On 26th May 1908 the Court (LORD M'LAREN, LORD KINNEAR, and LORD MACKENZIE), without delivering opinions, ordained the petitioners to lodge in process a copy of the scheme as proposed in the petition, and on this being done pronounced, on 29th May 1908, the following interlocutor:—

"Approve of said report and of the said scheme: Authorise and empower the petitioners to administer the bequest under their charge in accordance with the provisions contained in the scheme."

Counsel for Petitioners — R. S. Horne. Agent—R. Ainslie Brown, S.S.C.

Friday, May 29.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

THE HORSLEY LINE, LIMITED *v.* ROECHLING BROTHERS.

Ship — Charter-Party — Lay Days — Commencement—Arrival of Vessel at Port.

A charter-party provided that a steamship should "proceed to Middlesborough and there load a . . . cargo and proceed to Savona . . . and there deliver the same . . . The reckoning for loading to commence when the steamer is berthed at the respective wharves and notice given that she is ready to receive cargo. Time for discharging to commence on being reported at the Custom House."

The steamship anchored in the roads at Savona at 8·40 a.m. on a Tuesday, was reported at the Custom House at 3 p.m. of the same day, lay in the roads until 3·25 p.m. on Saturday, when she entered the harbour and was moored to a quay. The roads were the ordinary place of anchorage for vessels waiting room in the harbour, where alone discharging and loading took place, and were outside the geographical limits of what was ordinarily known as the port of Savona.

In an action for demurrage at the instance of the owners of the vessel, in which they further averred that, according to the custom of the port, vessels on arrival in the roads were reported at the Custom House, and were allotted berths in the harbour according to the order of reporting—*held*, subject to the pursuers proving their averment as to the custom of the port, that the lay days commenced to run at 3 p.m. on Tuesday, that being the time when she was reported at the Custom House.

Ship—Charter-Party—Lay Days — Demurrage—Calculation—Whole Days or Fractions of Days.

A charter-party provided "cargo to be received at the port of discharge at the rate of 400 tons per weather working day. . . . Demurrage at the rate of £25 per running day . . . ." The cargo consisted of 2850 tons.

Held (1) that the charterers were entitled only to lay days amounting to seven days and three hours, and not, as they contended, to eight complete days; (2) the vessel having been on demurrage for six days and one and a half hours of a seventh day, that the owners were entitled to be paid demurrage for six days and one and a half hours, and not, as they contended, for seven complete days.

Ship—Charter-Party—Exception—Hands Striking Work.

A charter-party, entered into in January 1907, provided that the charterers were to receive the cargo at the port of discharge at a certain rate per day, "except in cases of riot, or any hands striking work, or accidents to machinery which may impede the ordinary loading and discharging of the steamer."

The vessel on arriving at the port of discharge was moored end on to the quay for a number of days, and no cargo was discharged until she obtained a berth alongside of a quay. This was due to the fact that the presidents of the two co-operative societies of labour at the port had published in November 1906 a declaration, regularly acted upon and widely known, that steamers were not to be discharged while lying end on to a quay.

Held that the charterers were under an obligation to receive cargo during the days in which the vessel was lying end on to the quay, as the clause of exception did not apply to the circumstances of the case.

The Horsley Line, Limited (owners of the s.s. "Dalmally"), in January 1907 chartered the s.s. "Dalmally" to Roechling Brothers.

The charter-party bore—"That the said steamship . . . shall, after discharging present cargo, with all convenient speed proceed to Middlesbrough and there load . . . a full and complete cargo . . . and being so loaded, shall with all convenient speed proceed to Savona or Genoa, as ordered on signing bills of lading, and there deliver the same to the order of the said freighters or their assigns. . . . . .

"Steamer not to be responsible for any loss, damage, or delay to cargo, caused by strikes, lockouts, and/or combinations of officers, engineers, crew, dock labourers, stevedores, lightermen, or any other hands or agencies connected with the loading or discharging of the steamer. . . . . .

"The cargo to be supplied at the port of loading as fast as the steamer can stow same, and received at the port of discharge at the rate of 400 tons per weather working day (Sundays and holidays excepted) except in cases of riot, or any hands striking work, or accidents to machinery which may impede the ordinary loading and discharging of the steamer. The reckoning for loading

to commence when the steamer is berthed at the respective wharves, and notice given that she is ready to receive cargo.

"Time for discharging to commence on being reported at the Custom House.

"Demurrage at the rate of £25 per running day to be paid by the freighters or consignees for any detention in the loading and delivery, as above. . . . . .

"Finally this charter in all its clauses to be binding on both parties notwithstanding any and every custom of the port of discharge to the contrary. . . . . ."

In October 1907 the owners raised the present action against the charterers, in which they sued for a sum of £175 as demurrage.

