This is a different question from the other point in the case. These ground-annuals are *ex facie* irredeemable rights, and in my opinion the fact that she had acquired these rights in her own person does not militate against the view that she could leave this property to anyone under burden of them. She could have given this property to the disponee unburdened if she had chosen to do so, and the question is, whether she did so or not? In that state of affairs we are therefore driven to see what are the terms of the settlement itself. In the settlement, then, not only do I find that the grant is to be taken subject to any heritable burdens that may affect the same, but the testatrix expresses most distinctly that it is to be subject to the ground-annuals upon it. I think that that is quite a clear expression of her will upon that matter, and I therefore think the Lord Ordinary's interlocutor should be affirmed.

LORD YOUNG—With respect to the question of the heritable security I think there is no difficulty, and I agree with the opinion of the Lord Ordinary.

With respect to the question of the ground-annuals, I think that there is a great deal of difficulty, but on the whole I am disposed to read the will somewhat differently. I think that the meaning of the will is that the pursuer is to take this property exactly as he would have taken it if he had been the heir of the testatrix. He is to take this property "under burden of any heritable securities that may affect the same had the feu-duty, ground-annual, and other burdens affecting it, with entry as at the term immediately preceding" her death. Whatever burden was on it then—heritable bond or ground-annual—the pursuer took it with all its obligations. Any obligation which was on the property at the time of the making of the will she might remove before her death, and it would be removed for the pursuer. The heritable bond was removed. She purchased the ground-annuals. There was no longer a ground-annual affecting the ground unless she put on another, and that she did not do.

I think that the same reasoning exactly which applies to the case of the heritable bond applies to the case of the ground-annual. It was on the land, and was removed when she purchased it herself.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred with the Lord Justice-Clerk.

The Court adhered.

Counsel for the Reclaimer — Dickson—Guy. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Respondent—Murray—Craigie. Agents—Miller & Murray, S.S.C.

Thursday, December 18.

SECOND DIVISION.

[Sheriff Court of Aberdeen.

AVON STEAMSHIP COMPANY, LIMITED *v.* LEASK & COMPANY.

Ship—Charter-Party—Construction—Carriage of Goods—Delivery of Cargo—Ship's Obligation in Delivering — Defective Appliances—Demurrage.

A charter-party provided—"The said cargo (salt) to be brought to and taken from alongside, free of expense and risk to the ship, . . . cargo to be loaded and discharged as fast as steamer can receive and deliver during usual working hours. If longer detained, demurrage to be paid at the rate of £12 per day." Demurrage of one day and a-half was incurred at the port of loading. The shipowner wrote to the charterers—"If you give us really good despatch and moderate charges at 'the port of delivery,' I will try and get my folks to meet you in this matter." The charterers by unusual efforts unloaded the ship one day sooner than in usual course, but on account of the inefficient character of the ship's appliances for discharging cargo quantities of the salt were lost between the ship's side and the wharf. The charterers retained part of the freight to meet the short delivery. In an action against them by the shipowner for the sum retained, and for demurrage—*held* (1) that under the charter-party the shipowner was bound to place the cargo outside and alongside the ship; that the loss of cargo occurred while under control of the ship, and that the ship was liable therefor; (2) (*diss.* Lord Young) 1st, that under the charter-party the obligations to load and discharge were separate; that the defenders were not entitled to lump the time of loading and discharging, and so escape a claim for demurrage, even although they could show that the time occupied in loading and discharging did not exceed the time in which the ship could have received and delivered the cargo "during usual working hours;" 2nd, that the pursuers' letter did not amount to abandonment of the claim for demurrage.

Upon 6th July 1889 Leask & Company, shipbrokers, Peterhead, chartered from the Avon Steamship Company the s.s. "Avon" to carry a cargo of salt in bulk from Liverpool or Birkenhead to Peterhead. A cargo was thereafter loaded at Liverpool and conveyed to Peterhead, and duly delivered there. The charterers paid the freight due upon the cargo, deducting £6, 10s. 9d. on the ground of short delivery.

The Avon Steamship Company then raised an action in the Sheriff Court at Aberdeen for this sum of £6, 10s. 9d., and also for a sum of £18 which they claimed

as demurrage for a day and a-half's delay at Liverpool.

The charter-party provided— . . . "The said cargo to be brought to and taken from alongside free of expense and risk to the ship, ... cargo to be loaded and discharged as fast as steamer can receive and deliver during usual working hours. If longer delayed, demurrage to be paid at the rate of £12 per day." Demurrage of a day and a-half was incurred while the ship lay at Liverpool.

