to the awards in the recent cases in the Admiralty Court to which our attention was called.

We were also referred to the case of the "*Vulcan*," 9 R. 1057, where an award of £500 was made on a salved value of £21,000. Although the circumstances were entirely different and the danger to the salved vessel not at all imminent, I think it has always been recognised in the profession that the award represents the judicial low water-mark of salvage remuneration.

Reliance was also placed on an Outer House decision of Lord Stormonth Darling (*The Greenock Towing Company*, 9 S.L.T. 221), where the extremely small sum of £350 was awarded in respect of salvage services rendered to a stranded vessel valued at £43,000. I can only account for that on the footing that his Lordship thought that the services, although of the value of salvage services, were not much different from towage, and that the steamer would have floated off without assistance at the next tide, and as she had the use of her own engines and rudder could have been navigated safely into port —in short, that the services rendered by the tug consisted in merely plucking the ship round into a position in which she was less likely to take further damage. On any other view of the facts the award in that case is quite irreconcilable with the whole trend of decisions both here and in England.

LORD GUTHRIE—I am of the same opinion. The Court is always unwilling to disturb an amount found due by the Judge who heard the witnesses. We do not do so unless the amount found due is substantially either inadequate or excessive — so excessive or inadequate as in our opinion necessarily to involve misapprehension of essential facts. Your Lordships have incidentally dealt with the points on which we all think the Lord Ordinary has erred. I content myself with tabulating them. First, as to the position of the vessel. Captain Griffiths says that the "Taquary" was nearly at right angles to the shore. The defenders do not go so far as this, nor, on the other hand, do the pursuers maintain that it was exactly broadside on. The question is whether it was not substantially broadside on. Apparently the Lord Ordinary thinks it was not—a view which the evidence seems to me to negative. Then the Lord Ordinary says that the "Taquary" was not "in imminent danger." It seems to me, whether we take the pursuers' or the defender's views of the place where she went ashore and the position in which she was, that she was in imminent danger. In the third place, the Lord Ordinary says that the "Cruiser's" services were certainly useful. It seems to me that that is a quite inadequate way of describing what she did. It would be more proper to say that her services were absolutely essential. Then the Lord Ordinary, in the fourth place, says that the "Flying Serpent" and the "Flying Scotsman," looking to the state of the weather at the time, would have been in a position to salve the "Taquary" had she not been floated by the "Cruiser." As your Lordships have pointed out, these vessels were sent for a purpose which excluded the notion that they would be available for the "Taquary." In any case, even if they might have been available ultimately, the evidence shows, and we are advised by the nautical assessor, that by that time the "Taquary" would have been beyond salvage.

Lastly, the Lord Ordinary says — "It does not appear to me that the record raises a case for my estimating the amount to be awarded for the joint-salvage services and allocating to the pursuers their proper proportion." No doubt, although we must confine our consideration to the particular services of the salvor now before us, it seems necessary to form an opinion of the total amount that should be paid. Considering the "Cruiser" only, and taking into view, first, the risk to the "Taquary" from which she was saved by the "Cruiser"; second, the value of the salved vessel; third, the nature of the "Cruiser's" services; and fourth, the time taken, I concur in thinking that £1200 is a reasonable sum —certainly not out of line with the cases quoted to us, particularly those dealing with stranded vessels.

The Court recalled the interlocutor of the Lord Ordinary, and decerned against the defender for payment to the pursuers of the sum of £1200.

Counsel for the Reclaimers (Pursuers)— Horne, K.C. — D. Jamieson. Agents — Whigham & Macleod, S.S.C.

Counsel for the Respondent (Defender)— Dean of Faculty (Scott Dickson, K.C.) — Stevenson. Agent—Campbell Faill, S.S.C.

Thursday, July 10.

SECOND DIVISION.

[Lord Cullen, Ordinary.

DAMPSKIBSSELSKABET DANMARK *v.* CHRISTIAN POULSEN & COMPANY.

Ship — Charter-Party — Demurrage — Exemption — "Time Lost through Strikes either Preventing or Delaying the Working, Leading, or Shipping of the said Cargo."

A charter-party provided that "the parties hereto mutually exempt each other from all liability . . . arising from, or for time lost through, . . . strikes, . . . or by reason of . . . any unavoidable accidents and hindrances beyond their control, either preventing or delaying the working, leading, or shipping of the said cargo."

The charterers contracted with a colliery company to supply a cargo of coals, but the company were not taken bound under the contract to deliver the coals in due time for loading within

the days stipulated in the charter-party, and in consequence of a strike of dock coal-trimmers failed to deliver the coals in time.

Held that the charterers were not relieved from a claim for demurrage by the clause in the charter-party; *per* Lord Dundas, on the ground that they had not taken all reasonable measures to secure the timeous delivery of the cargo; *per* Lord Guthrie, on the ground that they had not proved that the delay was due to the strike, and would inevitably have occurred even although they had taken the company bound to deliver the cargo timeously.

