points which were argued were, in the first place, that the state of the market by itself cannot justify a finding that the coal has become within the meaning of this lease not worth the expense of working; and the second point was, that in any view the state of the market at the time the tenants gave notice is not sufficient to support such a finding with reference to a lease for twenty-nine years from Whitsunday 1867. Now, on the first point, my opinion is that the worth of coal in a particular field necessarily depends on the state of the market, because it depends on the market in that neighbourhood whether that coal can be brought into use at such a cost as will pay working expenses. I think this is illustrated by supposing that at the time when the lease was entered into there had been no coal of that kind in the district which could be supplied without working a mine of equal depth and difficulty, and that subsequently a similar coal of equal quality had been discovered near the surface of the ground and in the same locality. In that case it is obvious that the coal in the lease must become and be not worth the expense of working so long as the more accessible coal shall last, and that if there is enough of that coal this state of matters must endure for the remainder of the lease. Thus, without any change on the subject of the lease or in the expense of working, and simply by reason of the outside circumstance of other coal being attainable, and capable of being brought into the market without the trouble and expense of working such a mine as was required here, the coal in the lease ceases to be worth the expense of working. I think that all contingencies affecting the value of coal in the district must be held to have been in view of the parties to this lease, and that therefore it must have been contemplated as possible that the coal might come to be not worth the expense of working although everything in the way of proper working has been done and no change takes place except in the state of the market. I agree therefore with the Lord Ordinary on this point.

On the question whether the report sufficiently shows that the coal had become not worth the expense of working, I assent to the proposition contended for by the reclaimer, that the fact to be ascertained is not merely the worth of the coal with reference to the state of the market at a particular time, but that it is absolutely, so far as this lease is concerned, not worth the expense of working. But although I agree with the view which your Lordship has expressed upon the ambiguous and even apparently contradictory character of the report in some parts of it, I think the reporters in referring to the date at which the tenants gave notice cannot be held to have qualified the absolute terms of their report as made in the previous paragraph. They appear to have thought it necessary to have fixed some time at which to bring their calculation to a point; but it is not consistent with a fair construction of their report, in my view, to hold that they did not take into consideration, in arriving at the conclusion as at that date, the whole circumstances of the lease, including the length of it. I do not think that they could have reported as they have done in the second last paragraph of their joint report if they had confined their attention to a particular month or year. I concur therefore on both points, and I am of opinion that the Lord Ordinary's interlocutor should be affirmed. In my view, the case of *Dickson* v. *Campbell* is really not applicable here at all. I have examined that case with some care, and it appears to me that the clause in the lease and the report which was before the Court in that case were both different. The terms of the lease related to unforeseen accidents, occurrences, dykes, or troubles not occasioned by irregular or improper working. These expressions were construed as having reference to something within the mine, and as requiring that the Court should be able to find that from some cause arising within the mine, or at least partly from some cause arising within the mine, the coal in question had ceased to be capable of being worked to advantage. That ground does not apply here, for the lease is different. It does not refer to anything of that kind, but is quite general in its terms. Further, the view on which the case was decided was that the report showed only a temporary fluctuation in the market, and did not show a permanent change. In both of these respects, therefore, the case of *Dickson* v. *Campbell* is clearly distinguishable from the present.

With reference to the date which should be fixed by the Court as that at which this lease should be declared to be at an end, I do not see that there is any occasion to alter the Lord Ordinary's interlocutor.

The Court adhered.

Counsel for Sir George Deas—Asher—J. P. B. Robertson. Agents—H. B. & F. J. Dewar, W.S.

Counsel for Shotts Iron Co.—R. Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Counsel for La Cour & Watson—D.F. Kinnear, Q.C.—Thorburn. Agents — Boyd, Macdonald, & Co., S.S.C.

Friday, March 11.

FIRST DIVISION.

[Sheriff of Lanarkshire.

ARROSPE *v.* BARR.

Ship — Charter-party — Bill of Lading — Clean Bill of Lading.

The captain of a ship and the charterer disputed as to whether liability for demurrage at the port of loading had been incurred, and also whether the ship was fully loaded. As a settlement of the dispute the charterer agreed to put additional cargo on board, and the captain to sign clean bills of lading, protesting for his alleged claim of demurrage, to be settled at the port of discharge. *Held* that the captain was not entitled to add to the bill of lading the words "and all other conditions as per charter-party."

Opinions as to the meaning of the expression "clean bill of lading."

Ship—Charter-party—Bill of Lading—To Sign Bills of Lading as Presented.

Held that a condition in a charter-party

that the captain should "sign bills of lading as presented, at any rate of freight, without prejudice to this charter-party," did not entitle the charterer to vary the charter-party except as regards the rate of freight.

On 24th September 1880 the pursuer, as master and managing owner of the ship "Victoria," of Spain, entered into a charter-party with the defender, by which the pursuer undertook that his ship should proceed to a crane berth in Victoria Harbour, Greenock, and there load from the defender a full and complete cargo, consisting of steam-coals, and being so loaded should proceed therewith to Barcelona, on being paid a stipulated freight. It was provided by the charter-party that the ship should remain until 2d October for loading at the part of loading, and that the defender was to have ten days' demurrage at the rate of £8 per day. The charter-party further contained this provision—"The captain to sign bills of lading as presented, at any rate of freight, without prejudice to this charter-party."

The defender proceeded with the loading of a cargo of coals, but on the morning of the 4th October he stopped. The pursuer represented to the defender that the ship was then short of a full cargo to the extent of 35 tons or thereby, and ultimately, after considerable discussion as to whether the defender was bound to load any more coals, and also whether he was liable for demurrage, the following letters passed between the parties:— "*Greenock, 5th October* 1880.

"Thomas Barr, Esq., Charterer of 'Victoria.'

