which the Association was designed to promote could not be passed against the opposition of a minority, at all events so as to affect their patrimonial rights. It is not necessary to decide this point, but I am inclined to agree with the respondent's argument. I incline to think that the effect of such an alteration would be—in Lord Selborne's words in *Murray* v. *Scott*, 9 A.C. 538 (quoted by the Lord Ordinary)—"to make the society a thing different from . . . a society formed for the purpose and in the manner defined" by its constitution. That observation seems to me as applicable to a voluntary association with a detailed constitution involving pecuniary interests in its members but not containing any express power to alter as it is to a statutory society. In addition, it must be observed that the Association was not founded to promote the interests of Labour as a whole, but—to quote the words both of the present and former rules—to "exercise a supervision of all matters affecting the printing trade." Yet the reclaimers' alterations compel every member of this Typographical Association to pay money in connection with the return and support of Labour members, whose duty in relation to Labour as a whole might compel them, as for instance in a question between Free Trade and Protection, to promote or support legislation which, although favourable to Labour interests generally, happened to be detrimental to the interests of the printing trade.

I was at first inclined to doubt whether the alteration of rule 53 was open to the same objections as the other alterations, either as *ultra vires* or as involving breach of contract. But the averments in condescendence and answer 6, as explained at the bar, satisfy me that no distinction can be drawn. The respondent's counsel explained in regard to the payments to "Parliamentary Committees," challenged in condescendence 6, that he does not object to them if the reclaimers' explanation is correct, namely, that they apply to payments to the Trades Union Congress, and are not for political purposes, and do not apply (as the name of "Parliamentary Committees" would suggest) to Labour Party conferences which are for political purposes. On the footing of this explanation, it thus appears that the alteration on rule 53 must stand or fall with the other alterations, because the Labour Party conferences therein referred to are primarily, if not entirely, for political purposes.

In regard to the other grounds which were argued, namely the constitutional question, as the amended record now presents that question, and the question whether, assuming the Association was entitled to make the alterations, they did so in proper form, it is unnecessary to decide either of them. But in regard to the first question I may say that my impression is in favour of the reclaimers.

The LORD JUSTICE-CLERK concurred in the opinion of Lord Dundas.

The LORD JUSTICE-CLERK intimated that LORD SALVESEN, who was present at the hearing but absent at the advising, also concurred in the opinion of Lord Dundas.

The Court pronounced an interlocutor sustaining the reclaiming note; recalling the Lord Ordinary's interlocutor; finding and declaring that the rules and parts of rules referred to in the first declaratory conclusions of the summons were *ultra vires*, illegal, and invalid, and were not binding on the pursuer or any other members of the Association; and granting declarator under the fourth conclusion with reduction and interdict; and *quoad ultra* dismissing the action in the same terms as in the Lord Ordinary's interlocutor.

Counsel for Pursuer and Respondent—Chree—J. Macdonald. Agents—Rainy & Cameron, W.S.

Counsel for Defenders and Reclaimers—Sol.-Gen. Anderson, K.C.—Hon. W. Watson—J. H. Henderson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Thursday, February 8.

SECOND DIVISION.

[Sheriff Court at Glasgow.

THE MOOR LINE, LIMITED *v.* DISTILLERS COMPANY, LIMITED.

Ship—Charter-Party—Demurrage—Claim for Damages.

In a charter-party twenty-two running days were allowed for loading and unloading a steamer, "and ten days on demurrage over and above the said lay-days at twenty-five pounds per running day." It was provided that the days for discharging should not count during the continuance of a strike or lock-out, and further, that "in case of any delay by reason of the before-mentioned causes no claim for damages shall be made by the receivers of the cargo, the owners of the ship, or by any other party under this charter." The vessel was not discharged within the lay-days, but was detained for four days thereafter. This delay was caused by the congestion of shipping in one of the ports of discharge after the termination of a strike. The owners thereupon claimed four days' demurrage.

Held that the claim for demurrage was a claim for damages within the meaning of the charter-party, and was therefore excluded by its terms.

