been imperfectly and improperly described. I think therefore the distinction taken is not a material one, and that the case is ruled in terms by the judgment in the case of *Smiles* v. *Crooke*.

LORD RUTHERFURD CLARK and LORD ADAM concurred.

LORD MURE and LORD SHAND were absent.

The Court affirmed the determination of the Commissioners.

Counsel for the Appellants—Young. Agent—The Solicitor of Inland Revenue.

Counsel for the Respondents—Vary Campbell—Gillespie. Agents—Wylie & Robertson, W.S.

Wednesday, March 20.

FIRST DIVISION.

[Lord Trayner, Ordinary.

GARDINER AND OTHERS *v.* MACFARLANE, M'CRINDELL & CO. AND ANOTHER.

Ship—Charter-Party—Demurrage—Undue Detention—Damages—Lien on Cargo.

A charter-party provided, "Charterers' responsibility to cease on cargo being loaded, provided the cargo is worth the freight at port of discharge. Owners to have lien on cargo for freight, dead freight, and demurrage."

Held, in the absence of anything in the charter-party showing that the parties intended otherwise, that "demurrage" fell to be interpreted in its strict legal sense; and that the owners' lien on cargo for demurrage did not free the charterers from an action of damages for the undue detention of the vessel at the port of loading.

Observed (*per* Lord Adam) that "demurrage" ought always to be so construed, unless the charter-party made it clear that it was the intention of parties that the word should be used in another and a wider sense.

This was an action by the owners of the ship "Lismore" against the charterers for damages for undue detention of the vessel at the port of loading. The charterers pleaded that the action was excluded by the terms of the charter-party, which, *inter alia*, provided that the "Lismore," then at Hull, should proceed to Sydney, and there receive from the charterers' agent a cargo of coals, and being so loaded should proceed to San Diego, and deliver them there, the freight being a specified rate per ton. The charter-party contained the following among other clauses—"To be loaded as customary at Sydney, N.S.W. To be discharged as customary . . . and at the rate of not less than 100 tons of coal per working-day, to commence when the ship is in berth and ready to discharge, and notice thereof has been given by the master in writing; and ten days on demurrage, over and above the said laying-days, at 4d. per register ton per day." . . . Charterers' responsibility to cease on cargo being loaded, provided the cargo is worth the freight at port of discharge. Owners to have lien on cargo for freight, dead freight, and demurrage."

The "Lismore" arrived at Sydney on or about 15th August 1888, but she was not loaded with her cargo, and did not sail for San Diego until 2nd December.

James Gardiner & Company, the registered owners of the "Lismore," raised the present action against Macfarlane, M'Crindell, & Co., merchants, Liverpool, and George Gray Macfarlane, merchant, Glasgow, the only known partner of the said firm, concluding for £5000 as damages for undue detention of the vessel at Sydney.

The pursuers averred that upon the arrival of the "Lismore" at Sydney due notice was sent to the defenders' agents, and that they were requested to arrange for loading her under the charter-party; that to enable the outward cargo to be fully discharged 500 tons of coals were required for stiffening; that it was not until 10th September that the full 500 tons were supplied, and that thus there was delay in getting the outward cargo discharged, for which the charterers were responsible. The pursuers averred further that the "Lismore" ought to have been loaded by the 4th October; that by her detention till December the bottom of the vessel became so foul that they had to place her in dock to be cleaned, and that considerable expense was thereby occasioned through the defenders' fault. They also averred that they had suffered loss by the detention of the vessel, and by the defenders' failure to provide cargo.

The defenders alleged that any delay that had occurred arose from a strike at the collieries near Sydney; that the ship was not ready to load her cargo until 14th September; that she was loaded in regular colliery turn with a full cargo; and that any delay which took place in loading the ship at Sydney was due entirely to causes for which, in terms of the charter-party, the charterers were not responsible.