Dampskibsselskabet Danmark, Copenhagen, Denmark, registered owners of the steamship "Helge" of Copenhagen, *pursuers*, brought an action against Christian Poulsen & Company, coal exporters, Glasgow, *defenders*, for payment of £142, 10s., demurrage.

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (CULLEN), who on 26th July 1912, after a proof, pronounced an interlocutor decerning against the defenders for the sum sued for.

Opinion—"The pursuers are the owners of the s.s. 'Helge.' The defenders are a firm of coal exporters in Glasgow.

"By charter-party, dated 5th July 1911, the defenders chartered the 'Helge' to proceed to Leith, whence, after loading a full cargo of coals of about 2550 tons, she was to proceed to Cronstadt, freight to be paid at the rate of 3s. 9d. per ton.

"The charter-party provided:—'5 c. The cargo to be loaded in 84 running hours (2 p.m. Saturday to 6 a.m. Monday, colliery and dock holidays excepted, unless used). Time to count when written notice of readiness in dock to receive the entire cargo is given to the charterers' agent, or handed in to his office between the hours of 9 a.m. to 5 p.m. or 9 a.m. to 2 p.m. on Saturdays. . . . The loading date to be not before 6 a.m. on the 15th to 17th July.

"'6. . . . If the steamer be detained beyond her loading time, the charterers to pay demurrage at the rate of 16s. 8d. per running hour.'

"The 'Helge' arrived in Leith at 4 p.m. on Sunday, 16th July 1911. Notice was duly given on the following morning, and the running hours commenced at 9 a.m. on that day and expired at 9 p.m. on Thursday, 20th July. The loading was not completed until 3 a.m. on Friday, 28th July.

"In these circumstances the pursuers claim demurrage, amounting to £142, 10s. No question has been raised as to the amount of this claim, if the pursuers are entitled to demurrage at all. The defenders maintain that they are not, and they found their defence on an exception clause in the charter-party.

"The exception clause is in the following terms:—

"'6. Any time occupied in the shipment of bunker coals not to count (unless used by the shippers of the cargo), nor time used in shifting for the purpose of bunkering. In the event of the steamer shifting for bunker coals, and not returning to her loading berth before noon on Saturday, the loading hours shall not be resumed until 6 a.m. on the following Monday, unless the loading is continued. Should any of the cargo be shipped during the above excepted periods, only the time actually occupied in shipping coals to be reckoned in computing the steamer's time for loading. . . .

"'The parties hereto mutually exempt each other from all liability (except under the Strike Rules) arising from or for time lost through riots, strikes, lock-outs of workmen, or disputes between masters and men, or by reason of accidents to mines or machinery, obstructions on railways or in harbours (not including congestion of ships or traffic), or by reason of frosts, floods, fogs, storms and any unavoidable accidents and hindrances beyond their control, either preventing or delaying the working, leading or shipping of the said cargo, occurring on or after the date of this charter until the expiration of the loading time; and thereafter if the steamer be not available.

"'In the event of any stoppage or stoppages arising from any of these causes (other than a "strike," as defined in the Strike Rules) continuing for the period of three days from the time of the steamer being ready to load at the colliery or collieries for which she is stemmed, this charter shall become null and void, provided, however, that no cargo shall have been shipped on board the vessel previous to such stoppage or stoppages.

"'The vessel to be moved to and from the spout as required by the staithman during the course of her loading at the shipowner's risk and expense.

"'In case the steamer is not ready to complete her loading when she has once begun, any time occupied in partial loading only to count, but at least one half of the total loading hours as above provided to be allowed to the charterers for completing the loading. This clause not to apply to bunkering operations or shifting for the purpose of loading bunker coals.'

"The facts which are founded on by the defenders as bringing in the exception clause are as follows:—Between 5th July and 12th July there was a strike of dock coal-trimmers and scutchers at Leith. This prevented the loading of coal during that period. In consequence, collieries sending coal for shipment to Leith Docks had to restrict their output, as the coal already forward was not being shipped and there was thus no outlet. In particular, the Edinburgh Collieries Company, Limited, with whom the defenders had placed an order for 1500 tons of Lothians steam coal for the 'Helge,' was affected in this way. After the strike ended on 12th July there were arrears of shipment, and more ships wanting coal than could be at once supplied with it. Delays in loading thus took place, and, in particular, the 'Helge' was delayed in her loading to the extent of the time already stated.