"Dear Sir—Upon condition that you supply the balance of cargo, say 35 tons coals, I agree to sign clean bills lading, but under protest for three days' demurrage incurred here, to be settled at Barcelona.

"Coal to be put on board to-day.—I am, yours truly, "MANUEL DE FRIBIS ARROSPE."

"*Greenock, 5th October* 1880.

"Captain Manuel de Fribis Arrospe,
of ship 'Victoria.'

"Sir—I acknowledge receipt of your note to-day, and consent to put 35 tons more coal on board your ship, leaving the demurrage claim to be adjusted at Barcelona.—Yours truly,

"*P. pro.* THOMAS BARR,
DAVID I. URQUHART."

In terms of this agreement the pursuer made a formal protest before a notary for his claims for demurrage, and the defender shipped the additional 35 tons of coals. The defender then presented to the pursuer a bill of lading for the cargo, but the pursuer declined to sign this unless allowed to add the words "and all other conditions as per charter-party," which the defender would not agree to. The ship was in consequence unable to sail, as it was necessary that a copy of the bill of lading, together with certain declarations, should be delivered to the Spanish Consul before a Spanish ship could leave a British port. On the expiry of the ten days allowed for demurrage, therefore, the pursuer raised this action, in which he prayed the Sheriff "to grant warrant to the pursuer to discharge and land a cargo of 584 tons or thereby of steam-coals, at present on board his ship 'Victoria,' lying in the harbour of Greenock, and to deposit the same in the hands of a storekeeper or other neutral custody for behoof of whom it may concern, and to grant interim warrant to the effect foresaid pending the present process; and further, to grant decree against the above-named defender, ordaining him to pay to the pursuer the sum of £750 sterling, with expenses; and to grant warrant to arrest on the dependence."

The defender pleaded, *inter alia*—"(3) Under the charter-party, the pursuer, being bound to sign bills of lading as presented, was not entitled to refuse to sign the bills of lading presented to him by the defender, his alleged claims against the defender as charterer not being prejudiced thereby. (4) The pursuer having expressly agreed, upon condition of the defender giving his vessel other 35 tons of cargo, to sign clean bills of lading for the cargo, was not entitled to refuse to sign clean bills of lading when presented to him by the defender."

The Sheriff-Substitute (SPENS), after a proof, which largely related to the meaning of the terms "clean bill of lading," assoilzied the defender, adding this note:—"This case seems to me to turn wholly upon the question of whether pursuer was or was not entitled to require the addition of the words 'and all other conditions as per charter-party' in the bills of lading. As the case strikes me, I do not think it is of any importance to inquire into either of the questions, viz. (1) Whether upon Tuesday 5th October three days' demurrage was due by defender? or (2) Whether on that day or previously the pursuer was entitled to demand that 35 tons more coals should be put on board the 'Victoria?' Neither does it seem in any way necessary to determine whether the cargo was a general cargo—a question which was mooted at the proof—but if required to decide that point, I would have no hesitation in holding the cargo was not general cargo. By the charter-party pursuer was taken bound to sign bills of lading as presented at any rate of freight; but this condition was qualified by the clause that it should be without prejudice to the charter-party. Then by the charter-party it is stipulated that the owners should have a lien for freight, dead freight, and demurrage. At the meeting at Greenock on Tuesday 5th October the pursuer considered that he had a claim against the defender, not only for demurrage, but also for dead freight, to the extent of 35 tons. Both of these claims were disputed, and, as I have already said, I think it unnecessary for the decision of this case to determine whether these claims were well or ill-founded. But as matter of law, on the clause of the charter-party quoted, the master, up to the time at all events of granting the letter of 5th October produced, was, in my opinion, entitled to refuse to sign the bills of lading without the adjection of the words which he demanded. I read the words 'without prejudice to the charter-party' as qualifying the clause that the master shall 'sign bills of lading as presented.' Therefore I think he could not be called upon to sign bills of lading which would in any way prejudice his rights or those of the owners under the charter-party. By signing bills of lading without the words desiderated, or words of a similar import, the right of lien, which by the charter-party was expressly stipulated to be not only over freight, but also over dead freight and demurrage, would, as regards the two last-named subjects, have been abandoned. At all events, those rights

