found in his garden, but as your Lordships are all opposed to that opinion, I do not enter on that question, and do not dissent from your Lordships' decision.

The Court affirmed the interlocutor of the Sheriff.

Counsel for Appellant—Lorimer. Agent—J. K. Lindsay, S.S.C.
Counsel for Respondent—Darling. Agent—W. G. L. Winchester, W.S.

Saturday, January 14.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

LAMB AND OTHERS *v.* KASELACK, ALSEN, & CO., AND GILLESPIE & CATHCART.

Ship—Freight—Charter-Party—Bill of Lading—Dead Freight—Demurrage.

A charter-party provided that "the owners shall have an absolute lien on the cargo laden on board for all freight, dead freight, and demurrage." Bills of lading for certain parts of the cargo shipped on board by the charterer, and transferred to onerous consignees, provided that freight should be at a certain rate, "other conditions as per charter." *Held* that the owner was entitled as against the consignees to a lien over their portion of the cargo for the freight due on another portion for which no consignee appeared at the port of discharge, since the obligation of the charterer imported into the bill of lading was that every portion of the cargo should be liable for the whole.

By charter-party entered into at Glasgow on 4th June 1879 between Roberts and Burdis, on behalf of the owners of the vessel "Lewis M. Lamb," and Robert Stephens, that vessel was chartered by Stephens to proceed to Patagonia, and there load a cargo of guano or other lawful merchandise. The material parts of the charter-party were, that the ship should "proceed, as directed by the charterer or his agent, to Monte Video, for orders for the Guano Islands, on the coast of Patagonia, east coast of South America, not beyond 50 degrees south, and there load as customary, with the ship's boats and crew, a full cargo of guano or other lawful merchandise, and being so loaded she shall therewith proceed to a port of call and discharge in the United Kingdom, or on the Continent between Havre and Hamburg, both inclusive. Orders to be given by telegram immediately on receipt of telegram of ship's arrival, or lay-days to count, and deliver the said cargo agreeably to bills of lading, and according to the custom of port, and so end the voyage and charter. (The dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever during the said voyage always excepted.) The freight to be paid on final delivery of the cargo, in cash, at the rate of 42s. 6d. sterling per ton of 20 cwt., if discharged in the United Kingdom, with 2s. 6d. per ton extra if discharged on the Continent, with £10 gratuity to the captain for his extra care and attention to the business of this charter. Should the vessel be ordered direct at her final loading to her port of discharge, 1s. 6d. per ton is to be deducted from the above rates of freight. The vessel to be consigned to charterer's agents at port of discharge, paying the usual commission once only of 2½%, which includes custom-house business inwards. The vessel, if required, is to take a boat, guano bags, materials, &c., from Monte Video, also the charterer's agent and labourers, to and from the coast; and after the vessel is loaded land them at Port Desire, Monte Video, or any other place on the way home that may be arranged, free. The charterer to pay any port charges that may be incurred in consequence of the vessel calling to land labourers, material, &c.,; but she is not to lie longer than forty-eight hours at her port of call, unless compelled by stress of weather. The charterer pays and provides the labourers with rations while on shore, also will provide water-casks, the vessel to provide the men with rations while going to and from the coast or islands, and also with water. The vessel is not obliged to take the cargo beyond 50 yards from the beach or place of shipping. Sixty running days are to be allowed for loading the said vessel at the islands, to commence twenty-four hours after arrival at place of loading, and end when she has finished taking in cargo. Any days on demurrage at the rate of 4d. per register ton per working day. The owners shall have an absolute lien on the cargo laden on board for all freight, dead freight, and demurrage. The owners engage that the said vessel, her boats, crew, and materials, shall be kept up in the same good and efficient state during this voyage, and the captain and crew shall render all usual and customary assistance in working the cargo. . . . Bills of lading to be signed by the captain for the cargo when presented to him, but at not less than the chartered rate. No claim for demurrage nor dead freight will be allowed, unless intimated to charterer's agent by the captain in writing when getting his final sailing orders from the coast. Penalty for non-performance of this charter, the amount of freight. The brokerage on this charter is at five per cent. on the gross amount of freight, is payable to Alston & Tulloch by the vessel as customary, and may be deducted from the freight unless previously paid. The vessel to provide six men (labourers) with rations and waters, same as crew, for which charterer will allow 1s. 9d. per man per day, on board and on shore. Disbursements to not exceeding £50 sterling to be advanced at Monte Video by merchant, subject to cost of insurance."

