general terms with the whole of his estate of whatever kind it happened to be at his death, *i.e.*, whether it was heritable or moveable. We were told that he left landed property to the extent of £6000, and a very small amount of moveable property. What we have to deal with in this case is two-thirds of the moveable property and the whole of the heritable property, because he gave one-third of the moveable property to his widow absolutely and the liferent of one-third of his heritable estate, and she is now dead. With respect to the residue, he directs his trustees to hold the residue and remainder of his whole estate for the benefit of his five children who were then living, and of any others that might be born, "equally share and share alike." They are directed to pay, and I read the word "pay" as meaning to pay over money, or to convey heritage according to the quality of the estate, to each of the children upon each of them attaining majority. There is no other direction in the will which has any other bearing on this case, except the power given to the trustees to sell the estates, "heritable and moveable, by public roup or private bargain and of compromise and submission, and in general to do or cause to be done everything necessary for the execution of the trust hereby created."

Now, we must take the property he left as it existed at the time of his death unless there is a conversion, and there is none here unless it is contained in the power of sale, having regard to the fact that the testator was survived by five children all in majority. Now, I do not think that among the views I entertained and expressed in the case of *Sheppard* there is anything stated which would show that I thought that such facts as these I have just stated would show a desire for conversion on the part of the testator. I put the case during the argument whether if in this case there had been only one son surviving his father, it would have been necessary for the execution of the will to hold that conversion had taken place, and I think everybody must be convinced that it would be ridiculous to say that it was necessary. Then is it necessary to hold that conversion has taken place because the testator was survived by five children, all of whom, as we were told, continued to desire for seven years after the testator's death that the estate should remain heritable as it was at his death, and not be sold? Indeed, they are all of the same opinion still except the representative of the deceased son.

I cannot come to the conclusion that conversion is necessary for the execution of the trust, or that by the words of his deed the testator intended that conversion should take place.

I can find no more brief and emphatic explanation of the law relative to this matter than the words of the Vice-Chancellor in the case of *Smith* v. *Claxton*, January 17, 1820, 4 Madd. 484, at p. 492—"Under every will the true question is whether the devisor has expressed a purpose that, in the events which have happened, the land shall be converted into money. Where a devisor directs his land to be sold, and the produce divided between A and B, the obvious purpose of the testator is that there shall be a sale for the convenience of division, and A and B take their several interests as money and not land."

Now, I cannot find that the testator has expressed in his settlement any intention that the heritable property he left should be sold and the price divided among the various beneficiaries. I therefore think we should adhere to the Lord Ordinary's interlocutor.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER—There are some principles in the law of conversion which are well settled. A direct instruction to trustees to sell heritable subjects and convert them into money operates conversion. A mere power to sell does not operate conversion unless the necessity for the exercise of the power arises, in which case conversion takes place.

The question we have to consider in this case is in connection with a power of sale given by the testator to his trustees, and we have to say if there is anything in this deed, looked at in view of the circumstances which existed at the time of the truster's death, which would lead us to the opinion that it was the intention of the truster to convert his heritable into moveable estate, or anything which made it necessary for the carrying out of the trust so to convert it.

I am unable to find anything of that kind, and I therefore think we should affirm the Lord Ordinary's interlocutor.

The Court adhered.

Counsel for the Pursuer—Salvesen—T. B. Morison. Agent—Peter Morison, junior, S.S.C.

Counsel for the Respondents — C. S. Dickson — Constable. Agents — Carment, Wedderburn, & Watson, W.S.

Saturday, January 19.

[Lord Wellwood, Ordinary.

SECOND DIVISION.

LILLY AND OTHERS *v.* STEVENSON & COMPANY.

Shipping Law — Ship — Construction of Charter-Party—Commencement of Lay-Days—Demurrage—Exception.