might have been prejudiced. As matter of law, therefore, I am of opinion that the master was entitled under the charter-party to insist on the adjection of words in the bills of lading which would preserve his lien for his claims for dead freight and demurrage. On Tuesday the 5th, however, Mr Urquhart, who is said to be a junior partner of the defender's (and whose right to act for the defender was not in any way disputed), had a meeting in Greenock with pursuer, the first witness examined, Joaquin Arellano, and himself—Arellano apparently acting as the pursuer's adviser—the result of which meeting was that the two letters of that date were written out. These I have thought it advisable to quote *in extenso* in the interlocutor. Arellano, it may be stated, is a clerk in the employment of F. E. Harvey & Company, shipbrokers, Greenock, agents for the owners of the ship, and he negotiated the charter-party for pursuer. Not only was an agreement come to by those letters, or at least was supposed to be arrived at by the defender, or Urquhart as acting for him, but what I cannot hold to be anything else than *rei interventus* followed in the procuring and loading of 35 tons of coal. Pursuer was claiming that the cargo was not the full cargo which he was entitled to under the charter-party. The answer was that he himself had specified 550 tons as a complete cargo, and on the faith of that statement, which defender alleged had, up till the Monday at least, remained uncontradicted, the specified cargo had been supplied. On the other hand, as regards demurrage, the defenders disputed the claim on the ground that the delay had arisen from circumstances outwith the defender's control. This being the state of matters, the natural explanation, I think, of the agreement of 5th October is that a compromise was arrived at—defender, on the one hand, agreeing to supplement the cargo on board by 35 tons more, while at the same time pursuer agreed to grant clean bills of lading, but under protest for the three days' demurrage, to be adjusted at Barcelona. After this agreement, and up to date, as I understand, pursuer has persistently refused to sign bills of lading except with a reference *in grœmio* to 'the other conditions of the charter-party.' Evidence was led on both sides as to what the adjection 'clean' before the words "bill of lading' meant. There were so many witnesses on the one side, and so many on the other, that the adjection of the words specified did not affect the cleanness of a bill of lading, and *vice versa*. If the whole evidence as to what the phrase meant by the custom of trade were all to one effect, then such interpretation would, I do not doubt, be adopted by the Court; but as the phrase is one on which there is this conflict of opinion among traders, it is not a question, I apprehend, which can be determined by weighing the evidence of one set of witnesses as against the other. Custom of trade to interpret such a phrase must be invariable, and therefore in this case I think that the whole evidence upon the subject referred to must be disregarded. The meaning of the phrase must be interpreted by the Court, and the agents for both pursuer and defender stated that they had been unable to find any legal decision interpreting the word 'clean' as applied to a bill of lading. Before, however, adverting to the meaning of the phrase itself, let me for a moment deal with the intention of parties in using the word 'clean,' on the supposition that the phrase is an ambiguous one. The dispute up to the 5th October was that pursuer demanded the insertion of the words 'all other conditions,' &c. Defender agreed to supply the extra coal, for which otherwise pursuer would claim dead freight. Defender meant something by asking that the word 'clean' should be inserted before bills of lading. Urquhart undoubtedly meant that pursuer was to waive his insistance about reference to the conditions of the charter-party. Now, what did pursuer mean by it? Pursuer knew that the dispute as to the bills of lading had arisen from his insistance that the reference to conditions of the charter-party should be inserted in the bills of lading. By the words 'clean bill of lading' in connection with the past dispute he must have intended to waive his objection to sign bills without the clause in dispute, and that this was his intention is confirmed by the words which succeed, viz., 'but under protest,' &c. These words surely imply either that on the bills of lading, as an exception to their being otherwise 'clean,' there should be a protest for the three days' demurrage, or that the bills of lading should be granted without condition and the protest be made elsewhere—a protest in the usual understanding of ships'-captains being a separate document, solemnly attested before a notary-public. It is true that Sinclair speaks of having asked Mr Urquhart at the time of the signing of the letter if the bills of lading were to be with the conditions of the charter-party, and says that the answer was in the affirmative. I cannot hold this to be proved, but if this conversation did take place, Urquhart surely meant that the conditions of the charter-party would remain good as against the shipper, and not that the bills of lading were to be qualified by a reference to the charter-party conditions. Assuming, therefore, the phrase 'clean' to be an ambiguous phrase, if it were to be interpreted by what was the intention of parties, I could come to no other conclusion but that the construction put upon the phrase by the defender is the right one. But turning again to the interpretation of the phrase to be deduced simply from the word itself, I think that meaning is 'without conditions.' For instance, the phrase 'bill of health' means the certificate of the healthiness of a ship's crew. To that phrase the word 'clean' is sometimes appended. I understand that phrase to mean a bill of health without qualification. Of course there are certain understood and well-known conditions invariably inserted in bills of lading—the act of God, the Queen's enemies, &c.—and the phrase 'clean' is not to be held as preventing the insertion of such invariable clauses; but I take it that it means that the bill of lading shall be clean or free from any other conditions except those invariable conditions. I am of opinion that it implies that no conditions shall be inserted which may affect its negotiability. And there can be no doubt that the reference to a charter-party which has the effect of importing the unknown conditions of a different document must necessarily affect negotiability. Whether, therefore, the phrase falls to be interpreted by the intention of the parties themselves, or whether its meaning is to be decided by a judicial interpretation of the phrase from what appears to be the proper meaning of the word itself, I am of opinion that the de-

fender's construction is that which must be held to be established.

"The agent of pursuer contended that there was no offer on the part of the defender to accept a bill of lading with the words 'but under protest of three days' demurrage,' &c. I am not clear that the letter of 5th October implies that it was conditioned that these words were to be adjected to the bill of lading; indeed, I incline to think that it meant a separate protest. Be that, however, as it may, I think it rested upon the pursuer, if such was his construction of that letter, to propose that these words should be adjected. Instead, however, of making any such proposal, he persistently stuck to the demand that the words 'all other conditions,' &c., should form part of the bill of lading.

"Arriving at the above conclusions, it follows that no judicial authority can be given to the pursuer to land the cargo, and necessarily also the claim of damage, based upon his allegation, falls.

"Had the pursuer's statements been proved, questions of some difficulty would have required determination, viz.—(1) Whether pursuer would have been entitled to hold the charter-party at an end, and been therefore entitled to land the cargo? and (2) as to the measure of damages which would fall to be awarded, imputing the breach of contract to defender. It is not, of course, necessary to express any opinion on either of these points."

On appeal the Sheriff (CLARK) adhered. He added this note:—"The charter-party taken by itself would seem to bear out the defender's contention. The phrase 'without prejudice to the charter-party' simply means that the charterer is to settle with the shipowners on the basis of the charter-party, whatever the bills of lading may bear. The effect is that the chartering merchant reserves to himself the right of chartering to others at different rates of freight and discharge, but remains bound to the shipowners as in terms of the charter-party.—See *Shand* v. *Sanderson*, 1859, L.J., N.S. Exch., p. 278, and *Marquand* v. *Burness*, 6 Ellis and Blackburn, 232. But this construction becomes greatly strengthened when the two letters are considered. These were written after a very full and anxious discussion of the rights of parties in reference to the very contention now raised. I do not think they can be read otherwise than in accordance with the defender's view. On any other construction it would be very difficult to see what the adjected word 'clean' can possibly mean."