The pursuers averred and the defenders answered, *inter alia*, as follows:—"(Cond. 4) The 'Dalmally' loaded a cargo of pig-iron at Middlesborough under the said charter-party, and arrived at Savona and anchored in the roads there at 8·40 a.m. on Tuesday 12th February. The roads at Savona are situated about half-a-mile from the Custom House, which is on the inner harbour, about 100 yards from the discharging wharves. They are within the port of Savona, or at all events they are the place where vessels lie when they are unable to obtain a berth in the harbour owing to the harbour being full. According to the custom of the port, vessels on arrival in the roads are reported at the Custom House and are allotted berths in the harbour according to the order of reporting. The 'Dalmally' was duly reported at the Custom House at 3 o'clock on the afternoon of 12th February, but was unable to get a berth as the harbour was full. The master also gave notice of her arrival to the defenders' agent there, who acknowledged receipt thereof. The 'Dalmally' lay in the roads until 3·25 p.m. on Saturday, 16th February, when she was taken inside the harbour and moored stern on to the breakwater. She was placed in a berth at the quay on Tuesday, 19th February, at 10 a.m. (Ans. 4) Denied. The 'Dalmally' did not arrive in Savona till 16th February 1907, and she had not arrived where her cargo could be delivered till the evening of 19th February, and time did not begin to count under the charter till 20th February 1907. Admitted that prior to 16th February the master had given notice of arrival and readiness to deliver cargo, but at the time of this notice the vessel was not arrived and in a position to deliver her cargo under the charter, and until she had so arrived and or was in a position to deliver cargo, time could in no case begin to count. The roads where the 'Dalmally' anchored on 12th February are not within the port of Savona. (Cond. 5) The cargo, which weighed 2850 tons, was received by the defenders, whose agent, M. Bandini, acknowledged the several notices given by the captain. The defenders did not actually commence unloading until 19th February, and did not finish until 7·30 p.m. on 27th February. On account of bad weather, Wednesday, the 13th February was not a weather working day. (Ans. 5.) Admitted that the discharge was completed on 27th February, also that Wednesday was not a weather working day and does not count under the charter, and that the quantity of cargo was 2850 tons. *Quoad ultra* denied. Explained that the discharge commenced on 20th February. (Cond. 6) The time allowed by the charter-party, at the rate of 400 tons per day for 2850 tons, was 7⅛ days or 7 days 3 hours. Reckoning from 3 p.m. on Tuesday, 12th February, when the 'Dalmally' was reported at the Custom House at Savona, and not counting Wednesday, the 13th, on account of the state of the weather, this time expired on Thursday, 21st February, at 6 p.m. From that time till 7·30 p.m. on 27th February, when the discharge was completed, the 'Dalmally' was on demurrage. She was therefore on demurrage for seven days. The demurrage at the rate of £25 per day is thus £175, being the sum now sued for. Denied that defenders were prevented by a combination of stevedores equivalent to a strike. In November, 1906 the presidents of the two co-operative societies of labour of the port of Savona published a declaration that from said month of November, until further notice, steamers were not to be discharged when moored end on to the quay. This declaration, which has been regularly acted upon since its date, was known to the defenders before entering into this charter-party. (Ans. 6) Denied. The defenders are entitled by the charter-party to complete days, and in no case can time be reckoned as pursuers propose. Explained that, assuming pursuers are entitled to say the vessel had arrived and that lay days had thus begun to run prior to 17th February, in respect that until the 20th February the defenders were prevented by a combination of the stevedores (being a strike within the provisions of the charter) from discharging the vessel, the defenders are entitled to have these days deducted in counting lay time."

The pursuers pleaded, *inter alia*—"(2) On a sound construction of the charter-party the lay days commenced to count on 12th February, when the vessel was reported at the Custom House. (3) The sum sued for being due by the defenders to the pursuers as demurrage under the charter-party condescended on, decree should be pronounced as craved."

The defenders pleaded, *inter alia*—"(1) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons. (3) The defenders fall to be assoilzied in respect that the ship, after being an arrived ship, was discharged within the lay days stipulated in the charter-party. (4) Upon a sound construction of the charter-party the lay days do not commence to count until the ship has arrived at a usual and recognised place of discharge in the port of destination. (5) Upon a sound construction of the charter-party the unit by which the time falls to be computed is a day. (6) *Separatim*, any delay in the discharge over and above the lay days having been occasioned by strikes or combinations of stevedores, the defenders fall to be assoil-

zied in respect of the exemption of their liability for these causes of delay in the charter-party."

The following joint minute of admissions was made by the parties—"1. That the s.s. 'Dalmally anchored in the roads at Savona at 8·40 a.m. on Tuesday, 12th February 1907. 2. That the s.s. 'Dalmally' was reported at the Custom House at Savona at 3 o'clock on the afternoon of 12th February 1907, and the same day was reported to the defenders' agents at Savona as having arrived in the roads. 3. That the roads at Savona where the s.s. 'Dalmally' was anchored is an ordinary place of anchorage for vessels to lie while unable owing to the harbour being full to get into same and preparatory to their entering the harbour of Savona, where alone discharging and unloading is effected. 4. That the roads at Savona are outside of the geographical limits of the port of Savona and of what is known commercially speaking as such port. 5. That it is not the custom at Savona to discharge cargo from vessels lying in the roads. 6. That the s.s. 'Dalmally' lay in the roads until 3·25 p.m. on Saturday, 16th February 1907, when she entered the harbour of Savona and moored stern on to a quay at a discharging berth in the inner harbour, and that it could not be moored in any other way. 7. That in November 1906 the presidents of the two co-operative societies of labour at the port of Savona published a declaration that from said month of November until further notice steamers were not to be discharged while moored end-on to the quay in said inner harbour. 8. That this declaration, which has been regularly acted upon since its date, was published in the Italian newspapers, and wide publicity was given to same. 9. That the s.s. 'Dalmally' did not discharge any of her cargo while she moored end-on to the quay as aforesaid."

