dents. The respondents disputed that, and I think unsuccessfully. The Lord Ordinary proceeds only on the terms of the 1896 Act as taking the respondents out of the rule which would otherwise be applicable. Your Lordship in the chair has held it sufficient that they have produced nothing that will be equivalent to what section 7 of the Personal Diligence Act calls "legal evidence," and has rather indicated that they might, without letters of horning, have produced evidence of their appointment which might have been sufficient. Lord Salvesen, I think, considers that letters of horning are necessary, but it does not appear to me that we need decide that question, because, whether that view is correct, or whether something else might have been sufficient, that something else has not been put forward, and therefore it is sufficient to hold that the respondents were not entitled to do what they did. In answer 6, they take up the position that a friendly society is like a corporation, and that there has been no change of creditors, but it is quite clear that they are not entitled to take up that position, and it cannot be maintained that they are in any intermediate position which would take them out of the result at which your Lordships have arrived.

LORD JUSTICE-CLERK—With reference to what Lord Guthrie has said, I did not intend to express an opinion on the question whether letters of horning were necessary or whether a connecting link would have been sufficient. It is, I think, enough that neither the one nor the other is present in this case.

The Court recalled the interlocutor of the Lord Ordinary, and suspended the charge *simpliciter*.

Counsel for the Reclaimer—C. H. Brown. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Respondents—Moncrieff, K.C.—King Murray. Agents—Sang & Moffat, S.S.C.

Tuesday, May 23.

SECOND DIVISION.

[Sheriff Court at Linlithgow.

SCHELE AND OTHERS *v.* LUMSDEN & COMPANY.

Ship—Charter-Party—Demurrage—Exceptions—Strikes—Discharge Delayed through Increased Price of Coal Due to Coal Strike.

A charter-party for the carriage of a cargo of pit-props provided that the ship being loaded with a cargo of pit-props "shall therewith proceed to a good and safe place in the Firth of Forth . . . and deliver the same on being paid freight . . . (strike, lock-out, the act of God, the enemies of the King, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever during the said voyage always excepted). . . . Ten working days are to be allowed the said merchant for loading and nine like days for discharging, and any days on demurrage over and above the said laying-days at £5 per day, to be paid day-by-day as it becomes due." At the time when the vessel arrived at the Firth of Forth there was a general strike of coal miners in the United Kingdom, and the railway company would only supply waggons, without which discharge was impossible, on being supplied with the coal necessary for haulage, which had risen to a high price. The charterers declined to pay this price. *Held* (1) that the strike clause, looking to its terms and position, was solely in favour of the shipowners, and could not be appealed to by the charterers, and (2) that even if it could it did not apply.

Th. Schele, ship broker, Halmstad, Sweden, and others, registered owners of the sailing vessel "Atlantic," of Halmstad, *pursuers*, brought an action in the Sheriff Court at Linlithgow against Lumsden & Company, pitwood merchants and timber importers, Bo'ness, *defenders*, for payment of £85 for demurrage in respect of failure to discharge the ship in nine days as required by the charter-party.

The pursuers pleaded, *inter alia*—"(4) The exception clause founded on by the defenders not being inserted in the charter-party for their benefit, or available to them, and it being inapplicable to the circumstances of the present case, the defenders' fifth plea-in-law should be repelled."

The defenders pleaded, *inter alia*—"(5) *Separatim*—Any delay in discharging the cargo having been occasioned by a strike within the meaning of the exceptions in the charter-party, the defenders are not liable for demurrage."

The clause in the *charter-party* out of which the claim arose was in the following terms—"That the said ship . . . shall, with all convenient speed, sail and proceed to the loading-place in Halmstad, or so near thereunto as she may safely get, and there load always afloat . . . a full and complete cargo (including deck load at full freight) of short pit-props; . . . and being so loaded shall therewith proceed to a good and safe place in the Firth of Forth, . . . as ordered on signing bills of lading, or so near thereunto as she may safely get, and deliver the same on being paid freight . . . (strike, lock-out, the act of God, the enemies of the King, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, during the said voyage always excepted). . . . Ten working days are to be allowed the said merchant (if the ship is not sooner despatched) for loading and nine like days for discharging, and any days on demurrage, over and above the said laying-days, at £5 per day, to be paid day by day, as it becomes due. . . . The cargo to be brought to and taken from alongside the ship as customary at merchant's risk and expense, where she can always safely lay afloat. . . ."

