conversant with the construction of railways should differentiate between ballast on the one hand and permanent-way materials on the other hand, and is in harmony with the conclusion which one would naturally draw from the special mention in the section of rails and chairs, which would be mere surplusage if the pursuers are right in their view that everything used in forming the permanent way is a "permanent-way material" within the meaning of the section.

LORD JOHNSTON, who heard part of the argument, delivered no opinion.

The Court pronounced this interlocutor—

"Having considered the reclaiming note for the pursuers against the interlocutor of Lord Cullen dated 31st July 1914, and having heard counsel for the parties, Recal the third finding in said interlocutor in so far as that finding determines that item 6 being 'ballast provided and laid' falls to enter the statement of expenditure on works between the parties: Find that said item 6 does not fall to enter the account between the parties: *Quoad ultra* adhere to the said interlocutor. . . ."

Counsel for the Pursuers—The Dean of Faculty (Clyde, K.C.)—Watson, K.C.—Gentles. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Defenders—Constable, K.C.—Macmillan, K.C.—E. O. Inglis. Agent—James Watson, S.S.C.

Tuesday, December 7, 1915.

SECOND DIVISION.

[Lord Hunter, Ordinary.

ROWTOR STEAMSHIP COMPANY, LIMITED *v.* LOVE & STEWART, LIMITED.

Ship—Charter-Party—Lay-Days—Demurrage, Computation of.

A printed charter-party for the carriage of timber, with written additions, contained the following clause, a marginal note being given in small type and the writing in italics:—"MEMO.—Owners may arrange for a fixed average number of standards per day for loading and/or discharging. 3. The cargo is to be loaded *at the rate of* 125 *fathoms daily* and discharged *at the rate of* 125 *fathoms daily, reversible*, with customary steamship dispatch, as fast as the steamer can receive and deliver, during the ordinary working hours of the respective ports, but according to the custom of the respective ports, Sundays, general or local holidays (unless used) in both loading and discharging excepted. Should the steamer be detained beyond the time stipulated as above for loading or discharging, demurrage shall be paid at 5*d. p. n.r. ton* per day, and *pro rata* for any part thereof. The cargo to be brought and taken from alongside the steamer at charterer's risk and expense, as customary. The master has liberty to bring iron or other deadweight as ballast from the loading or any other port."

Held that, it being conceded that the words "with customary steamship dispatch as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports" must be deleted as being inconsistent with the written portion of the clause, the words "but according to the custom of the respective ports," even if they also were not to be held *pro non scripto*, only applied to the means or method of loading or discharging, and did not include the local custom of a port whereby wet days and Saturday afternoons were excepted.

Ship—Agent and Principal—Charter-Party—Bill of Lading.

A charter-party contained a clause whereby the charterers had the right of slumping together the total lay-days, and were not liable for demurrage if in the processes of loading and discharging they did not exceed the total number of lay-days. The charterers purchased the cargo from the shipper. At the port of delivery they presented bills of lading on which were written the words "thirteen days used for loading." Only nine days had actually been used for loading, the master having made an allowance to the shipper in respect of four days saved by expeditious loading. The charterers knew of this. In an action for demurrage by the owners of the vessel against the charterers, *held* that the defenders were bound by the terms of the bills of lading and were not absolved from the pursuers' claim for demurrage in respect of the four days not actually used for loading.

Opinion per Lord Salvesen and Lord Guthrie that the agent of the charterers had authority as such to bargain with the master of the vessel that if less time was actually taken for loading than the stipulated number of days fixed by the charter-party, the master should pay for such dispatch on the footing that the days saved and paid for should not be added to the lay-days fixed for discharge.

On 4th March 1913 the Rowtor Steamship Company, Limited, Cardiff, owners of the s.s. "Glamorgan," *pursuers*, brought an action against Love & Stewart, Limited, pitwood importers, Glasgow, *defenders*, to recover £315, 15s. 5d. (restricted to £305, 15s. 5d.) as demurrage due for the detention in July 1912 of their ship "Glamorgan" at Newport, Monmouthshire, the port of discharge of a voyage for which she had been chartered.

The *charter-party*, which was headed "Chamber of Shipping Wood Charter (Scandinavia and Finland) to the United Kingdom 1899" was printed, with extensive alterations in writing. It contained the clause 3 quoted *supra in rubric*.

The pursuers pleaded—"(2) In respect that on a sound construction of the charter-party it was in the option of the pursuers to have the vessel discharged at the rate of 125 fathoms per day, and that the pursuers exercised this option, and that the defenders were accordingly bound to take delivery in 13 days, and that the pursuers' vessel was, through the failure of the defenders to take delivery within said 13 days, on demurrage for 6½ days after the expiry of the said discharging time, the defenders are bound to pay the pursuers the sum sued for in terms of the charter-party. (4) *Esto that the terms of the charter-party permitted the number of days saved in loading to be added to the number of days allowed for discharging, the defenders are not entitled to found upon this circumstance in respect* (1) *that the pursuers settled with the charterers by payment for the days saved in loading, and* (2) *that the bill of lading which the defenders presented in order to obtain delivery of the cargo bore that all the days allowed for loading had been used.* [The words in italics were added by amendment.]

The defenders pleaded—"(3) The pursuers' vessel having been discharged at the rate provided for in the charter-party, and/or with customary steamship despatch, during the ordinary working hours, and according to the custom of the port of Newport, the defenders should be assoilzied, with expenses."

The *facts* are given in the opinions of the Lord Ordinary (HUNTER), who on 13th June 1913 gave decree for the sum sued for as restricted.

Opinion.—"The pursuers, who are the owners of the steamship 'Glamorgan,' sue the charterers of that vessel for payment of the sum of £315, 15s. 5d., restricted to £305, 15s. 5d., in name of demurrage for detention of the vessel beyond the lay-days allowed for discharging her cargo. By the charter-party, dated 11th June 1912, entered into between the pursuers and defenders it was agreed that the 'Glamorgan' should proceed to 'one or two places Kristinestad, and there load a full and complete cargo of pit props, maximum 9 feet length, for Cardiff, Barry, or Newport, as ordered.' It was provided 'the cargo to be loaded at the rate of 125 fathoms daily, and discharged at the rate of 125 fathoms daily reversible with customary steamship despatch, as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, Sundays, general or local holidays (unless used) in both loading and discharging excepted.'

"It is stated for pursuers and admitted by the defenders that the cargo consisted of 1613 fathoms, so that the stipulated time for discharging amounted to 13 days.

"The 'Glamorgan' left Kristinestad on 10th July 1912 and arrived at Newport, Monmouth, on 18th July 1912. She was ready to start discharging on 19th July, and from that date the lay-days began to run. The time occupied by the defenders in taking delivery of the cargo amounted to 19½ days, and the amount sued for represents demurrage for 6½ days, at the rate of 5d. per net registered ton per day, in terms of a provision in the charter-party that 'should the steamer be detained beyond the time stipulated as above for loading or discharging, demurrage shall be paid at fivepence per net registered ton per day, and *pro rata* for any part thereof.'

