Works to execute the work specified in the notice. The Dean of Guild informed us that it has been the practice in his Court to combine the application for an inquiry and the application for a warrant in one petition. He does not, however, say that that has ever been done in a case like the present, where the original petition was presented on the false narrative that no objections had been lodged to the notice. Apart from this point I think the practice is not in accordance with the Glasgow Police Act 1866, on which it bears to proceed. The procedure where objections have been lodged is prescribed by section 322, and provides for the objecting proprietor being cited to appear before the Dean of Guild, who is to inquire into and try and decide the said question. Section 325 may thereafter be brought into operation if the Dean of Guild has previously repelled the objections, and it may also be appealed to if no objections have been lodged. It is only where there is a failure to comply with a requisition that a warrant may lawfully be applied for to have the work specified therein executed. But an objecting proprietor who has given due notice of his objections cannot be said to have failed to comply with the requisition the validity of which he disputes. If he be found wrong in the inquiry provided for by section 322, it is not to be assumed that he will fail to comply with the notice, and until there has been such failure I think it is incompetent to have recourse to section 325. In my opinion, therefore, the whole proceedings in this case were incompetent, proceeding as they did on the mistake that the appellant was a person who had failed to comply with the notice, whereas he was an objecting proprietor who was entitled to have his objections disposed of under section 322. That initial mistake I think could not competently be cured by amendment, even if it would have been competent, in a proper application under section 322, to have added a crave under section 325.

I am, therefore, of opinion that the appeal should be sustained, and that we should remit to the Dean of Guild Court to dismiss the petition, so that if any further procedure is necessary it may be taken in terms of section 322.

LORD GUTHRIE was absent.

The Court repelled the objections stated by the petitioner and respondent to the competency of the appeal, sustained the appeal, recalled the interlocutor of the Dean of Guild appealed against, and remitted to him to dismiss the petition.

Counsel for the Petitioner and Respondent — Sandeman, K.C. — D. P. Fleming. Agents—Campbell & Smith, S.S.C.

Counsel for the Respondent and Appellant —Constable, K.C. — MacRobert. Agent— A. C. D. Vert, S.S.C.

HOUSE OF LORDS.

Tuesday, July 29.

(Before Viscount Finlay, Viscount Cave, and Lords Dunedin, Shaw, and Wrenbury.)

FRONSDAL & COMPANY (OWNERS OF S.S. "HANSA") *v.* WILLIAM ALEXANDER & SONS.

(In the Court of Session, November 23, 1918, 56 S.L.R. 60.)

Ship — Charter-Party — Demurrage — Lay Days—"Provided Steamer can Discharge at this Rate."

Charterers of a ship were under the charter-party to unload its cargo of timber at the rate of 100 standards per day, "always provided that steamer can . . . discharge at this rate." Owing to shortage of labour the rate was not maintained and the shipowners claimed demurrage. *Held* that the charterers were liable, as there was no fault on the part of the shipowner, and the proviso of the charter-party did not cover want of labour, but referred to the capacity and fittings of the vessel herself.

This case is reported *ante ut supra.*

The defenders, William Alexander & Sons, charterers of the s.s. "Hansa," appealed to the House of Lords.

At delivering judgment—

VISCOUNT FINLAY—This is a claim by shipowners for demurrage under a charter-party. The Lord Ordinary decided in favour of the pursuers (now respondents), and the Second Division affirmed his decision. The questions arising on this appeal from their affirmance are two—(1) as to the general nature of the obligation imposed upon a charterer by a clause providing for discharge in a fixed number of days; and (2) as to the meaning and effect of the words at the end of the marginal note in this charter-party—"always provided steamer can load and discharge at this rate."

The appellants are the charterers and the respondents the owners of the steamship "Hansa." By the charter-party the vessel was to load at Archangel a cargo of timber and proceed with it to Ayr. The third clause in the charter-party so far as material is as follows:—"The cargo to be loaded and discharged *at the rate of not less than* 100 *standards per day, counting from steamer's arrival at the respective five ports, and notice of readiness given in writing during business hours and permission to load granted, whether berth available or not, always provided that steamer can load and discharge at this rate.* . . ." The words in italics form the marginal note, and there is a provision in the charter that "should the steamer be detained beyond the time stipulated as above for loading or discharging demurrage shall be paid at £70 per day and *pro rata* for any part thereof."

