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

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

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

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

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

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

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

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

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

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

Friday, December 19.

FIRST DIVISION.

CALDER AND OTHERS *v.* MILLARS.

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

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

his children as should die without becoming entitled, equally among said children and issue *per stirpes;* and upon the surviving daughters attaining twenty-five years, or being married, the trustees were further directed to hold, or place with other trustees, the shares of such daughters in trust, "for their liferent use only, and for the lawful issue of said respective daughters, or failing lawful issue, for their next-of-kin, in fee." Thereafter by certain informal holograph writings he excluded one of his daughters "from any right, title, or interest" in his estate, personal or moveable, whatsoever.

Held (1) that these writings were part of his will; (2) that they were effectual to exclude the daughter from her share in his estate; but (3) that they were ineffectual to exclude her child, as her issue had a separate and independent interest in the testator's estate.

The late Mr George Calder, merchant in Edinburgh, died on 24th December 1889, survived by his widow and by six children. The eldest of these children, Mrs Margaret M'Nair Calder or Millar, one of the parties of the second part, was married on March 13, 1888, to Thomas Millar, the other party of the second part. Of this marriage there was one child, Margaret M'Nair Millar, born on July 28, 1889, who, with her father as her administrator-in-law, was the party of the third part.

Mr Calder left a free moveable estate of about £8200, and heritable estate, including his own dwelling-house, to the value of about £2000.

Mr Calder had executed on 3rd March 1888 a trust-disposition and settlement which had been prepared for him by his law-agents, and this trust-disposition and settlement was at the date of his death in the hands of his law-agents. The parties of the first part were the accepting trustees named in that settlement.

By the fourth purpose of this deed Mr Calder directed his trustees "to hold the whole residue of my means and estate hereby conveyed for behoof of such of my children as shall survive me and attain the age of twenty-five years complete if sons or shall attain said age or be married under said age if daughters, and the lawful issue of such of my children as shall die without becoming entitled under this purpose leaving lawful issue, equally among said children and issue *per stirpes;* and shall pay over their shares to my sons surviving me on their attaining said age or on my death, if they shall then have attained said age, and shall set apart, as after mentioned, the shares of my daughters surviving me on their attaining said age or being married under said age, whichever event shall first happen, or on my death if they shall previous thereto have attained said age or shall have been married; subject always to the retention by my trustees during the life of my said wife, in the event of her surviving me, of so much of my means and estate as shall be required to meet said annuity or restricted annuity and liferent. . . . And as regards the shares of such of my said children as are daughters, my trustees shall, on and after the arrival of the period of payment of their shares, hold in trust and apply the shares of such daughters, or place the same in the names of other trustees, with like powers, privileges, and immunities as their own, in trust for such daughters respectively in liferent, for their liferent use only, and for the lawful issue of said respective daughters, or failing lawful issue, for their next-of-kin, in fee."

After Mr Calder's death there was found in his repositories, in an iron safe, along with titles to certain heritable properties, policies of insurance of those properties, bank pass-books, and other papers, a large envelope, backed thus, viz.—"Copy trust-disposition and settlement by George Calder, dated 3rd March 1888—see inside." This backing was in Mr Calder's handwriting, and the envelope contained, among other papers, a copy of the trust-disposition and settlement the original of which was in the hands of his agents. On one side of the envelope was a copy in Mr Calder's handwriting of a letter written and sent by him to his agents on 9th March 1888, and below that a writing also holograph of Mr Calder, and subscribed with his initials. The latter writing was in these terms—"Margret is to get nothing of mine whatsoever having no marriage-contract in her favour which is defined in my trust-disposition and settlement.—G. C." The said letter was duly received by Mr Calder's agents, and was of the following tenor—"*Redlac, Colinton, 9th March* 1888.—Dear Sir—I duly received your letter of 3rd curt. with trust-disposition prepared by you for me, which I now return for your safe keeping until required. — Yours truly, GEO. CALDER." They never received any instructions from Mr Calder to have the trust-disposition therein referred to altered, and they retained the custody thereof till his death. On the other side of the envelope were five holograph writings or jottings signed by Mr Calder, and, except one, dated. All the dates are subsequent to the date of the trust-disposition and settlement. The following is a specimen:—

"Margret is to get nothing of mine whatsoever having *no* marriage-contract in her favour which is defined in my Trust-Disposition & Settlement.

"(Initld) G. C."

"*Margaret* to get nothing on account of her hatred and conivence against me. (Signed) GEO. CALDER, 9th Mar. 1888."