On 21st February 1908 the Lord Ordinary repelled the first and sixth pleas-in-law for the defenders, and allowed the parties a proof of their averments.

Opinion.—"In this action the pursuers, who are the owners of the s.s. 'Dalmally,' seek to recover from the defenders five days' demurrage. Various questions are raised which mainly depend on a construction of the charter-party entered into between the pursuers and defenders, but there are also some facts in dispute, and although the parties have put in a joint minute of admissions they have failed to come to an agreement as to what appears to me to be a vital part of the pursuers' case. The defenders, however, maintain that they have sufficient admissions from the pursuers to justify the action being dismissed as irrelevant, and I shall accordingly deal with the argument on this head.

"The 'Dalmally' was chartered on 14th January 1907 to load a cargo of pig-iron of about 2900 tons at Middlesborough, and to proceed to Savona and there deliver the same. The charter-party provided 'that the cargo should be received at the port of discharge at the rate 400 tons per weather working day, except in cases of riot or any hands striking work, or accidents to machinery which might impede the ordinary loading and discharging of the steamer. . . . Time for discharging to commence on being reported at the Custom House.' The facts admitted by the parties are as follows:—The 'Dalmally' anchored in the roads at Savona at 8·40 on Tuesday, 12th February 1907. She was reported at the Custom House at Savona at three o'clock on the afternoon of that day. The place where she anchored is an ordinary place of anchorage for vessels unable to get into the harbour, in which alone discharging is effected, but is outside the limits of the port. The pursuers further aver that according to the custom of the port, vessels on arrival in the roads at Savona are reported at the Custom House, and are allotted berths in the harbour according to the order of reporting. (1) The first question in the case is, Are these facts relevant to infer that the lay-days under the charter-party in question commenced to run from three o'clock on the afternoon of 12th February? In my opinion they are.

"Practically the only argument submitted for the defenders was that the 'Dalmally' was not an arrived ship when she lay in the roads outside Savona, and they figured the case of a vessel being reported at the Custom House when she was still a long way from the port. I do not suppose such a thing would be commercially possible, but if it were I should of course not consider that the lay-days could possibly commence from the time of such reporting. The case is, however, quite different if it is the recognised custom of the port that vessels on arrival are reported at the Custom House, and are allotted berths according to the order of reporting, for I should then assume that the parties had this custom in view when they agreed on the terms of the charter-party. It may be noted that the defenders carry on business in Italy as well as in Glasgow; and shipowners, of course, make it their business to ascertain the customs of the ports to which they send their vessels. On this assumption, therefore, I think it is not a just implication that the running of the lay-days should be suspended until the vessel actually got into the harbour. I asked the defenders' counsel if the vessel was to report a second time at the Custom House after she had got into the harbour, and if there was any provision for such a report being received. I could get no satisfactory answer to either of these questions; but it appears to me that whatever assumption is made on these points the terms of the charter-party would be directly contradicted if the defenders' interpretation were adopted; for you would require to substitute for the quite unequivocal language used a clause such as this—'The time of discharging to commence after vessel has arrived in the harbour and has been reported at the Custom House.' I see no warrant for this. I recognise, of course, that if the contract does not state from what point of time the lay days shall commence to run, they will not run until the

ship has arrived in the port, and may not run until she is actually in a discharging berth, or at all events until such a berth is available. But there is nothing to prevent parties agreeing that the risk of the vessel's detention through the harbour being full shall be thrown on the charterer, and this —if the pursuers prove their averments—is what I think the parties truly intended.

"None of the reported cases seem to me to have any bearing on this question; but I note those to which I was referred—*Jackson*, 1838, 5 Bing, N.C. 71; '*The Machrihanish*,' Shipping Gazette, 4th April 1906; '*The Katy*,' P. 1895, p. 56; and *La Cour*, 1 R. 912.

"(2) If I am right in this, it follows that the lay days commenced to run at 3 p.m. on 12th February and must be reckoned as periods of twenty-four hours. The obligation of the defenders was to take delivery at the rate of 400 tons per day. The cargo consisted of 2850 tons; and the defenders claim that they were entitled to eight weather working days for unloading it, as it exceeded by fifty tons what they were bound to take out in the seven days. The only Scotch case cited by the defenders was that of *Christie*, 1896, 3 S.L.T. 284; but it has only a superficial resemblance. On the other hand I was favoured with a citation of two decisions in England—one supporting the pursuers' contention (*Yeoman*, 1904, 2 K.B. 429), and the other (*Houlder*, 1905, 2 K.B. 267), which quite as clearly supports the defenders. The latter was the decision of a single judge, Channell, J., but was subsequent in date to the decision of the Court of Appeal in *Yeoman's* case, which it professed to distinguish. It was held by Channell, J., that if a fraction of a day is required for the completion of the discharge the charterer is entitled to the whole of that day.