The Moor Line, Limited, Newcastle, *pursuers*, brought an action in the Sheriff Court at Glasgow against the Distillers Company, Limited, *defenders*, for payment of £100 sterling, being demurrage incurred in the discharge of the s.s. "Zurichmoor" belonging to the pursuers, for which the defenders were alleged to be liable as endorsees of the bills of lading for the cargo in the vessel.

On 19th May 1911 a charter-party was entered into between Messrs Walter Runciman & Company, managing owners of the "Zurichmoor" and Messrs M. Neufeld of Berlin, under which the vessel was to load a cargo of wheat and/or seed and/or grain at Kherson and Nicolaieff, and to carry it to Leith and/or Glasgow.

The *charter-party* was in the form known as "The 1890 Black Sea Charter-Party." It provided, *inter alia*—"7. Twenty-two running days, Sundays, Good Friday, Easter Monday, Whit Monday, and Christmas Day excepted, are to be allowed the said freighters (if the steamer be not sooner despatched) for loading and unloading, and ten days on demurrage over and above the said lay-days at twenty-five pounds per running day. Lay-days at port of loading are not to count before the next (new style), unless both steamer and cargo be ready earlier. The freighters have the option of cancelling this charter if the steamer does not arrive at port of loading and be ready to load on or before midnight of 6th June next (new style), unless the steamer has been detained waiting for orders as to loading port longer than six hours, in which case the date last mentioned shall be extended so far as to cover the time the vessel was detained for orders over and above the six hours, and if by reason of such detention the vessel is prevented reaching her loading port, the charterers shall pay demurrage for each day detained over the said hours, whether the vessel is ultimately loaded or not. . . . 13. If the cargo cannot be discharged by reason of a strike or lock-out of any class of workmen essential to the discharge of the cargo, the days for discharging shall not count during the continuance of such strike or lock-out. A strike of the receiver's men only shall not exonerate him from any demurrage for which he may be liable under this charter, if by the use of reasonable diligence he could have obtained other suitable labour, and in case of any delay by reason of the before-mentioned causes no claim for damages shall be made by the receivers of the cargo, the owners of the ship, or by any other party under this charter. This clause also to apply to the loading of the steamer."

In terms of the charter-party, Messrs Neufeld & Company shipped a cargo of grain in various parcels, for which they received bills of lading. These bills of lading were endorsed to the defenders. Eleven days in all were occupied in loading at Kherson and Nicolaieff. The "Zurichmoor" arrived at Leith on 4th July 1911. A strike of dock labourers was in progress but it terminated at mid-day on 12th July. The gear was hung the same afternoon and discharging began on 13th July. Discharging was completed of the Leith portion of the cargo on the evening of Friday, 21st July. The 16th July was a Sunday, and eight days were thus occupied in discharging at Leith. The said vessel then proceeded to Glasgow and discharging began there on and time to count from 25th July. The discharge was finished on 31st July. Thus twenty-six days in all were occupied in loading and discharging the vessel.

The defenders, *inter alia*, averred—"In consequence of the congestion following on and caused by the strike of dock labourers at Leith it was impossible to obtain the number of men necessary to work the full number of tackles, or to discharge the said cargo at the ship's fullest capacity. Further, and in consequence of said congestion, the supply of railway waggons necessary for the regular discharge of the cargo was insufficient, and the waggons when loaded were delayed in removal, owing to the same cause. There was no avoidable delay in the discharge of said cargo at Leith. If said delay at Leith had not occurred, the vessel would have arrived at Glasgow in time to discharge the balance of her cargo within the time allowed for loading and discharging, in terms of the charter-party."

The pursuers pleaded, *inter alia*—"(2) The defences are irrelevant."

The defenders pleaded, *inter alia*—"(2) The excess of four days over the twenty-two running days being due to delay in the discharge of the 'Zurichmoor' at Leith by reason of the said strike, and said delay being an exception under the charter-party, the defenders are entitled to absolvitor, with expenses.

On 19th December 1911 the Sheriff-Substitute (FYFE) pronounced an interlocutor in which he repelled the pursuer's second plea-in law, allowed a proof, and on the pursuers' motion granted leave to appeal.