Upon 18th July 1889 the pursuers' manager wrote to the defenders—"The 'Avon' sails from Liverpool to-night, and should reach you on Sunday. I am sorry this steamer has been delayed one and a-half days or so waiting cargo. If you give us really good despatch and more moderate charges at Peterhead I will try and get my folks to meet you in this matter."

The defenders averred—"Admitted there was delay in loading, but explained that the pursuers requested special despatch at Peterhead, promising that if that was given they would depart from any claim for demurrage in loading. The defenders accordingly were at the utmost pains to despatch the unloading, their men working about seven hours overtime or thereby on two days, commencing at four o'clock in the morning and ending at eleven at night. Through the defective gearing of the ship the pursuers were unable to take full advantage of said despatch. The ship's derrick, in particular, was found incapable of raising the salt from the hold and delivering it into the carts, and a temporary additional derrick had to be rigged for the purpose. In consequence of this fault of the ship great delay and inconvenience was created, as well as loss in unshipping the cargo. The defenders amply compensated by the altogether exceptional facilities which they gave for unloading for the delay in shipping the cargo, and the ship between loading and unloading was not delayed longer than a reasonable and proper time."

The defenders pleaded—"(2) The pursuers were bound to compensate for failure to deliver the cargo as specified in the bill of lading after reasonable allowance for natural wastage, and the sum of £6, 10s. 9d. is accordingly not exigible. (3) 1st, Any delay in loading was compensated for by extra despatch in unloading; and 2nd, by the terms of the charter-party no demurrage is therefore due."

On a proof before the Sheriff-Substitute it further appeared that the defenders made special efforts to unload at Peterhead, and the vessel was cleared one day sooner than in usual course. The derricks upon the vessel were not able to discharge the cargo into the carts upon the quay, and a temporary derrick had to be rigged up by the stevedore's men in order that the vessel might be unloaded. Owing to the defective means of unloading a quantity of salt, estimated by the defenders at 8 tons 6 cwt., fell into the sea while the cargo was being passed from the ship to the shore.

Upon 6th June 1890 the Sheriff-Substitute (BROWN) issued this interlocutor—"Finds in law that the defenders not having received the whole of the cargo shipped, are entitled to retain the balance of freight sued for, and that the negotiations between the parties, and the proceedings that followed thereon, constitute an implied agreement that unusual despatch in the unloading of the vessel should be imputed *pro tanto* in satisfaction of the claim for demurrage."

On appeal the Sheriff (GUTHRIE SMITH) recalled this interlocutor, and found "that under the charter-party there is a balance of freight due to the pursuers of £6, 10s. 9d., and that £18 is also due for demurrage admitted to have been incurred at the port of loading: Therefore repels the defences; decerns in terms of the conclusions of the summons: Finds the defenders liable in expenses," &c.

The defenders appealed, and argued—The pursuers had no claim for demurrage, (1) Because the defenders were entitled to set-off the extra despatch used at Peterhead against the delay at Liverpool. The defenders were entitled to lump together all the days occupied in loading and unloading the ship, and if there was no loss of time when all these days were counted together, then there could be no claim for demurrage. That was according to common sense, because if there was no actual loss of time upon the voyage, then the ship was not injured in any way. There was only one case upon the subject—*Marshall* v. *Bolckow, Vaughan, & Company*, January 19, 1881, L.R., 6 Q.B.D. 231. That case appeared to be against the defenders' contention, but it had only a negative application, because if it had not appeared plainly from the words of the charter-party that the intention of the parties was not to add the two periods together the plaintiff would not have succeeded in his claim for demurrage. (2) From the letters that passed between the parties, and their actings, it was plainly the meaning of both that special despatch at unloading should be set-off against delay at Liverpool. It was not a contract between the parties, but an invitation by the pursuers to the defenders to save the ship's time by extra despatch, which would be set-off against demurrage. Owing to that extra despatch no time had been lost to the ship, therefore the pursuers had no claim—Scrutton on Charter-Parties, sec. 130. *Short delivery* — The contention of the pursuers was that they were only bound to put the cargo upon the ship's rail, but it had been decided that cargo must be put into the hands of the consignee's porters, and that was certainly beyond the ship's rail—*British Shipowners' Company* v. *Grimond*, July 4, 1876, 3 R. 969. This part of the cargo was lost through the fault of the ship in not having the necessary appliances to unload. But even if there was no fault in the ship, the apparatus for unloading cargo was inefficient to be used according to the custom in Peterhead, and if any loss was occasioned, and the goods not delivered according to the

contract in consequence, the consignee was not liable—*Postlethwaite* v. *Freelands*, June 7, 1880, L.R., 5 App. Cas. 599; *Wyllie* v. *Harrison & Company*, October 29, 1885, 13 R. 92.