"The answer made by the pursuers is that the defenders did not take due steps

to provide a cargo for the 'Helge,' and that the delay in loading was due to this cause and not to the effects of the strike. They allow that had the strike not occurred there is every probability that the 'Helge' would have been loaded timeously. But they say that the defenders failed to duly arrange for the punctual supply of 1700 tons of the 2500 tons loaded, and that the evidence does not prove that if they had made due arrangements for such supply the strike would have had the effect of preventing the steamer from being loaded within the running hours.

"The defenders start with an absolute obligation to provide a cargo, so far as not qualified by exceptions in the charter-party; and the *onus* is on them to prove that the facts of the case bring them within the exception clause already quoted. This clause is not limited to strikes preventing or delaying only the shipping, but extends to the effect of strikes in preventing or delaying 'the working, leading, or shipping' of the cargo. It thus seems to contemplate the ship being booked for one or more particular collieries, and to intend to provide for the effects of a strike on these collieries.

"I shall now advert to the facts relating to the providing of the cargo by the defenders. They placed an order with the Ormiston Colliery for 800 to 1000 tons. The colliery obliged themselves only for 800 tons, and the remaining 200 tons were in their option. They exercised the option by supplying only 800 tons, which were loaded within the running hours. The reason why they did not supply 1000 tons was the restriction of their output consequent on the said strike. But as the defenders had made no firm bargain for 1000 tons they were, so far, left without any actual provision for 200 tons of the cargo. And they did not find this 200 tons until 26th July, and it was not shipped until 27th July.

"For the remaining 1500 tons the defenders placed an order with the Edinburgh Collieries Company, Limited. The Colliery Company's sale-note is dated 5th July and bears that the coal is 'to be shipped this month as may be mutually arranged. We do not undertake any liability for loading time unless under written guarantee.' The contract thus gave the company until 31st July to supply the coal, apart from mutual arrangement. The company have all along maintained this construction of the contract, and Mr Bonnington, their representative, who gave evidence for the defenders, reiterated it. It may not be of moment what the company maintain as matter of construction, but their construction appears to me to be right.

"The way in which the terms of this contract, so construed, bears on the question at issue is this. After the strike terminated, the Edinburgh Collieries Company, Limited, had enough Lothian steam coal at their command to suffice for the loading of 1500 tons on the 'Helge' within the running hours. The 'Helge' was berthed for loading after arrival, but was more than once unberthed because there was no more coal forward for loading her. Coal was forward from the Edinburgh Collieries Company, Limited, for other ships which they had undertaken to supply, and these ships got their coal. They were to some extent 'preference ships,' preferable because of running contracts under which they were periodically supplied by the Edinburgh Collieries Company. Mr Bonnington states that once a vessel is berthed for loading it is not the practice to unberth her in favour of a preference or other vessel if there is coal forward for her. And he further says that the reason why the 'Helge' was unberthed and delayed was that there was not sufficient coal forward for her, and that this was due to the effects of the strike, which delayed them in supplying all the ships which they had undertaken to supply. He says further that but for the strike they would have been able to give the 'Helge' the 1500 tons within the running hours, and I see no reason to doubt this.

"The pursuers' point, however, is that, owing to the latitude of time given to the Colliery Company in the defenders' contract with them, the company was under no obligation to forward coal for the 'Helge' at any given time prior to the end of July; that if the contracts had bound them to provide coal punctually for the 'Helge' when her arrival was notified to them, it is to be presumed that they would have fulfilled their obligation; and that it is not proved that if they had been so bound they could not have done so notwithstanding the strike. I am of opinion that the pursuers' contention is right. The Edinburgh Collieries Company had enough Lothian steam coal at their command to suffice for loading 1500 tons on the 'Helge' within the running hours. Having other ships to supply, and not enough coal for all, they might, in fact, have acted in one way or another in distributing the supply among them, even if they had undertaken to punctually supply the 'Helge' on her arrival. But I do not know what precisely were their contract obligations towards these other ships. And in the present question I think I must presume that, had the defenders taken them bound to punctually supply the 'Helge' on her arrival with the 1500 tons, they would have duly implemented their obligation. The evidence does not show that they could not have done so.

"Apart from the delay in shipping the 1500 tons from the Edinburgh Collieries Company, the 200 tons which the defenders had made no bargain for with the Ormiston Colliery Company or otherwise was not ordered until 26th July, and not shipped until 27th July. It is true that owing to the strike the defenders had difficulty in providing this part of the cargo after the Ormiston Company decided to supply only 800 tons. But they were, I think, at fault in making no more provision for this part of the cargo than a precarious one depen-

dent on the option of the Ormiston Colliery Company to supply it if it suited them to do so.

"On the whole matter I am of opinion that the defenders, on whom the *onus* lies, have not proved that the delay in loading the 'Helge' was due to the effects of the strike. It may be quite true to say that but for the strike the 'Helge' would have been loaded within the running hours. But notwithstanding the strike she might have been timeously loaded had the defenders made due provision for her being punctually supplied with cargo. This, in my opinion, they failed to do.