The pursuers pleaded, *inter alia*—"(3) That the defenders were not freed by the terms of the charter-party from liability for detention at the port of loading."

The defenders pleaded, *inter alia*—"(1) Irrelevancy. (2) The ship having loaded a cargo worth the freight at the port of discharge, the defenders are, in terms of the charter-party, freed from all responsibility to the pursuers for the damages claimed."

On 28th February 1889 the Lord Ordinary (TRAYNER) repelled the defenders' first and second pleas-in-law, and allowed the parties a proof of their averments.

"*Opinion.*—The charter-party founded on in this case provides that the 'Lismore' shall proceed to Sydney and there load a complete cargo of coals, with which she shall proceed to San Diego. The 'Lismore' arrived at Sydney about the 15th August last, but she was not loaded with her cargo, and did not sail for San Diego until the 2nd December. The present action is brought to recover damages from the charterers on the ground that the 'Lismore' had been unduly detained by them at Sydney; and the defence urged *in limine* (and the only defence I have now to consider) is that, in respect of the cesser and lien clauses in the charter-party, the defenders are not liable in the damages claimed.

These clauses are expressed thus:—'Charterers' responsibility to cease on cargo being loaded, provided the cargo is worth the freight at port of discharge. Owners to have lien on cargo for freight, dead freight, and demurrage.'

"Clauses of similar import have already been the subject of judicial consideration in one or two cases in Scotland, and in a considerable number of cases in England. I cannot say that the decisions in the cases I have referred to are conflicting, but there are *dicta* in one or two of the later cases in England which are of a tendency to throw doubt upon the decisions formerly given. It is not necessary for me to go over all the cases to which reference was made in the argument, but I may refer to a very useful digest of them given by Mr Scrutton in his work on Charter-Parties and Bills of Lading, page 103, *et seq.* One rule or principle recognised in all the cases is this—that the cesser and lien clauses must be co-extensive, and that any particular liability enforceable against the charterer will not be held extinguished by the cesser clause unless the lien clause enables the shipowner to enforce that liability against the cargo or its owners or consignees. In short, the personal liability of the charterer is not extinguished unless a lien over the cargo is substituted for it. The application of this principle seems to me to afford a solution of the question now raised.

"The charter-party in this case confers a right of lien in favour of the shipowners over cargo for 'demurrage;' and if the pursuers' claim was for demurrage, incurred either at the port of loading or the port of discharge, I think it must be taken to be settled by authority that the defenders would be entitled to absolvitor in respect of the cesser clause. But the claim now made is not for demurrage, but for damages for undue detention at the port of loading. Does the lien for demurrage cover such a claim? The defenders say that it does, because the word demurrage is popularly used among mercantile men to mean not only demurrage proper, but also detention beyond the demurrage days, as well as detention where no demurrage has been stipulated for. There can be no doubt that the word is popularly used as the defenders represent; and that popular use and meaning has been recognised by some of the English Judges in their opinions. In Scotland, however, so far as I know, the two things—demurrage and improper detention—have always been kept distinct, and in my opinion properly so. They are quite distinct in character and in origin. A claim for demurrage arises from contract; it is a payment fixed and determined by the contracting parties, in respect of which the charterer may detain the ship for a period longer or shorter beyond the lay-days. The claim for undue detention arises from fault, not contract, and the liability of the charterer is for the whole damage which his fault may have occasioned to the shipowner, whether greater or less than the sum which would in ordinary circumstances be stipulated for as demurrage for the same vessel.

"This distinction is as well known to merchants as to lawyers, and the disregard of that distinction appears to me to have led to the differences of opinion which are to be found in some of the cases on demurrage questions. Regarding the two things as entirely distinct, I am of opinion that the lien conferred in the present case for demurrage does not cover a claim for damages on account of undue detention; and that the lien clause not being, therefore, co-extensive with the charterers' personal liability, the cesser clause does not absolve them from the claim now made.