"The defenders do not dispute the dates given by the pursuers for the start and completion of the work of discharging the vessel. They maintain, however, that in terms of the charter-party the vessel was to discharge according to the custom of the port, and during the ordinary working hours thereof, Sundays, general or local holidays (unless used) excepted. They say that 'the discharging of Baltic pit props at the Alexandra Dock, Newport, Monmouthshire, is done by the dock authorities, and it is a custom of the port that the discharging of Baltic pit props is suspended during wet weather. The discharging of the 'Glamorgan' on this occasion was done by the dock authorities. The weather at Newport while the 'Glamorgan' was discharging was excessively wet, and throughout the whole time it hindered the work of discharging. In particular, from this cause work proceeded for only a quarter-day on 29th July, and on 31st July and 6th August no work was possible. Explained further that according to the custom of said port the work of discharging proceeds for only a half day on Saturdays.' They add that 'the 'Glamorgan' was discharged with customary despatch according to the custom of the port, within thirteen days from 9 a.m. of 19th July, at which time the vessel is believed to have been ready to discharge, and notice of readiness to discharge was sent to the defenders.' The defenders moved for a proof of these averments, but the pursuers maintained that they were irrelevant. This question of relevancy depends upon the construction to be put upon the charter-party.

"In dealing with a charter-party which provided that the cargo was to be discharged with customary steamship despatch as fast as the steamer can deliver during the ordinary working hours of the port of discharge, but according to the custom of the port, Lord Chancellor Halsbury (in *Hulthen* v. *Stewart & Company*, L.R., 1903, A.C. 389) said—'There are two forms in which charter-parties of this character can be made. In one a specific number of days are given within which the discharge is to be taken, and if those days are exceeded, quite apart from the circumstances, the demurrage is due. If on the other hand the parties choose to agree not to a definite number of days but to a charter-party such as this, they necessarily import into it the circumstances under which the discharge takes place.' In which of these forms is the present charter-party framed?

"On examining the actual charter-party it appears that in the printed form of clause 3 you have that form of charter-party which, to use Lord Halsbury's words, 'imports into it the circumstances under which the discharge takes place.' There is, however, a marginal note upon the document to the

effect that 'owners may arrange for a fixed average number of standards per day for loading or discharging.' As such an arrangement fixes a definite number of days just as much as the actual statement of time, I think that the effect of the marginal note is to give the owners the option of converting the printed form of the charter-party into a form where if the time is exceeded the demurrage is due quite apart from the circumstances. In the present case there are words in manuscript showing that parties arranged for loading and discharging at the rate of 125 fathoms per day. The printed words, which are appropriate for importing the circumstances under which discharge takes place into an obligation to discharge which is indefinite as to time, have been allowed to remain. I do not think that I should allow this circumstance to override what I hold to be clear evidence in writing of the parties agreeing to the owners exercising the option given them to substitute a definite for an indefinite time for discharge. Referring to the case of *Pearson* v. *Goschen*, 17 C.B. (N.S.) 352, Mr Justice Brett, in the case of *Gray* v. *Carr*, 1871, L.R., 6 Q.B. 522, at p. 536, said—"That case seems to me, if I may be allowed to say so, rightly and according to the true mode in which the courts ought to deal with mercantile business, to point out a necessary and timely modification of the older rule of construction as to giving, if possible, a meaning to every term in the contract, in cases where a modern mercantile instrument is known to be in a printed and general form, with parts of it to be filled up in writing to apply it to particular transactions.' It may be, as Mr Justice Charles said in the case of *Baumvoll Manufactur von Scheibler*, L.R., 1891, 2 Q.B. 310, at p. 317, that 'in construing a charter-party no greater effect can be given to writing than to print, although a different rule may prevail with reference to policies of insurance.' But such a rule does not preclude one from disregarding printed words which are inconsistent with writing which evidences the exercise of an option given in the printed form. I am equally unable to hold that the written word 'reversible,' whatever it may mean, gives the charterer the alternative of either loading in the specific time mentioned or in such time as he can in the circumstances under which the discharge takes place.

"I should notice that the defenders in answer 4 say that the cargo was loaded in nine days, and accordingly seventeen days were available for discharging as provided for in the charter-party. No argument was submitted to me in favour of this view. The pursuers maintained, apparently rightly, that the obligations to load and to discharge are separate, and that a failure in the performance of either as stipulated results in the obligation to pay demurrage without any right on the part of the charterer to lump the time for loading and discharging — see Lord Trayner's opinion in *Avon Steamship Company, Limited*, 18 R. 280, at p. 285, 28 S.L.R. 226, at p. 228-9.

"I hold the defences to be irrelevant, and give decree for the sum sued for as restricted, with expenses."

The defenders having reclaimed, and having proposed amendments of the record, on 18th June 1914 the Extra Division (LORD DUNDAS, LORD MACKENZIE, and LORD CULLEN) opened up the record, allowed the amendments, recalled the Lord Ordinary's interlocutor, and remitted to him to allow parties a proof before answer.

On 27th January 1915 the Lord Ordinary, after the proof, pronounced this interlocutor—". . . Finds that the defenders' construction of the charter-party is not a sound construction, and that they are liable in demurrage: Fixes the same at 2½ days, and decerns against the defenders for payment to the pursuers of the sum of £117, 12s. 1d. in respect thereof. . . ."

Opinion. — "At the conclusion of the argument in the procedure roll on 13th June 1913 I held the defences irrelevant, and found the pursuers entitled to demurrage for 6½ days. In reaching that conclusion, for the reasons given by me in my opinion at the time, I attached no importance to the word 'reversible' contained in the clause as regards the discharge of cargo, which is in the following terms:—'Cargo to be loaded at the rate of 125 fathoms daily, and discharged at the rate of 125 fathoms daily, reversible.' The defenders reclaimed against my interlocutor, and before the hearing proposed an amendment to the record making an averment to the effect that the presence of the word 'reversible' in the clause I have referred to meant that if the stipulated time, which it was agreed was thirteen days for either loading or discharging, was not used in either of these operations, the balance fell to be credited to the time available at the other operation. That averment was answered by the pursuers, who in their original answers denied the averment, but put forward a special case to the effect that in any event the ship had purchased the difference in time between the thirteen days and the time actually occupied in the loading, and that therefore the charterers were not entitled to any benefit from the admitted circumstances that less than thirteen days were occupied in loading.

"Before the proof was taken a minute was put in for the pursuers admitting that the customary use of the word 'reversible' in charter-parties in the shipping trade is to signify that if any time be saved in loading cargo it may be added to the time allowed for discharge. That, of course, admits the defenders' case unless the pursuers establish that they purchased the time, which they aver they did.

"Now as regards what occurred it is proved that an arrangement was made between the shipmaster as acting for the pursuers and a Mr Grankull, whereby dispatch was procured in connection with the loading of the cargo, and I think it may be taken as now proved that the cargo was loaded in nine days instead of the thirteen days which were available.

"Mr Grankull received consideration for that dispatch, and I think that the captain in negotiating with him thought that Mr

Grankull represented the charterers. The way in which the consideration was given to Mr Grankull was that he was allowed to treat the sum as part of the ship's disbursements, and a statement was put upon the bill of lading to the effect that thirteen days had been occupied in loading. That statement, of course, was contrary to the fact.