"Following these views I shall grant decree for the sum sued for."

The defenders reclaimed, and argued—The delay in loading was due to the strike, and thus fell under the clause of the charter-party which exempted the reclaimers from liability for "time lost through . . . strikes." The charter-party was the limit of the reclaimers' liability, and the nature of the contract between the defenders and the Colliery Company was irrelevant, since the charter-party imposed no duty on the reclaimers to make contracts which would neutralise the effects of strikes. Delay caused by strikes was one of the risks which the exemption clause was expressly framed to cover—*Moor Line* v. *Distillers Company*, 1912 S.C. 514, 49 S.L.R. 407; *Leonis Steamship Company* v. *Joseph Rank, Limited* (*No.* 2), January 31, 1908, 13 Com. Cas. 161, *affd.* June 17, 1908, 13 Com. Cas. 295; *Richardsons* v. *M. Samuel & Company*, [1898], 1 Q.B. 261; *Sailing Ship "Milverton" Company* v. *Cape Town and District Gas Light and Coke Company*, July 27, 1897, 2 Com. Cas. 281; *Alne Holme*, March 22, 1893, L.R. [1893], P. 173. In any event the evidence showed that the contract between the reclaimers and the Colliery Company was in point of fact a contract to deliver the coal by the 20th, not the 31st July, and but for the strike the coal would have been delivered by the 20th July.

Argued for the respondents—The contract between the reclaimers and the Colliery Company gave the latter the option of postponing delivery of the coal until the end of July, and therefore the delay in delivery was not necessarily caused by the strike and did not fall within the exemption clause of the charter-party. In point of fact the effect of the strike had disappeared by 17th July. There was no clause in the charter-party under which the respondents were bound to acquiesce in delay in delivery caused by colliery "turns." They were entitled to require delivery by 20th July—*"Arden" Steamship Company* v. *Mathwin & Son*, 1912 S.C. 211, 49 S.L.R. 143; *"Ardan" Steamship Company* v. *Andrew Weir & Company*, [1905] A.C. 501, *per* Lord Halsbury (L.C.) at 509; *Lilly & Company* v. *Stevenson & Company*, January 19, 1895, 22 R. 278, *per* Lord Wellwood (Ordinary) at 282 and Lord Trayner at 285, 32 S.L.R. 212 at 215 and 217; *Gardiner* v. *Macfarlane, M'Crindle, & Company*, February 24, 1893, 20 R. 414, 30 S.L.R. 541; *Grant & Company* v. *Coverdale, Todd, & Company* (1884), 9 A.C. 470, *per* Lord Selborne (L.C.) at 474.

At advising—

LORD DUNDAS—It is common ground between the parties that, though the running hours prescribed by her charter-party for the loading of the "Helge" expired on the evening of 20th July, her cargo was not in fact fully loaded until the early morning of the 28th. The defenders further admit that if under the circumstances demurrage is due at all, which they deny, they are liable in the sum sued for by the pursuers. The question of legal liability as between the parties, in view of the admitted fact that the cargo was not fully furnished in proper time, is a difficult one to decide, but I have come to the conclusion that the interlocutor reclaimed against is right.

The material facts of the case lie within narrow compass. They are summarised by the Lord Ordinary, and I need not go over them again. The whole question turns upon clause 6 of the charter-party, which, shortly read, provides that "the parties hereto mutually exempt each other from all liability . . . arising from or time lost through . . . strikes . . . or by reason of . . . any unavoidable accidents or hindrances beyond their control, either preventing or delaying the working, leading, or shipping of the said cargo." The words are peculiar. They have not, so far as I am aware, been used in any charter-party which has been brought to the notice of the law courts. Causes delaying "the working, leading, or shipping" of the cargo seem to me clearly to extend to something much wider than the mere loading, *i.e.*, to things occurring in the "working" at the collieries, or the "leading" of the coal by train or otherwise from the pits to the harbour. This view is strengthened by words (not above quoted) in clause 6 about "accidents to mines or machinery, obstructions on railways and in harbours," &c. It was, I think, intended that the charterers should be protected in the case of some causes of delay, not merely in the loading, but in the furnishing of the cargo, *e.g.*, a strike or a serious breakdown of machinery, occurring at the pits from which the charterers had contracted to get their coal at the proper time, or the collapse of a bridge upon the only railway line of communication. In such cases I think the defenders would probably have had a good answer, upon the contract in the charter-party, to a claim by the pursuer in respect of consequent delay in furnishing the cargo, provided they had taken all reasonable measures in their power towards expediting its advance. But the question still remains, whether, in the circumstances which have occurred, the charterers are not liable to the shipowners in demurrage arising from the delay in furnishing this cargo, in respect that they failed to take such measures.