The pursuer appealed to the Court of Session, and argued—Anterior to the agreement of 5th October the pursuer would clearly have been entitled to sign bills of lading with the condition he desired added, for it could not be contended that the words in the charter-party, "the captain to sign bills of lading as presented, at any rate of freight, without prejudice to this charter-party," entitled the charterer to override all the other conditions of the charter-party. What, then, did the captain undertake on the 5th October when he agreed to sign clean bills of lading. A clean bill of lading was a bill in which the obligation on the consignee was measurable by what appeared *ex facie* of the bill or was clearly imported into it. Now, a bill with the condition "all other conditions as per charter-party" was a clean bill, because the means were there given of settling the obligations of consignee. The bill was negotiable, because a copy of the charter-party could be annexed. In so signing the bill, therefore, the pursuer would be fulfilling his obligation.

Argued for defender—The pursuer was bound to sign without adding the words he wished (*a*) independently of the letters of 5th October, because of the condition in the charter-party, "the captain to sign bills of lading as presented, at any rate of freight, without prejudice to this charter-party." The object of such a condition was to enable the charterer to re-charter the vessel on such new terms as he thought fit. But (*b*) the agreement of 5th October made it obligatory on the captain to sign a clean bill, and what he proposed to do was to sign one which was not clean. In fact he desired to reopen the whole dispute.

Authorities—*Craig & Rose* v. *Delargy*, 18th July 1879, 6 R. 1269; *Reed* v. *Larsen*, L.R., 12 Eq. 378; *Pearson* v. *Goschen*, 23d June 1864, 33 L.J., C.P. 265; *Gabarron* v. *Kreeft*, L.R., 10 Ex. 274; *Shand* v. *Sanderson*, 28 L.J., Ex. 278; *Gray* v. *Carr*, L.R., 6 Q.B. 522; *Chapel* v. *Comfort*, 31 L.J., C.P. 58; *Porteous* v. *Watney*, 2d July 1878, L.R., 2 Q.B. 534; *Wegener* v. *Smith*, 24 L.J., C.P. 25; Abbot on Merchant Shipping, 265; Ford on Merchant Shipping, 500; Maclachlan on Merchant Shipping, 391.

At advising—

LORD PRESIDENT—The pursuer of this action in the Sheriff Court is the master and managing owner of a Spanish vessel called the "Victoria," and he entered into a charter-party with the defender by which he undertook that the ship should proceed to a berth in the Victoria Harbour at Greenock, and load from the defender a full and complete cargo of steam-coal, and carry the same to Barcelona at a stipulated rate of freight. An advance of freight was to be made to the extent of one-third on signing bills of lading, subject to 5 per cent. to cover charges. He proceeded, in terms of that charter-party, to Victoria Harbour, and it was stipulated that the lay-days should expire on the 2d of October. The cargo was loaded, but was not completely loaded when the lay-days expired, and on the 4th of October the captain represented that he had not even then obtained a complete cargo—that there was still a deficiency of 35 tons to fill the ship; and he also represented on the same occasion that he had a claim for demurrage for two or three days, as the case might be—three days it was mentioned to be, because the additional 35 tons could hardly be expected to be obtained before the following day at the earliest—and therefore the master's demand upon the 4th of October was that he should obtain delivery of 35 tons of coal in addition to what was already shipped, and should have a claim for three days' demurrage at the stipulated rate of £8 per day. Now, this was the subject of discussion between the parties upon the 4th of October, and a good deal of discussion apparently, and I daresay a good deal also of misunderstanding, for the parties who were conducting that discussion spoke different languages, and did not understand each other very well sometimes; and there is in consequence a good deal of confusion in the evidence about what precisely took place, but the substance of

it undoubtedly was this, that the master made the claims which I have already stated, and these were not admitted but resisted on the part of the merchant. The charterer proposed on that occasion, that as the matter stood the master should sign bills of lading without any special stipulation whatever, but just acknowledging receipt of the cargo, and undertaking in common form to make delivery at the port of discharge. That the master, for the reasons already mentioned, refused to do. Now, had the matter stood there, I think the master was in the right. In the first place, he had certainly not obtained a complete cargo. The ship required to be filled up, in order to complete the cargo, with an additional 35 tons—certainly not a very small difference—and there is no doubt also that he had, or appeared to have, a fair claim of demurrage. The defender, however, contends, that whatever the master's claims might be in that respect, he was bound to sign any bills of lading that the merchant presented; no matter what his claims might be under the charter-party, that he was bound, under a particular clause in that charter-party, to sign bills of lading simply acknowledging receipt of the cargo shipped, and undertaking to deliver it in the like good order and condition at the port of discharge.

The charter-party contains several very important stipulations in favour of the master and owner, and among others he has by express stipulation a lien at the port of discharge upon the cargo, not only for payment of freight but also for dead freight and demurrage. But the defender says he has undertaken by the terms of this charter-party nevertheless to sign bills of lading in the simple form which I have already mentioned. The words founded on are these—"The captain to sign bills of lading as presented, at any rate of freight without prejudice to this charter-party." Now, I do not attach much importance to the words "without prejudice to this charter-party," because I think these might be satisfied, if the defender's construction of this clause was otherwise sound, by giving it the meaning merely that the personal obligations of the master under the charter-party were not to be cancelled or abrogated by his signing bills of lading in any form presented to him. But the question appears to me to be, what is meant by the obligation on the captain to sign bills of lading as presented at any rate of freight? It is said that that gives the charterer an absolute power to make the bills of lading in any form he likes—not merely that he may alter the rate of freight from that stipulated in the charter-party, but that he may insert conditions to abrogate those stipulated in favour of the ship by the charter-party. As, for example, he might stipulate that the lien upon the cargo expressly stipulated by the charter-party should be abrogated by a clause in the bill of lading. Now, I do not so read those words. On the contrary, I think the fair meaning of them is that he is to sign the bills of lading as presented though the rate of freight shall be other than those that are in the charter-party. That construction seems to me completely to satisfy the words which are here used; and it would be very unreasonable to construe them in any other way, as I think is illustrated by the circumstances of this case. The master not having obtained a full cargo, was entitled, when he arrived at the port of destination, upon delivery of that imperfect cargo, to demand payment of dead freight, and to retain the cargo until that dead freight as well as the freight for the cargo itself should be paid. It certainly never could be intended by the parties to that original contract of charter-party that one of them, by presenting bills of lading in a particular form, should escape from the obligation which he had thereby incurred, and that the master should be deprived of the security of lien which was there stipulated.