"What I have to consider and determine —and it appears to me to be the only question I have to consider—is whether in making that arrangement Mr Grankull was acting on behalf of the defenders. I reach the conclusion on the facts that it is not proved that he was so acting. Mr Reid, whose testimony I saw no reason whatever to doubt, was quite clear that Mr Grankull had no such authority. Mr Grankull was not in fact the charterers' representative for all purposes in the port of Christianstad, although in connection with certain acts his action was no doubt binding upon them. Mr Reid explains that although when paying freight a deduction of this £31, 10s. was made because it was treated as part of the ship's disbursements, he in fact has received no benefit from the payment. It has not come to him. I believe him when he made that statement. Taking the evidence as a whole, I cannot hold that there was any action on the part of the defenders which amounted to a holding out of Mr Grankull as their agent at Christianstad, or as one clothed with authority to effect such an arrangement as that suggested. Mr Horne argued that in this case, whether or not he had proved that Mr Grankull was agent for the defenders in effecting this arrangement, the defenders were barred from pleading that he was not their agent. There does not appear to me to be on record any precise plea raising that question, nor are facts averred properly raising the plea.

"The second branch of the fourth plea is that the defenders are not entitled to maintain that they had extra days available for the discharge in respect that the bill of lading which the defenders presented in order to obtain delivery of the cargo bore that all the days allowed for the loading had been used.

"I do not think on the facts in this case that the defenders were bound by that statement on the bill of lading. There is no clear evidence of how it came to be made. There is a considerable amount of evidence, however, in the case that so far as Love & Stewart's representatives on the other side were concerned they were no parties to the arrangement by which time was purchased by the ship. In fact they say that it is against the interests of the defenders that loading should proceed not merely during working hours but at night and in weather that is not suitable. If that be so, so far as the payment of the £31, 10s. is concerned, the defenders appear to have received no benefit, and I have difficulty in seeing how a plea of bar, even if it had been properly pled and properly averred, would apply to the circumstances of the present case.

"I therefore hold that so far as the discharge of the cargo is concerned the defenders had about four days available in addition to the thirteen days they were allowed under the charter-party.

"The principal question in this case is really on the interpretation of the contract, because the matter I have dealt with is entirely special to the circumstances of the case. But a point of general interest undoubtedly is raised on the question of construction. The Inner House, as they found that it was necessary to have proof upon the averment with reference to the meaning and the use of the word 'reversible," allowed a proof to parties of their averments generally. I do not read Lord Dundas' opinion as necessarily at variance with the opinion which I expressed at the conclusion of the argument in the procedure roll. I thought it however safer to allow such evidence as was tendered, particularly by the defenders, upon the question of construction. I have now to express my opinion upon it. It appeared to me to be wholly useless so far as assisting me in interpreting the contract is concerned. I look upon it as both irrelevant and incompetent evidence. It amounted merely to this that Mr Reid, a partner of the defenders, said he considered that, notwithstanding the circumstance that written words had been put in clause 3 of the charter-party, the printed matter should remain. The evidence for the pursuers was to the opposite effect, *i.e.*, that in introducing the written matter their intention was to delete a considerable portion of the printed matter. It is perhaps sufficient that I should simply repeat the opinion that I already gave, because nothing in the case has in any way led me to alter that opinion. I may, however, say this—the printed charter-party was a charter-party where the intention of parties was, and the effect of the language used was, to introduce the custom of the port and other circumstances as affecting the time available for either the loading or the discharging of the cargo. But there is a marginal note to the clause which gives the owners an option to insert a fixed average number of standards per day for loading or discharging. The owners availed themselves of that option, and fixed a certain number. The fact of their so doing appears to me to substitute a fixed number of days for loading and discharging as opposed to a number that might vary according to the circumstances in which the loading or discharging was to take place. I cannot, in addition to giving an interpretation to the written words, give any interpretation to the words 'ordinary steamship dispatch,' because the two things are inconsistent the one with the other, and I have no hesitation whatever in preferring the written part which vouches the exercise of the option, to attempting to retain the printed matter, which would only have the result of making the whole clause something approaching to nonsense.

"I therefore find that the defenders' construction of the charter-party is not a sound construction, and that they are liable in demurrage; but in view of the facts which have been proved in the other parts of the

case, I think that the demurrage to which the pursuers are entitled is 2½ days as against the 6½ days which I previously allowed."

The defenders reclaimed, and argued—(1) Admittedly written words in the charter-party must prevail against printed words, but if they did not conflict they should be read together. The written words "at the rate of 125 fathoms daily" were not inconsistent with the printed words "according to the custom of the respective ports," and the latter words were not superseded by the exercise of an option such as the Lord Ordinary supposed the memorandum to confer on the parties. The memorandum conferred no such option. It merely indicated that the charter-party might be varied—*Central Argentine Railway Company* v. *Marwood*, [1915] A.C. 981; *Mawson Shipping Company, Limited* v. *Beyer*, [1914] 1 K.B. 304, *per* Bailhache, J., at 309; *Elderslie Steamship Company* v. *Borthwick*, [1905] A.C. 93, *per* Lord Halsbury, L.C., at 96; *Wemyss Collieries Trust, Limited* v. *Melville*, (1905) 8 F. 143, 43 S.L.R. 98; *Hulthen* v. *Stewart & Company*, [1903] A.C. 389; *Baumvoll Manufactur von Scheibler* v. *Gilchrist*, [1891] 2 Q.B. 310, *per* Charles, J., at 317. The words "according to the custom of the respective ports" were not limited to the mode of delivery. They affected the time of delivery, inasmuch as the local custom of the port of Newburgh exempted wet days and entitled the defenders to break up the days and to count half days—*Horsley Line, Limited* v. *Roechling Brothers*, 1908 S.C. 866, 45 S.L.R. 691; *Houlder* v. *Weir*, [1905] 2 K.B. 267; *Yeoman* v. *The King*, [1904], 2 K.B. 429; *Aktieselkabet Argentina* v. *Von Laer*, (1903) 19 T.L.R. 151; *Branckelow Steamship Company* v. *Lamport & Holt*, [1897] 1 Q.B. 570; *Nielsen* v. *Wait*, (1885) L.R., 16 Q.B.D. 67; *Postlethwaite* v. *Freeland*, (1880) L.R., 5 A.C. 599; *Nelson* v. *Dahl*, (1879) L.R., 12 Ch. D. 568; *Hough* v. *Althyra & Son*, (1879) 6 R. 961, 16 S.L.R. 553; *Holman* v. *Peruvian Nitrate Company*, (1878) 5 R. 657, 15 S.L.R. 349; *Commercial Steamship Company* v. *Boulton*, (1875), L.R. 10 Q.B. 346; *Brown* v. *Johnson*, (1842) 10 M. & W. 331; *Cochran* v. *Retberg*, (1800) 3 Esp. 121. (2) The defenders were entitled to credit the three days saved at the port of loading. The evidence showed that Grankull had no authority to take payment for these days and to bind the defenders thereby—*Sinclair, Moorhead, & Company* v. *Wallace & Company*, (1880) 7 R. 874, 17 S.L.R. 604; *Hamilton* v. *Dixon*, (1873) 1 R. 72, 11 S.L.R. 39; Gloag, Law of Contract, p. 164. (3) The terms of the bills of lading could not affect the defender's rights under the charter-party—*Sewell* v. *Burdick*, (1884) L.R., 10 A.C. 74, *per* Lord Bramwell at 105; *Wagstaff* v. *Anderson*, (1880) L.R., 5 C.P.D. 171.