The Lord Ordinary has held upon the

evidence that but for the strike among the coaltrimmers the "Helge" would probably have been duly loaded within the running hours; but also that, notwithstanding the strike, she might have been timeously loaded if the defenders had taken the collieries from which the cargo was to be supplied bound by their contracts to forward the coal in proper time. I think these conclusions are warranted by the evidence. The defenders' contract with the Edinburgh Collieries Company for the supply of 1500 tons is contained in the printed correspondence. We must consider the correspondence as a whole in order to decide what, reading it according to the natural and ordinary meaning of the words used, is the true import of the contract. So reading the documents, I find it impossible to avoid the Lord Ordinary's conclusion that "the contract . . . gave the company until 31st July to supply the coal, apart from mutual arrangement." It is hardly necessary to say anything about the defenders' contract with the Ormiston Colliery. That company had clearly an option, which they exercised, of declining to supply more than 800 tons. But the coal which the defenders obtained elsewhere, in order to make up the remaining 200 tons, was all shipped before the full amount of the Edinburgh Collieries contract was put on board, and the delay in loading thus really arose in connection with that part of the cargo.

It is, of course, well-settled law that (to use the often-quoted words of Lord Blackburn in *Postlethwaite* v. *Freeland* (1880, 5 A.C. 599 at p. 620) "in the absence of something to qualify it, the undertaking of the merchant to furnish a cargo is absolute." If he fails in that undertaking he will certainly, apart from special contract, be liable in demurrage. For the contract one must look to the charter-party; and though, of course, a charter-party may be so framed as to exempt the charterer under specified circumstances from his absolute legal obligation, I think the exemption must be expressed in very clear language. The contract must, I apprehend, be strictly read. The Court will not lightly infer that the shipowner has agreed to relieve the charterer from liability for delays which he (the owner) has no possible means of preventing or lessening; still less for delays which the charterer himself could by due diligence have avoided. Where there is, as here in fact, a delay in furnishing the cargo, I think the *onus* is on the charterer to prove not only that the delay arose from one or other of the specified causes which by the contract of charter-party are to form grounds of exemption, but also that he did all in his power by way of reasonable precaution or exertion to avoid it. He is not entitled to fold his arms and do nothing, relying implicitly upon his clause of exemption. I may refer to the observations of Lord Esher, M.R., in *Bullman* ([1894] 1 Q.B. 179, at p. 185), and also to *Gardiner* v. *Macfarlane*, *M'Crindell & Company* (1893, 20 R. 414), where the charterers were not excused for their failure to have a cargo ready—notwithstanding their exemption clause—because the furnishing of the cargo was not rendered impossible by causes beyond their control; they failed to make arrangements to secure that they would get the coals in time, and the Court therefore held that they had taken the risk of anything occurring to prevent this. In the present case, even if it be assumed in the defenders' favour—and I do not think such an assumption could upon the evidence be justified—that they have proved that the strike was the *causa causans* of the delay, they would still, in my judgment, have to show that they had done everything they could reasonably be expected to do in order to avoid the delay; and this I think the defenders cannot show. They did not, if I am right in my conclusion as to the true import of the contract, make a firm bargain with the Edinburgh Collieries Company for the timeous delivery of the coal—a precaution which they can hardly say would not have been a reasonable one to take, seeing that they maintain they intended to take it, and argue (I think erroneously) that they did effectually do so. The Lord Ordinary has held, and I think the evidence warrants him in so holding, that that company could, notwithstanding the strike, have supplied the full 1500 tons within the running hours if they had been taken bound by their contract to do so. The defenders' counsel insisted that their clients, having secured by clause 6 of the charter-party an absolute indemnity against all liability for delay in consequence of strikes, were not bound to have taken steps to avoid or lessen delay arising from that very cause—to neutralise, as they put it, the effect of the strike. I think the answer is that clause 6 did not furnish the defenders with an absolute indemnity. Such a clause of exemption, though it will avail to protect the charterer in many cases from liability which would otherwise have attached to him, when he has done his best to provide for the cargo being ready in proper time, will not, in my judgment, extend to relieve him from his inherent obligation to take all reasonable measures towards that end; and if he fails to do so he must take the risk of consequences if something happens which might have been avoided to prevent the due furnishing of the cargo. It seems to me that the true effect of the exemption clause is to alter the incidence of unavoidable loss as between two "innocent" parties, but that it does not extend to relieve the party originally responsible (the charterer) from his duty to avoid or minimise the loss by all means which he can reasonably adopt. The limits of that duty in the particular circumstances of any given case must in the last resort be determined by the Court, and the books abound in illustrations of the point (*e.g. Richardsons*, [1898] 1 Q.B. 261; *The "Alne Home,"* [1893] P. 173; *"Arden S.S." Company, Limited*, 1912 S.C. 211; Carver on Carriage by Sea (5th ed.), sections 257(*a*), 258, 258(*a*), and cases cited). It

seems to me that in the circumstances of this case the defenders fell short of their legal duty in failing to make a binding bargain with the collieries that the coal should arrive in due time for loading within the stipulated days. For the reason stated I think we ought to adhere to the interlocutor reclaimed against.