The respondents argued—They were entitled to demurrage. It was admitted that there had been delay at Liverpool, and it was not proved that there had been any extra despatch at Peterhead in unloading the cargo. The clause in the charter-party here was not essentially different from that in the case of *Marshall*, cited *supra*, and that case ought to rule. There was no special contract created by the letters between the parties. With regard to the wastage and loss of salt alleged, it was not proved that the loss was due to the ship at all, even if there was more loss than the natural shrinkage on the cargo. It might be due to the bad loading of the carts which allowed the salt to drop out as they carried it from the quay, or if it was due to any defect in the apparatus for putting the salt on shore, that was the fault of the stevedore in putting up the temporary derrick, which was rendered necessary by the fact that Peterhead was a tidal harbour. It was admitted that the ship's derricks could not swing the cargo on to the quay, but that was not necessary. The duty of the ship was discharged when the cargo was placed upon the rail to enable the consignee's men to take it off—Scrutton, p. 43. The ship was bound to give all reasonable assistance by her men and boats or other appliances for handing over the cargo to the consignee, but she was not bound to undertake any duty outside herself. In this case the derricks were sufficient to swing the cargo on to the rail; that was all that was needed—*Holman and Others* v. *Dasniers*, April 2, 1886, 2 Times' Law Rep. 480—*aff.* May 5, 1886, 2 Times' Law Rep. 607; *Nottebohn & Company* v. *Richter and Others*, October 30, 1886, L.R., 18 Q.B.D. 63; *Fletcher* v. *Gillespie and Others*, June 13, 1826, 3 Bingham's Rep. 635.

At advising—

LORD TRAYNER—The claim of the pursuers in this action consists of two items—(1) the sum of £6, 10s. 9d., which they say the defenders have improperly deducted from freight due to them, and (2) £18 for demurrage.

With regard to the first item, it appears from the record and proof that there was a short delivery of the cargo in question to the value of the sum now in dispute, and that the defenders retained that amount out of the freight due by them to the pursuers. There can be no doubt—indeed it is not disputed—that the defenders were entitled to set-off the amount of the short delivery against the freight, provided the short delivery arose from any cause for which the ship is responsible. The proof makes it quite clear how the short delivery was occasioned. The cargo (which was salt in bulk) was taken out of the vessel's hold in tubs, and in swinging it across from the vessel to the wharf considerable quantities of the salt were thrown or jerked off, and fell into the water between the ship's side and the wharf. This further appears to have been caused not by any carelessness on the part of the stevedore's men, but by the inefficient character of the ship's appliances for delivering the cargo. Even if the loss had been occasioned by the carelessness or fault of the stevedore's men, the ship would have been responsible, because the stevedore and his men were the servants of the ship, not of the consignee. But however the loss was occasioned, it was occasioned before the cargo was delivered to the consignee. It was maintained by the pursuers that they were not responsible for any loss which happened after the cargo had passed over the ship's side; that the ship fulfilled its obligation by putting the cargo on the ship's rail, and the case of *Grimond*, 3 R. 968, was cited as an authority for these propositions. The decision in that case does not support the pursuers' contention. It was there held that delivery had been completed when the cargo had been put over the ship's side into the hands of the consignee's servants, which is a very different thing from merely swinging the cargo over the ship's side or placing it upon the rail of the ship. Apart from this, the extent of the pursuers' duty in reference to the delivery of the cargo must be ascertained from the terms of their charter-party. Now, it is there provided that the cargo is "to be brought to and taken from alongside free of expense and risk to the ship." The ship therefore is to put the cargo at the port of delivery "alongside," as the consignee is only bound to take it from "alongside." But "alongside" is necessarily outside of the ship, and consequently putting it on the ship's rail would not be compliance with this provision of the contract. Nor would merely swinging the cargo over the rail of the ship be fulfilment of the contract in any reasonable sense. The meaning of such a stipulation as that in the charter-party in question is that the shipowner or charterer shall in delivering the cargo place it outside and alongside the ship in a place from which and at which the consignee may take it. I am therefore of opinion that the loss of cargo in the present case took place while the cargo was still under the control of the ship and before delivery was completed, and that for that loss the ship is responsible.