If the discharge at Ayr had been carried out at the rate of 100 standards per day the

time occupied would have been six and one-third days. Owing to a scarcity of labour at the port, the discharging, which began on the 17th November, was not completed until 6 p.m. on the 2nd December. By the custom of the port the discharge was a joint operation. It was the duty of the shipowners to put the cargo on the quay and of the charterers to remove it thence. Both the shipowners and the charterers employed the same stevedore for this work, and as he could not get enough men delay took place alike as regards the placing of the cargo on the quay and its removal thence. The appellants having been sued by the respondents for demurrage at the stipulated rate, urge that they are not liable as the ship was not in a position to put the cargo on to the quay at the stipulated rate owing to the same cause, scarcity of labour, which prevented the appellants from removing it.

Lord Hunter, the Lord Ordinary, rejected this contention. He said — "It is well settled that where a merchant has undertaken to discharge a ship within a fixed number of days he is liable in demurrage for any delay of the ship beyond that period, unless such delay is attributable to the fault of the shipowner or those for whom he is responsible. The risk of delay from causes for which neither of the contracting parties is responsible is with the merchant."

The Second Division, consisting of the Lord Justice-Clerk, Lord Dundas, Lord Salvesen, and Lord Guthrie, were unanimously of the same opinion. Lord Dundas said that in view of the authorities, if Mr Sandeman's appeal for the appellants was to succeed, it must be in the House of Lords.

On this appeal a great many cases were cited laying down the rule that if the charterer has agreed to load or unload within a fixed period of time (as is the case here, for *certum est quod certum reddi potest*) he is answerable for the non-performance of that engagement whatever the nature of the impediments, unless they are covered by exceptions in the charter-party or arise through the fault of the shipowner or those for whom he is responsible. I am here adopting in substance the language used by Lord Justice Scrutton in his work upon charter-parties and bills of lading, article 131. Of the authorities I will mention only *Budgett* v. *Binnington*, [1891] 1 Q.B. 35, and I refer especially to the judgment in that case given by Lord Esher.

Although no authority upon the point was cited which would in itself be binding upon your Lordships' House, there has been such a stream of authority to the same effect that I think it would be eminently undesirable to depart in a matter of business of this kind from the rule which has been so long applied, even if your Lordships felt any doubt as to the propriety of these decisions in the first instance — I myself have no doubt as to their correctness — and I understand that this is the opinion of all your Lordships.

It seems to me that the appeal on this point must fail.

With regard to the construction of the concluding words of the marginal note, the motive of the charterers for desiring the insertion of these words is immaterial; the question is, what is the true meaning of the words themselves. As regards all mechanical facilities and appliances the steamer was equipped for delivery at the rate mentioned in the charter-party. It was owing to the shortage of labour that she was unable so to deliver. It was forcibly contended that it was for the ship to provide the labour as well as the appliances, that appliances without labour are of no use, and that it is a condition of the charterer's liability in terms of the marginal note that the steamship should be in a position to discharge at the stipulated rate having men and appliances alike.

I do not think that this meaning should be read into the words of this proviso. The Court of Appeal in the case of the *Northfield Steamship Company* ([1912], 1 K.B. 434) took the view that such words should be read as referring merely to the physical capacity of the ship for discharging, and that where the inability to discharge was due to want of labour without fault on the part of the shipowner or of his servants, the charterers would not be protected by such words. I think they were right. If it had been intended that mere inability on the part of the ship to find labour should excuse the charterer much clearer words would have been employed. The terms used are not sufficient to work such a departure from the well-established rule that the charterer is excused from delivery in the stipulated fixed time only when he is prevented from doing his part by the default of the shipowner. He is not excused by the fact that the shipowner as well as himself was prevented without any fault on his part from doing his share of the work.

I think that this appeal should be dismissed with costs.

I am authorised to say that my noble and learned friend Viscount Cave concurs in the judgment I have just read.

LORD DUNEDIN—[*Read by Lord Atkinson*] —The general question of the construction of a contract to load and discharge a vessel within a certain date is too well settled to be unsettled now. In the words of Mr Bell (Principles, 432)—"When lay-days and demurrage days are stipulated the shipper's obligation is absolute not to detain the ship beyond the days; and he will be liable for the demurrage . . . although occasioned by circumstances over which he has no control." The only real question in this case is as to the effect of the ship clause. As to this I agree with the learned Judges of the Court below. It is, I think, impossible to draw any distinction between any of the various kinds of agencies which are not within the control of the ship any one of which may delay the loading or unloading. If, therefore, the clause in question were given the most expanded meaning it would certainly reverse the ordinary legal result of the stipulation as to lay-days. I agree with the Lord Justice-Clerk that if that was meant it would have to be effected by unambiguous words. If, on the other