"*Note*—As the record stands, I think the proper order in this case is to allow a proof, because there are certain facts not admitted on record, although I understand there is no real dispute, and that the whole question at issue between the parties really arises upon the relevancy pleas. That question is, in brief, whether congestion following a strike of dock labourers at Leith is within the charter-party exemptions in favour of the charterers—a cause of delay precluding a claim for demurrage.

"The cargo in question was carried under the bill of lading No. 7/1 of process. But that bill of lading imports into the contract the terms of charter-party No. 7/2 of process.

"Clause 7 of the charter-party allows twenty-two running days for loading and unloading, and ten days on demurrage. Read alone that clause is clear and unqualified. But there is a qualifying clause, No. 13, and the charter-party must be construed as a whole. If, therefore, clause 13 is unambiguous it qualifies clause 7.

"No question arises under the first part of clause 13, because it is agreed that the delay in discharging did not arise 'during the continuance of the strike referred to.'

"The question arises alone upon the words in clause 13, 'in case of any delay *by reason of* the before-mentioned causes no claim for damages shall be made by the receivers of the cargo, the owner of the ship, or by any other party under this charter.' On the face of it this case would appear to be ruled by the case of *The*

Leonis Steamship Company, Limited, v. *Rank, Limited*, 1908 (Henderson's Commercial Cases, vol. 13, p. 295), which is an authority I think I am bound to follow, although as applied to the present case it carries the exemption clause very far, and practically absolves the charterer from liability for demurrage if the delay is in any way occasioned '*by reason of*' the strike, although that delay may occur subsequent to the strike having ended. The pursuer contends, I think rightly, that it is a very important factor in the case that the charter-party fixes the exact loading and discharging time and the exact demurrage period.

"I accept the argument that clause 7 of this charter-party cannot be qualified by the exemption clause 13, unless that clause is perfectly clear and unambiguous (*Elderslie S.S. Company* v. *Borthwick*, 1905 App. Ca. 93; *Nelson Line Limited* v. *Nelson & Sons, Limited*, 1908 App. Ca. 16), but I think clause 13 is quite clear.

"One of the things to which clause 13 of the charter-party applies is a claim for damages made by the owners of the ship. The pursuers' agent drew a fine distinction between a claim for demurrage arising (as is the case here) within the ten demurrage days specified in clause 7, and some other claim of damages by the shipowner, which might have arisen, as for instance a claim for detention of the ship after the expiry of the ten demurrage days. I think that this is one of that class of refined distinctions which was rejected in the *Leonis* case, in which Fletcher Moulton (L.J.) said, 'This is a business document, drawn up by business men, to be used in a business sense, and there is no room for those very fine distinctions.'

"In my opinion the claim made in the present action is a claim of damages by the owners of the ship, in the sense of clause 13 of the charter-party.

"Demurrage is in its nature a claim of damages, and although the last part of clause 13 does not expressly mention demurrage, I think it is covered. In other words, I am of opinion that the legal principles laid down in the cases referred to, when applied in the present case, mean that if the congestion at Leith which caused the delay in discharging the s.s. 'Zurichmoor' is proved by the defenders (upon whom the *onus* rests) to have been a reasonably direct result of the preceding strike of dock labourers at Leith, then that was delay which fell within the exemption clause 13 of the charter-party, and accordingly that the defence stated is relevant."