LORD GUTHRIE—The essential facts in this case are not in dispute. The defenders admit the period of delay alleged by the pursuers and the amount of demurrage, if demurrage is due; and the pursuers admit the facts as to the duration and effect, direct or indirect, of the strike at Leith, the port of loading, on which the defence is founded.

The first question is one of construction. The delay to the "Helge," the pursuers' vessel, chartered by the defenders to carry about 2550 tons of coal, loaded at Leith, from Leith to Cronstadt, arose from the action of the Edinburgh Collieries Company, who had contracted to supply 1500 tons of the cargo, in not forwarding the coals contracted for in time to enable the defenders to complete the loading by the evening of 20th July, the expiry of the loading days under the charter-party. Delay which occurred in connection with the balance of the cargo need not be considered, as the total delay and the pursuers' claim for demurrage would have been the same even if the balance of the cargo had been loaded within the loading days.

The question of construction arises under the contract between the defenders and the Edinburgh Collieries Company. The pursuers say that whereas under the contract between them and the defenders the latter had only till the evening of 20th July to load, the defenders' contract with the Edinburgh Collieries Company gave that company till 31st July. The defenders say that they intended to contract with the Colliery Company, so as to avoid any claim for demurrage under the charter-party; and Poulsen admits that, if his view that they did so contract be right, the words "shipped this month" (which he says he did not notice till shortly before the proof) should not have been in the sale-note. I think the Lord Ordinary is right in holding that no such contract was made. There is no evidence that there would have been any difficulty in arranging with the Edinburgh Collieries Company for a 20th July limit.

The terms of the sale-note of 5th July, taken by themselves, are clear. The coal is "to be shipped this month as may be mutually arranged. We do not undertake any liability for loading time unless under written guarantee." No doubt, in the case of a mercantile contract such as we are here dealing with, a sale-note like this, which is in the form of a letter, must be read along with the preceding and contemporaneous correspondence. But so reading it I cannot find any obligation on the Edinburgh Collieries Company to supply earlier than 31st July; and the admitted facts, taken along with the correspondence, in whatever order the documents dated 5th July may be placed, negative Poulsen's suggestion that "as may be mutually arranged" referred to the name of the ship being communicated by the defenders to the Edinburgh Collieries Company. Such a communication could not be an "arrangement," and it would not explain the use of the word "mutually" and, besides, the Edinburgh Collieries Company had received either previous or contemporaneous notice of the ship's name. "As may be mutually arranged" evidently refers to the amounts and dates of coal to be forwarded not later than 31st July. It is admitted that no written guarantee was given as to loading time; and it is not alleged that there was any contract between the parties except what is contained in the documents.

If, then, the defenders failed to carry out their intention to bind the Edinburgh Collieries Company to supply coal so as to enable them to load within the loading days, was this, as the pursuers allege, the cause of the defenders' failure to implement their contract under the charter-party? It was a natural and sufficient cause, and I am of opinion that it was the true cause.

In these circumstances the *onus* is on the defenders to prove that, even supposing they had made the contract with the Edinburgh Collieries Company which they intended to make, the cause of delay would still have occurred, owing to another cause, for the effects of which they are not liable under their contract with the pursuers.

The defenders maintain that such a cause was constituted by a strike, lasting from the 5th to 12th July, of dock coal-trimmers and scutchers at Leith, from the effects of which, direct and indirect, they are protected by the strike clause in the charter-party, specially these words "The parties hereto mutually exempt each other from all liability . . . arising from or from time lost through . . . strikes . . . either preventing or delaying the working, leading or shipping of the said cargo occurring on or after the date of this charter until the expiration of the loading time." The facts of this case do not raise any question under the intervening part of the clause dealing with "unavoidable accidents and hindrances beyond their (the charterer's) control."

The pursuers' replies are, I think, conclusive, namely, *first*, the strike was over on 12th July, but, assuming that the defenders can found on the indirect effects of the strike, it is not proved that these lasted beyond 17th July, when the "Helge" gave notice that she was ready to load; and it is not proved that there was anything connected with the strike to prevent a certain amount of supply between the 12th and the 17th, and completion of the balance 'by the 20th. *Second*, the pursuers have proved, by the supply of about 2000 tons of coal to the "Sir Walter Scott," and by other evidence, that the Edinburgh Collieries Company were in a position to supply the "Helge" with 1500 tons by the

20th; and had this been necessary for the pursuers' case, which I do not think it is, the defenders have not proved that, had the Edinburgh Collieries Company been taken bound to supply the "Helge" by the 20th, they would not have done so notwithstanding the strike. It is proved that there was neither deficiency of coal nor of waggons, nor delay by the railway company in sending off the waggons after receiving intimations from the merchants; and I cannot assume that the Colliery Company would not have fulfilled their contract obligations.

