodes, where they were left.

I think it is proved that in ordering the vessel into quarantine for this time the Turkish authorities were acting under a regulation then existing that all vessels coming from Egyptian ports were required to perform 21 days' quarantine. This is expressly sworn to by the witness Rassim Effendi, director of quarantine at Macri. His evidence is corroborated by Alcadef, one of the stevedores, who seems to have been quite aware of the regulation and to have seen it enforced in other cases, and by the terms of the order written on the bill of health of the vessel, having appended the visa of the British Consul at Port Said, and the visas also from the Lazaretta at Marmorice, and the subsequent visa of the consular agent at Macri. The order to which I refer is dated 8th November 1883, and signed by one of the Turkish officials, and bears, that as the steamship "Winchester" had arrived from a suspected province the captain was required to proceed to Marmorice, there to undergo the regular quarantine applicable in the case of vessels coming from ports in Egypt. This view is further confirmed by the correspondence which took place between the managing directors of the Shipowners Company and Messrs J. & R. Young & Company, dated 23d and 24th November 1883, while the vessel was being detained, from which it appears, from inquiries then made, it had been definitely ascertained that all vessels from Egypt to Turkish ports were subject to 20 days' quarantine.

Taking the case, then, on the facts that the vessel having come from an Egyptian port was liable to quarantine on presenting herself at a

Turkish port for loading, and that she was detained accordingly, the question to be decided is whether the loss thereby caused should, under the charter-party, fall on the shipowner or on the charterer. In considering that question it seems to me to be quite immaterial that the vessel had been allowed at Ikinjik to take part of her cargo on board. This circumstance is obviously to be accounted for simply because there were no Turkish sanitary officials on the spot. If there had been, the vessel would not have been allowed to load any part of the cargo there until after performing quarantine. Accordingly on proceeding to her next port, viz., Macri, the regulation was enforced. It seems to be quite immaterial whether the quarantine was enforced at the one port or at the other.

The Sheriff-Substitute has held in a careful judgment, and after a consideration of all the leading authorities which have a bearing on the question, that the lay-days under the charter-party commenced on the arrival of the vessel at Ikinjik, and again that lay-days began to run as soon as the vessel arrived at the intended place of loading at Macri; so that in performing quarantine the vessel was on the charterers' time, and her lay-days consequently expired before she was allowed to take on board cargo at Macri and Conjek. The question is undoubtedly one of considerable difficulty on the authorities, and the reasoning of the Sheriff-Substitute on the cases which have hitherto occurred has been clearly and forcibly stated. But having fully considered his Lordship's views and the authorities, I have come to the conclusion that in accordance with sound principle the shipowners are not entitled in the circumstances to charge the loss arising from the ship's detention in quarantine against the charterers, but must themselves bear the loss which has thus arisen.

The argument for the shipowners rests entirely on that clause of the charter-party which lays on the charterers the obligation to supply the cargo at the rate of not less than 140 tons per running day. If the obligation had been to load with all dispatch, or to load in the usual and customary manner, or in a reasonable time, it must be conceded that the shipowner must himself bear the loss arising from the enforcement of quarantine. This is plainly the result of the leading authorities applicable to charter-parties so expressed. It is sufficient to refer to the cases of *Ford* v. *Colesworth*, L.R., 4 Q.B. 127, L.R., 5 Q.B. 544, and *Postlethwaite* v. *Freeland*, 5 App. Cases, 599, cited in the argument and by the Sheriff-Substitute.

But it is said the present case belongs to another category, being one of the class in which the shipowner has protected himself against all delays at the place or places of loading by stipulating that the loading shall be completed within a specified number of lay-days after the arrival of the vessel at the place of loading, on the expiry of which the vessel will necessarily be on demurrage, and that where the charter-party contain such a stipulation, as in this case, detention from every possible cause, including quarantine, must be reckoned in the lay-days. For the charterers it was maintained that this is not a case in which there is an obligation to complete the loading within a specific number of days, but the argument to this effect in my opinion fails. It is true the obligation is not in terms to complete the loading in 20 running days, but in effect it is so, for an obligation to load a full cargo, say about 2800 tons, and to do so at the rate of not less than 140 tons per running day, is an obligation to complete loading in 20 days counting as at each port from the time when the ship has arrived and is ready and in a position to receive cargo. The case of *Holman* v. *The Peruvian Nitrate Company*, 5 R. 657, in this Court, and the authorities in England there cited seem to put this point beyond dispute.