"Assuming, however, that the word 'demurrage' in the lien clause would cover not only demurrage proper but also damages for detention beyond the demurrage days stipulated for, I am of opinion that the cesser clause in question does not free the defenders from the present claim. If the charter-party stipulated for demurrage only at the port of discharge, the lien clause for 'demurrage' will only be enforceable for that, and will not cover undue detention at the port of loading. Accordingly, upon the principle I have already stated, the charterers' personal liability in such a case for undue detention at the port of loading will not be affected by the cesser clause. And that is the case here. The provision in this charter-party regarding the loading of the cargo is thus expressed—'To be loaded as customary at Sydney.' This provides only for the mode of loading, and has no reference whatever to the time in which it shall be done—*Lawson* v. *Burness*, 1 H. & C. 400; *Tapscott* v. *Balfour*, L.R., 8 C.P. 52-3; *Lamb* v. *Kaselack, &c.*, 9 R. 490. There being no time for loading stipulated, directly or indirectly—that is, no lay-days—there could be no stipulation for demurrage. With regard to the discharge, however, there is stipulation. It is provided that the cargo shall be discharged 'at the rate of not less than 100 tons of coals per working-day, to commence when the ship is in berth and ready to discharge . . . and ten days on demurrage over and above the said laying-days, at 4d. per register ton per day.' The time allowed for discharging (that is, the lay-days) is thus fixed and limited, and the demurrage days over and above the lay-days, and the rate of demurrage are also fixed. For such demurrage, if incurred, the owners have a lien over the cargo. The lien clause, however, for 'demurrage' cannot be extended beyond the 'demurrage' stipulated for; the same word in the same charter must be held to refer to the same thing. In such a charter the lien for demurrage cannot in my opinion be extended to cover claims not stipulated for, although they may be of the same nature.

"The case of *Lockhart* v. *Falk*, L.R., 10 Exch. 132, is quite in point. In that case the charter-party provided that the charterer should load the cargo 'in the customary manner,' that the cargo should be discharged in ten working-days, with demurrage at '£2 per 100 tons register per day,' that the ship should have an absolute lien on cargo for freight and demurrage, 'the charterer's liability to any clauses in this charter ceasing when he has delivered the cargo alongside ship.' It was held that undue detention at the port of loading was not demurrage, and that the charterer was liable for such detention notwithstanding the cesser clause. That decision has never been overruled. But the defenders say that its authority has been doubted or questioned in later cases, where opinions have been delivered inconsistent with its ruling. Even if this had been so, I would have been prepared

for my own part to maintain its authority. But I think its authority is not even questioned.

"The first case cited as impugning the authority of *Lockhart's* case was *Kish* v. *Cory*, L.R., 10 Q.B. 553. There the charter-party provided that the cargo was to be loaded 'in thirteen working-days,' and to be discharged at not less than thirty-five tons per working day. 'Ten days' demurrage for all like days above *the said days* to be paid at the rate of 4d. per registered ton per day,' and 'charterer's liability to cease when the ship is loaded, the captain or owner having a lien on cargo for freight and demurrage.'

"The vessel was detained in loading five days beyond the thirteen provided lay-days, and the charterer was held not liable, because the claim was for demurrage, and that therefore the cesser clause applied. The difference between the cases of *Lockhart* and *Kish* is obvious, and they are in no way conflicting. In *Lockhart's* case there were no lay-days for loading, and no demurrage or lien for demurrage stipulated in reference to the loading. In *Kish's* case there were lay-days for loading and a provision for demurrage in reference thereto. Consequently the lien clause for demurrage which included demurrage at the port of loading having been substituted for the charterer's liability, the cesser clause took effect. But in *Kish's* case it was not suggested that *Lockhart's* case (referred to in argument) had not been rightly decided. On the contrary, the three Judges who decided *Lockhart's* case took part in the decision of *Kish's* case, and made no reference whatever to their former judgment. The essential difference between the cases which I have pointed out fully accounts for this.