Argued for the respondents—(1) Where the written and printed words in the charter-party were in conflict the latter were superseded—*Nelson Line (Liverpool), Limited* v. *James Nelson & Sons, Limited*, [1908] A.C. 16; *Scrutton* v. *Childs*, (1877) 3 Asp. Mar. Ca. 373; *Gray* v. *Carr*, (1871), L.R., 6 Q.B. 522; *North British Insurance Company* v. *Tunnock & Fraser*, (1864) 3 Macph. 1; *Pearson* v. *Goschen*, (1864) 17 C.B. (N.S.) 352. The rate of discharge as fixed by the writing was inconsistent with the printed words "with customary steamship dispatch" and "according to the custom of the respective ports," and therefore the latter words were superseded—*Bennetts & Company* v. *Brown*, [1908] 1 K.B. 490; *Houlder* v. *Weir* (*cit.*); *Postlethwaite* v. *Freeland* (*cit.*); Carver, Carriage by Sea (5th ed.), sec. 611; Scrutton, Charter-Parties and Bills of Lading (7th ed.), sec. 131. "According to the custom of the respective ports" did not go beyond the method and machinery of discharge—*Gardiner* v. *Macfarlane, M'Crindell, & Company*, (1893) 20 R. 414, 30 S.L.R. 541; *Kearon* v. *Radford & Company*, (1895) 11 T.L.R. 226; *Castlegate Steamship Company* v. *Dempsey*, [1892] 1 Q.B. 854, *per* Lord Esher, M.R., at 858 and Fry, L.J., at 861; *Nelson* v. *Dahl* (*cit.*). "Days" in the charter-party meant consecutive days, and included Sundays and holidays, and part of a day counted as a whole day—*Houlder* v. *Weir* (*cit.*); *Metcalfe, Simpson, & Company* v. *Thomson, Pattrick, & Woodwark*, (1902) 18 T.L.R. 706; *Hough* v. *Athyra & Son* (*cit.*); *Holman* v. *Peruvian Nitrate Company* (*cit.*); *Brown* v. *Johnson* (*cit.*). Saturday might be a half-holiday, but as a lay-day it counted as a full day—*The "Katy,"* [1895], P. 56; *Leonis Steamship Company* v. *Rank No.* 2, (1908) 13 Com. Cas. 161. (2) Grankull was the defenders' agent, and the defenders were bound by his actings. Accordingly the "purchased" days should not be included in the days allowed for discharge—*Nelson & Sons, Limited* v. *Nelson Line* (*Liverpool*), *Limited*, [1907] 2 K.B. 705; *The "Glendevon,"* [1893], P. 269; *Avon Steamship Company, Limited* v. *Leask & Company*, (1890) 18 R. 280, *per* Lord Young at 285, 28 S.L.R. 226, at 229; *Freeman* v. *Cooke*, (1848) 2 Ex. 654. (3) In any event the defenders were bound by the terms of the bills of lading—*Craig & Rose* v. *Delargy, &c.*, (1879) 6 R. 1269, 16 S.L.R. 750; *Compania Naviera Vasconzada* v. *Churchill & Sim*, [1906] 1 K.B. 237; *Oakville Steamship Company* v. *Holmes*, 1899, 5 Com. Cas. 48; *Allen* v. *Coltart*, (1883) L.R., 11 Q.B.D. 782; *Glyn, Mills, & Company* v. *East and West India Dock Company*, (1882) 7 A.C. 591; *Hayn* v. *Culliford*, (1879), L.R., 4 C.P.D. 182.

At advising—

LORD JUSTICE-CLERK—This action is one brought by the owners of the s.s. "Glamorgan" for demurrage at the port of discharge. Clause 3 of the charter-party is that out of which the disputes between the parties primarily arose.

The charter-party is the Chamber of Commerce Wood Charter (Scandinavia and Finland) to the United Kingdom, 1899. Clause 3 was originally printed, with the exception of a blank for the rate of demurrage, but the parties in accordance with the memo. on the margin altered the clause in writing so as to make it read "The cargo is to be loaded *at the rate of* 125 *fathoms daily*, and discharged *at the rate of* 125 *fathoms daily, reversible*," the rest of

the clause being left as originally expressed in print.

The parties are agreed that where there is any conflict between the writing and the print the former must prevail, and also that as altered the charter-party is to be read as if the opening words had been that the cargo was to be loaded in thirteen days, and discharged in thirteen days reversible. Further, they are agreed that the printed words "with customary steamship despatch as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports" are displaced by the written alterations, and must be disregarded except, as the pursuers contended, so far as affecting the words which immediately follow, viz., "but according to the custom of the respective ports.'

As to these later words, the pursuers contended either that they too must be disregarded, or alternatively that they only referred to the means or method of loading and discharging, and did not in any way affect the time for loading or discharging, viz., thirteen days, either as to the number of days or as to the meaning of the word "days." The defenders, on the other hand, contended that the words now being considered must be held as effective, with the result that a local custom at the port of discharge, Newport, by which, according to the minute of admissions, the discharge of Baltic pit-props is suspended during wet weather, and during the half of each Saturday, called in the minute Saturday half holidays, must receive effect.

It is not in my opinion necessary to express an opinion on the pursuers' first contention, because in my view the words in question, if retained at all, can only be construed as applying to the means or method of discharge. The defenders founded on the word "but." So far, however, as any important significance may attach to that word, it seems to me to support the view that it only links the word in question to those which precede, and which the defenders concede must be disregarded, with the result that their qualification should also be disregarded.

Article 3 makes an express provision for days to be excepted in the words immediately following those just considered when it says, "Sundays, general or local holidays (unless used) in both loading and discharging excepted." I do not think it would be in accordance with the recognised canons of construction to hold that in addition to these express exceptions further exceptions of wet days and Saturday afternoons should be held to lurk in the words "according to the custom of the port." There is no case where a Saturday half holiday (as the defenders call it) as such has been recognised in this branch of the law, and I do not think it would be right to introduce it in such a charter-party as we are now dealing with.

The only other question was to the alleged purchase, as it is termed by the pursuers, of four days saved in loading by the payment of dispatch money. On this point the pursuers were the reclaimers, the Lord Ordinary having refused to accept their argument. Two points were raised—(1) whether the arrangement made at the port of loading was so made as to bind the pursuers, in respect that Grankull was their agent in the matter; and (2) whether the defenders were not bound by the marking on the bill of lading, viz., "thirteen days used for loading."

On the first point I think the evidence, both oral and documentary, is not satisfactory, although I think the master dealt with Grankull, and was probably entitled to deal with him, as such agent. But the second point, in my opinion, offers a sufficient ground of judgment. I do not consider whether any other course was open to the defenders, but I think it is established that in full, or at least sufficient, knowledge of what had been done at the port of loading as to the four days in question they presented the bill of lading at the port of discharge and took delivery of the cargo on the terms of that bill, including by necessary inference the provision that as thirteen days had been used for loading only thirteen days remained for discharge.