A charter-party provided that a ship should proceed to one of several ports as ordered by the charterers, and there receive a full cargo of coals "at the berth or berths pointed out by charterers' agents, if required. . . The

coals to be loaded . . . in sixty hours, weather permitting, and Sundays and holidays excepted. . . . If longer detained, demurrage to be paid at 12/6 per hour, unless detention arises from a strike, restriction, or holidays . . . at any works, mine, or mines with which vessel may be booked . . . or any cause beyond merchants' control delaying the obtaining, providing, loading, or discharging of cargo. Lay-days to count from the time the master has got ship reported, berthed, and ready to receive cargo, and given notice of same in writing to charterers or their agents.

On 19th October 1893 the charterers ordered the ship to proceed to a particular port with coal from a particular colliery. She arrived on 13th November, and on the same day the master gave written intimation to the charterers that the ship was ready to receive cargo. On 14th November a berth was available for loading the cargo, but as there was no cargo forward for the ship, the berth, in accordance with the harbour rules, was given to another vessel. The ship was not berthed for cargo until 22nd November, no cargo having come forward to entitle her to a berth earlier. On 23rd November a strike took place at the colliery, which continued till 11th December. The loading of the ship was completed on the afternoon of the 15th December.

Held (1) (*aff.* judgment of Lord Wellwood) that the lay-days commenced to run on 14th November 1893, as the ship would have been berthed on that date but for the fault of the charterers in failing to have the cargo ready for shipment; and (2) (*rev.* judgment of Lord Wellwood) that no demurrage was due by the charterers from 23rd November to 11th December, the period of the strike at the colliery.

By charter-party between Jesse Lilly and others, owners of the s.s. 'Charles Steels,' and D. M. Stevenson & Company, Leith, the charterers, it was contracted, *inter alia*, "that said ship being tight, staunch, and every way fitted for the voyage, shall proceed as soon as possible to Burntisland, Methil, Bo'ness, or Grangemouth, and there receive, in one or more lots as ordered, at the berth or berths pointed out by charterers' agents, if required, a full cargo of coals. The charterers hereby agree to supply the said cargo. . . . The coals to be loaded in sixty hours, and delivery to be taken at the rate of 300 tons per running day, weather permitting, and Sundays and holidays excepted in both cases. Receivers to have option of discharging cargo, ship paying the usual charge for same, but at Aarhus 6d. per ton only, and giving free use of winches and steam where customary. No bunker coal to be shipped in steamer's holds without consent of charterers. If longer detained, demurrage to be paid at 12/6 per hour, unless detention arises from a lock-out, strike, restriction, accident, stoppage, idle time, or holidays at any works, mine, or mines with which vessel may be booked, railway strikes, breakdowns, or detentions, accidents to loading machinery, strikes, holidays, or idle time, or any cause beyond merchants' control, delaying the obtaining, providing, loading, or discharging of cargo. Lay-days to count from the time the master has got the ship reported, berthed, and ready to receive or deliver cargo, and given notice of same in writing to charterers or their agents during business hours, say between 9 a.m. and 5 p.m., but loading time not to count while bunkering or discharging inward cargo, nor during idle time or holidays, nor between 2 p.m. on Saturdays and 7 a.m. on Mondays, unless used, nor during time (if any) during which loading is stopped through ship being aground. . . ."

On 19th October 1893 the charterers ordered their agents at Bo'ness to book the 'Charles Steels' to be loaded at that port with coal from Longrigg Colliery, and thereafter the ship was ordered by the charterers to proceed to Bo'ness and there load her cargo. In accordance with the orders given the 'Charles Steels' proceeded to Bo'ness, where she arrived at 4 a.m. on Monday, 13th November 1893, and on the same day the master gave written intimation to the charterers' agents that the ship was ready to receive cargo. At 6 a.m. on Tuesday 14th November a berth was available for loading the cargo of the 'Charles Steels,' and the master gave notice in writing to the charterers' agents, "As a berth was available this morning at 6 o'clock, at which the s.s. 'Charles Steels' could load her cargo, that the lay-days for loading the s.s. 'Charles Steels' commenced at six o'clock this morning, the 14th day of November 1893, and will run and count as per charter-party."

Notwithstanding this notice there were no coals forward for the 'Charles Steels', and according to the custom of the port of Bo'ness the berth was given to another vessel whose cargo was ready for shipment. On 20th or 22nd November coals were brought forward, and the 'Charles Steels' was berthed on the latter date.