The *facts* are given in the note (*infra*) of the Sheriff-Substitute (MACLEOD), who on 9th December 1914 found in fact and in law "that (1) the nine working days allowed by the charter-party for taking delivery of the cargo began on 21st March 1912, and (2) under circumstances which were not due to 'strike' the discharge of the vessel was not begun until 9th April 1912, and was completed on 15th April 1912:" Found in law that the defenders were liable to the pursuers in demurrage: Therefore repelled the defences, and decerned against the defenders for payment to the pursuers of the sum of seventy-five pounds sterling.

Note.—"This vessel arrived in the Bo'ness Dock on 20th March 1912, and on the same day by letter the master intimated that he was ready to discharge, but as matter of fact no business was done, or indeed could be done, till 9th April, because till that date (*a*) the vessel was not at a berth, and (*b*) no haulage was available to convey the cargo from the quay to the receivers' yards. The sole cause at the root of those two subordinate causes (*a*) and (*b*) was that no coal was supplied for the use of the waggon locomotive, and in the end of the day it will, I think, be found that the defenders are liable in demurrage if it was their concern to supply the coal. Parties are agreed that if there is a good claim there shall be decree for seventy-five pounds. The controversy between the parties has arisen under the following circumstances:—

"1. The defenders are large pitwood importers, and are in use to get haulage of their cargoes from the quayside to their yards from the North British Railway Company, to whom the Bo'ness Dock belongs.

"2. Owing to the lack of space the stacking of pitwood on the quay is strictly prohibited, and for the discharge of such a cargo a supply of waggons is essential in the case of the defenders. It does appear that two other pitwood importers lease a small yard from the railway company in the immediate vicinity of the hand-berth and are thus enabled to do a little discharging without either stacking on the quay or the aid of waggons, but the point in this case is that in the case of the defenders waggons were a necessary preliminary to discharge according to the custom of the port.

"3. Waggons require a locomotive, and a locomotive requires coal, and the lack of coal was the sole reason for the delay which has given rise to this claim.

"4. The vessel was in the dock on 20th March 1912. A berth was then available (in the sense which I explain in paragraph 13 hereof) for her, and but for the lack of coal her discharge would have been begun on the following day and would have been completed well within the stipulated number of days. Owing solely to the lack of coal the discharge was not begun until 9th April. During the whole period from 20th March to 9th April a berth was available for the vessel as soon as a supply of coal enabled her to begin discharge. On 9th April coal was available and the discharge was then taken in hand and completed on 15th April.

"5. The scarcity of coal was due to the national coal strike, which began on 1st March and ended on 8th April 1912. For the first ten days or so of the strike the railway company refused to do any shunting in the dock, but before this vessel arrived traffic was again quite active. The conditions, however, on which the railway company did the shunting were altered. Prior to the strike it had a fixed rate for haulage, which included a charge of 7s. 6d. for each ton of coal used. After the strike it made a rebate of 7s. 6d., and anyone who wanted haulage at the dock had to supply to the railway company such quantity of coal as it thought fit to demand. Coal was available during the period under discussion, but its price was about £2 a ton. Now what was the railway company's demand?

"Although one witness is fairly confident that he could have secured haulage of this cargo by giving a small truck (5 tons) of coal to the railway company instead of a large truck (10 tons); and although we do not know the number or size of trucks (for the demand was made in terms of trucks, not of money or tons) which the railway company demanded (letter of date 21st March) for the two vessels then under discussion, yet on the evidence as it stands I think we must take it that the railway company demanded 10 tons for the cargo of this vessel, and on that footing there would be a maximum extra charge of about £16, 5s. in name of coal.

"6. On the arrival of the vessel the defenders lost no time in acquainting the captain with the situation, and certainly the defenders were active in their endeavours to arrange a compromise, even going the length of suggesting an equal division of the cost of coal, but they could not persuade the captain to go higher than £2.

"7. When the defenders' efforts at compromise thus failed it is matter of regret that the parties did not put their heads together to secure immediate discharge pending a settlement of the controversy, and make such financial arrangements as might be appropriate.

"8. It is suggested that the captain might have supplied the coal, and might have landed under his lien such small portion of the cargo as would cover the cost of the coal. And no doubt some such plan would have been admirable, but was it his duty to do so? In certain circumstances it becomes the duty of the captain to minimise loss by discharging his cargo into neutral custody, but I am not persuaded that such an emergency had arisen in the case of this vessel.

"9. Now who ought to suffer for the failure to supply the coal? Against their absolute obligation (an obligation which one must never lose sight of) to take delivery within the stipulated time the defenders plead the exception 'strike.' Let me assume that exception to be available for the defenders. Mr Horne for the

defenders did not suggest that a mere rise in the price of coal in consequence of a miners' strike would bring his clients within the exception, but he laid special stress on the following terms in the charter-party, viz. 'the cargo to be . . . taken from alongside the ship as customary,' and argued that we had here not a mere increase in the price of coal, but a complete upsetting of the customary method of taking delivery.