I now come to the second item in the pursuers' claim, namely, the claim for demurrage. It is admitted that demurrage to the extent sued for was incurred at the port of loading, but the defenders maintain (1) that that claim was sopited by extra despatch at the port of discharge, and (2) that the pursuers agreed to give up their claim for demurrage incurred in the loading if they got "good despatch" at the port of discharge, and that this was in point of fact given. The first of these views depends on a construction of the clause in the charter-party. It provides—"Cargo to be loaded and discharged as fast as steamer can receive and deliver during usual working hours." Under this provi-

sion the defenders maintain that they are entitled to slump the time occupied in both loading and discharging, and that they are not liable for demurrage if they can show that the time occupied both in loading and discharging did not exceed the time in which the ship could have received and delivered the cargo "during usual working hours." I cannot adopt this construction of the charter-party. I think the obligation to load and discharge are separate. Each of these operations is to be performed as fast as the ship "can receive and deliver," and a failure in the performance of either as stipulated, results in the obligation to pay demurrage. Two considerations go to strengthen this view in my mind—the first is that where it is intended to lump the time for loading and discharging, this is usually stated expressly in the charter-party, and the second is that if the defenders' view was adopted, it would virtually read out of the charter-party the important provision that the ship should have a lien on the cargo for demurrage—*Marshall*, 6 Q.B.D. 231. The defenders' other ground of defence, that the pursuers agreed to give up their claim for demurrage on a condition which was fulfilled, has not been substantiated. The pursuers' letter relied on to prove this defence does not amount to an abandonment or discharge of the claim for demurrage already incurred, but merely indicates that if extra despatch was given in the discharge of the cargo, an effort might be made to arrange that claim favourably for the defenders. I think the defenders read the pursuers' letter as meaning more than that, and that they gave extra despatch in the discharge of the cargo, at extra cost and trouble to themselves, in the belief that they would thereby get rid of the claim for demurrage. Whatever I may think of the pursuers' fairness or unfairness in insisting on that claim in the circumstances, I am of opinion that they are not barred from insisting upon it, and are entitled to decree for the amount of the demurrage incurred at the port of loading.

I think that as this is a case of divided success, we should find no expenses due to or by either party.

LORD YOUNG—Lord Trayner was good enough to favour me with a previous perusal of the judgment which he has just delivered, and which, I need not say, I perused most carefully, with this result—that I concur in the opinion which he has just expressed upon the first point in the case, viz., the loss of salt in the delivery of the cargo. I think that it is according to the evidence that the damage to the salt was occasioned by the fault of the ship.

On the other point of the case, I would not have ventured to differ if I did not think that it involved a question of law, and, as I think, a question of law of such importance that, having formed an opinion upon it, I consider it is right that I should state the reasons and grounds of my opinion. The question which we are asked to decide is as to the meaning and effect of such a clause as we have in this charter-party in regard to demurrage, and its application to the facts of this case.

The general view which I understand your Lordship to have stated is, that the two things ought not to be lumped together, *i.e.*, that there ought not to be lumped together the delay at the port of loading and delay at the port of discharge. I concur in that view so far, that in my opinion it is not meant that where there is undue delay, which is to be paid for at the same rate at either the port of delivery or the port of discharge, that the detention at the one port is not to be lumped with the detention at the other port. It is not meant that if there is a day and a-half's detention at the port of delivery, and a day and a-half's delay at the port of discharge, that these two are not to be lumped together, and that three days' demurrage would be due. The question is, whether delay which was caused by a fault in making the loading of the ship take too long at the port of delivery, and which ought to be paid for, may not be made up by extra despatch and exertion at the port of discharge, so as to enable the ship to get away earlier than she would otherwise have done. I agree in the opinion so far as this — that the ship is not bound to allow, nor that the shipper is bound to insist that the ship shall give him the opportunity of making up delay at the port of delivery by extra despatch at the port of discharge. The clause in the charter-party is—"Cargo to be loaded and discharged as fast as steamer can receive and deliver during usual working hours." Now, if on any day at the port of delivery the shipper has not any cargo forward for a day or a day and a-half, and the ship is consequently idle during that time, I do not think that the ship is bound to permit the shipper of the goods to make up for this delay by working double tides on the following day or at any time. The contract is for loading the ship during the usual working hours, and that is all that they are entitled to exact. The ship, however, might in her own interest and for her own ends act otherwise. If in following out her own interest she should permit the shipper to make up the delay he had occasioned by working double tides, more especially when the shipowner invites the shipper to overtake the delay by extra work, so that the ship is not delayed beyond the usual and necessary time that she would have had to wait for loading her cargo, I do not think that her owners have any claim for demurrage. I make the same remark as to what happens at the port of discharge. The ship is not bound to allow the consignee, who has already incurred a charge for demurrage at the port of loading, to escape from that claim by enabling him to work harder, and to get a larger amount of cargo out of the ship sooner than he would otherwise have done. But here, again, if it is in the interest of the ship that the cargo should be quickly cleared out, so that she should be able to proceed upon her voyage without undue delay, I am of opinion that there is no claim for demurrage.