"I was, however, specially referred to the following expressions of opinion by Mr Justice Brett in *Kish's* case as throwing doubt upon the authority of *Lockhart's* case:—'I feel certain that when the occasion arises it will be held upon a clause like this, containing a cesser of liability of the charterer and a lien for demurrage, that 'demurrage' includes not only demurrage proper, but also that which is in the nature of demurrage, viz., detention at the port of loading.' I have some difficulty in understanding this observation, and certainly cannot read it as indicating any dissent from the decision in *Lockhart's* case. If Mr Justice Brett meant to say that in cases where lay-days had been stipulated in regard to loading, followed by a general clause as to demurrage, that 'demurrage' would be construed as including 'that which is in the nature of demurrage, viz., detention at the port of loading' (that is, detention after the demurrage days had expired), then the observation has no application whatever to the case where lay-days are not stipulated with regard to loading, and consequently has no bearing upon *Lockhart's* case or the present case. But if the observation I have quoted meant that a stipulation as to demurrage at the port of discharge would be construed, when the occasion arose, so as to cover a claim for improper detention at the port of loading, I can only say that the occasion had arisen before the decision in *Kish* v. *Cory*, and that the demurrage clause was not so construed. The reverse was decided in *Gray* v. *Carr*, L.R., 6 Q.B. 522, Justice Brett concurring in the judgment, and (on page 537, while throwing doubt on the decision in *Bannister* v. *Bresslauer*) stating without objection the very proposition on which *Lockhart's* case was decided.

"I was also referred to the case of *Sanguinetti*, L.R., 2 Q.B. Div. 238. In that case the charter-party provided that the ship should be loaded and discharged at so many tons per day, 'demurrage to be paid for each day beyond the said days allowed for loading and discharging at the rate of 3d. per registered ton per day.' The cesser and lien clauses were in the usual terms. The only peculiarity in the case is this, that the number of demurrage days is not limited, but every day beyond the days allowed for loading and discharging is treated as a demurrage day. The ship was detained in loading beyond the lay-days, and was therefore on demurrage during the whole detention. The Court held that the charterer was not liable, because the claim was for demurrage, and a lien had been given over cargo for demurrage. No question was raised, nor could have been raised, as to the charterer's liability for damages for undue detention, as distinguished from demurrage. The case of *Lockhart* (although referred to in argument) was not referred to in the decision, much less questioned or doubted.

"Another case referred to is that of *Harris* v. *Jacobs*, L.R., 15 Q.B. Div. 247. In that case the ship was to be discharged 'as fast as steamer can deliver.' A day was lost by the consignee not having a ready berth for the vessel, and the claim made upon that account was held to be covered by the clause which gave a lien for demurrage. Some observations were made as to the term 'demurrage' being elastic, and sufficient to cover this claim, which it was said was not 'strictly demurrage.' It appears to me to have been demurrage, and nothing else. 'The ship was to be discharged as fast as she could deliver,' and 'demurrage to be at the rate of £30 per running day'—that is, £30 a-day for each day the cargo was not discharged as fast as the ship could deliver. The day the vessel was detained from want of a berth (which it was the consignee's duty to provide) was just a day on which cargo was not taken delivery of at all, and was the same, so far as demurrage was concerned, as if the ship being in a berth no cargo had been taken by the consignee. If the steamer had got into her berth when she arrived her discharge would have been completed a day sooner than it was. That day was a day beyond her lay-days, and was therefore a day on demurrage. However this may be, *Harris* v. *Jacobs* does not directly or by implication question the authority of *Lockhart* v. *Falk*.