Therefore I think that upon the 4th of October, as matters then stood, the master was in the right, at least as regarded the matter of short cargo and dead freight. Whether he was entitled to claim demurrage as against the consignee of the cargo or the endorsee of the bill of lading as at the port of delivery—that demurrage having occurred before the voyage commenced—is a question of more difficulty; and whether he was right or wrong in that respect I do not think it necessary to determine, because at all events I think he was right in one question, and had at least a fair claim to have the other reserved. And if the matter had stood there I should have been disposed to say that for what has occurred the defender must be responsible, because he would not allow the master to sail upon the conditions on which I think he ought to have been allowed to sail. He prevented that from being done by applying to the Spanish Consul, without whose authority the vessel could not proceed on her voyage.

But then matters were somewhat changed next day—on the 5th of October—because, after a good deal of discussion upon the points in dispute to which I have referred, the parties exchanged two letters—one addressed by the pursuer to the defender, and the other by the defender to the pursuer; and I think the result of these letters is that each party gave up something in order to come to a conclusion and enable the vessel to proceed upon her voyage. The pursuer (the master) writes—"Upon condition that you supply the balance of cargo, say 35 tons coal, I agree to sign clean bills lading, but under protest for three days' demurrage incurred here, to be settled at Barcelona;" and the answer by the defender is—"I acknowledge receipt of your note to-day, and consent to put 35 tons more coal on board your ship, leaving the demurrage claim to be adjusted at Barcelona." Now, I think the substance of that agreement is that the two points in dispute were settled so far as to enable the vessel to proceed upon her voyage. The ship was to be filled up so as to complete the cargo. Well, that put an end to the complaint of deficient cargo, and it put an end also to a prospective claim for dead freight. On the other hand, as regarded the matter of demurrage, the captain was satisfied to protest that that claim was not abandoned, but must be settled at Barcelona—"adjusted at Barcelona" is the phrase in the one letter, and "settled" in the other. Now, I do not think that the meaning of that was that the master was to keep up his claim of demurrage to the effect of giving him a lien for that demurrage upon the arrival of the ship at Barcelona; and the other objection therefore being removed, the question comes to be what the master meant by agreeing to sign clean bills of lading? When the bills of lading are

again presented to him in the same form as before he will not sign them except with the addition of certain words importing into the bills of lading the conditions of the charter-party. Now, if it had not been for the letters which so passed between the parties, I do not say that he might not have been entitled to have that reference to the charter-party. I do not at all agree with the argument that he was bound to sign those bills of lading, leaving the charter-party to speak for itself and to work out its own conditions. I think that in certain circumstances, and probably in the circumstances as these stood on the 4th of October, the demand of the master to add the words "other conditions as per charter-party" would have been reasonable enough. And there is no difficulty as regards the practical operation of such a demand, because although it is argued that a bill of lading with a reference on the face of it to unknown conditions would not be a negotiable instrument, it would be a perfectly negotiable instrument if a copy of the charter-party were attached to it; and that is the practical answer to the whole suggestion of difficulty arising from the nature of the instrument. But then matters stood in a very different position when the bills of lading were again presented on the 6th of October. The master had reserved his claim for demurrage, and his other difficulty about dead freight had been obviated by the cargo being filled up. What, then, did he mean by agreeing to sign clean bills of lading? I do not think that that phrase has any technical meaning, nor do I think it is a legal phraseology at all. On the contrary, I think it is popular phraseology as amongst mariners. I do not attach any importance to the evidence that has been laid before us as to what is called custom or understanding in this matter. I do not think there is any settled meaning of those words applicable to every conceivable case. In short, it appears to me that a clean bill of lading must be construed with reference to the circumstances of each particular case. If there is a matter in dispute between parties as to the conditions on which the voyage is to take place, and the goods which are to be carried and delivered, then a clean bill of lading will have reference to the subject of that dispute, and the meaning of it will be that the master will not cumber his bill of lading with any reference to that dispute. Other cases may be imagined in which difficulties may be foreseen, not the subject of regular dispute, but where there are difficulties anticipated, and if these form an element in the discussion between the parties, and the master signs the bill of lading, it will be understood that it is to exclude all reference to such difficulties. That appears to me to be the rational construction of this term. It can have no abstract meaning. It must have a meaning referable to the circumstances of each particular case. The bill is to be made clean of something—of something that is present to the minds of parties, and has either formed the subject of discussion or dispute, or at least has been anticipated as a difficulty. Now, using the phrase in that meaning here, I cannot doubt that the intention of the master in agreeing to sign clean bills of lading was that the bill of lading should not be encumbered with any reference whatever to the matters that had been in dispute between the parties, and had been compromised—compromised by full delivery of a cargo on the one side, and by the reservation by the master of demurrage to be adjusted at Barcelona. I am therefore upon the whole matter of opinion with the Sheriff-Substitute. I think his ground of judgment, although there is some slight inaccuracy in the order of his findings, is substantially quite right.

Lord Deas—This case was very fully discussed and considered at consultation, and I came to the same conclusion as your Lordships in regard to it. I concur in the views which your Lordship has now stated, and I do not think it is necessary for me to add almost anything. The question which was in dispute is made very clear by the protest of the master in signing the bills of lading. He says—"I agree to sign clean bills lading, but under protest for three days' demurrage incurred here, to be settled at Barcelona." That is plainly just adhering to his view of what had been in dispute. In these circumstances it is impossible to say that the bills of lading could have been understood to be clean bills of lading when the only dispute which had occurred before is reserved by that protest.