The pursuers appealed, and argued—The defence was irrelevant. The last part of clause 13 of the charter-party dealt only with claims of damage. There was a clear distinction between demurrage and damages for detention. Claims for damage arose *ex delicto*. Demurrage, on the other hand, was purely contractual. It was the agreed-on payment or hire for the ship for a fixed period after the lay-days—Bell's Prin. 431, 432, and 434; Bell's Comm. (7th ed.), i, 622; *Moorsom* v. *Bell*, 1811, 2 Campbell 616; Carver, Carriage by Sea (5th ed.), pp. 785, 855, 856; *Gardiner* v. *Macfarlane, M'Crindell, & Company*, March 20, 1889, 16 R. 658, Lord Trayner at 660, 26 S.L.R. 492; *Dunlop & Sons* v. *Balfour, Williamson, & Company*, [1892] 1 Q.B. 507. The exemption applicable to the days on demurrage was found in the first part of clause 13, which provided that "the days for discharging" (which meant both the lay-days and the demurrage days), should not count during the continuance of a strike. If the defenders' reading of the clause were adopted, then the last part of it contradicted the first. That had the effect of making general words derogate from special. There was an absolute and unconditional obligation on the freighter to discharge a ship within the time fixed by the charter-party—Bell's Prin. 432; *Postlethwaite* v. *Freeland*, 1880, 5 A.C. 599, Lord Chancellor Selborne at 608, and Lord Blackburn at 618; *Budgett & Company* v. *Binnington & Company*, [1891] 1 Q.B. 35; Carver (*sup. cit.*), 351. The *onus* was therefore on the defenders. They must make it perfectly clear that they were within the exception. It would not do for them to point to a clause which might have the meaning they contended for; they must show a clause which must have such meaning—*Elderslie Steamship Company* v. *Borthwick*, [1905] A.C. 93; *Nelson Line Limited* v. *Nelson & Sons, Limited*, [1908] A.C. 16; Beal on Cardinal Rules of Legal Interpretation (2nd ed.), 208. The true meaning of the charter-party was a division of loss between the ship and the charterer. The shipowner took all the risks except that of delay caused during the ten demurrage days by the results of a strike. The case of the *Leonis Steamship Company Limited* v. *Rank Limited*, 1908, 13 Com. Cas. 295, relied on by the Sheriff, did not apply. The terms of the charter-party there clearly covered the case of delay during the demurrage days "by reason of" a strike.

Argued for defenders (respondents)—It was provided by clause 13 that the time in any way lost through a strike was not to give rise to claims of damage. The delay here was by reason of a strike—*Leonis Steamship Company Limited* v. *Rank Limited* (*sup. cit.*); *The "Diamond"* [1906] P. p. 282. Days on demurrage were clearly not "days for discharging." Moreover, the pursuers' reading of clause 13 involved this, that while it protected the charterers from a claim of damages for detention by reason of a strike after the days on demurrage had expired, it gave them no protection against a claim for demurrage during the ten days. The word "demurrage" originally denoted an agreed-on payment for a specified period beyond the lay-days, but the tendency had been to extend the meaning of the word. Demurrage in the strict sense was at the present time liquidated damages for a fixed period for the detention of the ship, assessed by agreement between parties. In the popular sense it now included even unliquidated damages for detention—Maclachlan's Law

of Merchant Shipping (5th ed.), 393 and 578; *Lilly & Company* v. *Stevenson & Company*, January 19, 1895, 22 R. 278, 32 S.L.R. 212; *Little* v. *Stevenson & Company*, June 26, 1895, 22 R. 796, 32 S.L.R. 575; *Harris & Dixon* v. *Marcus Jacobs & Company*, 1885, 15 Q.B.D. 247 (Brett (M.R.) at 251); Scrutton, Charter-Parties and Bills of Lading (6th ed.), p. 140. The last part of clause 13 did not contradict the first, but was supplementary thereto, as the first part dealt only with the days for discharging, *i.e.*, the lay-days, and not the days on demurrage. The following cases were also referred to—*Salvesen & Company* v. *Guy & Company*, October 28, 1885, 13 R. 85, 23 S.L.R. 59; *Gray* v. *Carr*, 1871, L.R., 6 Q.B. 522; and *Kish* v. *Cory*, 1875, L.R., 10 Q.B. 553.