hand, the clause is to have a restricted meaning, then I agree that it must refer to some defect peculiar to a ship as a ship. So construed it is not without its use, for I do not agree with what Mr Sandeman urged, namely, that if the clause were not there and the ship's hatches were such that unloading within the days was not possible, the ship could not insist upon demurrage. In such a case I think the general rule would apply, the charterer having taken upon himself to guarantee the discharge within a certain number of days. Such a case is distinct from a case of actual fault on the part of the master hampering discharge. I should only in conclusion mention the case of *Hansen* v. *Donaldson* (1874, 1 R. 1066, 11 S.L.R. 590), upon which the appellant placed great reliance. I think that decision can be well supported but only in one view, namely, that the master was able to get extra assistance and did not get it. Whether that was a true view of the facts matters not. The Lord Justice-Clerk in one passage shows, I think, that a case of the present sort was not in his view to be ruled by that decision. He says—"Until the shipmaster, not being prevented by an external or adventitious circumstance, was prepared to give delivery there could be no detention of the vessel in the sense of the charter-party." Shortage of available labour is an external and adventitious circumstance. Lord Ormidale speaks of culpable delay on the part of the ship in putting out the cargo, and that this is the true view of the case seems to follow from the fact that both the Lord Justice-Clerk and Lord Ormidale accepted the general law as to the charter guaranteeing the unloading in a certain time as settled by the cases.

I think the appeal should be dismissed.

LORD SHAW—I concur. I am of opinion that the judgments of the Courts below are correct, and that the demurrage of £490 is due. No question is raised in the appeal as to the calculations upon which this sum is reached, and it is admitted that the lay-days were exceeded by 7, these lay-days being calculated in the proportion of 100 standards per day of the total cargo of 630 standards.

The question in the case arises upon clause 3 of the charter-party and these words therein, *i.e.*,—"The cargo to be loaded and discharged at the rate of not less than 100 standards per day counting from the steamer's arrival at the respective ports, and notice of readiness given in writing during business hours, and permission to load granted whether berth available or not, always provided the steamer can load and discharge at this rate."

It is admitted that notice of readiness to discharge was duly given by the ship on her arrival at Ayr on 17th November 1915. The reason in fact why the ship was not discharged within the lay-days is admittedly stated accurately in the examination of the witness Kenny, who was charged by both parties to make arrangements for the discharge of the ship—"(Q) Did you get for the ship all the men that you could get? (A) All that I could find round about; any old man who was knocking about I employed and put him on ship work." In a later passage the same witness says—"The complaint then really was a fewness of men, shortage of labour. Apart from that I never heard anything said on the subject." As applied to facts like these the law is perfectly well settled. In *Randall* v. *Lynch* (2 Campbell's Report, 355) Lord Ellenborough stated the position in law, which has never been departed from—"I am of opinion that the person who hires a vessel detains her if at the end of the stipulated time he does not restore her to the owner. He is responsible for all the various vicissitudes which may prevent him from doing so."

This proposition was repeated in ampler words by Lord Selborne in *Posselthwaite* v. *Freeland* (5 A.C. 599, at p. 608)—"There is no doubt that the duty of providing and making proper use of sufficient means for the discharge of cargo when a ship which has been chartered arrives at its destination and is ready to discharge lies (generally) upon the charterer. If by the terms of the charter-party he has agreed to discharge it within a fixed period of time, that is an absolute and unconditional engagement for the non-performance of which he is answerable whatever may be the nature of the impediments which prevent him from performing it and which cause the ship to be detained in his service beyond the time stipulated."

This law has been applied over and over again and is too settled to be shaken. The risk of vicissitudes which prevent the loading or discharge of cargo within the stipulated lay-days lies unconditionally with the charterer. This is the prescription of the general law. To avoid its application either (1) the contract of parties must be absolutely clear, or (2) it must be established that the failure of the charterer's duty arose from the fault of the shipowners or those for whom they are responsible. The law of Scotland is identical with that of England on this topic. Mr Bell is as clear as the English judges quoted when he says in his "Principles"—"When lay-days and demurrage days are stipulated, the charterer's obligation is absolute not to detain the ship beyond the days, and he will be liable for the demurrage or for the loss arising from detention although occasioned by circumstances over which he has no control." Recent cases in Scotland have followed this clear rule.