It is not easy to reconcile the various views that have been judicially expressed where both a charter-party and a bill of lading have to be considered, and the problem is not made more easy by pleadings and the proof in the present case. The defenders were parties to two contracts—they were the charterers under the charter-party with the pursuers, they were also the buyers under the contract of sale with Grankull, and they were, moreover, the endorsees and holders of the bill of lading. Under the charter-party the cargo was to be loaded at the rate of 125 fathoms daily; under the contract of sale the seller, Grankull, was to provide cargo for the vessel f.o.b. 100 fathoms per weather working day, and in accordance with the custom of the port. Grankull as seller shipped the cargo and took a bill of lading from the master, which he endorsed blank and delivered to the defenders. The defenders presented this bill of lading to the pursuers, and under and in respect thereof received the cargo. It bore the memorandum "thirteen days used for loading." [*His Lordship examined the evidence, and continued*]—Accordingly on the evidence I hold, as I have stated, that the defenders took delivery of the cargo under the bill of lading with full, or at least sufficient, knowledge of what the memorandum thereon meant and not under the charter-party, and that they did so without any protest or reservation.

The defenders were not shippers of the cargo, and therefore the present case does not fall under the principle which has been applied, where the holder of the bill of lading is both shipper and charterer, even accepting that principle as broadly as it has been stated in some of the decisions. The statement of the law in *Gullischen* v. *Stewart*, 11 Q.B.D. 186, 13 Q.B.D. 317, and *S.S. "Calcutta" Company* v. *Weir*, [1910] 1 K.B. 759, appears to me to apply to the present case. I am therefore of opinion that the defenders are bound by the terms of the bill of lading, and must be held to have

received the cargo on the footing that only thirteen days remained for discharge.

The result is that, in my opinion, we should find the defenders liable in six and a-half days' demurrage, and should decern in favour of the pursuers for payment of £305, 15s. 5d.

LORD DUNDAS—I have come to the same conclusion. As your Lordship has dealt fully with the case, and I am aware that my brother Lord Salvesen is about to do so also, I shall only say a few words.

As regards the construction of the charter-party I think the Lord Ordinary's conclusion is right. The defenders conceded that in order to give proper effect to the written words introduced into clause 3 of that document some part of the printed matter must give way and be disregarded, viz., the words "with customory steamship dispatch as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports." The pursuers' counsel maintained that the words which follow, viz., "but according to the custom of the respective ports," must also be read out of the charter-party. As a question of construction I agree with the pursuers' view. But I do not think it much matters whether or not the words last quoted are held *pro non scriptis*, because according to the authorities, both Scots and English, *e.g.*, *Gardiner*, 1893, 20 R. 414; *Castlegate Steamship Company, Limited*, [1892] 1 Q.B. 854, they are not inconsistent with the obligation to load and discharge at a fixed rate per day, but must be read as relating primarily at least to the mode of doing the work, and not to the time within which it is to be completed. Now the rate of loading and discharging respectively being fixed at 125 fathoms daily, the period for each of these operations appears on a simple arithmetical calculation to be 13 days. The actual operation of discharge covered a period of 19½ days. It would seem therefore that the pursuers are entitled to claim 6½ days' demurrage. The defenders seek to reduce the time occupied in discharging the vessel to 13 days by an ingenious piecing together of broken portions of days alleged to have been actually employed, as set forth on record in answer 5, and they found upon the words in clause 3 of the charter-party that "demurrage shall be paid at 5d. per net registered ton per day, and *pro rata* for any part thereof." I think the defenders' contention is ill-founded. The authorities cited to us seem to me to negative it. But the defenders further argued, and with more plausibility, that at the worst they are only liable in respect of two and a-half days' demurrage, because only nine days having been in fact occupied in loading the vessel they were entitled, looking to the word "reversible" in clause 3 of the charter-party, to spend seventeen days in the discharge. The pursuers in answer to this maintain that they in fact purchased the four days saved in loading by paying dispatch money to Mr Grankull as representing the charterers. The Lord Ordinary was adverse to the pursuers on this point, and they reclaim against this part of his judgment. I think the pursuers are in the right of the matter. A sufficient—and to my mind probably the clearest—ground for so holding is that the defenders having taken up the bill of lading without protest in full knowledge that dispatch money had been paid to Grankull though not of the precise amount thereof, must be held bound by the words appearing on the face of that document, "thirteen days used for loading," and are not entitled in a question with the pursuers to plead that only nine days were in fact occupied in that operation.

The result therefore, in my judgment, is that the pursuers are entitled to six and a-half days' demurrage, and that we must give them decree for payment of the sum sued for as restricted by article 5 of the condescendence.

LORD SALVESEN—The first question raised in this case relates to the construction of clause 3 of the charter-party on which the pursuers' claim for demurrage is based. The printed clause has been altered in terms of the memorandum on the margin, which provides that the owners may arrange for a fixed average number of standards per day for loading and/or discharging. This is somewhat erroneously termed by the Lord Ordinary an option, but it is really a matter of contract between the parties before the charter-party is signed. Although a daily rate of loading and discharging was fixed, the printed matter was allowed to stand; and the clause as it appears in the original charter-party is as follows:—"The cargo to be loaded at the rate of 125 fathoms daily and discharged at the rate of 125 fathoms daily, reversible, with customary steamship despatch as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports, Sundays, general or local holidays (unless used) in both loading and discharging excepted." It is obvious that loading or discharging at a fixed daily rate is inconsistent with the printed clause which follows, for the steamer might be able to receive or discharge at a greater or less rate. It was accordingly admitted by the defenders that so far as the printed matter is inconsistent with the manuscript alterations made before signing the charter-party the latter must prevail. Counsel for the defenders admitted further that the words "with customary steamship despatch as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports" can receive no effect, but must be held as deleted by the provision for loading and discharge at a daily rate. They maintained, however, that the words "but according to the custom of the respective ports" are not inconsistent with the manuscript matter, and therefore are to be construed along with it. In my opinion the Lord Ordinary has rightly rejected this contention. I think this clause qualifies the previous clause, which must admittedly be held *pro non scripto*, and accordingly that it cannot receive any effect. The pro-