"10. Mr Carmont, on the other hand, presented the view that the effect of the strike upon the discharge of this vessel was not only remote, but also slight, being merely an increase in the price of coal plus the change that the coal had to be brought on the scene by the receivers instead of by the railway company as in ordinary times, and that in such a case as the present the defenders could not escape from the absolute obligation of the charter-party by an appeal to the 'strike' exception if at reasonable trouble and expense they could have obviated the effects of the strike, and he submitted that commercially the burden in this case was well outside 'the unreasonable.'

"11. And that leads me to remark that a good deal of time was devoted at the trial, especially by the defenders, to proving how this coal emergency was dealt with by others. It was not suggested by either side that such evidence could be conclusive, but it was submitted as possibly helpful. And it was certainly proved that a number of shipowners had supplied the coal necessary for discharge—some of them even to the extent of supplying the receivers' lighters. One must, however, bear in mind that each shipowner will do what seems to him best in his own interests on a careful consideration of the pros and cons of his particular position, and one must admittedly be careful about making what some shipowners in a sudden emergency have been willing to do the measure of what all receivers or indeed any other receiver can demand.

"12. Then the defenders took another point—how can one talk (they say) of obligation to take delivery on 21st March, seeing that the vessel was not in a berth till 9th April? But then must one not go a question further back, viz., as discharging-berth facilities were available for her on her arrival in dock, why did she not actually moor at a berth?

"13. In proceeding to answer that question one must bear in mind that when this vessel came into the dock all the berths were physically occupied by other vessels, but as at least several of those other vessels were doing no business for the same reason, viz., lack of coal, physical occupation of a berth by one of these would have been brought to an end by the harbour-master in favour of this vessel as soon as coal was available for it. Accordingly if it was the receiver's duty to provide the coal, they were themselves the sole cause of the fact that this vessel did not at once occupy a berth on her arrival in dock. From 20th March onwards both parties knew (1) that no business could be done till coal was supplied, and (2) that business would begin as soon as coal was supplied. And as matter of fact the vessel was actually in her berth when the receivers were ready to do business with her, *i.e.*, on 9th April. I cannot gather that the lack of actual mooring at a berth troubled anyone till the case came into the hands of the lawyers, and certainly the receivers neither did anything nor said anything about the ship getting a berth. But Mr Horne was very emphatic that it was the duty of the ship to go through the empty form of getting herself moored to a berth before time could begin to run against the receivers.

"14. It may be quite true (though Mr Carmont pointed out that the evidence on the point was somewhat slender) that in ordinary times the custom of the port of Bo'ness is accurately stated thus, viz., that time does not begin to run against a receiver until the vessel is moored to a berth. But this custom (if proved) means nothing more than this—that when the ship's inability to do business arises from her inability to get a berth, the loss caused by this delay is a burden which by the custom of the port falls on the ship. But I hope I do no injustice to the evidence viewed as a whole if I put it that in this case there was absolutely no difficulty about a berth—the sole difficulty was the failure to supply the coal which was a necessary preliminary to the doing of business, *i.e.*, a new situation had given rise to a new controversy for the solution of which a reference to the custom in a totally different situation is not conclusive. And yet perhaps the principle of settlement is the same in both situations, viz., put your finger on the real cause of the delay in doing business. Different causes may lead to different results. Was it want of a berth? Then the ship suffers, according to the custom of the port. Was it lack of coal? Then put your finger on the man who ought to have supplied it.

"15. On the whole matter I cannot with reasonable confidence point to anything which relieved the receivers from their absolute obligation under the charter-party."

The defenders appealed, and argued—Lay-days did not begin to run till the ship had cleared the customs and been berthed. The consignee had to follow the ship to the berth assigned for her. Defenders knew that the ship would have got a berth if she had applied for one. In any event the coal strike was the immediate cause of delay, and fell within the exceptions of the charter-party — *Leonis Steamship Company, Limited* v. *Rank Limited*, [1908] 1 K.B. 499, *per* Kennedy, L.J., at pp. 520, 521; *Newman & Dale Steamship Company* v. *British and South American Steamship Company*, [1903] 1 K.B. 262; *Barrie* v. *Peruvian Corporation*, 2 Com. Cas. 50; *Turnbull, Scott, & Company* v. *Cruickshank & Company*, 1904, 7 F. 265, 42 S.L.R. 207; *Letricheux & David* v. *Dunlop & Company*, 1891, 19 R. 209, 29 S.L.R. 182.