(no not anything — whatever)

"Mr Fraser, W.S., '*has the original*,' of Fraser, Stoddart, & Ballangal, W.S., Castle Street, Edinbh, knows abt *abt Margaret* from what I said to him and that she is to get nothing whatever of anything whatsoever belonging to me. (Signed) GEO. CALDER. Decr 14 1888."

There was also found in the same iron safe a writing on two separate sheets of paper, holograph of Mr Calder, dated on the first sheet 18th December 1888, and on the second sheet 8th December 1888. These

contained in great part complaints of harsh conduct and want of consideration on the part of his wife and daughter towards himself, and also of the secrecy with which his daughter's marriage had been carried through in spite of his known hostility. The material part of these writings consisted in the words which followed, viz.—"Under these circumstances and from the abuse and violance I have receive from the said now Mrs J. Miller and her sarcastic behavour toward me, I hereby exclude the said Mrs J. Miller from any right title or interest in my estate personal or moveable whatsoever and not to give her as much as one farthing. Witness my hand written by me this 18th day of Decr 1888. (Signed) GEO. CALDER. 11 o'cl. a.m."

On 20th June 1890, while an examination of some of Mr Calder's papers was being made at his house at Redlac by the agents for his trustees, there was found in a wardrobe in his bedroom a letter by Mr William Stuart Fraser, dated 27th February 1888, within an envelope addressed to Mr Calder, bearing Colinton and Juniper Green postmarks of date 28th February 1888, on which envelope there is the following pencil memorandum or jotting in Mr Calder's handwriting — "Trust-Disposition and Settlement. Codicil to exclude Margret totally"—but no instructions were ever given by Mr Calder to his agents to prepare such a codicil.

Questions having arisen as to the validity and effect of the various holograph writings executed by Mr Calder, the parties of the first part contended that the holograph writings were valid and effectual testamentary writings, and that their effect was to revoke the provisions of the trust-disposition and settlement in so far as the provisions were therein contained in favour of Mrs Millar and her children were concerned.

The parties of the second and third part contended that the said holograph writings were mere jottings or scrawls written hastily and in fits of anger, and onght not to be given effect to as testamentary writings, or expressing the concluded intentions of the deceased Mr Calder. The parties of the third part further contended that, even assuming that Mrs Millar was excluded by said holograph writings from participating in her father's succession, her children's interests under the said trust-disposition and settlement were not affected thereby.

The parties asked the opinion and judgment of the Court upon the following questions of law, viz.—"1. Are the said holograph writings of Mr Calder, or any of them, valid and effectual testamentary writings? 2. Have the said holograph writings, or any of them, the effect of revoking the provisions in Mrs Millar's favour made by the trust-disposition and settlement of the deceased George Calder? 3. Have the said holograph writings, or any of them, the effect of revoking the provisions in favour of the child or children of Mrs Millar made by the said trust-disposition and settlement?"

Argued for the first parties—(1) The general rule applicable is found in *Colvin* v. *Hutcheson*, 12 R. 947 (Lord M'Laren's opinion, 953, and the Lord President). Here there was an informality in the writings, but they were found in a safe, and along with a copy of the trust-disposition. That the codicil was upon odd sheets of paper was not material—*Spiers*, 6 R. 1359. The expression jotted upon the envelope was not adverse; it might mean a codicil either was or was to be executed. If the document was part of deceased's will, Mrs Millar was unquestionably excluded. (2) But Mrs Millar's child was also excluded. The will directed equal division among children and their issue. Mrs Millar being excluded, the child's participation ceased, as its share was derivative. [LORD KINNEAR—How can a right of fee be derived from a liferent?] [LORD PRESIDENT—The codicil merely revokes what Margaret got, and she got a liferent only.]

Argued for the second and third parties—The child clearly was not deprived, as its fee was a separate and independent interest from the liferent of its mother. But neither was the mother deprived. The writings founded on were not testamentary in their character. They were merely abusive epistles, at most showing a floating intention to alter, and no instructions were given to carry out the intention. In *Munro* v. *Coutts*, 1 Dow's App. 437, even a holograph codicil sent to an agent to have a formal deed prepared on same lines was held invalid. Here the agents kept the trust-disposition, and if alteration had been intended they would have got instructions, but they never did. Similar cases were *Cunningham* v. *Murray's Trustees*, 9 Macph. 713, and *Stainton*, 3 S. 363.

At advising—

LORD PRESIDENT—I do not think that this case admits of any doubt. The late Mr Calder had by his trust-disposition and settlement divided his estate in a very sensible manner among his children equally, and thereafter, having had a serious quarrel with his daughter Margaret, he executed certain holograph writings altering the disposition he had made in her favour. I cannot see any reason for refusing to give effect to these writings. They are complete in themselves, and they were found at the truster's death in very good company, being enclosed in an envelope along with a copy of the trust-disposition, the original of which was in the hands of the truster's law-agents.