Lord Mure—I am of the same opinion. The case is a little special in its circumstances, and has been decided by the Sheriff-Substitute with reference to that specialty, viz., the terms of the letters which passed between the master and the charterer on 5th October 1880. These letters have admittedly reference to the dispute which had arisen between the parties relative to the quantity of cargo that had been put into the vessel, and as to the settlement of the claim that had been made relative to demurrage; and the parties being at issue upon these points, the letter of 5th October was written, stating that upon condition that the charterer supplied the balance of cargo—35 tons of coal—the captain agreed "to sign clean bills lading, but under protest for three days' demurrage incurred here, to be settled at Barcelona." To that he received an answer from the charterer agreeing to put in the 35 tons of coal, qualifying to some extent the letter of protest by adding, "leaving the demurrage claim to be adjusted at Barcelona;" and upon that footing that particular dispute is settled. Now, this gives rise to the question, What is a clean bill of lading? and there is a great deal of evidence adduced to show what in the views of the respective parties a clean bill is. That evidence is very contradictory, but I think the difficulty may be solved in this case in the view which your Lordship has now expressed, viz., that what the parties intended here was a bill of lading which should contain nothing which could by possibility give rise to a renewal of the points as to which the parties had been at issue, and which were settled by the two letters of 5th October. And therefore any bill of lading containing any general qualification which could by possibility revive those questions was not a clean bill of lading. Upon that special ground the Sheriff-Substitute has decided the case, and has, I think, rightly decided the case.

Upon the general question of a clean bill of lading it appears to me that the authorities rather tend to this, that a clean bill of lading in ordinary circumstances means a bill of lading of

the usual kind recognised in different countries, and that whenever any special stipulation is made with reference to the cargo in the bill of lading by the captain it can scarcely be held to come within the description of a clean bill of lading. I see that in Bell's Commentaries, p. 542, a description is given of bills of lading, and he says—"The form used in Britain is uniform, and generally printed, with spaces left for introducing the names and descriptions of the ship, captain, goods, and voyage." He gives in a note the style and form, and adds, "special stipulations may, however, be introduced." In the case of *Craig & Rose* there was a special stipulation as to leakage and breakage added by the captain to the ordinary uniform printed style; and there are opinions in that case to the effect that there the bill was not clean because of that special stipulation having been inserted. I am rather inclined to think, if we were forced to decide the general question, that a clean bill of lading must mean a bill in the ordinary uniform style recognised in all ports in this country, and without any special stipulations different from that ordinary style. That, I think, is the import of the decision in *Craig & Rose;* but in this case the necessity of deciding the general question is got over by the terms of the letters passing between them.

Lord Shand—In the discussion before us in this case there were two questions argued—the first being, whether if there had been no special agreement such as is contained in the letters of the 5th of October, the master was entitled to insert in the bill of lading the words which he proposed, viz., "and all other conditions as per charter-party?" and the second, assuming that he was entitled to insert these words, whether he contracted to give up his right to do so by the letter which he wrote on 5th October and what followed upon it? In regard to the first of these questions, which is of general interest, I concur in the opinions that have been delivered. The charter-party contained a number of stipulations in favour of the owner of the vessel, none perhaps of more importance than that towards the close, to the effect that for payment of all freights, dead freight, and demurrage the owners shall have an absolute lien on the cargo. The argument of the shipper is that the captain was bound to sign a bill of lading for the whole cargo [for the case we are now dealing with is one where the bill of lading was for the whole cargo], which would practically deprive him of those rights as against the cargo; and it appears to me that in order to make out that proposition it would require very clear, distinct, and unambiguous language on the face of the charter-party to entitle the charterer of the vessel to say that he shall have bills of lading so expressed. The clause founded on as operating that effect is this—"The captain to sign bills of lading as presented, at any rate of freight, without prejudice to this charter-party." It appears to me that that clause is limited to one matter, viz., the rate of freight. Notwithstanding that a certain rate of freight is stipulated for in the charter-party, the captain binds himself to sign bills of lading, at any rate of freight, without prejudice to this charter-party—that is to say, that if he signs bills of lading for a smaller rate of freight his claim against the charterer shall be good; but I do not see that the clause goes further to any extent. We were referred to the authority of a case of *Gaberon*, in which the clause was to this effect—the captain to sign bills of lading as presented without prejudice to this charter-party. That is a very different clause from the one we have here. If a captain binds himself to sign bills of lading as presented, the ordinary meaning of which would be that whatever be the terms of the bills of lading he is to sign them, and to look to the charterer for his remedy ultimately, then he has contracted to sign bills of lading in any terms; but here it appears to me to be quite clear that the words "as presented" are qualified by the words which follow, "at any rate of freight," and accordingly that the only obligation on the part of the master was that he would sign bills of lading at a lower or higher rate of freight as he might be asked, but that he undertook nothing else in the way of depriving him of the other rights under his charter-party. Accordingly, if this case had depended upon the general question, I should be of opinion that the pursuers would be entitled to succeed. But then there was a very special transaction between the parties, for on the 5th of October their position was this—a dispute had arisen between the charterer and the captain as to whether the vessel had been fully loaded, and a second dispute as to three days' demurrage. In regard to the loading, as I understand, the shipper maintained that he had sent down all the cargo which the captain had told him his vessel would carry—a quantity which would fill the vessel according to the representation which had been made to them by the captain, or at all events by the agents for the captain, who were acting with his authority, and that although it might be that the vessel might carry more coals, they were entitled to act on the view which had been presented to them, and were bound to give no more cargo. The captain, on the other hand, maintained that he was entitled to the full cargo for his ship, and that she could carry other 35 tons. A question was also raised between them which to some extent also depended on the other question, viz., as to three days' demurrage, making in all a sum of £24. In that state of matters the arrangement which was embodied in these letters is, I think, plainly enough expressed. The captain writes—"Upon condition that you supply the balance of cargo, say 35 tons coals, I agree to sign clean bills lading, but under protest for three days' demurrage incurred here, to be settled at Barcelona." The reply to that is—"I consent to put 35 tons more coal on board your ship, leaving the demurrage claim to be adjusted at Barcelona." Now, the first question is, what was the effect of that agreement? I think it was plainly a settlement of any question about deficient cargo. But I think it went further than that, for the charterer agreeing to give the 35 additional tons of coal, stipulated for something in his favour, and what he stipulated for in his favour was that he should get clean bills of lading, leaving the captain to stand upon his protest for three days' demurrage to be settled at Barcelona. It appears to me to be very plain upon the face of this contract that whether the words "clean bills of lading" would go further or not, at least they went to this extent, that these bills of lading were to be so expressed