On 23rd November a strike took place at Longrigg Colliery, which lasted till 11th December 1893, and it was not till Friday 15th December at 3·10 a.m. that the vessel was actually loaded.

In these circumstances the shipowners contended that the ship was, in terms of the charter-party, on demurrage from 16th November at 6 p.m. to Friday 15th December at 3 a.m., being a period of 677 hours, after deducting four hours during which the ship was occupied in bunkering. They therefore demanded demurrage from the charterers at the rate of 12s. 6d. per hour, amounting to £423, 2s. 6d. The charterers denied their liability under the charter-party, and the owners thereupon raised an action against the charterers for the above sum.

After proof the Lord Ordinary (WELLWOOD) on 9th November 1894 decerned against the defenders for the sum of £408, 2s. 6d.

"*Opinion.*—[*After narrating the facts and referring to the provisions of the charter-party.*]—The pursuers now sue for demurrage at the stipulated rate, or alternatively, for damages for detention. They maintain that if the charterers had had a cargo forward on 14th November the 'Charles Steels' would have got a berth, and would have been loaded before the strike commenced.

"1. The defenders' first proposition is that they were under no obligation to supply a cargo, and the lay-days did not begin to run until the 'Charles Steels' was berthed on 22nd November. The pursuers answer that they were prevented from getting the vessel berthed by the act of the defenders themselves, because, according to the custom of the port, the harbour-master will not allow a vessel to enter or remain in a berth unless its cargo is forward. The following is the evidence of the harbour-master, Angus M'Intosh, in regard to the custom of the port—'Vessels take their turn at the loading berth according to the time of their arrival in the dock or harbour, if there is cargo there for them. It is I who authorise the taking of the vessel to the berth under the crane—after I am asked for it. When I am asked I regulate the order by the regular turn of the vessel. If, when a vessel's turn to go into the loading berth comes, she has not cargo forward, I take the next vessel in turn if she has cargo there. According to usage a vessel waiting her turn is not allowed to go into the berth unless her cargo, or part of her cargo is there, or her bunker coals if she is a steamer. If a vessel misses her turn through her cargo not being there, when her cargo arrives she gets the first vacant berth. A vessel which gets the turn in place of one whose cargo is not forward is allowed to complete her cargo before leaving the berth, but as soon as the berth is vacant the vessel that has lost her turn is reinstated if in the meantime her cargo has arrived.' And again—'If the master or agent of a ship had told me on the 13th of November 1893 that his bunker coal was forward and he wanted to load it, I would have been bound to give him the berth if it was his turn. If the bunker coal of the 'Charles Steels' had been forward on the morning of the 14th November, and the agent had asked me for the berth, I would have given it. Messrs Stevenson & Cowie were the ship's agents.' And lastly—'If a vessel got into the berth to take in her bunker coal, if when it was in she had no cargo there, I would turn her out.'

"The defenders maintain that even if the 'Charles Steels' failure to obtain a berth was due to their not having supplied a cargo, the condition must be taken literally, and that the pursuers must be held to have agreed to run the risk of not obtaining a berth until the cargo was forward, trusting to the defenders, in their own interest, supplying a cargo in good time. I am unable to sustain this contention. It would place the shipowner absolutely at the mercy of the charterers. The contract must be construed reasonably in the view of the custom of the port of loading, and so construed, I think that the expression 'berthed' in the charter-party must be read as meaning that a berth shall be available for the vessel, and the vessel ready to enter and receive the cargo. In this, as in other contracts where there is a condition-precedent which one party has been prevented from fulfilling through the fault of the other, the condition is held to have been satisfied—*Mackay* v. *Dick & Stevenson*, 8 R. (H. of L.) 37. If the 'Charles Steels' had been prevented from obtaining a berth through any fault of the pursuers, or through the crowded state of the docks in the port, or the action of the harbour authorities alone, the pursuers would have had no claim for demurrage. But the only reason why the vessel was not berthed was that (I assume meantime through the fault of the defenders) the cargo was not forward. The pursuers had done all that lay upon them; the vessel had reached the port of loading and entered the dock; its turn for a berth had arrived; the harbour-master was ready to assign a berth; and notice had been given in writing to the charterers' agents. In these circumstances the vessel must be held to have been berthed.