The important question still remains, however, When do the lay-days begin to run? Is it enough that the vessel shall sail to the appointed place of loading even where, as in this case, she is disqualified from receiving cargo—where pratique cannot be obtained by the captain—and where indeed she is ordered to leave the port or place of intended loading, and go into quarantine at another place more or less distant. It humbly appears to me that the weight of sound reasoning is against that view, and that until the vessel is not only at the place of loading, but the captain or owners are in a position to place her at the disposal of the charterers as open to receive cargo, she cannot be regarded as an arrived ship within the meaning of the contract, and consequently that until she can be so presented the lay-days cannot commence to run against the charterer, even where he has undertaken to complete the loading within a specfied time. In short, I think that even with such an undertaking it is an implied condition of the commencement of the running of lay-days that the ship shall not only be at the place of loading, but that the owner shall be able to place her at the disposal of the charterers to receive cargo, and shall not merely present the ship subject to such a disqualification that she will not be allowed by the authorities of the port or country to take in cargo. Probably the most forcible illustration of the view now stated which can be put is to take the case of a vessel leaving a port or district not in any way suspected, but on board of which one or two cases of cholera have appeared on the voyage, and shortly before the vessel approaches the port of loading or discharge at which the charterer has bound himself to complete the loading or discharge within a specified time. In this country, in such a case, and indeed even where choleraic diarrhoea has appeared on board ship, the captain is bound by the regulations in force at once to report the occurrence, and the ship may be ordered into quarantine, and with other nations it is notorious that quarantine regulations are even more severe and more strictly enforced. It could not, I think, be possibly maintained with success that in such a case, even if the vessel had got to the place of loading or discharge, that her lay-days would commence to run because she had so arrived. The vessel would be an arrived ship in name only, but not in reality, so far as regarded the charterer, whose duty and obligation—the unloading or loading—should begin on arrival. The charterer might be quite ready to unload or ready with a cargo waiting on them to load the vessel, but the disqualification of the ship would prevent this, and indeed would lead to the ship being at once sent away from the place of loading or discharge. She would thus never be at

the disposal of the charterer so as to enable him to fulfil his obligation. The principle and the rule must be the same in the case of suspicious incidents occurring on board during the voyage, to use the language of the Board of Trade notice of 20th August 1883, although falling a long way short of a case or cases of cholera. I am unable to distinguish the present case from the cases now suggested by way of illustration. The regulation of the Turkish authorities attached a disqualification to all ships coming from Port Said, or other Egyptian ports, at least to the coast within the Rhodes district, and so the vessel could not possibly be placed at the disposal of the charterer till this disqualification had been removed by 21 days' quarantine at Marmoritza. It cannot make any real difference that the vessel was in fact allowed to sail up to the intended place of loading, for she was immediately ordered to leave Macri, and would have been in like manner required to leave Ikinjik had the sanitary authorities known she was there. In the arrangements to secure observance of quarantine the authorities might have had steamers sailing along the coast to prevent vessels coming from Egyptian ports even going to any place of loading or near it. Had the "Winchester" in this way been intercepted she could not have ever reached Ikinjik or Macri till after she had performed quarantine. In that case her lay-days could not have begun to run till she arrived at her ports of loading respectively, and it can, I think, make no difference that she did reach Macri to the effect of reporting herself, the result being that she was immediately ordered to leave as a suspect ship. I have already said that according to the evidence neither of the parties to the contract was aware of the existing Turkish quarantine regulations, though at leaving Port Said the captain had reason to expect that his ship must undergo a quarantine of ten days; but I may observe that knowledge on that subject of either or both of the parties would not in my opinion affect the result, for after all that question is one of the construction and effect of the provisions of a written instrument, viz., the charter-party.