But the appellants found upon *Hanson* v. *Donaldson*, 1 R. 1066, 11 S.L.R. 590. I do not look upon that case as varying or invading the principle. In so far as it may be held to do so—and some of the language of the Lord Justice-Clerk (Moncreiff) is not very clear—the decision must in my humble opinion be reckoned a bad one. But in truth the decision was one upon fault, and to *prevent* a person from claiming damages or a remedy under contract in respect of circumstances which he himself has brought about is a principle of much wider application in law than in regard to shipping. Lord Ormidale, however, cleared up the point in his opinion

when, after quoting Mr Bell as above, he comments as follows upon the passage—"He does not mean to say, and does not say, that the merchant or consignee is liable for the consequences of detention caused by fault on the part of the ship, or, in other words, by the culpable or undue delay of those in charge of the ship in putting out the cargo."

It was on this latter ground that *Hanson* was decided. It is admitted in the present case that no fault attaches to the respondents. The responsibility for delay and consequent damage is accordingly with the appellant. It would have been with them under the general law supposing wind and weather had been such as to prevent discharge of cargo, and even under this special charter-party it is expressly provided that the unloading days have to count "whether berth available or not." It is not disputed that the vessel was of a capacity and had equipment to enable the proviso to be complied with, viz., that the "steamer can load and discharge at this rate." A proviso of that description cannot be construed in a general sense so as to wipe out the well-known obligations and responsibilities which rest upon the charterer. The inability to discharge is an inability of the steamer in the more limited sense of a reference to the vessel itself, its equipment or the like. And the meaning of the clause is, that suppose, for instance, the charterer was ready and able to discharge at 100 standards per day, but on account of the ship's defect or lack of equipment her maximum discharge could only be 50 standards per day, then, of course, in such a case the position of the ship is just the same in result as if by deliberate fault of those in charge of her the performance of the charterer of his obligations had been prevented. Construed in any broader sense, the proviso would wipe out the obligation, and this can never be allowed.

LORD WRENBURY—This is the charterers' appeal from an interlocutor holding them liable for demurrage. There arise two points for decision—first, whether, if the charter had not contained the proviso presently stated, the charterers would have been liable; and secondly, whether, if the first question be answered in the affirmative, the charterers are protected by the proviso "always provided steamer can load and discharge at that rate."

The charter provides as follows—"The cargo to be loaded and discharged at the rate of not less than 100 standards per day 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," &c. For the moment I stop there. The cargo was 630 standards, and by arithmetical computation, therefore, although not by definition of lay-days in so many words, the charterers were entitled to 6⅓ lay-days. The action is for demurrage at per day in excess of that time. The vessel was detained for 13½ days. The cause of delay in discharge was shortage of labour at the port of discharge.

The general rule is that the duty of providing sufficient means for the discharge of the cargo lies upon the charterer. The party who has contracted to unload within a specified time must bear the loss occasioned by any excess of time although the delay is not occasioned by any default on his part. But this of course is subject to any provision to the contrary in the charter. In the absence of such a provision the charterer contracts not to do his best to deliver, but contracts to deliver. In the charter so far as I have quoted it I find nothing to relieve the charterer from this contractual obligation. If the charter had not contained the proviso I think the charterer would have been liable.

The second question is, whether he is relieved by the proviso. The words are—"always provided steamer can load and discharge at this rate." It was admitted by the pursuers that it was the duty of the ship to dump the cargo on the quay. The witness Steele, who was agent for the ship at Ayr, acting as he says "of course for the ship" endeavoured to obtain but failed to obtain sufficient labour. When the ship had dumped the cargo on the quay it was the cargo owner's duty no doubt to keep the quay from being blocked with timber. There was no default by the cargo owner in that respect. The ship was never kept waiting on the shore gang. The timber was promptly removed whenever landed on the quay.

In these circumstances the question is as to what is the meaning of the words "provided steamer can" discharge. The language is of course elliptical. It must refer not merely to the structural capacity of the steamer, *e.g.*, that she has only certain hatchways and no more, but also to at least the mechanical appliances with which she is fitted, *e.g.*, that she has only certain engines, and of certain horse power and no more. I see no reason why it should not refer also to the labour which is to work the mechanical appliances. Suppose the power was electric but the motors were out of order. The steamer then I conceive cannot discharge. How does this differ from the case where the motors are in order but there is no man to pull a lever and start the power? Or suppose the power were steam and there was neither stoker nor engineer — the machinery is not machinery for any effective purpose unless it can be operated. Then does the case differ when the machinery can be worked but there is no manual labour to introduce the goods to the machinery and cause it to operate upon them, and again to disengage the goods and set the machinery free to operate upon further goods? All these are to my mind similar in kind. The steamer whose ability is the test must, I think, be a structure plus a control which will give life to that which without it is powerless, and which will make it an apparatus capable for giving discharge. "Discharge" is a word which involves activity, not mere passive existence. If the expression is to be thus understood, the contract is that the charterer will discharge at 100 standards a day, provided that the steamer is such as

regards (*a*) her structure, (*b*) her engine and mechanical power, (*c*) such labour to utilise these mechanical appliances as it is for the steamer to supply as that she "can discharge" (*i.e.*, as admitted, dump on the quay) 100 standards a day. This I think is the meaning of the proviso. The delay was caused by the deficiency of the labour above called (*c*); the proviso cast upon the ship the responsibility for this deficiency. The result is, in my opinion, that the proviso has relieved the charterers from a liability which would otherwise have rested upon them. For these reasons I think that the appeal should be allowed.