"The defenders maintain that it is unreasonable that they should be expected to have a cargo waiting for a vessel whose turn may not arrive for many days. But that is one of the consequences of the rule of the port, as the defenders well knew. It is plain from their correspondence with the Longrigg Colliery that they fully recognised and strongly contended that vessels in the position of the 'Charles Steels' without cargo, and therefore without a berth, were on demurrage. I may refer, for instance, to their letter of 19th October 1893 to James Nimmo & Company, in which they say—'We are sorely disappointed at not receiving any coal from you for the past few days for boats lying ready so long and demurrage accruing. In the face of our bookings and the quantity we have to get from you, we do not see why you should engage and give preference to other tonnage to gain a mere temporary benefit.'

"To this, James Nimmo & Company replied to the defenders in a letter dated 20th October 1893—'We note what you say with reference to supplies of coal to you this month, but we must repudiate the remark you make as to our engaging and and giving preference to other tonnage to gain a temporary advantage. We are not doing so, because you know very well that the non-shipment of coal into your steamers at Bo'ness has arisen through their inability to secure berths, and we are satisfied that inquiry at Bo'ness will show that we have loaded any of your boats which have been in turn.' The defenders replied by letter to James Nimmo & Company, of date 21st October 1893—'Your favour of yesterday received. You are quite wrong in saying that the non-shipment of Longrigg coal into our ships is caused through their inability to secure berths. You know perfectly well that you have not sent us any coal to Bo'ness during the past few

days, since 17th inst., while our boats would have got berthed long ago had you sent them, but instead of this you are keeping our ships out of berth by sending coal to load into other boats. There is no use trying to blink the fact that the steamers "Creto," "River Avon," and "George Fisher" have got the preference and the coal, keeping us short of our due supplies for days and weeks past, landing us into heavy demurrage, and yet you say we remain scatheless.' Besides, it does not seem to have been the defenders' custom to order coals specially for any particular vessel. The vessels as they arrived got their share of the weekly supply which the colliery 'poured into' Bo'ness. It was the failure of this regular supply which led to the detention of the 'Charles Steels.'

"2. I have felt more difficulty in regard to the next question, whether, still assuming that the defenders were in fault in not having a cargo ready for the 'Charles Steels' the pursuers might not have satisfied the condition by getting the vessel berthed for the purpose of loading her bunkers. It is clear from the evidence that even if she had been allowed to enter the berth for that purpose it would have been useless, so far as loading the cargo was concerned, because the harbour-master would have turned her out as soon as her bunkers were loaded—that is in three or four hours—if her cargo was not then forward. At the same time, if the harbour-master's evidence is correct, he would, had he been asked, have allowed her to go into the berth for the purpose of loading her bunkers. It is somewhat strange that the master of the 'Charles Steels' and Stevenson & Cowie, the agents for the charterers as well as for the ship, were under the impression that as a matter of right the 'Charles Steels' was not entitled to get into a berth to load her bunkers, and the witnesses, Richard Mackie and William M'Taggart, men of experience in the shipping trade, entertained the same belief. But taking it that, strictly speaking, the 'Charles Steels' might have claimed the berth in order to load her bunkers, I am not prepared to hold that the pursuers were bound to do so for the purpose of satisfying the condition in the charter-party. It is the evidence of Mackie, a shipowner of experience, concurred in by M'Taggart, that it is the custom in the shipping trade not to berth a vessel to take in bunker coals if the cargo is not forward, and that the custom is not to load bunkers until part of the cargo has been loaded. Now, the expression 'berthed in the charter-party must, I think, be held as meaning berthed for the purpose of receiving cargo. The pursuers were not bound to incur the expense and trouble of berthing the vessel merely for the purpose of loading bunkers out of the usual and convenient order. As I have said, even had they done so, detention would not have been avoided, because the vessel would have been turned out of the berth on the forenoon of 14th November after loading bunkers.