Argued for the pursuers — The strike clause did not apply in favour of the con-

signee, who in any event could by paying a higher price have got coals and avoided the effect of the strike — *Dampskibsselskabet Svendborg* v. *Love & Stewart, Limited*, 1915 S.C. 543, 52 S.L.R. 456; *Dampskibsselskabet Danmark* v. *Poulsen & Company*, 1913 S.C. 1043, 50 S.L.R. 843.

LORD JUSTICE-CLERK — In this case the Sheriff-Substitute has found in favour of the pursuers, and I am quite content with the judgment he has given and with the reasons assigned therefor. The first point argued before us was whether there was a custom at the port of Bo'ness that a ship was not "arrived" until she was at a discharging berth. [*His Lordship stated his reasons for holding that no such custom had been proved.*]

The obligation of the merchants under this charter-party was an absolute one, namely, to discharge the cargo within a certain number of days unless some legal exception could be made out. It is said that there was a strike at the collieries and no coal was coming forward, and in these circumstances the railway company intimated that they would not undertake to provide waggons and haulage unless the merchants who asked for these facilities supplied them with the necessary coal. I assume from the fact that that position was assented to that the railway company were within their legal rights in so doing.

The question arises, was this strike clause in the charter-party one by which the merchants were entitled to benefit and which they could apply in the circumstances? It does not contain the usual expression "mutually excepted;" it is only "excepted," and it occurs in the middle of the obligations which are imposed upon the ship by the charter-party. It seems to me on a proper construction of the clause that it was not for the benefit of the charterer at all. Two English cases were cited to us — one decided by Mr Justice Mathew (*Barrie* v. *The Peruvian Corporation*, 2 Com. Cas. 50), and the other by Mr Justice Bigham (*in re Newman & Dale Steamship Company*, [1903] 1 K.B. 262). The charter in the first case was materially different from the one with which we are now dealing, and in the second case Mr Justice Bigham, although he thought it was his duty to follow Mr Justice Mathew's decision, clearly indicated that in his own opinion that was not the view he would have been inclined to take apart from authority.

I am of opinion that the exception of strikes in the present charter-party was not intended to benefit the merchants; it was only for the ship's benefit. I go further even than that. If it were intended for the benefit of the merchants it could not, in my opinion, be extended to cover the consequences which were said to have followed the strike in question. The strike was a colliery strike. It was not connected with the harbour, dock, or railway, and the only relation between it and the delivery of this cargo was that it made the railway company alter their conditions of providing haulage. I do not think that is a consequence of the strike which would bring in the exception as expressed in the terms used in this charter-party.

Moreover, it seems quite plain that for an expenditure of £10 the receivers could have provided coals for the haulage of the waggons. They did not choose to do so, as several others in like case did, but insisted that the ship should lie idle until the abnormal state of things at the collieries was removed, or until the ship consented to pay half the cost of getting the waggons. In my opinion that was not a position the merchants were entitled to take up, and accordingly I think the Sheriff-Substitute arrived at a right result.

LORD DUNDAS concurred in the opinion of the Lord Justice-Clerk.

LORD SALVESEN—I think this is really a very clear case. When this vessel arrived in the port of Bo'ness she was ready to discharge, provided the defenders made arrangements with the railway company to supply waggons. The customary mode of discharging a cargo of pit-props is into railway waggons, and if no railway waggons are available it may be that the charterer is absolved from liability arising from detention of the ship. But in this case there was no want of waggons. The railway company owing to a general coal strike had put up the price they were in use to charge for the coal from 7s. 6d. to the price then current. They put it in a different way. They said they would only haul if the consignee or merchant supplied them with coal, and as there was plenty of coal to be got in Bo'ness, all the merchants had to do in order to get the necessary number of waggons was to pay the additional sum for coal to the railway company in respect of the abnormal conditions caused by the strike which had greatly raised the price of coal. There were plenty of dock labourers available, and the only impediment to discharge was one created by the defenders in refusing to meet the railway company's demands for a supply of coal. [*His Lordship stated his reasons for holding that the alleged custom of port was not proved.*]

I think it is obvious as matter of construction that the clause in the paragraph of the charter-party beginning with the word "strike" only qualifies the obligation of the ship to deliver, and is not a clause in favour of the charterer at all. I can quite understand the judgment in the case of *Barrie*, 2 Com. Cas. 50, which Mr Justice Mathew pronounced; because there the clause had appeared in a separate paragraph at the end of the charter-party, and the paragraph contained matter referring to the obligations of the charterer both in the clause preceding the strike clause and in the one following, so that the strike clause was embedded in clauses referring to the charterer's obligations. As matter of construction I think it is very intelligible that in that case it should be held that the strike clause was intended for the benefit of both parties. Here I think it is impossible to

read it as having any reference to the obligations of the charterer at all.