that they were not to keep open that claim of demurrage against the cargo. The claim of demurrage was to be kept open as against the charterers; there was a protest for it, and the captain said in his letter, "I have not only protested, but it is to be settled at Barcelona;" and the charterer agreed that that should be so. But I think both parties by these letters must be held to have agreed, from the language used, that although that question was to be open as between the charterer and the captain at Barcelona, the cargo was to be clear of that claim. I say the agreement went that length certainly. I am by no means satisfied that it did not go further, and that the true meaning of the agreement was not that the cargo should be clear of everything by way of condition except the payment for the freight stipulated in it. But certainly I think the agreement did amount to this, that the cargo was to be free of a claim of demurrage. Now, that being so, the captain insisted on these words being inserted, "and all other conditions as per charter-party;" and it is desirable to see from the record and the correspondence at the time what his object was in doing so. Turning to the record, I find that in condescendence 6 the captain says—"The pursuer offered to sign the bills of lading provided a general reference to the conditions as per charter-party was inserted, or any other words that would preserve his right to claim three days' demurrage at Barcelona." As I read that, the meaning of it was—"I mean to claim three days' demurrage against that cargo, and to keep my right open." I think that is clear by the letter from pursuer's law-agents on 7th October 1880—"The captain is bound to sign bills of lading at any rate of freight you think proper to insert, but he is entitled to have the words 'all other conditions per charter-party' also inserted so as to keep up his claim of demurrage," &c. Now, I read that letter and that passage in the record as meaning this, that the captain maintains his right to have his claim of demurrage kept up, not against the charterer only, but against the cargo, and he desires to have these words put in for that purpose. Now, I think it is clear on the authorities that if these words had been inserted they would have had that effect. That is matter of express decision, for in the case of *Wegener* v. *Smith*, in 1854, 15 Common Bench Reports, it was expressly held that where these words were inserted, "and other conditions as per charter-party," they amounted to an agreement that at the port of discharge the person holding the bill of lading should settle all claims of demurrage which were due by the charterer. It was, no doubt, left as a question to the jury by the learned Judge who tried the cause, but the opinions of the Judges were to that effect, and I agree in these opinions as thus expressed by Justice Maule in the course of the argument—"The defendant is liable for demurrage if the bill of lading makes it part of the contract. The fact of his receiving the goods, to which he is only entitled under a bill of lading making them deliverable to him on payment of freight and demurrage, renders him liable to pay demurrage. That is putting it at the lowest. His repudiation of liability amounts to nothing." And the same view as to the somewhat serious consequences which may follow from the insertion of these words, "and other conditions as per charter-party," is very well illustrated by the decision in the case of *Porteous and Others* v. *Watney*, referred to in the course of the discussion, L.R. 3 Q.B. Div. 534. It was suggested that the law was otherwise, upon the authority of the case of *Chapel* v. *Comfort*—a much earlier case, in which there is a very learned judgment by Justice Willes, But it must be observed that in *Chapel's* case the only words inserted in the bill of lading were "he or they paying freight as per charter-party," not "and all other conditions as per charter-party." In short, the charter-party was introduced into the bill of lading in the case of *Chapel* simply for the purpose of putting in the amount of freight, but was not referred to or brought into the bill of lading so as to import any condition as to lien on the cargo or demurrage, or anything else. Now, it appears to me, upon the view I have just stated, that the contract between the parties under the letter of 5th October was that there was to be no claim for demurrage made against the cargo. The bill of lading was to be so far clean. The captain insisted on putting in a clause which would have made the cargo liable to demurrage, and in that I am clearly of opinion that the captain was wrong. Questions have been discussed at the bar, and even more fully discussed by the witnesses in the course of the proof, who seem to have given opinions upon legal questions with more or less confidence, and some with more or less difficulty, as to the meaning of the words "a clean bill of lading." It may not be necessary to decide that question here, but I can very well see that a question as to the meaning of these words in the general case might occur—as, for example, if a captain were to sign a charter-party in which he undertook to sign clean bills of lading "without prejudice to this charter-party;" and upon that question I shall only say now that it appears to me that the true meaning of that expression is that the captain shall sign a bill of lading which from its terms will entitle the holder to delivery of the cargo as there described, on payment simply of the freight, or at least on payment of an amount which may be ascertained on the face of the bill of lading itself. What I mean is this, that even if a sum were stated in addition to freight, but defined, which would let the holder or the acquirer of the bill of lading know that upon presentment of the bill, and upon payment of the sum which may be ascertained on the face of the bill, he can get the cargo, that bill of lading is a clean bill of lading, for it will enable the holder to go into the market and transfer the cargo at the current price of the subject of it to a purchaser who knows precisely what he has to pay in order to get delivery of the cargo. In short, such a bill of lading is properly negotiable. But if you have conditions referred to which can only be ascertained by reference to another document, or which leave the sum which the holder of the bill of lading has to pay in considerable uncertainty instead of giving him the means of knowing the amount which will get him the cargo, then it appears to me that in the ordinary sense that would not be a clean bill of lading. Upon the ground I have now stated, I am of opinion with your Lordship that the decision of the Court below ought to be adhered to, and I have only to express my regret and astonishment that in this case, in which the parties were really disputing

about a sum of £24, this vessel has been kept lying for months at Greenock during a period in which she might have made I do not know how many voyages back and forward to Barcelona, leaving a question of this kind to be determined in the meantime.