"It must also be observed that the defenders' agents, who of course knew that no cargo was forthcoming, were fully as responsible as the defenders for not berthing the vessel if there was any neglect in the matter.

"3. The next question is, whether the defenders are saved from the consequences of not timeously supplying a cargo by any of the exceptions in their favour in the charter-party. They maintain that the detention arose from a 'cause beyond the merchant's control delaying the obtaining, providing, or loading . . . of cargo.' I am of opinion that these words do not apply to the particular cause or causes which in this case led to a cargo not being supplied. It appears from the correspondence that the owners of the colliery, while they undertook to supply a certain quantity of coal before the end of the year, were not bound to supply, or at least did not admit that they were bound to supply, a cargo for any particular ship, or even to furnish any fixed quantity of coal in any particular month. Notwithstanding that the defenders were well aware of the contention of the colliery owners as to the terms of their contract, they continued to charter vessels, including the 'Charles Steels,' and book them with Longrigg Colliery against the remonstrances of the colliery owners. Now, at the time in question, in consequence of a strike in the coal trade in England, there was a great demand for Scotch coal, and high prices were obtained for it. It is not distinctly proved where the Longrigg Colliery's coal was going during November 1893, but it is clear that it was being sent to customers other than the defenders. Now, even if the Longrigg Colliery were in breach of their contract with the defenders in not sending more coal to Bo'ness, that is not a cause beyond the control of the defenders in the sense of the charter-party. I may refer to the case of *Gardiner and Others* v. *M'Farlane, M'Crindell & Company*, 20 R. 414, especially Lord Trayner's opinion at p. 427. The causes of detention contemplated in the charter-party as constituting exceptions are strikes, lock-outs, accidents, and so forth—causes preventing or restricting output, or preventing or delaying the transit of the coal to the port. Here the cause of delay was either the fault of the defenders themselves in failing to make a contract with the mine-owners which would effectually insure the coal being forward in time, or in booking more vessels than the colliery could be expected to supply, or it was the fault of their agents, the mine-owners, in supplying other customers, and not properly fulfilling their contract with the defenders. Such causes do not, in my opinion, fall within the exceptions. In either case the pursuers cannot be allowed to suffer.

"4. The only other matter to be determined is the amount of demurrage or damages to be awarded. It is said that during the month of November there was a restricted output at Longrigg Colliery in consequence of the approach of the strike. I do not think that it is clearly and satisfactorily made out that at the time which is

of importance, viz., between the beginning of November and the 20th of that month, there was any substantial restriction of output at Longrigg Colliery. Comparing, for instance, the output during the first eleven working days of November (1st to 17th) with that during the last eleven working days of October (17th to 31st), it will be found that there is only a difference in favour of October of 346 tons, or an average of 31 tons a-day. I am therefore not prepared to make any reduction on the head of restricted output, but the defenders will be entitled to have deducted four hours for loading bunkers, and twenty-four hours for Thursday, 16th November, taking it as an idle day—in all twenty-eight hours—which, being deducted from 681 hours, leaves 653 hours. Calculating demurrage at the rate of 12s. 6d. an hour, brings out £408, 2s. 6d., for which the pursuers are entitled to decree."

The defenders reclaimed, and argued, *inter alia*—(1) In terms of the charter-party the lay-days did not commence till the master had got the ship berthed on 22nd November. The pursuers construed "Lay-days to count from the time the master got ship berthed," as meaning "Lay-days to count from the time that berth available." This was not a fair construction. Under a fair reading of the charter-party the defenders had no duty to commence loading until the ship was berthed. In any event, even if no cargo was forward, the master might have berthed the ship on the 14th in order to get her bunkered, and the ship would thus have been berthed in terms of the charter-party. (2) Under the charter-party they were not liable for demurrage during the period of the strike at Longrigg Colliery. "If longer detained" meant "If detained longer than the lay-days."