"The clause here under construction is practically identical with that in *Houlder's* case. No reasons, however, are given for the judgment except that there is a general rule that for purposes of demurrage fractions of a day are not to be taken into consideration. That, however, must always yield to the intention of parties as deduced from the words used; and I am unable to see how a provision that a vessel shall be discharged 'at the rate of 400 tons per weather working day' is satisfied by the charterer receiving the cargo at the rate of 362½ tons. In *Yeoman's* case there were no doubt words which are not here, for demurrage was to be paid at 4d. per net register ton per day 'and *pro rata*;' whereas here the corresponding clause is 'demurrage at the rate of £25 per running day.' So far as I can judge, however, the majority of the Court of Appeal would have reached the same result on the language of the clause with regard to the average rate of discharge alone. I agree with Romer, L.J., when he says—'I do not see why because the average rate mentioned does not work out to an exact number of days it should therefore follow that it does not apply to a portion of a day.' I think it also obvious that if the day is interrupted by bad weather—say, for three hours—the charterer would be entitled to the benefit of these three hours on the succeeding day; and the same with strikes or riots which interfered with the discharge of the vessel for less than a day. On the other view—that only whole days can be taken account of—either the charterer would fall to be debited with a whole lay day if discharging took place during any part of it, although it had to be stopped through an excepted cause; or the charterer might take up the position that no day on which there was an interruption could be reckoned as a lay day. In short, in my opinion, the only way in which a commercial contract like this can be expiscated is on the assumption of the parties having had in view lay days consisting of twenty-four consecutive hours, which would fall to be extended in proportion to the number of hours that the vessel's discharge was interrupted through the excepted causes.

"(3) The third question relates to the construction of the clause, 'except in case of riot or any hands striking work which might impede the ordinary discharging of the steamer.' The 'Dalmally' was taken into the harbour of Savona at 3·25 on Saturday, 16th February, and was moored stern-on to a quay at a discharging berth—there being no discharging berth available for her. She lay in this position without discharging any cargo until Tuesday, 19th February, at 10 a.m., or—according to the defenders—till the morning of 20th February. The defenders claim to deduct this period from the 16th to the 20th in respect that until then they were prevented by a combination of stevedores from discharging the vessel. The facts upon which I am asked to decide this question are narrated in articles 7 and 8 of the joint minute of admissions, and come to this, that the presidents of the two co-operative societies of labour at Savona published a declaration in November 1906 that from that time steamers were not to be discharged while moored end-on to the quay in said harbour; and that this declaration, which has since been regularly acted upon, received wide publicity. The charter-party, however, was entered into on 14th January 1907, and I think it is impossible to hold that this declaration, which merely settled the custom of the port as to discharging of steamers for the future, can be held to come under the clause dealing with riots or hands striking work. I was referred to the case of *Richardson*, 1898, 1 Q.B. 261, where it was said that the exception as to strikes and lockouts applies generally to labour disputes. I daresay it does; but so far as this discharge is concerned I see no evidence that there was any dispute—certainly none of any dispute arising with reference to the discharge of the 'Dalmally.' In fact I should not wonder if the declaration of the labour presidents had been published at the suggestion of the receivers of cargo, for it is they alone who have an interest in reducing the expense of discharge.

"(4) The last question relates to a period of one and a-half hours on the 27th of February, for which the pursuers claim a whole day's demurrage. Assuming their calculations to be correct, the lay days expired on Thursday, 21st February, at 6 p.m., but the 'Dalmally' was not completely unloaded before 7·30 on the 27th. I should have been very glad if I could have given effect to the defenders' contention on this head, but I consider myself foreclosed by the decision in *Hough* v. *Athya*, 6 R. 961, by the First Division, approving of the decision of the English Courts in *Commercial Steamship Company* v. *Boulton*, L.R., 10 Q.B. 346, where it was held that in the case of demurrage a fraction of a day counts as a day. I do not think that the reasons assigned by the learned judges for the rule which they laid down at all accord with the more modern practice under which demurrage in the case of large steamers is generally reckoned by the hour. On the other hand, parties who still contract on the footing that the only unit which they provide for calculating demurrage is a day cannot complain if they be held to have so contracted in view of the rule laid down more than thirty years ago. In the case of the *Branckelow s.s. Company*, 1897, 1 Q.B. 570, Lord Russell of Killowen introduced a kind of rough and ready method of calculating weather working days when there had been an interruption from bad weather, and held that where substantial work was done, though not amounting to half a day, the charterers were to be charged with half a day; and where substantially a full day's work—though not amounting to twelve hours—was done, the charterers were to be charged a full day. I confess I see no merit in this except the simplicity of the arithmetic, and it has this disadvantage that the charterer is in both cases overcharged. It would seem much simpler as well as more equitable, to take the actual hours during which discharging was stopped by bad weather. But for the purposes of the present question Lord Russell's decision is also an authority for the proposition that after the loading days are exhausted every part of a day counts as a whole day's demurrage.

"As already indicated, parties on more than one point are at serious variance as to the facts, and all therefore that I can do at present is to repel the defenders' first and sixth pleas-in-law and allow parties a proof of their averments."