vision for a daily rate of loading and discharge is in this view substituted for the series of clauses which regulate the rate of discharge when no fixed rate has been agreed upon by the parties. In my opinion, however, it makes no difference whether they are retained or not, because they cannot be construed as qualifying the obligation to load and discharge at a fixed daily rate. The defenders seek to import by this clause an admitted custom of Newport, which was the port of discharge, not to unload a cargo of timber in wet weather, and not to work for more than half a day on each Saturday. If this had been the intention of the parties, it seems to me that they would have enlarged the exception clause by inserting in it Saturday half-holidays and days in which work was stopped by bad weather. But further, the point appears to be concluded by authority. The words "according to the custom of the port of discharge" have been held to be a mere expansion of the common clause "as customary," and these words in their turn have been held to refer only "to the manner of loading customary at the port of loading." I quote from the opinion of Lord Trayner, who gave the judgment of the Court in the case of *Gardiner* v. *Macfarlane, M'Crindell, & Company*, (1893) 20 R. 414 at p. 426. He goes on to say—"The clause in my opinion affects the question of time only in so far as it might happen that the customary manner of loading occupied more time than some other manner of loading would occupy. For example, if the customary manner of loading is by lighters or barges floated off to the ship's side, the loading of the cargo would occupy more time than would be taken if the cargo was loaded at a wharf by steam crane or by waggons being brought down to the ship's side and the coal tilted into the hold directly from the waggons." These words were so interpreted where the only provision with regard to loading was "to be loaded as customary at Sydney, New South Wales"; but where, as here, there is a specified rate of discharge it seems to me that it cannot be affected even in this indirect manner by reference to the custom. In short, this method of interpreting the clause affords an additional reason for holding that it cannot be read along with the provision for a daily rate of discharge, except so far as the custom may regulate the manner of discharge—either into lighters or on to a quay or the like. The judgment of the Second Division in *Gardiner's* case is binding upon us; but apart from that the same result appears to have been arrived at by the English Courts. In the case of the *Castlegate Steamship Company*, [1892] 1 Q.B. 854, Lord Esher, M.R., said—"The expression 'as customary' if expanded must mean the same as 'according to the custom of the port.' . . . Therefore unless the present case can be distinguished as regards the construction of these terms by reference to the other terms of the charter-party, it follows that the words 'as customary' refer to the manner and not to the time of discharge." This latter case was decided in the same year as the case of *Gardiner* and without either Court having before it the views expressed by the other. Fry, L.J., seems to express in different language the exact view which commended itself to Lord Trayner. He said—"It has been held in *Dunlop & Sons* v. *Balfour, Williamson, & Company*, [1892] 1 Q.B. 507, and in other cases that the words 'as customary' in such expressions as this are equivalent to 'in the customary manner.' They therefore primarily refer to manner of discharge and secondarily only to time. They are not entirely disconnected with time, because the dispatch is to be in the customary manner, and that manner may be one which expedites or delays the discharge of the cargo." I am accordingly of opinion that it makes no difference in the present case whether the words "according to the custom of the respective ports" are held to be deleted or to remain as part of the clause. In the latter case they must be limited to the customary mode of discharge, which it is not said in any way impeded the unloading of the vessel.

If I am right so far, then the time for loading and discharging of the pursuers' vessel was fixed, and the obligation to load and discharge within the time fixed a strict one. There is ample authority for holding that so soon as the capacity of the vessel to load cargo has been ascertained, a provision to load at a certain rate daily is exactly the same as if the number of days for loading had been fixed, that number being ascertained by the daily rate divided into the total number of fathoms carried by the ship. In this case it is admitted that the number of days so ascertained is thirteen for each of the operations of loading and discharging, and the contract between the parties is the same as if it had been expressed that the cargo was to be loaded in thirteen days and to be discharged in thirteen days. Now the word "day," when occurring in a charter-party has acquired a fixed meaning which is nowhere better stated than by Lord Shand in *Holman* v. *Peruvian Nitrate Company*, 5 R. at p. 661—"If the term 'running days' be used in a charter-party, it has been long settled that every day, including Sundays and public holidays of every kind, is reckoned against the charterer and in favour of the shipowner, who has agreed to allow so many days consecutively only; and the rule is the same when the word 'days' or 'lay-days' only is used apart from any proved custom which may control or explain the meaning of these words. . . . Where it is intended to alter this common mode of stipulation it has become usual to qualify the term 'days' by prefixing the word 'working'; but I am of opinion that the effect of this is substantially the same as if the expression 'lawful days had been used; and the result is merely that in place of every day being reckoned, Sundays and certain recognised holidays shall not be included." It is indeed said by Mr Carver in his book Carriage by Sea, section 613—"No doubt when the work is to be done at a certain rate per day that must mean per working day." I accept that view, but it makes no difference in

the present case, for Sundays and general or local holidays are expressly excepted; so that the days referred to in this charter-party do mean working or lawful days.

Assuming that I have correctly construed the clause in the contract on which this matter depends, and on the other assumption that only thirteen days were available to the defenders for discharging the cargo, it is conceded that the ship was actually detained six and a half days beyond the thirteen days in question, and that demurrage at the specified rate per day falls to be paid to the pursuers.

It was at first argued on the pursuers' behalf that every fraction of a day must count as a whole day, and that they were entitled to seven days' demurrage; but this argument was ultimately given up, and indeed cannot be maintained consistently with the judgment in the case of *Horsley*, 1908 S.C. 866.

I turn now to what I regard as the more difficult question with regard to which the Lord Ordinary has decided adversely to the pursuers. The manuscript clause in the charter-party which regulates the daily rate of loading and discharge ends with the word "reversible." This word is more generally used where the contract stipulates for a fixed number of lay-days for loading and a fixed number of lay-days for discharging; but it is equally applicable where the rate of loading and discharging only is fixed, and although at one stage of the case its effect appears not to have been appreciated, that has been put beyond all question by the pursuers' minute of admissions. The clause as construed with the aid of this minute means that the charterers have the right of slumping together the total lay-days, and are not to be liable for demurrage if in the processes of loading and discharging they do not exceed the total number of lay-days. Thus if nine days only were actually employed in loading as in the present case the charterers were entitled to detain the ship for seventeen working days at the port of discharge without being liable for demurrage. In point of fact the "Glamorgan" was loaded in nine days at Kristinestad, although this dispatch was only obtained by working a considerable amount of overtime. The case for the pursuers, however, is that the captain on their behalf entered into an arrangement with the agent of the charterers who supplied the cargo that the latter should receive a payment of £9 per day for every day saved in the operation of loading, and that in terms of this arrangement the captain allowed the sum of £31, 10s. to be debited against the ship and deducted from the freight that would otherwise have been due. Had the days of loading and discharge not been reversible this would be a matter with which the defenders had no concern; but as matters stand the master had no interest in paying for dispatch at the port of loading if the only result was to enlarge the period during which the steamer could be detained at the port of discharge by exactly the number of days saved in the operation of loading. Accordingly it was part of the bargain between him and the charterer's agent that any time saved at the port of loading and for which the captain paid was to be treated as if it had been actually used. In accordance with this arrangement there was marked on the bill of lading which the captain signed the words "thirteen days used for loading." The defenders decline to recognise this bargain as binding upon them. They say that Mr Grankull, who entered into it with the captain, had no authority, either express or implied, so to contract on their behalf, and that they are entitled to disregard it. On the other hand the pursuers maintain that they were referred to Mr Grankull as the agent of the charterers at the port of loading, that they contracted with him on this footing, and that it is within the implied authority of such an agent to arrange with the captain in all matters relating to the loading of the cargo, including an arrangement to expedite the loading on receiving an agreed-on sum by way of payment.

In dealing with this controversy it is necessary to distinguish the facts which were known to the defenders and those of which the captain had cognisance. Mr Grankull did not hold any appointment as general agent for the defenders. He is a timber merchant in Finland, and in October 1911 entered into a contract with the defenders for the sale to them of 8000 cubic fathoms of pit-props. It was contemplated in this contract that the defenders would charter the vessels to load the props, the sale being an f.o.b. one, and it was expressly provided that intimation of chartering was to be given to the seller (Mr Grankull) at least six days before the vessel's calculated arrival at the loading place. The contract, however, contained the following clause—"The seller must provide cargo to the vessel as soon as it arrives and can take on board 100 fathoms per weather working day and in accordance with the custom of the port." The contract also provides that the vessel must clear with Mr Grankull or his agent, and also employ his stevedores at a specified rate per cubic fathom, and it provides—"If any dispute arises between the seller and the captain regarding demurrage or other matters the same must be arranged before bills of lading are issued or the amount will be made good to the buyers in the seller's invoice."