Argued, *inter alia*, for pursuers—(1) The lay-days commenced on 14th November. The ship on that date was in port and a berth was ready for her, and it was through the fault of the defenders in not having coals forward for loading that the ship was not allowed to get berthed. The defenders had not excused their failure to bring coals forward under any condition in the charter-party, and they were thus liable for the ship's failure to get berthed. The pursuers had fulfilled all that was required of them in order to get the ship berthed, and the defenders were alone in fault. (2) Demurrage must be paid for the period of the strike. The exemption did not apply in a case like this where no use had been made of the lay-days. If the lay-days had been used the ship would have been loaded before the strike commenced, and the pursuers should not be made to suffer on account of the negligence of the defenders. If it were decided otherwise, the charter-party would amount to a contract for the lease of the ship for any length of time at 12s. 6d. an hour subject to the exceptions specified. The Lord Ordinary's judgment was right and should be affirmed.

At advising—

LORD TRAYNER—In this case the pursuers seek to enforce a claim for demurrage in respect of the detention of their vessel by the defenders beyond the lay-days allowed for loading. There seems to be no material difference between the parties as to the facts out of which the present claim arises; and the debate before us was confined almost entirely to the construction which the parties respectively put upon the charter-party entered into between them, and the rights and liabilities thence arising *hinc inde* according as the one construction or the other was adopted. The charter-party in question we were told is in a form only recently adopted, and contains certain conditions intended to meet some views, unfavourable to the shippers of cargo, expressed in a recent decision. Whether the draughtsman has fully accomplished all that he proposed to do need not be determined, but I may say that the charter-party before us would in my opinion admit of considerable improvement both in the arrangement and expression of its clauses. So far as is necessary for the determination of this case, however, I have not felt any serious difficulty in arriving at a conclusion as to its meaning and effect.

By this charter-party (to state its terms briefly) it was contracted that the pursuers' vessel, the 'Charles Steels,' should proceed to Bo'ness and there receive a full cargo of coals "at the berth or berths pointed out by charterers' agents if required." The coals were to be loaded in 60 hours, weather permitting, and Sundays and holidays excepted. The lay-days were to commence "from the time the master has got ship reported, berthed, and ready to receive" cargo, and given written notice of the same to the charterers' agent, but time occupied in discharging mixed cargo, or loading bunker coals, or during which loading was stopped through ship being aground, or "idle time" and time between 2 p.m. on Saturday and 7 a.m. on Monday (unless needed for loading) was not to be counted as loading time. If longer detained, demurrage was to be paid at the rate of 12s. 6d. per hour unless detention arose, *inter alia*, from a strike or restriction of output "at any work, mine or mines, with which vessel may be booked . . . or any cause beyond merchants' control delaying the obtaining providing, loading, or discharging of cargo." These are, I think, the whole provisions of the charter-party so far as we are now concerned with them; and the facts of the case to which these provisions have to be applied are as follows—The 'Charles Steels' arrived at Bo'ness on the morning of the 13th November, and on the same day the master gave written intimation to the defenders that his ship was ready to receive cargo. On the morning of the 14th a berth was available for loading the cargo, which the vessel should have got had its cargo or part thereof been at the port for shipment. But there was no cargo forward, and therefore according to the harbour rules in force at Bo'ness, the berth was not given to the 'Charles Steels' but to another vessel whose cargo was there ready for shipment. The 'Charles Steels' was not berthed for

cargo until the 22nd of November, no cargo having come forward to entitle her to a berth earlier. On 23rd November a strike took place at the Longrigg Colliery (at which the 'Charles Steels' had previously been booked), which continued until the 11th December following. The loading of the pursuers' vessel was completed on the afternoon of 15th December.

From these facts it appears that the pursuers' vessel was detained very much beyond the stipulated lay-days, and for such detention the defenders are responsible unless they can show that the detention was occasioned by some fault or failure on the part of the ship, or arose from some cause falling within the conditions of the charter-party, in respect of which they are exempted from liability. Recognising this to be their position the defenders have maintained several grounds on which they claim to be free from the liability for demurrage now sought to be imposed upon them.