The defenders reclaimed, and argued—(1) The lay days could not commence to run until the vessel had got in to the port of Savona. This was plain, *firstly*, from the terms of the charter-party, the fundamental clause of which was that the vessel should "proceed to Savona and *there* deliver her cargo." Accordingly until she had arrived at Savona, she was under no obligation to deliver, and it was admitted by both parties that the "roads" were not Savona. *Secondly*, the same result was arrived at by applying the well-known rules of law which applied to charter-parties. One of these, to which there was no exception, was that before the commencement of the lay days the ship must have arrived at her destination, and so be within the designation of an "arrived" ship—*Leonis Steamship Company, Limited* v. *Rank Limited*, [1908] 1 K.B. 499, L.J. Kennedy at 517; *cf. La Cour, &c.* v. *Donaldson & Son*, May 22, 1874, 1 R. 912, 11 S.L.R. 524. Here it was impossible to say that the ship was an "arrived" ship while she was still in the roads, where it was not suggested she could possibly discharge her cargo, and from which she might at any moment have to put to sea again through stress of weather. It was obvious that the clause upon which the pursuers mainly relied—"time for discharging to commence on being reported at Custom House"—must be read as qualified by the condition that the vessel had arrived. The time of her arrival was therefore 3·25 p.m. on 16th February, when she entered the harbour, and that was the earliest point of time at which, on any view, lay days could begin to run. In "*The Machrihanish*" (Shipping Gazette, 4th April 1906), founded on by the pursuers, there was an express contract as to the time at which the ship was to be held to have arrived. (2) The defenders were entitled to eight complete lay days in which to receive the cargo, as it exceeded by fifty tons what they were bound to take out in the seven days, the rule being that days meant calendar days from midnight to midnight, and not periods of 24 hours—"*The Katy*" [1895], P. 56—and that fractions of a day counted as whole days—*Houlder* v. *Weir*, [1905] 2 K.B. 267; *Hough and Others* v. *Athya & Son*, May 27, 1879, 6 R. 961, 16 S.L.R. 553. The only apparent authority to the contrary was *Yeoman* v. *The King*, [1904] 2 K.B. 429, which was distinguishable in that the parties there made it clear in their contract that the calculation was to be made by hours. (3) Lastly, the time for discharging did not begin to run until the vessel was properly berthed alongside the quay. Until then, and while lying end-on to the quay, the operation of unloading was prevented by "hands striking work," a delay for which, under the charter-party, the defenders were not responsible.

Argued for the pursuers (respondents)—The doctrine of the "arrived" ship had no place in a case like the present, where the parties had definitely fixed for themselves the time at which discharging was to begin, viz., "on being reported at the Custom House." In fact the object of parties was to avoid the difficulties which had often arisen as to whether a ship had arrived or not, by fixing a definite *punctum temporis* from which the lay days were to run. They were prepared to prove that the roads at Savona were the customary and necessary place from which to report. There was no inherent difficulty in making the lay days run from a period anterior to arrival in port, such a thing having often been done before. "*The Machrihanish*," Shipping Gazette, 4th April 1896; *Jackson and Another* v. *Galloway*, 5 Bingham, N.C. 71. (2) The defenders were only entitled to seven days and a fraction of a day, and not

to eight days, as lay days in which to unload the cargo, days meaning periods of 24 hours, and not calendar days from midnight to midnight. The present case was ruled by *Yeoman* v. *The King*, *cit. sup.*, from which it was indistinguishable—*Hough* v. *Athya & Son*, *cit. sup.*, and *Commercial Steamship Company* v. *Boulton*, L.R. 10 Q.B. 346, were cases dealing with demurrage to which a different rule was applicable, and "*The Katy*," *cit. sup.*, and *Houlder* v. *Weir*, *cit. sup.*, were distinguishable, because in them there was no definite time fixed for the commencement of the discharge. (3) The lay days continued to run throughout the period during which the vessel lay end-on to the quay, the fact that she was not unloaded during that time being due to a custom of the port which must have been known to the parties when they entered into their contract, and which at anyrate could not be described as a "case of riot" or "hands striking work"—*Stephens* v. *Harris*, 1887, 57 L.T. 618. (4) The ship had been on demurrage for six days and a fraction. The pursuers were accordingly entitled to payment for seven days, the rule being settled that in calculating demurrage fractions of days counted as whole days—*Commercial Steamship Company* v. *Boulton*, *cit. sup.*; *Hough* v. *Athya & Son*, *cit. sup.* The fact that a different rule was applied in calculating lay days and demurrage was explained by the fact that the latter was of the nature of a penalty or fine, and was therefore calculated in the way most unfavourable to the offender.

At advising—

LORD JUSTICE-CLERK—The facts of this case are most simple. They are stated very clearly in an opinion prepared by Lord Low which I have had an opportunity of perusing and in which I concur. The principal point in the contract between the parties is whether the days of discharge of the ship at Savona are to count from the time when the ship was reported at the Custom House, after reaching the outer harbour, or whether they are to count from the time at which she reached a berth for discharge. In my opinion the view the Lord Ordinary has taken is right. The words of the charter-party are distinct and unambiguous, fixing the time as being the time of the vessel being reported at the Custom House. Presumably those who signed the contract intended what it expresses. To say that the time is to commence to run from some other occurrence seems to me to be nothing short of saying that the words of the contract are either not to be held to mean what they say, but something different, or are to be ignored altogether in respect of some custom or practice inconsistent with it. I cannot assent to either contention. I think the words must be taken according to their plain meaning, it being right to presume that the charterers knew what they were doing when they accepted the terms contained in the document. All arguments about its being unfair and unreasonable to make the days run from arrival at the harbour and not from arrival at a berth are futile. The answer is plain, that the time must count according as it is fixed by the agreement between the parties, and that time is the time of the reporting at the Custom House. If the charterer made a bad bargain for himself, *sibi imputet*.