"The last case to be noticed is that of *Salvesen* v. *Guy*, 13 R. 85, in which the charter-party stipulated for twenty working-days in loading and sixteen days for discharging, 'with ten days on demurrage over and above the said laying-days.' Twelve days beyond the lay-days were occupied in loading, and demurrage for these twelve days was claimed from the charterers. The charterers pleaded the cesser and lien clauses in defence, and their defence was sustained. Now, here undoubtedly the Court in effect held that the demurrage clause covered two days for which demurrage proper could not be claimed. But the distinction between demurrage and damages for detention does not appear to have

been adverted to even at the argument. The point raised and decided was the general one that where a lien is given over cargo for demurrage, the charterer is by the corresponding cesser clause freed from personal liability for demurrage, and that irrespective of whether the demurrage has been incurred at the port of loading or port of discharge. It is obvious that the question raised and decided in *Lockhart* v. *Falk* was not before the Court. The case does not appear to have been cited. *Gray* v. *Carr* seems to have been cited either to show that Baron Bramwell doubted the decision in *Bannister* v. *Bresslauer*, or in support of the view that the cesser clause could not be pleaded because the cargo had not been 'shipped in terms of the charter-party.' The law laid down in *Lockhart* and *Gray* was not discussed, nor the decision in either case doubted.

"But even if the Court had intentionally decided (in agreement with the *dictum* of Mr Justice Brett in *Sanguinetti's* case) that a clause providing for demurrage at the port of loading should be construed so as to cover damages for detention at that port beyond the stipulated demurrage days, that would in no way conflict with *Lockhart* v. *Falk*, or with the judgment I am now pronouncing. In *Lockhart*, as here, there is no demurrage stipulated for at the port of loading at all. The demurrage clause has reference to the lay-days, and the lay-days have only reference to the port of discharge. Whatever therefore the Court might consider covered by a demurrage clause actually existing and forming part of the charter, and however much they might extend the limits of such a clause, it is clear that they could neither construe, extend, or limit a clause which did not exist.

"I agree with the view expressed by the Lord Chief-Justice (Coleridge) in *Kish* v. *Cory*, and by Lord Kinnear in *Salvesen* v. *Guy*, that as mercantile contracts are expressed with reference to decided cases in which the language used in such contracts has been judicially construed 'it is important *stare decisis*.' I therefore follow the direct authority of *Lockhart* v. *Falk*, which I humbly think to be a sound decision, and the authority of which has not been impaired by any subsequent decision.

"There is another point in this case to which I must allude, but upon which, after what I have said, it is not necessary I should pronounce any judgment. The present action was raised before the cargo in question was shipped, and the pursuers' claim is not limited to damages for the time lost by improper detention, but also for damage of another kind, directly attributed to the detention (Cond. 5). The damages claimed on this latter ground would certainly not be covered by the lien clause. But taking the case as if it were for improper detention alone, I incline strongly to the opinion that the action having been raised against the charterers before the cargo had been loaded, and therefore before the cesser clause became operative, that claim could not be avoided simply by the subsequent loading of the cargo. The claim must be looked at as at the date of raising the action, and it was then a claim enforceable against nobody but the charterers. The subsequent acceptance of the cargo does not seem to me, in the present state of my opinion, to be in itself a waiver of the pursuers' claim."

The defenders reclaimed, and argued—This action could not be maintained, as the cesser clause was so expressed as to free the charterers in the circumstances which had arisen from all responsibility, for the cargo which was put on board was far above the amount of the freight. The circumstance that the lien was for a future and unascertained amount was not sufficient to nullify this claim; there was here a good lien on the cargo for dead freight, it was an unascertained claim, and yet it did not render the clause null. "Demurrage" might be used in two senses—(1) In a strictly legal sense—1 Bell's Comm. (7th ed.) 624; Bell's Prin. sec 231; *Salvesen* v. *Guy*, October 28, 1885, 13 R. 85. (2) As including damages for undue detention—*Bannister* v. *Bresslauer*, 1867, L.R., 2 C.P. 497; *Gray* v. *Carr*, 1871, L.R., 6 Q.B. 522; *M'Lean & Hope* v. *Fleming*, March 27, 1871, 9 Macph. (H of L.) 39; *Lockhart* v. *Falk*, L.R., 10 Exch. 132. Demurrage was used in the latter and wider sense in this charter-party. The words "as customary" were different from and meant something more than "in the customary manner," which was the usual expression; they meant "as customary" in point of time, and referred to the custom of the port of loading. Demurrage was contracted for at the port of discharge; it was implied at the port of loading, for there was no reason why the charterers' liability should cease at one end of the voyage and continue at the other. No information as to the intention of parties was to be gathered from the charter-party itself (apart from the clauses narrated), or from their position in the deed, as a charter-party was an informal document, but it was clear that both the cesser and the lien clauses were quite universal in their application. The English authorities on the construction of the word demurrage in a charter-party like the present were not binding, while the Scotch authorities, so far as they went, favoured the defenders' contention.