I agree with the remark of the Sheriff-Substitute that the claims here are *ejusdem generis*. Freight was paid for the carriage of the cargo from one port to another, and for the necessary and unavoidable delays incurred in loading and unloading the vessel, the shipowners got nothing beyond their freight. Then I think if there is no extra delay occasioned than would have been caused by the actual operations of loading and unloading, that it is according to the rules of common sense, if there is no actual delay occasioned to the ship, there should be no claim for demurrage. The matter was in the ship's hands entirely, but here the ship invited, nay, she even solicited, the help of the consignee in order that she might get away more quickly from the port, and it is that circumstance which makes me think that the letter of the defenders is of some importance. I think there is a great deal to be said for the view that there was no contract on the basis of the correspondence. It is clearly not a contract in the sense that the shipper was not entitled to say that under this contract he was bound to work double tides so as to clear the delay at the port of embarkation. I assume as being true what both the Sheriffs have stated as a fact, that the consignees did work extra hard in unloading this vessel, that they worked nineteen instead of ten hours, the question then is, why did they do it? Of course they did it for the sake of the ship; there is no evidence at all that in doing so the ship was obliging them, but rather that she solicited them to make the hasty discharge. In this letter of 18th July 1889 I think that the shipowners raised an expectation—and intended to raise an expectation—that any extra despatch in unloading the vessel would be taken into account, when the claim for demurrage at Liverpool was calculated, against the delivery of the cargo. But when the extra despatch was given, and the extra charges incurred, the shipowners turn round and refuse on the ground of no contract. That is not the kind of action that commends itself to me.

In my opinion the law is as I have stated it, that the ship is not bound to receive the cargo on board, nor is the consignee bound to take delivery from the ship except during the ordinary working hours, but they may act otherwise without any special written contract, and if the consignee agrees to do extra work at unloading at the ship's desire in order that she may suffer no delay from being detained, I think there is no claim against the consignees for demurrage.

As regards the only case to which we were referred — *Marshall* v. *Bolckow, Vaughan, & Company*, L.R., 6 Q.B.D. 231—I am of opinion with the Sheriff-Substitute that it is not applicable to this case. If I thought it was, and that the doctrine upon which it was founded was contrary to what I have stated, I would not readily assent to it, but I repeat, I do not think that it is in point.

I only wish to notice one argument, although it has not much weight with me. We were told in the course of the debate that if the view which I have stated was to prevail, the result would be to deprive the ship of her lien over the cargo for demurrage. I think that that would be a captious objection, but I am also of opinion that it is not a good objection. The ship has a lien over the cargo for the freight as well as the demurrage, and if the shipmaster had thought that there was fear of the freight not being paid he could have kept on board the ship as much of the cargo as he thought was necessary to cover the charge both for freight and demurrage. The amount here would not have been more than £24, but there was no proposal to detain cargo to that amount for demurrage. If the detention had taken place, and the consignee had paid the amount under protest so that he might get delivery, the case would have been exactly the same as it is now, but I repeat, the argument has no weight with me.

I do not go into the evidence, but my opinion is that at the solicitation of the ship, the loss which had been incurred in loading at the port of delivery was made up by the extra despatch used in unloading her at the port of discharge. I think that we should affirm the Sheriff-Substitute's interlocutor.

If, however, the case is to be decided according to the opinion stated by Lord Trayner, I only wish to say I agree that the question of expenses should be decided as he suggests.

LORD RUTHERFURD CLARK and the LORD JUSTICE-CLERK concurred in Lord Trayner's opinion.

The Court found that under the charter-party the obligations to load and discharge were separate; that thereunder the defenders were liable for demurrage; and that the pursuers' letter did not amount to abandonment of this claim.

Counsel for the Appellants—W. Campbell—Salvesen. Agent—Wm. Croft Gray, Solicitor.

Counsel for the Respondents—Jameson—C. S. Dickson. Agents—J. & J. Ross, W.S.

Friday, December 19.

FIRST DIVISION.

CALDER AND OTHERS *v.* MILLARS.

Succession—Testament—Trust—Codicil—Revocation of Daughter's Share of Residue—Separate and Independent Interest in her Children.

A father by his settlement conveyed his whole means and estate to trustees, and directed them, after making certain provisions, to hold the residue for behoof of such of his surviving children as should, if sons, attain the age of twenty-five years, or if daughters, attain that age or be earlier married, and for the lawful issue (if any) of such of