In the first place the defenders maintain that the lay-days did not commence until the 22nd November, being the day on which the pursuers' vessel was actually berthed for cargo, and they refer to the charter-party, which provides, "lay-days to count from the time the master has got ship reported, berthed, and ready to receive cargo." This, it is said, put upon the ship the duty of obtaining a berth and freed the defenders from all duty to commence loading until that had been done, and had been intimated to them; that the ship took the risk of any course whereby her berthing might be delayed or burdened. The Lord Ordinary has repelled this contention, and in my opinion rightly repelled it. I see nothing in the charter-party which transfers to the ship the common-law obligation of the shipper to procure the loading berth. The stipulation that the master was, if required, to go to any berth pointed out by the charterers is certainly against the defenders' view. But even were this otherwise it would not avail the defenders, because it was through their failure to have cargo ready for loading, and through that cause alone, that the ship did not obtain the berth otherwise available for her on the 14th November. What therefore the ship was unable to do through the fault or direct hindrance of the defenders, cannot be pleaded by them as failure on the part of the ship. It was said by the defenders, however, that the ship could have been berthed on the 14th to load bunker coals, and that if this had been done the ship would have been berthed so as to fulfil the condition of the charter-party necessary to the commencement of the lay-days. I think this view quite untenable. The master of the vessel did not want a berth for bunkering; but it is certain that if he had asked and got it, he could only have retained it for three or four hours, the time necessary for filling his bunkers. That would not have been berthing in terms of the charter-party, the berthing in which refers to berthing to receive and load cargo and nothing else.

The second ground of exemption pleaded by the defenders was an alleged restriction in the output of coals from the Longrigg Colliery during the lay-days, or at all events prior to the 23rd November, when the strike began. On this point also I agree with the Lord Ordinary. I think it is not clearly established that there was any material restriction of output during the period referred to in comparison with the ordinary output of other times. There is, and must be, a certain variation in the output, comparing one week or one month with another, but it has not been shown in this case that any difference in the output during the specific period exceeded such ordinary and usual variation.

The third point relied on by the defenders was the general clause that they should not be liable for detention arising from "any cause beyond merchants' control delaying the obtaining, providing, or loading the cargo." Apart from the question of restriction of output and strike at the colliery, no other specific cause is assigned for delaying the loading of the cargo. It is true the defenders say that they could not get the coal from the colliery although they made repeated demands for it. On the other hand, the correspondence shows that the coalmasters who were supplying the coals took up the position that they had duly supplied according to their contract the coal of which the cargo of the "Charles Steels" formed a part. It is not necessary here to decide between the coalmasters and defenders which of them was right in this controversy. It is enough for the purposes of this decision to say that the defenders have not satisfied me that the coalmasters were in the wrong. On the effect of this very general clause in the charter-party I give no opinion, guarding myself however at same time from being supposed to hold that it necessarily affords to the merchant so complete an absolvitor from liability as they, from their argument upon it, seemed to think.

The fourth and last contention on the part of the defenders has reference to the period during which there was a strike at Longrigg colliery, viz., from 23rd November till 11th December. Now, the charter-party provides that if the ship is "longer detained" (which can only mean detained longer than the stipulated lay-days) demurrage shall be payable unless detention arises from, *inter alia*, a strike at the "mine or mines with which vessel may be booked." Three things appear to me to be clear on the proof—1st. that the "Charles Steels" had been booked with the Longrigg Colliery on 19th October (that is, ten days after the date of the charter-party, and more than three weeks before the vessel arrived at Bo'ness), and that this had been intimated to the pursuers' agents at Bo'ness on same date; 2nd, that a strike did occur at the Longrigg Colliery on 23rd November, which continued until the 11th December; and 3rd, that during that period no coals were or could be got for the cargo of the "Charles Steels." In these circum-