Against the view now stated the counsel for the respondents, the owners of the ship, have appealed to a number of authorities which it is said have settled that where a specified number of lay-days for loading or unloading is stipulated the rule is absolute that the lay-days commence from the time when the vessel reaches the place of loading or discharge. I cannot regard these cases as fixing an absolute rule which applies to the present case. If they were to be so read it seems to me that the result would be inequitable and unjust in some of the cases I have already suggested, and the rule would not apply where measures were successfully taken to intercept suspected vessels at the mouth of a harbour, unless indeed such vessels escaped notice from want of vigilance, and so managed to reach the port of landing, which would be a most unsatisfactory reason for drawing any distinction in the application of the rule. The cases to which I refer are chiefly *Holman's* case, already mentioned, and the English cases of *Thiis and Others* v. *Byers*, L.R. 1 Q.B.D. 244, and other cases cited in that judgment; and the *dicta* in the case of *Postlethwaite*, in which Lord Blackburn quotes with approval a statement of the general rule by Lord Tenterden, L.R., 5 Ap. Cas. 618. It cannot be disputed that in all of these cases the distinction is clearly drawn between the case of a charter-party, in which the loading or unloading is undertaken to be done within a specified time and those in which the stipulation is only within a reasonable time or with despatch; and it is laid down in broad terms, in my own opinion, in the case of *Holman* and in the other cases, that the charterer by agreement takes the risk of bad weather and all other ordinary contingencies—it may even be said extraordinary contingencies—which prevent him from supplying the cargo, or taking it by lighters or otherwise from the shore to the ship's side. But these *dicta* must be read with reference to the circumstances of the cases in which the disability to furnish cargo affected the shipowner only, or arose merely from stress of weather. None of these was a case of quarantine. In none of them was the vessel disqualified to receive cargo when she arrived at the place of discharge or loading. In all of them she was in the fullest sense an arrived ship. In all of them the ship was available to the charterer, and was at his disposal for discharge or loading. The condition-precedent which was not fulfilled in this case was fulfilled in all of these cases, and so the laying-days commenced to run. That in my opinion makes the vital difference between the cases referred to and the present.

In conclusion, I may say that perhaps the main difficulty I have felt in reaching the result to which I have come without much hesitation in the present case has arisen from the fact that the noble and learned Lord Blackburn has in the case of *Hudson* v. *Ede*, L.R. 2 Q.B. 578, and in the case of *Postlethwaite*, 5 Ap. Cas. 619, referred to quarantine in such terms as to support the argument that his Lordship regarded detention from that cause as similar to detention caused by ice or other natural or ordinary impediments. But in the former of these cases his Lordship, in referring to quarantine, regarded it only from the point of view that this might prevent the charterer having his cargo forward or bringing it alongside the ship, and does not seem to have had the case of the ship herself being disqualified to receive cargo in view, while the latter merely contains a reference to a practice which has been sometimes followed of providing that strikes, quarantine, or other impediments shall excuse the merchant. His Lordship has not said that in the case of quarantine, where the ship is directly affected, such a provision is necessary for the charterer's protection. I believe that quarantine had sometimes been also included with perils of the sea and other risks excusing the shipowners, but little if anything of any weight can be inferred from this. The present question has been argued with special reference to the peculiarity of quarantine as attaching a disability to the ship, and none of the cases or *dicta* referred to in any way deal with that point.

On the whole, I am of opinion that the judgment of the Sheriff-Substitute ought to be recalled, and decree should be granted in favour of the appellants for payment of the money consigned by them to meet the shipowners' claims for demurrage.

I have only to add, that in coming to this conclusion I give no opinion favourable to the view

of the appellants, first stated in the correspondence and again renewed on record, that they have a claim of damages against the respondents on account of their failure to load the cargo on arrival at the Gulf of Macri. That failure arose from a *vis major*, and having regard to the obligations of the shipowners in the charter-party, I can see no ground for any such claim.

Lord Mure—I have come to the same conclusion. Under this charter-party the shipowners undertook to have their ship ready at several ports in or near the Gulf of Macri, to load a cargo of 2800 tons of ore, at the rate of 140 tons per running day; and the vessel duly arrived at the first of these ports and took in the cargo to be shipped there. On that being done she proceeded to the next port in order, but on arrival there she was subjected to quarantine, as explained by Lord Shand, and so prevented for twenty days from taking in cargo at the second port at which her owners had undertaken to present her, and the question for decision is, whether in such circumstances the owners are entitled to recover from the charterers the loss they have sustained owing to this delay? I am of opinion that they are not.