It thus appears that Mr Grankull's actual relation to the cargo of the "Glamorgan" was that he was the shipper of it under a contract with the defenders to load it in that vessel, which they had chartered for the purpose. He was not bound in any way by the charter-party, and had therefore no responsibility to the ship. His contractual obligation was to load no more than 100 cubic fathoms on board the vessel per weather working day. Assuming that all the working days were favoured by good weather, he was still absolutely entitled to keep the vessel at the port of loading for sixteen and a quarter days, and for as many more days as the loading might be interfered with by the weather. Mr Reid, who is a director of the defenders' company, frankly admits

this in his evidence, and says—"Of course although the shipper protects himself by that minimum, we know perfectly well from experience that he can load a little better than that, and therefore we took the risk. That is just a frank explanation. If he had not been able to do it we would have had to pay the piper." Mr Reid might also have added that if Mr Grankull was not willing to do so, the defenders would also have had to suffer. In these circumstances Mr Grankull might well think himself entitled to make a bargain with the captain, by which if he succeeded in loading the vessel four days sooner than the stipulated lay-days in the charter-party he would receive such payment from the captain as he could induce him to make. The defenders were not prejudiced in his view by this arrangement, for one half of the lay-days still remained to them for the discharging of the vessel although he was entitled under his contract to encroach upon these to the extent of another three or four days.

The true relation of Grankull to the defenders was not however known to the captain of the "Glamorgan." On the margin of the charter-party the master is directed to apply for cargo to Geo. W. Easton, Wiborg, who was represented as the shipper. The captain did so, and was directed by Easton to Mr Grankull as the person from whom he would receive his cargo. In point of fact Easton was the general agent of the defenders in Finland and was not in any sense the shipper of the cargo, but the captain had no knowledge of the true state of the facts. The person from whom he was to load was described in the charter-party as the agent for the charterers, and Mr Grankull was the only person who filled that position. The charter-party also obliged the steamer to employ charterer's stevedores. Mr Grankull appointed these stevedores at the port of loading and performed all the other duties that fell to be discharged by the charterer's agent at the port of loading. The cargo was brought to the steamer by him; he supplied cash for the steamer's ordinary disbursements; he prepared the bill of lading in terms of the form endorsed on the charter and presented it for signature by the master. In short, every detail, including the clearing of the ship at the custom house, was performed by Mr Grankull, and the only evidence in the case is to the effect that the captain believed that Grankull was the defenders' agent and that it was their cargo which was being shipped on board his vessel. Under the contract between Grankull and the defenders, provision was made for a representative of the defenders being on the spot to check the measurement of the cargo, and the young man D. G. M'Kerracher was in fact in attendance at Kristinestad while the loading was going on, and was superintending the measuring of the cargo on their behalf, but there is no reference to him in the charter-party, and his sole duties related to the measurement of the cargo, with which the vessel had little concern, as it was not responsible even for the number of the pieces of cargo put on board. In these circumstances I think the conclusion cannot be resisted that Grankull was, as in a question with the ship, appointed the agent of the charterers and that the master was entitled to contract with him as such.

The question, however, remains whether the agent of the charterers has as such authority to bargain with the master that if less time than the stipulated number of days fixed for the loading is actually taken, the master shall pay for such despatch on the footing that the days saved and paid for shall not be added to the lay-days fixed for discharging. This, so far as I know, is a novel question, but in my opinion it must be answered in the affirmative. No doubt it is possible to communicate by telegraph in these modern days from almost every port in Europe where vessels are loaded to charterers who are resident in this country, but I think the master of a ship is entitled to deal with the agents of the charterers on the spot on the footing that they are representing the charterers in all matters connected with the loading of the vessel. It was said that this would not imply an authority to vary the charter, and I should be disposed to assent to this proposition, but the arrangement between the master and Mr Grankull did not involve any variation of the charter-party. The master knew that Grankull was entitled to detain the vessel for thirteen days at the loading port. It would therefore *prima facie* appear to be to the advantage of the charterers that they should receive a payment for every day less than the thirteen days by which he might expedite the loading. To the ship also it was an advantage, but only on the footing that the time saved and paid for was held as having been occupied, so that it could not be added, as it otherwise would have been, to the lay-days at the other end. From the point of view of the charterers it appeared to be an advantageous arrangement, because the full number of days for which they had stipulated for the discharge of the ship was not in any way encroached upon, and a sum of money was paid over to their agents in consideration of the time saved to the ship. Had Grankull in fact been the agent of the defenders he could have been required to account to them for the payment made to the captain under deduction of any payments which he made to the stevedore's men for working overtime. As it happens, the money remains in Grankull's possession, and the defenders have as in a question with the ship only themselves to blame for the money having been paid over to him. If he is accountable to them for any portion of it, their claim against him remains open.

I am accordingly of opinion that the defenders are not entitled to repudiate Grankull's authority in respect of an arrangement which was made by him as their nominated agent, and which appeared to be for the mutual advantage of shipowners and charterers. That it would have been better, as matters have turned out, if the ship had been loaded in nine days and that no such agreement had been made goes

without saying; but the answer is that but for the agreement the ship would in all probability not have been loaded in less than thirteen days, and might indeed, if Grankull had chosen, have been longer detained by him without his incurring any responsibility either to shipowners or charterers.

There is, however, one other ground for reaching the same result, which as it seems to me is conclusive against the defenders. When the bill of lading came to be adjusted before signature by the captain the words "thirteen days used for loading" were written in manuscript upon it, and it also contained a receipt on account of freight for £467, 15s. 6d. signed by the master. This sum included the £31, 10s. which the master had agreed to pay for dispatch. The receipt authorised the consignee of the bill of lading, whoever he might be, to deduct £467, 15s. 6d. from the freight due at the port of discharge. There was some discussion between Mr Grankull and M'Kerracher as to the form of the bill of lading, and ultimately the bill of lading was adjusted in its present form, which was the form that M'Kerracher preferred, the words "thirteen days occupied in loading" taking the place of "thirteen days remain for discharge." M'Kerracher says that he protested against any note to this effect being put upon the bill of lading, but this is denied by the master, who says that M'Kerracher wrote in his own hand the words which appear on the printed document. This document, although presumably in the hands of the defenders, has not been produced. There is no suggestion of any protest in the letter which M'Kerracher immediately thereafter wrote to the defenders. On the contrary, a certificate by Mr Grankull was enclosed in it to the effect that all the cargo had been loaded in nine working days, and that as the captain had promised to pay him for every day saved he had received dispatch money in respect of four days so saved. M'Kerracher's letter corroborates Grankull as regards the fact, although he puts the days saved at two or three, and he adds that if the captain had not paid extra for dispatch the steamer would not have been loaded much under the time allowed per charter. A copy of the bill of lading was enclosed with the letter of 11th July, and was received by the defenders prior to the arrival of the ship at Newport. The principal bill of lading was forwarded by Grankull to his bankers, along with an invoice certified by M'Kerracher for payment to him of £1114, 3s. 6d., which was the price of the cargo plus the sum of £467, 15s. 6d., the amount advanced on account of freight. It is plain that the defenders had no title to receive the cargo unless they took up the bills of lading in the hands of the bankers and accepted Grankull's draft upon them for the amount contained in the invoice. Mr Reid admits this, and says—"I did not on presenting the bill of lading for the goods take any exception to the statement on the face of it that thirteen days had been occupied in loading, because I knew that our agent had already protested and said that he would hold Mr Grankull responsible for the consequences, and therefore I took the bill of lading without saying any more about it. We thought it was not a serious enough question to entitle us to refuse the man's draft and bill of lading, which, as you know, would have caused a great deal of trouble." The alleged reason for adopting this attitude is not supported by any evidence at all. At the time when the bill of lading was taken up the defenders had received no information as to any protest or as to any threat to hold Mr Grankull responsible. All the information they had at the time is contained in the certificate by Grankull and M'Kerracher's letter already referred to. No doubt Mr Reid afterwards was told M'Kerracher's version of what passed at the interview when the bill of lading was signed, but that was undoubtedly long after the date when the bill of lading was presented by him for the delivery of the cargo. At that time he knew all the material facts — that nine days only had been occupied in loading, and that Grankull had been paid dispatch money for four days saved. The exact amount of money paid he did not know, but this was in my view quite immaterial, and it seems to me also immaterial whether he knew that it was included in the £467, 15s. 6d. which he deducted in settling the amount of freight due to the ship.