At advising—

LORD SALVESEN—This case raises an interesting question on the construction of the charter-party of a vessel belonging to the pursuers. The facts on which the pursuers base their demands for four days' demurrage are not disputed, and but for clause 13 there would be no answer to their claim. Under the contract twenty-two running days (with certain exceptions) were allowed for loading and unloading the steamer, "and ten days on demurrage over and above the said lay-days at £25 per running day." The vessel, in point of fact, was not discharged within the lay-days, but was detained for four days thereafter before the discharge was finally completed. Had clause 7, therefore, of the charter-party, which contains this provision, stood alone, there would have been no defence to the action. The charterers undertook that the operations of loading and unloading would not occupy more than twenty-two days, and became bound to pay demurrage for every day thereafter, although it might be shown that in the circumstances which actually prevailed during the discharging they could not have finished the discharge within the stipulated lay-days. This absolute obligation, however, is qualified by clause 13, and it is really on the construction of this clause that the whole controversy turns. The first part of the clause presents no difficulty. It says—"If the cargo cannot be discharged by reason of a strike or lock-out of any class of workmen essential to the discharge of the cargo, the days for discharging shall not count during the continuance of such strike or lock-out." This clause plainly contemplates a strike occurring before the expiry of the lay-days. If such a strike occurs, the running of the lay-days is suspended during its continuance, but when it ceases the lay-days again commence to run. The only matter on which parties differ as to the construction of this clause is not really material to the decision of the case. The pursuers maintained that "days for discharging" included the ten days for which the charterers were entitled to detain the ship on paying the stipulated rate of demurrage. I cannot so read them. "Days on demurrage" are not "lay-days" or "days for discharging," but are days during which the vessel is detained beyond the time within which the charterers undertook that she should be completely discharged.

I pass over for the present the second part of clause 13, and then follows the part with regard to which the true issue arises. "In case of any delay by reason of the before-mentioned causes no claim for damages shall be made by the receivers of the cargo, owners of the ship, or by any other party under this charter." The pursuers maintained that a claim for demurrage is not a claim for damages, and that accordingly, while this provision would protect the charterer from a claim of damages for detention after the days on demurrage had expired, it confers no protection from a claim for demurrage strictly so called. If this view be sound, the charterer would not be protected during the very period when the operation of discharging would most likely be affected by reason of a strike which had terminated before the days on demurrage commenced to run. This would be an unreasonable view to take of the intention of the contract, and is not readily to be adopted unless the language admits of no other construction.

The whole basis of the argument, however, depends on the view that "demurrage" in the strict sense is not a claim for damage, but is in the nature of a payment in respect of the continued use or hire of the vessel for the charterer's purposes after the expiry of the lay-days. That is a theory of demurrage which at one time received some countenance, and which is certainly supported by Lord Trayner's opinion in the case of *Lilly* v. *Stevenson* (22 R. 278). In my opinion, however, the more correct view is that demurrage is "agreed-on damages to be paid for detention of the ship in loading or unloading beyond the agreed-on period." In other words, the distinction between "demurrage" and damages for detention is that the one is liquidated damages and the other unliquidated. A claim under either head is a claim in respect of detention, and is in the nature of a claim of damages. Amongst mercantile men, indeed, "demurrage" is often used in a wider sense as including both demurrage, strictly so called, and damages for detention, although it is not necessary in order to affirm the decision of the Sheriff-Substitute to hold that the term is so used in this particular clause. If, then, demurrage is regarded as liquidated damages for detention, I think there is no difficulty in holding that it is not excluded from the third part of clause 13, but is covered by the words "no claim for damages." The word "demurrage" could not have appropriately entered this clause, because it exempts from liability not merely the receivers of the cargo, but the owners of the ship, in case of any claim being made against them in case of delay. But, further, it is quite obvious from a study of the charter-party as a whole that the term "demurrage" is not used in any invariable sense. In the last part of clause 7 "demurrage" is used to describe liability for

detention arising before the vessel reaches her loading port owing to the failure of the charterers to give her her sailing orders within the six hours allowed for that purpose. Such detention is to be paid for at the stipulated rate of £25 per day, even although the charter-party is otherwise cancelled and no loading takes place. Again, in clause 13 there is a provision that "a strike of the receiver's men shall not exonerate him from any demurrage for which he may be liable under this charter if by the use of reasonable diligence he could have obtained other suitable labour." To my mind it appears plain that "demurrage" occurring in this clause must also cover damages for detention. I think, therefore, that we are not entitled to read the third part of the clause in the limited sense for which the pursuers contend so as to exclude from its operation a claim in respect of demurrage proper. It is according to the good sense, and, I think, also according to the strict language of the contract, that in the case of delay arising as a consequence of a strike which has terminated, but the effects of which on the rate of discharge still continue, that to the extent that that delay is attributable, not to want of reasonable diligence on the part of the receiver, but to the after-effects of a strike or lock-out, he shall not be answerable for any delay, whether it occurs during the running of the ten days or after the expiry of that period. Parties were agreed that if this be the true construction of the contract the Sheriff-Substitute was right in allowing a proof, as the case of *Leonis* to which he refers is a clear authority in favour of the relevancy of the defenders' averments. I am accordingly of opinion that we should affirm the interlocutor appealed from, and remit the case to the Sheriff Court for further procedure.