Their Lordships (Lord Wrenbury dissenting) dismissed the appeal with expenses.

Counsel for the Appellants — Condie Sandeman, K.C. — Douglas Jameson. Agents—John W. & G. Lockhart, Ayr—Dove, Lockhart, & Smart, S.S.C., Edinburgh—Ince, Colt, Ince, & Roscoe, London.

Counsel for the Respondents — F. D. Mackinnon, K.C.—J. A. Maclaren. Agents—Lucas, Hurry, Galbraith, & Macpherson, Glasgow—Macpherson & Mackay, S.S.C., Edinburgh—Botterell & Roche, London.

Thursday, July 31.

(Before Viscounts Finlay and Cave, and Lords Dunedin, Shaw, and Wrenbury.)

MARSHALL & COMPANY *v.* NICOLL & SON.

(In the Court of Session, December 21, 1918, 56 S.L.R. 178.)

Contract—Sale—Breach of Contract—Damages—Sale of Goods Act 1893 (56 *and* 57 *Vict. cap.* 71), *sec.* 51 (3).

Circumstances in which *held* that a contract for the sale of goods had been established, and damages for the non-delivery thereof *assessed* where there was little or no market for such goods.

This case is reported *ante ut supra.*

The defenders Nicoll & Son appealed to the House of Lords.

At delivering judgment—

VISCOUNT FINLAY—This action was brought by the respondents to recover damages from the appellants for their failure to perform five contracts for the delivery to the respondents of steel sheets. The defence was a denial that the contracts had been entered into.

The facts of the case are fully stated in the judgment which will be delivered by my noble and learned friend Viscount Cave. I have had the advantage of seeing that judgment, and I agree with him that the appeal fails.

I have only to add the following observations under each of the three heads which were in controversy between the parties:—

1. The Lord Ordinary held that two of the five contracts, namely, one for 100 tons of close annealed sheets and another for two lots of 50 tons each of steel sheets had been established. He was affirmed as regards these contracts by the Second Division. I entirely agree with the conclusions at which both these Courts arrive with regard to these contracts.

I also agree with the Second Division in their finding that another contract for 30 tons of steel sheets had been proved. This contract was in substitution for one of 25 tons which had been found by the Lord Ordinary.

2. There were two other alleged contracts in dispute, each for 100 steel sheets at £15, 12s. 6d. per ton, said to have been entered into on the 24th and 30th October 1916 respectively by oral agreement on the telephone.

The Lord Ordinary held that these contracts had not been established on the ground that the testimony was conflicting, and that he thought that it was extremely improbable that the appellants should have entered into these contracts at £15, 12s. 6d. per ton at a date when the price of such sheets had risen considerably, and when they knew that they could only get them by special arrangement as such sheets did not fall under their contract with the Youngstown Mills for the supply of sheets.

I was much impressed in the course of the argument with this improbability, and was disposed to think that the Second Division ought not to have held as they did that these contracts had been proved. But at the close of his address for the respondents Mr Moncrieff called your Lordships' attention to the correspondence between the appellants and the respondents in December 1916. In that correspondence the appellants explicitly admitted the existence of these two contracts. This admission, in my opinion, completely gets rid of the argument of improbability which prevailed with the Lord Ordinary, and which but for these letters would probably have prevailed with me. These letters appear to have been overlooked by the Lord Ordinary, but in my opinion when once they are examined their effect is decisive.

3. It was further contended for the appellants that the damages had been erroneously assessed.

It appears that there was no market in which goods of this description could be obtained. It follows that the damages must be assessed on the basis of what the goods if delivered would have been worth to the pursuers apart from any special circumstances. Strict accuracy with regard to the amount of such damages is impossible, but the sum of £2000 awarded by the Lord Ordinary in respect of the contracts which he found proved seems to be a fair estimate, and I certainly can see no reason for interfering with it. The Second Division applied the same measure to the case of the additional breaches of contract which they held to have been established, giving a total amount of £3475. I think that this amount should stand.

In my opinion the appeal should be dismissed with costs.