Even if it had, I agree that there was no strike here to which that clause could possibly apply. It was a very remote consequence of the strike, not at the port of Bo'ness, but at the collieries throughout the greater part of the country, that coal prices were high and that the defenders were induced to take up the erroneous position that they did. It was not a strike which had any connection with the discharge of this vessel. On the whole matter I have no difficulty in reaching the result which the Sheriff-Substitute reached, and which I think he has expressed with remarkable clearness and fairness.

LORD GUTHRIE—I agree. The Sheriff-Substitute has dealt properly with the case, and I also think that the additional ground of judgment which your Lordships have referred to is sound. The defenders found in their answers on the strike clause in the charter-party as one to which they are entitled to appeal, and they also say that it is applicable in the circumstances. The pursuers cover in their plea 4 both these points. In his judgment the Sheriff-Substitute assumes that the strike clause is one they can found on, but he decides the case on the footing that the delay was not due to the strike. In his opinion he elaborates that point and takes the view which was submitted by the pursuers, namely, "In such a case as the present the defenders could not escape from the absolute obligation of the charter-party by an appeal to the 'strike' exception if at reasonable trouble and expense they could have obviated the effects of the strike."

I agree with your Lordships that the judgment of the Sheriff-Substitute can be supported on the additional ground proposed in the words of the pursuers' plea that the strike clause was not one that was framed for the benefit of the defenders or is available to them.

The Court dismissed the appeal.

Counsel for the Pursuers and Respondents —Sandeman, K.C.—W. T. Watson. Agents —Gray, Muirhead, & Carmichael, S.S.C.

Counsel for the Defenders and Appellants — Horne, K.C. — Maconochie. Agents — Bruce & Stoddart, S.S.C.

Tuesday, May 30.

SECOND DIVISION.

GRAHAM'S TRUSTEES *v.* LANG'S TRUSTEES.

Succession—Vesting—Double Contingency —Direction to Trustees upon the Death of a Liferentrix to Pay Money Liferented by her to her Lawful Issue, failing Appointment by her, Equally among them, and upon her Death without Leaving Issue, to Pay the Money to the Truster's Other Children Equally among them.

A testator directed that in the event of the marriage of any of his daughters her share of his estate was to be retained by his trustees, such daughter to receive the annual proceeds during her life; and when such daughter should die the money was to be paid to the lawful issue of such daughter, failing appointment by her, equally among them, share and share alike. There was a subsequent direction to the trustees, in case any daughter should die without leaving lawful issue, to pay the money to the other children of the truster equally among them.

Held that vesting was suspended until the daughter's death, and in a competition between an assignee of her son (who had predeceased her) and his children, that no part of the share was carried by the assignation.

Binnie's Trustees v. *Prendergast*, 1910 S.C. 735, 47 S.L.R. 271, *followed*, and *Hickling's Trustees* v. *Garland's Trustees*, 1898, 1 F. (H.L.) 7, 35 S.L.R. 975, *distinguished.*

Sir Henry John Lowndes Graham, K.C.B., barrister-at-law, Clerk of the Parliaments, House of Lords, London, and others, trustees under the trust-disposition and settlement of the deceased William Graham jun., merchant, Glasgow, *the testator*, dated 27th February 1851, and relative codicils, *first parties;* William Graham Lang, residing at Broadmeadows, in the county of Selkirk, and others, trustees under the trust-disposition and settlement of the deceased Mrs Margaret Graham or Lang of Broadmeadows aforesaid, dated 28th August 1900, and sundry relative codicils, *second parties;* (*a*) the said William Graham Lang and another, the trustees acting under the antenuptial contract of marriage between Rear-Admiral Spencer Yorke de Horsey, R.N., and Mrs Cicely Jane Lang or de Horsey, his wife; (*b*) the said William Graham Lang, the sole surviving trustee acting under the antenuptial contract of marriage between Thomas George Taylor, lieutenant in the Gordon Highlanders, and Mrs Josephine Margaret Lang or Taylor, his wife; and (*c*) Hugh Cyril Lang of Broadmeadows aforesaid, the said Mrs de Horsey, Mrs Taylor, and Hugh Cyril Lang being the children of Robert James Lang, a son of Mrs Margaret Graham or Lang who predeceased her, *third parties;* and the said William Graham Lang and others, being the six surviving sons and