I therefore agree with the Lord Ordinary that the defenders' failure to make a contract with the Edinburgh Collieries Company identical in respect of loading days with the contract in the charter-party, and not the strike was the cause of the delay founded on by the pursuers.

But the defenders say that but for the strike the Edinburgh Collieries Company, even if only bound to deliver by 31st July, would have delivered by 20th in ordinary course. I do not find this proved. At the best it was only a probability, more or less great. It involved a risk, which the defenders were entitled to run if they chose, but which as in a question with the owners of the ship they were not entitled to add to the risk arising from strikes contemplated in the charter-party. The risk contemplated was from strikes alone, not strikes plus unwillingness on the part of the Collieries, at probable loss to themselves, and without legal obligation, voluntarily and gratuitously, to safeguard the defenders' interests. For aught that appears the Colliery Company not only acted within their legal rights but in the ordinary way of business, by fulfilling, in preference to the defenders' contract, orders which they could only have got on the footing that they were so fulfilled.

The fact that but for the strike the natural consequence of the defenders' failure to make a proper contract with the colliery would probably have been avoided does not make the strike the cause of the defenders' breach of contract. The strike merely destroyed the defenders' chance of escaping the natural consequences of their action. This view seems to me to follow from the cases referred to by Lord Dundas, and in particular from the cases of *Gardiner* 1893, 20 R. 414; *Bullman*, 1894, 1 Q.B. 179; and *Arden*, 1912 S.C. 211.

In *Gardiner's* case the charterers founded on the clause in the charter-party exempting them from liability for the non-fulfilment of the contract on account of "dangers and accidents of the seas, rivers, and navigation, strikes, lock-outs, or accidents at the colliery directed, or on railways, or any other hindrances of what nature soever beyond the charterers or their agents' control." Owing to a strike, there had been an unusual demand upon the colliery with which they had contracted. It was held, notwithstanding, that the charterers were liable for demurrage. Lord Trayner said—"It has been clearly shown that the direct cause of the 'Lismore's' detention was that the charterers had no cargo to give her. Now the obligation to have or provide a cargo is not a charter obligation. The contract of charter-party presupposes that the charterer has a cargo or will have a cargo ready for the ship when the ship is ready for it. . . . Having thus ordered the coals for the 'Lismore' as well as for two other vessels which were named, the agents seem to have thought that they had done all that could be required of them. And in ordinary circumstances perhaps no more would have been necessary to enable them duly to fulfil their obligation to load the 'Lismore.' They took no precautions, however, to secure that they would get coals for the 'Lismore' in due time and took the risk of anything occurring which would prevent this. It is the chance so risked that has occurred. . . . The charterers' agents could in May have contracted for the delivery to them of the coal ordered for the 'Lismore' by a certain day or within a certain number of days after the 'Lismore's' arrival. Nothing hindered them doing that, and if that course had been adopted it is to be presumed that the colliery so bound would have fulfilled its obligation, and no delay in loading the Lismore would have occurred."

In *Bullman's* case the charterers were held exempt on account of a strike clause. Lord Esher said—"A strike would in itself not be sufficient to exonerate the charterers from doing the best they could to accept delivery, and would not entitle them to fold their arms and do nothing. If notwithstanding the strike they could by reasonable exertion have taken delivery of the cargo within the proper time, the strike would not have afforded them any defence." And in the case where the clause, founded on in defence to an action for demurrage, referred to "any accidents or causes beyond the control of the charterers which may prevent or delay the loading," the Lord President (Dunedin) said—"I do not think the charterers escape under this clause of the charter-party. It seems to me that here they took their risk. As matter of fact they did not make any contract by which they could be certain that the coals would come within the time they wanted them. I am not keeping out of view the fact that the representative of the Fife Coal Company stated that if he had been asked for a guarantee he would not have given one. That is his affair and the charterer's affair."

On the whole matter I am of opinion that the Lord Ordinary's interlocutor should be affirmed.

LORD JUSTICE-CLERK—I, like Lord Dundas, felt at first that this case looked difficult, but on full consideration I concur in the judgment proposed by him. His opinion commends itself entirely to me as expressing the right view of the case. The Lord Ordinary seems to me to have given the only answer that could be reasonably given to the question put to him, on the evidence, oral and documentary, that was before him. I therefore content myself

with stating my concurrence in the opinion of Lord Dundas, in which he shows the grounds on which it must be held that the charterers cannot excuse themselves, seeing they did not do what they might have done to secure that their contract to supply the full cargo might be fulfilled. They failed sufficiently to secure that the Collieries Company should deliver in time.