The second question is whether a fraction of a day necessary to complete the discharge is to be reckoned as a whole day for demurrage. The Lord Ordinary holds himself bound by two cases to which he refers. If I thought that the terms of the contract in these cases were of similar import to those in the present case, I should, though reluctant, come to the same conclusion. In one case the words were "thirteen running days to be allowed for loading and unloading and ten days on demurrage at £40 per day." In the other case the words were, "a minimum of seven days to be allowed the merchants and ten days' demurrage over and above the said lying days at £25 per day." In this case the terms are somewhat different. The cargo is to be received "at the rate of 400 tons per weather working day." Thus the delivery is to be at a rate per day, and that would in my view be fulfilled, although the end of the discharge took place not at the exact close of any particular working day but at any hour. If for a broken day running beyond the discharging time, payment was made for the broken time at the rate specified, the contract would in my opinion be fulfilled, the demurrage being at a rate, as the discharge was to be at a certain rate. I therefore cannot agree with the contention that the defenders are liable for a whole day in respect of a fraction of a day, namely, one hour and a half. See the case of *Yeoman*.

As regards the question of strikes, the Lord Ordinary's view seems to me to be entirely sound, and I do not find it necessary to add anything to what he has said.

I would fain hope that if your Lordships concur, as I understand you do, in the views I have expressed, that it may not be found necessary to send the case back for further proof, and further expense incurred.

LORD STORMONTH DARLING—I also have had an opportunity of reading and considering the opinion of my brother Lord Low in this case, and I entirely concur in it. The only legal point in which we differ from the Lord Ordinary is one at which he arrives unwillingly, for he says he would have been very glad if he could have given effect to the defenders' contention, but he considers himself foreclosed by the decision of the First Division in *Hough* v. *Athya & Son* in 1879 (6 R. 961), approving and following the judgment of the Queen's Bench in 1875 in *Boulton's* case (1875, L.R. 10 Q.B. 346). Now I do not suppose for a moment that any of us desire to impugn the soundness of either of these judgments with reference to the charter-parties affecting the cases then under consideration. But in neither of these charter-parties was there any reference to a unit of time other than a day. That, I apprehend, was the

real ground of the decision in the English case which was followed by the First Division of this Court. "There is no ground for saying" (so said Mr Justice Lush) "that in the case of demurrage there can be any division of a day without express stipulation to that effect." Mr Justice Quain was equally distinct to the same effect—"It was contended for the defendants that they are only liable for one day or only for a portion of the second; but it was not suggested how the proportion was to be calculated, and it is clear that, in the case of demurrage like this, we cannot go into the calculation of part of a day." So it was a difficulty of calculation according to the terms of the particular charter-party that led to the judgment, and nothing else. The framers of modern charter-parties have, as the Lord Ordinary indicates, got over this difficulty by naming as a unit hours instead of days; and Lord Low suggests other words in this charter-party which sufficiently distinguish its language from those of *Hough's* case and *Boulton's* case. I therefore think that the present case is not ruled by *Hough* and *Boulton*, and that there is no legal necessity for holding that the defenders are liable to pay as demurrage more than a proportionate part of the £25 applicable to the time actually occupied in discharging the cargo. And I agree that *Yeoman's* case ([1904], 2 Q.B. 429) affords strong confirmation of that view.

With respect to the parts of the Lord Ordinary's judgment in which we agree with him—which are chiefly the question at which point of time the "Dalmally" became an "arrived" ship, and the question whether the "strike" clause in the charter-party affected her or not—I do not desire to add anything to what the Lord Ordinary and Lord Low have said, and I agree with the latter that the question whether the proof allowed by the Lord Ordinary shall go on or not must depend on the real attitude of the defenders towards their own averments.

LORD LOW—The first question in this case is, When did the lay days commence to run?

The clauses in the charter-party in regard to loading and unloading are to the following effect:—"The cargo to be supplied at the port of loading as fast as the steamer can stow same, and received at the port of discharge at the rate of 400 tons per weather working day . . . . The reckoning for loading to commence when the steamer is berthed at the respective wharves, and notice given that she is ready to receive cargo; time for discharging to commence on being reported to Custom House."

The port of discharge in the charter-party was Savona or Genoa, and it was to the former that the "Dalmally" was sent. It is admitted that she anchored in the roads at Savona at 8·40 a.m on Tuesday the 12th February 1907, and that she was reported to the Custom House at 3 p.m. on the same day; that the roads at Savona are outside of the geographical limits of the port of Savona, and of what is known, commercially speaking, as such port; and that the roads where the "Dalmally" was anchored is an ordinary place of anchorage for vessels which cannot get into harbour (where alone cargo can be discharged) on account of its being full. It is also averred by the pursuers (Cond. 4) that "according to the custom of the port, vessels on arrival in the roads are reported at the Custom House, and are allotted berths in the harbour according to the order of reporting." That averment is denied by the defenders, but upon a question of relevancy it must be assumed to be true.

In these circumstances it seems to me that the provision in the charter-party in regard to the time when the lay days shall commence is quite distinct—they are to commence when in ordinary course the arrival of the vessel is reported at the Custom House. The defenders argued that such a construction of the charter-party was inconsistent with the leading provision that the vessel should "proceed to Savona," and "there deliver" the cargo, because until she got within the limits of the port she was not an "arrived" vessel, and was not in a position to deliver the cargo. Assuming that the averment of the pursuers which I have quoted is correct, I am of opinion that that argument cannot be sustained. The pursuer's averment amounts to this, that the custom of Savona is that when the harbour is full, an arriving vessel anchors in the roads and reports her arrival to the Custom House, and that that report regulates the order in which she gets a berth in the harbour. If that be so, then the report to the Custom House which the "Dalmally" made when she had anchored in the roads is the report referred to in the charter-party, and accordingly she must then be regarded as having been an "arrived" ship within the meaning and for the purposes of the charter-party. I am therefore of opinion that upon this branch of the case the Lord Ordinary is right.