Argued for the respondents—The contention of the defenders was untenable; they sought to mix up demurrage proper, which arose *ex contractu*, with undue detention, which arose *ex delicto*—1 Bell's Comm. (7th ed.) pp. 588 and 622. In demurrage proper it was not necessary to fix the number of days provided a rate *per diem* was fixed, and for this a lien over the cargo could quite competently be given, though it could not be given for an illiquid claim for debt—*Lamb* v. *Kaseluck*, Jan. 31, 1882, 9 R. 482. As to termination of lay-days and commencement of demurrage—*Holman* v. *The Peruvian Nitrate Company*, Feb. 8, 1878, 5 R. 657; *White* v. *Steamship "Winchester" Company*, Feb. 1886, 13 R. 524. As there was no demurrage stipulated for at the port of loading, undue delay there could only be met by damages, and no lien could be given over the cargo for an illiquid claim of damages. In the construction of a charter-party such an interpretation must be put upon the words as not gratuitously to discharge the security of the shipowner for freight, and the charterer could escape liability until he has secured the shipowner by a valid lien over the cargo—*Christoffersen* v. *Hansen*, 1872, L.R., 7 Q.B. 509. There could here be no discharge of the charterers prior to the vessel obtaining a full cargo, for it was only then that their liability

was to cease. But the delict had been committed prior to that, so it was impossible that the shipowners could recover damages from the cargo. In the construction of a charter-party demurrage must be held to be used in its strict legal sense, unless it was clearly shown that parties intended it to have a different and a wider meaning—Authorities cited in Lord Ordinary's note.

At advising—

Lord Rutherfurd Clark—This is an action at the instance of the owners of the ship "Lismore" against the defenders, who chartered the vessel for the voyage from Sydney to San Diego. The pursuers seek to recover damages on the ground that the "Lismore" was unduly detained by the charterers at the port of loading, while the defenders on the other hand maintain that the pursuers' claim is excluded by the terms of the charter-party. The Lord Ordinary has repelled the defenders' pleas founded upon that contention, and the question which we have to determine is, whether the Lord Ordinary was right in so doing. The charter-party in the present case, while closely resembling the ordinary class of document of this kind, has one clause in it which may be noticed in passing. It provides that the "Lismore" was to proceed to Sydney, and there she was to load a complete cargo of coals, with which she was to proceed to San Diego. The loading at Sydney was to be "as customary," and the unloading was also to be "as customary," and at the rate of not less than 100 tons of coal per working-day. The charter-party further provided for the ship being ten days on demurrage, over and above the lay-days, at 4d. per register ton per day. It is to be observed that there is no stipulation as to lay-days or demurrage at the port of loading; all that the charter-party says as to that is, that the vessel is to be loaded "as customary." It does not appear to me to be material whether the word customary be held to mean within the customary time, or in the customary manner. If it be held to mean within the customary time, then, instead of providing for the vessel being loaded in a reasonable time, the stipulation is, that it is to be loaded within the usual or customary time. The important fact to be kept in mind is, that so far as the port of loading is concerned, there is no agreement between the parties that the ship is to remain at Sydney on demurrage.