I may add that my concurrence extends to the opinion just delivered by Lord Guthrie.

LORD SALVESEN was absent.

The Court adhered.

Counsel for the Reclaimers (Defenders)—Sandeman, K.C.—C. H. Brown. Agents—J. & J. Ross, W.S.

Counsel for the Respondents (Pursuers)—M'Clure, K.C.—W. T. Watson. Agents—Beveridge, Sutherland, & Smith, W.S.

Friday, July 11.

SECOND DIVISION.

[Lord Skerrington, Ordinary.

DAVIDSON *v.* CAIRNS.

Trust — Proof — Deposit-Receipt — Deed of Trust—Act 1696, *cap.* 25.

A, with the consent of his brother B, raised an action against C for declarator that A had sole right to a deposit-receipt taken in the joint-names of B and C. A averred that the whole of the money contained in the deposit-receipt was his own property, which he had handed to C to deposit in the joint-names of B and C, the deposit-receipt to be retained by C on behalf of A. C averred that the money only partly belonged to A, part of it being his own.

Held that the pursuer's averments could be proved *prout de jure*, the limitation of proof enacted by the Act 1696, cap. 25, not being applicable, on the grounds that (1) the deposit-receipt was not a deed of trust within the meaning of the Act; (2) B, one of the alleged trustees, admitted the pursuer's claim; and (3) (*per* Lord Guthrie, *diss.* Lord Salvesen), *following Grant* v. *Mackenzie*, June 7, 1899, 1 F. 889, 36 S.L.R. 671, the defender admitted that the deposit-receipt did not express the rights of parties.

Dunn v. *Pratt*, January 25, 1898, 25 R. 461, 35 S.L.R. 365, *dub.* (*per* Lord Salvesen).

The Act 1696, cap. 25, enacts—". . . That no action of declarator of trust shall be sustained as to any deed of trust made for hereafter except upon a declarator or back-bond of trust lawfully subscribed by the person alleged to be the trustee, and against whom or his heirs or assignees the declarator shall be intended, or unless the same be referred to the oath of party *simpliciter*. . . ."

Hugh Cairns, miner, Hamilton, *pursuer*, with consent of Robert Cairns, miner, formerly residing in Hamilton, then residing in the United States of America, brought an action against William Davidson, miner, Larkhall, and the Clydesdale Bank, Limited, Glasgow, *defenders*, concluding, *inter alia*, for decree of declarator "that the pursuer has the sole right, title, and interest in and to a deposit-receipt for the sum of £260 sterling, dated 4th May 1912, granted by the Hamilton branch of the defenders, the Clydesdale Bank, Limited, in favour of the defender William Davidson and the said Robert Cairns, and that the said sum of £260 sterling, thereby acknowledged to have been received by the defenders, the Clydesdale Bank, Limited, truly belongs in property to the pursuer." [The Clydesdale Bank did not appear.]

The defender pleaded, *inter alia*—"(1) The action is incompetent. (2) The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons the action should be dismissed. (3) The pursuer's averments, so far as material, are provable only by writ or oath."

The *averments* are summarised in the opinion (*infra*) of the Lord Ordinary (SKERRINGTON), who on 29th May pronounced an interlocutor in which he repelled the first, second, and third pleas-in-law for the compearing defender and allowed a proof.

Opinion.—"Under his first and leading conclusion the pursuer asks for declarator that he has the sole right, title, and interest in and to a deposit-receipt for the sum of £260 sterling, dated 4th May 1912, and granted by the Clydesdale Bank, Limited, in favour of the defender William Davidson and the pursuer's brother Robert Cairns, and he also asks declarator that the said sum of £260 belongs in property to him. The pursuer's brother, the said Robert Cairns, is a consenter and concurrer to the action, and the only compearing defender is William Davidson. The bank, who have no interest except to get a valid discharge, have not lodged defences. It appears from the averments that the deposit-receipt in question is a partial renewal of an original receipt for £360 which was taken in favour of the same persons. The pursuer alleges that this sum was his own property, and that on 18th October 1909 he handed it to the defender Davidson, who 'agreed and undertook to deposit the said sum in bank in the joint names of himself and of the pursuer's brother, and he agreed with the pursuer that the deposit-receipt when obtained should be retained by him for safe custody as agent or mandatory or custodier for the pursuer, and against the instructions of the pursuer as to the further application of the sum so deposited.' The pursuer's counsel explained that the latter clause meant that the contents of the deposit-receipt were to be held subject to the instructions of the pursuer. In his answer the defender admits that the pursuer handed to him a sum of money on the occasion in question, but he states that the sum was £250 and not £360. He admits