The result is that the lay days commenced to run at 3 p.m. on the 12th February 1907, and if so it was not seriously disputed that they must be reckoned as periods of twenty-four hours. So calculating the lay days, they expired at 6 p.m. on the 21st February, and the discharge was completed at 7·30 p.m. on the 27th February. The vessel was therefore on demurrage for a period of six days (reckoning a day as a period of twenty-four hours) and a fraction (one hour and a half) of a seventh day, and the question is whether that fraction of a day is, for the purpose of calculating the amount of demurrage due, to be regarded as a whole day?

The clause in the charter-party fixing the rate of demurrage is as follows:—"Demurrage at the rate of £25 per running day to be paid by the freighters or consignees for any detention in loading or delivery as above."

The Lord Ordinary has held that the fraction of a day must count as a day. He has arrived at that conclusion unwillingly, and only because he regards the question

as settled by the decisions in *Hough* v. *Athya & Son*, 1879, 6 R. 961, and *Commercial Steamship Company* v. *Boulton*, 1875, L.R. 10 Q.B. 346. It was no doubt laid down in these cases in somewhat absolute terms that in the case of demurrage a fraction of a day is counted as a day. In both cases, however, the terms of the charter-parties differed very materially from those of the charter-party now under construction. In *Hough* v. *Athya & Son* the provision in the charter-party in regard to loading and unloading was "thirteen running days to be allowed for loading and unloading, and ten days on demurrage at £40 per day"; and in *The Commercial Steamship Company* v. *Boulton* it was provided that the charterers should be bound "to load and discharge as fast as the ship can work, but a minimum of seven days to be allowed merchants, and ten days on demurrage over and above the said lying-days at £25 per day."

Now, it is to be observed that in these cases there is nothing to suggest that any period of time is to be considered except the day, that is, the ordinary working day. So many lay days are allowed, and so many days on demurrage, and the amount of demurrage is fixed at a given sum "per day." Compare these terms with the charter-party in this case. The consignees are bound to receive the cargo "at the rate of 400 tons per weather working day." If in discharging the cargo at that rate the unloading is completed in so many days and a fraction of another day the obligation of the consignees is fulfilled, and I have difficulty in understanding why they should nevertheless be dealt with as if the completion of the discharge had occupied a whole day instead of a fraction of a day. Then demurrage is fixed "*at the rate of* £25 per running day." I regard the words "at the rate of" as important, because they seem to me to be consistent with the view that only a portion of the £25 is to be payable in respect of a day a part only of which is occupied in discharging. As the discharge is to be *at the rate of* 400 tons *per* day, so demurrage is to be *at the rate of* £25 per day. That seems to me to distinguish the present case entirely from those of *Hough* and *The Commercial Steamship Company*, and I am of opinion that upon a sound construction of the charter-party the defenders are not liable to pay, as demurrage for the hour and a half of the seventh day which was occupied in completing the discharging of the cargo, more than a proportionate part of £25. In that view I am confirmed by the judgment of the Court of Appeal in England in *Yeoman* v. *The King*, L.R. [1904] 2 K.B. 429, where the terms of the charter-party closely resembled those with which we are dealing.

I should explain that I have dealt only with the time during which the vessel was on demurrage, because the pursuers' claim is for demurrage. I may say, however, that in my opinion precisely the same considerations which have led me to the conclusion that in a question of demurrage a portion of a day does not count as a whole day, apply to lay days. I know of no reason why a different principle should apply in the two cases, and I observe that in *Hough* v. *Athya & Son* Lord President Inglis said—"I do not see any distinction between lay days and days of demurrage in the matter of counting."

The only other question which was argued relates to the construction of the clause in the charter-party which refers to strikes, and in regard to that matter I need only say that I agree with the Lord Ordinary.

I am not sure whether the defenders seriously deny the pursuers' averment in Cond. 4, which I have quoted in regard to the custom of the port. If they do not do so the case might be disposed of without further procedure, because if the views which I have expressed be sound, all that would require to be done would be to adjust the amount. If, however, the defenders dispute the averment the proof allowed by the Lord Ordinary must proceed.

LORD ARDWALL—On the question, when did the lay days commence, I entirely agree with the views expressed by the Lord Ordinary and the reasoning by which he supports them. The case of "*The Machrihanish*" as read to us by counsel from the *Shipping Gazette* appeared to be an authority in favour of the proposition, which indeed seems self-evident, viz., that although when there is no express stipulation on the subject in the contract lay days will not be held to commence to run till the ship becomes what has been called "an arrived ship," yet the parties may contract otherwise, and, as in this case and that above quoted, fix the date of arrival in the harbour roads as the commencement of the lay days, thus throwing on the charterers the risk of the vessel failing to get a harbour berth for some time after arrival in the roadstead off the port.

I accordingly agree with the Lord Ordinary and your Lordships that the lay days commenced to run at 3 p.m. on the 12th February. (2) The next question raised is, how many lay days were the charterers entitled to under the charter-party? They maintain that they were entitled to eight "weather working days" for unloading, because, as they argue, there is no specified number of lay days in the charter-party, and the obligation on them, the defenders, is to take delivery at the rate of 400 tons per day. Now the cargo consisted of 2850 tons, and the defenders claim that they were entitled to eight weather working days for unloading it, as it exceeded by 50 tons what they were bound to take out in seven days, and they claim this on the principle that, in questions under charter-parties regarding demurrage and the like, days must mean whole days, and that if a part of a day is occupied they are entitled to the whole day. The Lord Ordinary has decided this matter against the defenders and in favour of the pursuers' contention, principally, apparently, upon the case of *Yeoman*, [1904] 2 K.B. 429, and in this I think he has done rightly.