At Sydney the pursuers allege that the vessel was unduly detained by the defenders, and that she was so detained in breach of the contract between them, and they aver that in consequence of this undue detention of the vessel they have suffered damages. Against this the defenders urge that they are discharged from all liability for this detention by the following clauses in the charter-party—"To be loaded as customary at Sydney, N.S.W. To be discharged as customary . . . and at the rate of not less than 100 tons of coals per working-day, to commence when the ship is in berth and ready to discharge, and notice thereof has been given by the master in writing; and ten days on demurrage, over and above the said laying-days, at 4d. per register ton per day." . . . "Charterers' responsibility to cease on cargo being loaded, provided the cargo is worth the freight at port of discharge. Owners to have lien on cargo for freight, dead freight, and demurrage." The defenders further say that they put on board a full cargo, and that having done so, their responsibility under the charter-party ceased.

Among the numerous authorities which were cited in the course of the discussion there is, I think, one important case which decides the interpretation which is to be put upon clauses of this kind, and that is the case of *Christofferson*, 7 Q.B. 509. It is the more important as I understand its authority is not disputed upon either side. The decision in that case was that such a clause as we have here applied only to future liability unless the liability for illegal detention was by another clause in the charter-party transferred to freight. What the defenders therefore really maintain is, not that the pursuers are not entitled to recover for the loss which they allege that they have sustained through the detention of the vessel, but that that loss ought to be made good by the cargo, over which a lien for any such loss was granted, and that in consequence of this lien they (the charterers) are free.

What we have to do therefore is to construe the clause in the charter-party which is said to create this lien. The words are, "Owners to have lien on cargo for freight, dead freight, and demurrage."

The question therefore comes to be, what is intended to be included in the word "demurrage"—is it intended by it to cover damages for undue detention in breach of the contract, or is it limited to demurrage proper. Now, the answer to that question must depend to a large extent, if not entirely, on the terms of the present contract as to the interpretation of which little or no authority can be got from other cases. What has to be considered is, what is the fair meaning of the word demurrage in the present case? If the view of the defenders is right, then it is to be held that a lien has been effectually constituted over the cargo of this vessel for an entirely illiquid claim. It is quite possible that such a lien might be validly contracted for, but it is clear, I think, that this would require to be done in very distinct and explicit terms. In the case of *M'Lean & Hope* such a lien was admitted, because it was for dead freight, and was specially contracted for.

The question here therefore comes to be, whether we are to hold that these damages which are claimed by the pursuers for the undue detention of this vessel at Sydney are to be liquidated by the defenders, or whether it was the intention of the parties that an effectual lien for them should be constituted over the cargo, and that this intention has been effectually expressed. Looking to this charter-party as a whole, I think that what the parties stipulated for was demurrage in the proper legal sense of the word. The word occurs twice in the deed. As to its meaning upon one of those occasions there can, I think, be no question, and I am not prepared, without some very distinct reason, to attach different meanings to the same word occurring twice in the same charter-party. I think therefore that it was not the intention of the parties that the owners were to have any lien on the cargo for damages arising from the undue detention of the vessel by the charterers at the port of loading. Taking, then, this view

of the charter-party, I do not think it necessary to consider any of the cases to which we were referred. I need only add that the cases of *Lockhart* and *Guy* confirm the view which I have taken as to the meaning of the word demurrage in this charter-party.

Lord Adam—I concur in the result arrived at by Lord Rutherfurd Clark, and for the reasons stated. This is an action against the charterers of this vessel for alleged wrongful detention at the port of loading. The vessel reached the port of loading about the 15th of August, but she was not loaded with her cargo and did not sail for San Diego until the 2nd December. Now, it is clear that the charterers' liability for the loss arising from this undue detention of the ship cannot be got rid of unless that liability can be transferred from the charterers to the cargo. I think, however, it is quite clear that the clause in the charter-party will not bear the construction proposed by the defenders unless demurrage is to be held as including undue detention. The case accordingly turns upon the interpretation which is to be put upon this word. I agree with the reading proposed by Lord Rutherfurd Clark, and think that apart from the word demurrage being used here in its strictly legal sense, it should always be so read unless there is something in the terms of the deed which demonstrates that it was the intention of the parties that it was to be interpreted in a different and in a wider sense.