I am of opinion accordingly that the defenders are not entitled to repudiate the transaction between the captain and Grankull, and to hold, contrary to the bill of lading which they presented to the captain without protest, that they had still seventeen days in which to discharge the vessel. Had they taken up that position at the time, the master would certainly have been entitled to maintain that he was not bound to submit to a deduction from his freight, to the extent at all events of the amount of the dispatch money included in the freight advanced. The only warrant which the defenders had for deducting £467, 15s. 6d. from the vessel's freight was the master's receipt on the bill of lading. They cannot use the bill of lading as a warrant for making this deduction and at the same time repudiate one of the conditions on the faith of which the captain's receipt was given. In the case of *Harman* v. *Gandolph*, (1815) Holt's Report at p. 38, the ordinary liability of consignees is thus stated—"The consignee by taking to the goods contracts with the owners to perform the terms upon which they have undertaken to convey and deliver them. Those terms are expressed in the bill of lading," and in the case of *Gullischen* v. *Stewart*, (1883) 11 Q.B.D. 186, Pollock, B., said —"The consignees because they are charterers are not the less liable in respect of the stipulations of the contract which they have made by the bill of lading." If they desired to raise this question with the ship they should either have protested at the time and before the cargo was delivered, or they should have refused to take up the bill of lading at all, in which case no doubt the bill of lading would have been assigned by the shipper to some third party who could not have disputed its terms and who would

have been liable to pay the ship's demurrage if more than thirteen days had been occupied in discharging the cargo. If they have any remedy at all it seems to me that that remedy is not against the ship but against the shipper, and looking to the terms of their contract with him he would seem to have a very plausible defence. The truth of the matter I think is that the defenders at the time when they presented the bill of lading never anticipated that the discharge would be hindered by bad weather to such an extent as was actually the case; but this was just one of the risks which they took in agreeing to a stipulated rate of discharge instead of adhering to the printed clauses of the ordinary charter-party. I am therefore of opinion, differing from the Lord Ordinary on this branch of the case, that the pursuers have established their right to six and a half days' demurrage, and that our decree should be for the amount for which the Lord Ordinary originally decerned.

LORD GUTHRIE—On the question of construction I think the Lord Ordinary has come to a right conclusion. The case is cleared of its chief difficulty once it is admitted by the defenders, as they were bound to do, that the usual principle of construction, namely, that the Court is bound, wherever reasonably possible, to give effect to every undeleted clause in the document they are construing, is inapplicable. They admit that certain parts of article 3 of the charter-party must be treated as if they had been deleted. I agree with your Lordships that the same reasons which compel this admission, make it equally necessary to hold as deleted the words "but according to the custom of the respective ports," on which the defenders rely. I also agree that even if these words be left standing, their application in an article framed like the one the Court is asked to construe must be held as referring to mode of delivery and not to time, except in so far as time is affected by mode of delivery. On the question of Grankull's agency for the charterers, *ad hoc*, in the absence of any other person to act for them, and his power on their behalf to traffic in unused or saved days of loading, I do not differ from the conclusion Lord Salvesen has reached; but I prefer to rest my judgment on this part of the case on the terms of the bill of lading and the defenders' use of it without protest or qualification. I think the pursuers' plea 4 (2) is well founded. The result, as it happens, is to affirm in effect the Lord Ordinary's interlocutor of 13th June 1913, which was pronounced on relevancy.

The Court pronounced this interlocutor—

". . . Recal the said interlocutor: Of new find that the defenders' construction of the charter-party is not a sound construction, and that they are liable in demurrage; fix the same at six and a-half days; and decern against the defenders for payment to the pursuers of the sum of £305, 15s. 5d., being the amount sued for as restricted by condescendence 5, with interest as concluded for. . . ."

Counsel for the Pursuers (Respondents)—Horne, K.C.—A. M. Mackay. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Defenders (Reclaimers)—Sandeman, K.C.—D. Jamieson. Agents—Dove, Lockhart, & Smart, S.S.C.

HOUSE OF LORDS.

Monday, February 28, 1916.

(Before the Lord Chancellor (Buckmaster), Lord Kinnear, Lord Atkinson, and Lord Shaw.)

WORDIE'S TRUSTEES *v.* WORDIE.

(In the Court of Session, January 15, 1915, 52 S.L.R. 306, and 1915 S.C. 310.)

Trust—Charitable and Educational Bequests—Uncertainty.

Held that a direction to trustees, duly appointed, "to pay over the balance or residue of my estates to or for behoof of such charitable purposes as I may think proper to name in any writing, however informal, which I may leave, but failing my leaving such writings, then to such charitable institutions or societies which exist for the benefit of women and children requiring aid or assistance of whatever nature, but said institutions and societies to be under the management of Protestants"—the testator having left no such writing—was not void from uncertainty, neither on the ground that no power of selection was expressly conferred on the trustees, nor on the ground that the objects to be benefited were insufficiently pointed out.

This case is reported *ante ut supra.*

Miss Janet Wordie and others, the testator's whole next-of-kin, *second parties*, appealed to the House of Lords.

At the conclusion of the argument on behalf of the appellants—

LORD CHANCELLOR — In this case the question that arises for your Lordships' decision is to be found in the will of one Peter Wordie who died on the 27th June 1913. He left surviving him two sisters and some nephews, who together represent the class of next-of-kin, the appellants, in the present proceedings. His will was dated the 28th February 1911. By it he appointed certain people, who are the respondents to this appeal, trustees. He expressed his full confidence in their integrity and their ability to execute the trust he reposed in them, and then he made certain pecuniary bequests and gave certain annuities, and finally created the trust of his residuary estate which has given rise to the present dispute. The pecuniary bequests and annuities are quite trivial in amount in comparison with the total value of the estate, and consequently the residuary gift embraces by far the greater portion of the testator's property. That gift is in these terms—"I direct my trustees to realise and convert into cash the