According to this calculation the lay days amounted to seven days three hours, and they accordingly expired on Thursday, 21st February, at six p.m. (3) It will be convenient now to advert to what the Lord Ordinary treats as the fourth question. Keeping in view that the lay days expired on Thursday, 21st February, at six p.m., the "Dalmally" was not completely unloaded until 7·30 on the 27th, being six days of twenty-four hours and one hour and a-half in addition. The pursuers claim that they are entitled to seven days' demurrage in respect that the unloading ran into a seventh day to the extent of one hour and a-half. The Lord Ordinary has unwillingly given effect to this contention, but I agree with my brother Lord Low, and upon the grounds set forth by him, that in this particular case the proper computation is not limited to a computation by days, but should also deal with fractions of days where the facts render that course equitable. The Lord Ordinary has applied this principle to the question of lay days, and I am of opinion that by parity of reasoning it ought to be applied to questions of demurrage arising under the same contract of charter-party. I entirely agree with the Lord Ordinary and your Lordships upon the question turning upon the construction of the strike clause.

The Court refused the reclaiming-note, and, proof not being required, gave decree against the defenders for £151, 11s. 3d.

Counsel for the Pursuers—Aitken, K.C. —C. H. Brown. Agent—F. J. Martin, W.S.

Counsel for the Defenders—Scott Dickson, K.C.—Spens. Agents—J. & J. Ross, W.S.

Friday, May 29.

SECOND DIVISION.

[Sheriff Court at Perth.

BELL *v.* FINLAYSON (BELL'S TRUSTEE) AND OTHERS.

Bankruptcy — Sequestration — Discharge— Bankruptcy and Cessio (Scotland) Act 1881 (44 *and* 45 *Vict. cap.* 22), *sec.* 6 (1) *—Failure to Pay Five Shillings in the Pound—Proof that Failure Due to "Circumstances for which the Bankrupt Cannot Justly be Held Responsible"— Discretion of Sheriff-Substitute.*

A bankrupt presented a petition for discharge in the Sheriff Court more than two years after the date of his sequestration; objections were lodged by the trustee and by certain creditors, on the grounds that no dividends had been paid, that the bankrupt had failed to keep proper business books, and that he had refused to make a *spes successionis* available for his creditors. It appeared also that the bankrupt had indulged for a number of years in business of a speculative nature. The Sheriff-Substitute holding that the bankrupt's failure to pay a dividend of five shillings in the pound had arisen from circumstances for which he could not justly be held responsible, found him entitled to his discharge, but postponed the granting of the same for three months. On appeal the Court (*diss.* Lord Ardwall) *refused* to interfere with the discretion exercised by the Sheriff.

The Bankruptcy and Cessio (Scotland) Act 1881 (44 and 45 Vict. cap. 22), sec. 6, enacts—"Notwithstanding anything contained in the Bankruptcy Acts, the following provisions shall have effect with respect to bankrupts undischarged at the commencement of this Act, and to bankrupts whose estates may be thereafter sequestrated, that is to say—(1) A bankrupt shall not at any time be entitled to be discharged of his debts, unless it is proved to the Lord Ordinary or the Sheriff, as the case may be, that one of the following conditions has been fulfilled—(*a*) That a dividend or composition of not less than five shillings in the pound has been paid out of the estate of the bankrupt, or that security for payment thereof has been found to the satisfaction of the creditors. (*b*) That failure to pay five shillings in the pound, as aforesaid, has in the opinion of the Lord Ordinary or the Sheriff, as the case may be, arisen from circumstances for which the bankrupt cannot justly be held responsible. . . . . (3) Any deliverance of the Lord Ordinary or Sheriff, as the case may be, under this section shall be subject to appeal in the manner provided in sections 171 and 170 of the Bankruptcy (Scotland) Act 1856: Provided always that the judgment of the Inner House of the Court of Session on any such appeal shall be final and not subject to review. . . . . "

On July 3, 1905, the estates of John Wanliss Bell, sheep dealer, were, on his petition, sequestrated by the Sheriff-Substitute at Perth (SYM), and on July 18, 1905, William Finlayson, secretary of Macdonald, Fraser, & Company, Limited, auctioneers and live stock salesmen, Perth, was appointed trustee. No dividend was ever paid by the trustee.

In October 1907 the bankrupt presented a petition in the Sheriff Court for his discharge. Objections were lodged by the trustee and by Macdonald, Fraser, & Company, Limited, averring the failure to pay a dividend, the bankrupt's neglect to keep proper business books, and his refusal to make a *spes successionis* available for his creditors.

The trustee reported, *inter alia*, as follows:—"(1) The bankrupt has made a fair discovery and surrender of his estate, except that he refuses to make available for his creditors—(*a*) An estate belonging to him in expectancy, namely, his hope of succession on the death of his mother (a lady whose age at present is about 65), to funds held in trust under a joint settlement by the bankrupt's parents, dated 3rd July 1891. By that settlement the whole estate of the bankrupt's parents (with the excep-