Lord President—This portion of the charter-party may be viewed as containing either one or two clauses. If it be dealt with as containing two clauses, then the one may be taken as the counterpart of the other—that is to say, the cessation of the charterers' liability was to be given in exchange for a lien over the cargo. The question therefore between the parties here turns, as has been pointed out, on the construction which is to be put upon the word demurrage. *Prima facie* it is a stipulated payment contracted for in the charter-party, in respect of which the vessel may be detained in dock for a certain time beyond the lay-days. It is said, however, that the word is used in this charter-party in another and in a wider sense, and that it was intended by the word demurrage to cover damages for undue detention of the vessel. If no demurrage, in the strict sense of the word, had been stipulated for, then there might have been a good deal to say for this use of the word, but a little further on in the charter-party demurrage is stipulated for as matter of contract, not at the port of loading, but at the port of discharge.

In considering whether a lien of the kind contended for by the defenders has been validly constituted or not, it may be well to consider what the effect might be of adopting one construction of the word demurrage rather than another. If we look at the pursuers' claim we see it is based partly on the defenders' negligence, as set out in article 4 of the condescendence, and partly on the fouling of the ship's bottom in consequence of the delay caused by this negligence (Cond. 5). Now, these two grounds of claim suggest that their settlement depended upon the determination of certain facts. When the ship reached her destination, was there fouling? What was it caused by, and what was the expense to which the owners were put thereby? It is clear, I think, that if an inquiry of this kind was to proceed while the cargo was still on board, the consequences would be most serious to all parties; and yet if there was to be a lien over the cargo for damages in the event of these being found due, then clearly the cargo could not be discharged until these questions of fact had been determined. In construing demurrage, then, in this charter-party all these considerations must be kept in mind, and I have no doubt that looking to the circumstance that the word is used again in the deed, and that there can be no question that upon this subsequent occasion it is used in its strict legal sense, that it was the intention of the parties that when used in the clause which we have had to construe it was not intended to cover damages for the undue detention of this vessel.

Lord Mure and Lord Shand were absent from illness.

The Court adhered.

Counsel for the Pursuers—Asher, Q.C.—C. S. Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Defenders—Balfour, Q.C.—Ure. Agents—Hamilton, Kinnear, & Beatson, W.S.

Wednesday, March 20.

SECOND DIVISION.

KIPPEN'S TRUSTEES *v.* LEITCH AND OTHERS.

Succession—Vesting—Heritable and Moveable—Conversion—Power of Sale.

A testator by trust-disposition and settlement, dealing with his whole estate, directed his trustees "to pay to my said wife, in case she shall survive me, for her own use and disposal, out of the capital of the trust-estate, any sum or sums of money she may require, not exceeding in all the one equal half of the residue and remainder of the trust-estate, and that at any time, or from time to time, as she may desire." He also directed his "trustees at the first term after his wife's death, if she survived him, to pay and assign to her heirs, executors, and assignees the balance, if any, which shall remain unpaid to her of the equal half of the free residue and remainder of the trust-estate, after reckoning the payments out of capital which may have been made to her by my trustees." . . . The trustees were empowered, "for accomplishing the purposes of this trust," to sell and dispose of the truster's whole estate, heritable and moveable, and convert it into money. His wife survived, and died leaving a testament disposing of her whole moveable estate without having asked or received any money from the capital of her husband's estate. Part of said estate consisted of house property, which remained unconverted during the widow's lifetime, but was sold after her death.

Held that the widow's right to half of her