Under a charter-party of this description the shipowners were, I conceive, bound to have their vessel at the stipulated port or ports in their order, ready and available for the use of the charterers. Now, this vessel when she arrived in Turkish waters, was subject to quarantine, as she had come from a suspected port, and had this quarantine been enforced at Ikinjik, as it would have been had the officials there been aware that all vessels coming from Egypt were subject to quarantine, it appears to me to be clear, upon the grounds fully explained by Lord Shand, that the owners could not have recovered against the charterers. Because the vessel, coming as she did from a suspected port, was disqualified, and so not available for taking in the cargo which the charterers had ready for her, and that being so, I do not see any good grounds in law on which the charterers could with justice have been subjected in payment of the losses occasioned to the owners by this delay, which arose entirely from a disqualification attaching to the ship, and I agree in thinking that this omission to enforce the quarantine at Ikinjik cannot have the effect of subjecting the charterers in a liability which would not have attached to them had the quarantine been in the first instance duly enforced. It was however enforced at a port to which the shipowners were bound by the charter-party to bring their ship in a condition available for the use of the charterers; and as they failed to do this the loss thereby occasioned to them must, I think, be held to fall upon themselves.

Lord Adam and the Lord President concurred.

The Court pronounced this interlocutor—

"Find that by the charter-party dated 7th November 1883 it was agreed by Blindell, Dale, & Co., acting for the respondents, the Steamship 'Winchester' Co. (Limited), owners of the steamship 'Winchester' of London, then at Port Said, on the one part, and Paterson & Co. of Smyrna, merchants, now represented in the present action by the appellants, on the other part, that the said ship (after discharge of her then present cargo, if any) should proceed to Ikinjik and Gulf of Macri (say in Gulf of Macri, & or Conjek), and there load a cargo of ore, say about 2800 tons, which cargo the said merchants or charterers thereby engaged to ship, and being so loaded should therewith proceed to Glasgow, and deliver the same on payment of the freight thereby stipulated: Find that the appellants, the charterers, thereby undertook as follows:—'Cargo to be supplied at the rate of not less than 140 tons per running day, Sunday excepted . . . and ten days on demurrage over and above the said lay-days:' Find that in performance of the voyage stipulated by said charter-party, the ship 'Winchester' sailed from Port Said to Ikinjik, where she arrived on or about 12th November 1883: Find that in the absence of any officials charged with sanitary duties at Ikinjik, the ship 'Winchester' was allowed to take on board, and did take on board, from the merchants or their agent, 1200 tons of ore or thereby, and thereafter, on or about 19th November, by the desire of the merchants or their agent, proceeded along the coast to Macri, the second port or place of loading specified in the charter-party, to take in further cargo, and arrived at Macri after sailing some hours: Find that at Macri the officials of the Turkish Government refused to allow the vessel to take in cargo or to lie there, and ordered her to sail to Marmoritza, and there to undergo quarantine for twenty days, in respect that she had arrived on the Turkish coast from Port Said, and the vessel did accordingly sail to that place, where she was detained in quarantine for twenty days before she was allowed to return to Macri and take in cargo there: Find in law that the shipowners are not entitled in a question with the charterers to have the days occupied in quarantine counted or taken as lay-days running against the charterers under their obligation to load the cargo: Therefore recal the interlocutor of the Sheriff-Substitute of 8th June 1885: Find the nominal raisers liable only in once and single payment of the fund *in medio:* Rank and prefer the claimants John & James White to the whole amount of said fund: Grant warrant to authorise and ordain the Union Bank of Scotland to make payment to the said claimants of the sum of £1152, 6s. 8d. sterling, the amount of the said fund, with all interest accrued thereon: Grant warrant to the custodier of the consignation receipt for the said sum to deliver the same to the said claimants or their agent that said payment may be made, and on said payment being made, exoner and discharge the nominal raisers from all claims under the action: Find the said claimants John & James White entitled to expenses in both Courts," &c.

Counsel for John & James White—Asher, Q.C. —Lorimer. Agent—F. J. Martin, W.S.

Counsel for Steamship "Winchester" Co.—D.-F. Balfour, Q.C.—R. V. Campbell. Agents—Hamilton, Kinnear, & Beatson, W.S.