The Court adhered to the judgment, with findings in terms of the Sheriff's judgment.

Counsel for Pursuer (Appellant)—Trayner—Pearson. Agents—Dove & Lockhart, S.S.C.

Counsel for Respondent (Defender)—Guthrie Smith—Jameson. Agents—J. & J. Ross, W.S.

Wednesday, March 16.

SECOND DIVISION.

[Lord Craighill, Ordinary.

FLEMING *v.* SMITH & COMPANY.

Sale — Retention — Sub-Sale — Seller's Right to Retain for Payment of the Price — Where Sale on Credit effect of Silence of Seller when Sub-Sale intimated to him, as indicating Acquiescence in Sub-Sale.

Goods having been sold on credit to be delivered on demand, the buyer immediately, without having taken delivery, resold them to a party, who at once requested the seller to hold to his order. The seller made an entry in his books of the transfer, but returned no answer to this request. During the currency of the credit the first buyer became bankrupt and could not pay for the goods. *Held, per* Lords Young and Craighill—that the silence of the seller imported acquiescence in the sub-sale, and that he had thereby barred himself from retaining the goods; *per* Lord Justice-Clerk—that in a sale on credit, if the buyer assigns his right to demand delivery to a third party, who intimates that assignation to the seller, the assignation thereby made and intimated gives the assignee an absolute right to demand delivery.

On 9th and 10th February 1880 Macnaughtan & Co., sugar merchants in Edinburgh, bought from A. C. Smith & Co., sugar merchants in Greenock, 171 bags and 11 casks of sugar, being parts of larger lots held on their account by sugar refiners in Greenock from whom they had purchased them. In payment of the price Macnaughtan & Co. accepted a bill dated 14th February 1880, and payable one month after date. On 11th February Macnaughtan & Co. sold to James Fleming, merchant, Leith, the sugar mentioned, and in payment Fleming granted bills, which were afterwards duly met by him. Macnaughtan & Co. having thus sold the sugars to Fleming, granted him a delivery-order on Smith & Co., dated 17th February, requesting them to deliver the sugar to Fleming. This order Fleming enclosed on the following day to Smith & Co. in the following letter:—"Enclosed you have a delivery-order for 171 bags sugar and 11 casks, which please hold to my order." On receipt of this letter Smith & Co. made in their stock-book this entry after the entry of the 171 bags 11 casks—"Transferred by F. J. M. & Co. to James Fleming, Leith, 17/2/80;" but they did not acknowledge receipt of the letter by any communication to Fleming. Early in March Macnaughtan & Co. became insolvent, and intimated their insolvency to their creditors by circular dated 13th March. Among others Smith & Co. received a copy of the circular. In consequence of their failure Macnaughtan & Co. could not meet their bill for the sugar when it fell due on 17th March. Thereafter Fleming having required delivery of the sugars, Smith & Co. refused delivery, in a letter in which they wrote as follows:—"We hold no sugar belonging to you. The sugars you refer to were sold to Messrs Macnaughtan & Co., but they have not been paid, and the transaction is cancelled by their failure."

Fleming then raised this action, concluding for delivery of the sugar, with £100 as damages for delay in delivery, or otherwise for £700 damages for non-delivery.

Smith & Co. defended the action, and pleaded —"(2) The defenders were entitled to retain the sugar in question at the time when delivery was demanded, in respect it had not been paid for and the purchasers had become insolvent."

The Lord Ordinary (CRAIGHILL), after a proof, by interlocutor containing findings of fact to the effect above narrated, found as matter of law—"that the defenders by their silence during the period between the receipt of the pursuer's letter of 18th February 1880, and accompanying delivery-order by F. J. Macnaughtan & Co. in favour of the pursuer, must be taken to have consented that the sugars in question were to be held by them to the order of the pursuer as required; and that after F. J. Macnaughtan & Co.'s insolvency they were not entitled, and are not now entitled, to refuse delivery of said sugars to the pursuer: And before further answer, appoints the cause to be enrolled that these findings may be applied."

He added this note—"If the matter in question were to be determined according to the law of England, it was hardly disputed on the part of the defenders that the pursuer would be entitled to judgment. Even, however, had this view been resisted, the Lord Ordinary thinks that the authorities cited by the pursuer (*Hawes* v. *Watson*, 2 Barnewall and Cresswell, 540; Houston on Stoppage *in transitu*, 78–79; Benjamin on Sale, 2d ed., 640; *Pearson* v. *Dawson*, 27 L.J., Q.B. new series, 36 old series; *Wodeley* v. *Coventry*, 32 L.J. Excheq. 185 new series, 41 old series; *Knights* v. *Wiffen*, L.R., 5 Q.B. 660) would have been conclusive of the controversy. But the law of Scotland, and not the law of England, must govern the decision as to the rights and liabilities of the parties in the present action.

"The defenders' contention is that they remain undivested of the property in the sugars, and that they are not bound to give delivery to the pursuer while the price for which these had been sold by them to F. J. Macnaughtan & Co. continues unpaid. But for the effect due to their silence subsequent to the receipt of the delivery-order and pursuer's letter of 18th February this claim probably could not be resisted; and the point on which the case truly turns is, whether such silence is, in the circumstances shown in