stances I think the exemption from demurrage on account of "strike" came into operation, and that for the period during which the strike continued no demurrage is due by the defenders. The pursuers argued that the exemption from liability to which I have referred did not apply when no use had been made of the lay-days, and that if the defenders had used their lay-days the cargo would have been loaded before the strike began. But I cannot accede to that view. Days stipulated for by the merchant, *on demurrage*, are just lay-days, but lay-days that have to be paid for. If a charter-party provides that the charterer shall have ten days to load cargo, and ten days further on demurrage at a certain rate per day, the shipper has twenty days to load although he pays something extra for the last ten. Loading within twenty days is fulfilment of the obligation to load. Here the lay-days proper were limited to sixty hours, but any time beyond that which was occupied in loading the cargo was to be paid for at the rate of 12s. 6d. per hour. The pursuer said that this would amount to a lease of his vessel for any length of time the defenders were pleased, provided they paid the stipulated rate. Even if it had been so, I rather think it would have been a good enough bargain for the ship. But it is not so. Where the days on demurrage are not limited by contract, they will be limited by law to what is reasonable in the circumstances, as circumstances may happen to exist or emerge. But there is no such limitation of the application of the demurrage clause in the charter-party before us as that which the pursuer maintains there is, nor can any such limitation be fairly implied. The defenders were entitled to keep the vessel on demurrage, but was to pay no demurrage if the detention was caused by a strike. The defenders maintained that the exemption clause I have been considering applied also to any detention by non-loading in the course of the lay-days. I am not prepared to adopt that view, but it is not necessary to offer any opinion upon it. It is enough for this case that the exemption clause applies to the period during which the vessel is on demurrage, and that the detention now being considered (that is, during the continuance of the strike) occurred during that period.

The result of my opinion is to affirm the interlocutor of the Lord Ordinary, except as regards the demurrage allowed for the time the colliery was on strike. The demurrage for that period will fall to be deducted from the sum decerned for, and the pursuers found entitled only to the balance after that deduction has been made.

LORD JUSTICE-CLERK—That is the opinion of the Court.

The Court recalled the interlocutor of the Lord Ordinary, and decerned against the defenders for the sum of £136, 5s.

Counsel for the Pursuers—Ure—Aitken. Agents—Beveridge, Sutherland & Smith, S.S.C.

Counsel for the Defenders—C. S. Dickson—Salvesen. Agents—Boyd, Jameson, & Kelly, W.S.

Wednesday, January 23.

FIRST DIVISION.

[Sheriff-Substitute at Elgin.

SCOTT *v.* GREAT NORTH OF SCOTLAND RAILWAY COMPANY.

Reparation—Breach of Contract—Carrier—Railway Company—Right to Assign Particular Seats to Passengers.

A railway company finding that the straps of the carriage windows were being cut, and suspecting that the mischief was being done by someone holding a third-class composition season ticket, gave orders that the holders of such tickets should be restricted to certain particular compartments. One of these ticket-holders, after having taken his seat unnoticed in the compartment in which he had usually travelled previously, was ordered by an official of the company to move. He complied under protest, but, being unwilling to occupy the compartment assigned to him, he did not travel by the train, and brought an action of damages for breach of contract against the railway company.

The Court assoilzied the defenders, *holding* that a railway company had a right to assign the compartments and seats which passengers should occupy, and that the defenders were not barred from exercising this right, as they had not acquiesced in the pursuer choosing a seat for himself.

Opinions reserved as to whether, if a passenger has taken his seat with the acquiescence of the servants of the railway company, he can afterwards be removed without a good reason.

John Scott was the holder of a third-class composition ticket of the Great North of Scotland Railway Company, which entitled him to travel between Lossiemouth and Elgin up to 29th January 1894. On the 22nd January he went to the station at Lossiemouth and entered the carriage on the 8·30 a.m. train in which he usually travelled to Elgin. After he had taken his seat one of the railway company's porters named James Gerrie came and told him to remove into another carriage. Scott asked why he should do so, but, upon the porter repeating the order, he came out of the carriage under protest. As, however, he did not wish to enter the compartment which the porter pointed out to him, he walked to Elgin, a distance of six miles. Scott returned from Elgin by the 7·15 p.m. train. He was again asked to leave the compartment in which he had taken his seat, but refused, and was allowed to remain. Thereafter Scott raised an action