These writings, then, being part of the will of the truster, we have to consider what is their effect, and in this connection the important part of the document of 18th December is in these terms—"I hereby exclude the said Mrs J. Miller from any right title or interest in my estate personal or moveable whatsoever and not to give her as much as one farthing. Witness my hand written by me this 18th day of Decr 1888. (Signed) GEO. CALDER. 11 o'cl. a.m." This writing is signed by the testator; its meaning is not ambiguous; and though upon the face of it, if it is read

through, it is clear that it was written under the influence of anger, no satisfactory reason can, as I have said, be shown for refusing it effect. Another of the writings, of older date, but equally emphatic, is in these terms—[*Reads writing as quoted above*]. It is not necessary to go into any of the other writings, which are precisely to the same effect, as these two are holograph of the testator and of very clear meaning. I must say in passing that there does not appear to me to be any relevancy in the reference, which was made in the argument by counsel for the second and third parties, to the envelope dated 28th February 1888 as showing that the testator merely entertained the idea of excluding his daughter Margaret from a share in his estate, but took no subsequent step to give effect to his intention. For that date is anterior to the execution of the holograph writings founded on by the first parties, and it is therefore quite possible to suppose that by executing them he accomplished the purpose he had in view upon 28th February 1888, or shortly after that date. I therefore think that the provision in favour of Mrs Millar was absolutely revoked and annulled.

But the question still remains, whether that revocation affects the provisions under the trust-disposition in favour of her children? and our view upon that point must depend upon the construction to be put upon the original deed itself. Now, the first clause which calls for attention in that deed is the fourth purpose. It is in these terms—"That my trustees shall hold the whole residue of my means and estate hereby conveyed for behoof of such of my children as shall survive me and attain the age of twenty-five years complete if sons, or shall attain said age or be married under said age if daughters, and the lawful issue of such of my children as shall die without becoming entitled under this purpose leaving lawful issue, equally among said children and issue *per stirpes*." Here there is a very clear intention expressed that even if any of the testator's immediate children should die the children of that child should take. "And shall pay over their shares to my sons surviving me on their attaining said age, or on my death if they shall then have attained said age, and shall set apart as after mentioned the shares of my daughters surviving me on their attaining said age, or being married under said age, whichever event shall first happen, or on my death if they shall previous thereto have attained said age, or shall have been married." And then there follows the direction of the testator with regard to the shares destined primarily to daughters, in these words—"And as regards the shares of such of my said children as are daughters, my trustees shall, on and after the arrival of the period of payment of their shares, hold in trust and apply the shares of such daughters, or place the same in the names of other trustees, with like powers, privileges, and immunities as their own, in trust for such daughters respectively in liferent, for their liferent use only, and for the lawful issue of said respective daughters, or failing lawful issue, for their next-of-kin, in fee." Now, the only thing which a daughter can take under that destination is a liferent, while the fee of the share is destined to her children. The holograph codicil accordingly forfeits Margaret's share, which is a liferent only, but by its operation the children's right of fee is not in any way impaired. Whether the effect to be given to the cancellation of Margaret's share may not result in an increased share of the testator's estate falling to her and her family is not *hujus loci*, and we do not express any opinion upon that question. We are merely asked to answer the question whether the children are prejudicially affected by the execution of the codicil, and I do not think that they are.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court answered the first and second questions in the affirmative, and the third question in the negative.

Counsel for the First Parties—Asher, Q.C. —Gillespie. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for the Second and Third Parties —D.-F. Balfour Q.C.—Jameson. Agents—R.R. Simpson & Lawson, W.S.

Friday, December 19.

SECOND DIVISION.

[Sheriff-Substitute of Dumfries.

KERR *v.* LINDSAY.

Parent and Child—Proof of Paternity—Presumption of Fact arising from Marriage with Pregnant Woman.

The mother of a child born upon 5th January 1890 raised an action of affiliation and aliment, alleging that it was the result of an act of connection upon 7th April 1889. The defender admitted that he had once had connection with the pursuer, but that that was in February. They continued to live in the same town. Upon 12th April 1889 the pursuer became engaged to a widower, to whom, three weeks later, she confided that she was pregnant, and whom she married the following August. She and her husband both denied ever having been unduly intimate before their marriage.

Upon a proof the Sheriff-Substitute found the case proved against the defender, but the Court *held* (*diss.* Lord Trayner) that the very strong presumption of fact arising from the pursuer's husband having married her in full knowledge of her pregnancy, which pointed to him as her child's father, had not been rebutted by the evidence, and assoilzied the defender.