The LORD JUSTICE-CLERK, LORD DUNDAS, and LORD GUTHRIE concurred.

The Court dismissed the appeal.

Counsel for Pursuers (Appellants)—Sandeman, K.C.—C. H. Brown. Agents—J. & J. Ross, W.S.

Counsel for Defenders—Murray, K.C.—W. T. Watson. Agents—Boyd, Jameson, & Young, W.S.

Saturday, February 10.

FIRST DIVISION.

SMITH *v.* WATSON.

Expenses—Proof—Hearing on Evidence—Expenses of Copy of Notes of Evidence.

Where a litigant wishes the Lord Ordinary's notes of evidence, and proposes to charge their cost, if he is successful, against the opponent, he must intimate, in asking for them, that he so proposes, and get the Lord Ordinary's leave to that effect. If he simply asks for them without that intimation, then it will be held that he asks them simply for his own convenience, and he must pay for what he gets.

Coppack v. *Miller*, 1911, 2 S.L.T. 65, *commented on.*

Robert Bain Smith, Lochee, raised an action against Hugh Hayes Watson, accountant, Dundee, for the reduction of an agreement between them. Proof was allowed, and was led on 17th and 18th November, and 2nd December 1910. The hearing on evidence was taken on 8th December 1910. On 9th January 1911 the Lord Ordinary (ORMIDALE) assoilzied the defender from the conclusions of the action and found him entitled to expenses. The pursuer reclaimed to the First Division, who on 6th December 1911 adhered.

The defender objected to the Auditor's report on his account of expenses in respect that there had been taxed off the following item:—

Paid Lord Ordinary's clerk for notes of evidence . . .	£15 13 6
Agency settling same . .	0 3 4
	£15 16 10

At the hearing on the objections on 17th January 1912, argued for the defender—The Auditor would have allowed the charge had it not been for the case of *Coppack* v. *Miller*, 1911, 2 S.L.T. 65. They maintained that *Coppack* was wrongly decided, and that as the evidence here was of considerable length, and the hearing was taken after an interval, it was necessary to have the notes, and the charge therefor was reasonable and proper. They referred to *Gunn* v. *Muirhead*, October 19, 1899, 2 F. 10, 37 S.L.R. 9; *Birrell* v. *Beveridge*, February 15, 1868, 6 Macph. 421, 5 S.L.R. 252.

Counsel for the pursuer referred to *Coppack* (*cit. sup.*), and to *Girvin, Roper, & Company* v. *Monteith*, December 6, 1895, 3 S.L.T. 192.

The opinion of the Court (the LORD PRESIDENT, LORD KINNEAR, and LORD MACKENZIE) was delivered by

LORD PRESIDENT—In this case the Auditor had originally allowed—or rather was inclined to allow—this charge paid to the Lord Ordinary's clerk for notes of evidence, but felt himself bound to disallow it upon a judgment of Lord Ormidale in the case of *Coppack* v. *Miller* (1911, 2 S.L.T. 65) in the Outer House. That judgment seems to us to lay down a general rule which we cannot approve of. The question whether there should be an allowance for getting the notes of evidence must always be a question of circumstances. There is no doubt that if a case proceeds in the way in which it ought ideally always to proceed, the speech is taken immediately at the conclusion of the proof, and there is no opportunity and no right to get notes of evidence. Counsel ought to take such notes as they think necessary for themselves as they go along. But, then, ideal progress of a case is not always possible.