Stephens, the charterer, accompanied the vessel, which arrived at the Guano Islands on 11th November 1879, having on board labourers for the purpose of assisting in loading the guano. Work was begun on 13th November. On 29th November a portion of the cargo had been shipped, and the master executed bills of lading in the following form—"Shipped, in good order and well-conditioned, by Robert Stephens, on board the good ship or vessel called the 'Lewis M. Lamb,' whereof T. Williams is master for the present voyage, and now at , bound for a port of call in the United Kingdom for orders, to say, one hundred tons guano, fifteen water puncheons, the same being marked and numbered as on the margin, and to be delivered in the like good

order and condition at the aforesaid port of , as directed. The act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind, excepted. Unto Messrs Kaselack, Alsen, & Co., 134 Fenchurch Street, London, or to their assigns. Freight for the said goods to be paid by the consignees at the rate of Two pounds two shillings and sixpence per ton, other conditions as per charter, with per cent. primage, and average accustomed. In witness whereof, the master of the said ship hath affirmed to four bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void. Weight and contents unknown—leakage and breakage excepted. Dated at Crusoe Island, Patagonia, the 29th day of Nov. 1879." On 13th December certain quantities of penguin skins and bones having been also shipped, the master executed bills of lading therefor. The consignees therein were to be Kaselack, Alsen, & Company, and their assigns, as in the bills of lading of 29th November. The freight was to be £2, 2s. 6d. per ton, "other conditions as per charter," as in the bills of 29th November. The lay-days for loading cargo expired on 12th January 1880. At that time the ship was not nearly filled up, owing, as the charterer said, to the fault of the crew in not taking their proper share of the labour of filling the guano bags and conveying them to the ship in boats according to the custom of the trade, and owing to the fault of the master in wrongously refusing to load cargo at certain of the Guano Islands to which he was requested to proceed, and in leaving behind a quantity of guano which was filled into bags and ready for conveyance to the ship. Had it not been for those breaches of contract on the part of the master, the ship could, the charterer maintained, have been filled up within the sixty days allowed as lay-days, and no demurrage would have been caused, nor would any plastic have had to be taken on board, as about to be explained. On the other hand, the master maintained that the ship was not filled up within the lay-days owing to the scanty supply of guano at certain small and dangerous islands to which the charterer insisted that the vessel should be taken. He alleged that the guano tendered to him was in great part of such a quality, being so much mixed with stones, that he was not bound to receive it as cargo.

On 16th January 1880 the master executed other bills of lading for 150 tons guano, Kaselack, Alsen, & Company being consignees, freight £2, 2s. 6d. per ton, and "all other conditions as per charter-party." The vessel left the islands on 16th February 1880, having previously completed her loading by shipping at Penguin Island, from a person named Foverty, residing on that island with a number of labourers from Monte Video, 357 tons of plastic; a bill of lading for this quantity was executed by the master in favour of Foverty.

The ship was ordered to Leith to discharge. She arrived there on 17th June, and by 25th June she was placed in a berth and was ready to discharge. On that day Gillespie & Cathcart informed the master that they held the bills of lading for the whole cargo other than the plastic, which formed the upper portion of it, and were ready to take delivery of it. No consignee appeared to claim the plastic. The master and owners claimed a right of lien over the whole cargo on board for freight and demurrage under the charter-party, and declined to discharge the plastic, and allow Gillespie & Cathcart to take delivery of the under portion of the cargo, except on the footing that that claim should be recognised. On 6th July 1880 Gillespie & Cathcart presented a petition to the Sheriff of Midlothian, in name of Kaselack, Alsen, & Company, to have the master ordained to deliver the under portions of the cargo on consignation of a sum of £650, being the sum estimated as freight for their portion of the cargo. Defences were lodged for the master, and on 17th July 1880, the parties having arranged the matter, the Sheriff-Substitute of consent pronounced this interlocutor:—"On payment of the sum of £600, and on consignation of £500, to await the order of the Court in this process, or in any other action which may hereafter be brought for payment of the claims of the shipowners mentioned in the defences, Ordains the defender to deliver to the pursuers the goods mentioned in the bills of lading founded on."

On the same date the agent of Gillespie & Cathcart undertook that their clients would give a guarantee for payment of any further sum over and above what was to be paid and consigned in terms of the interlocutor, if any, and for which it might be established that the shipowner was entitled to retain the goods referred to in the bills of lading founded on, for which said goods, or consignees thereof, were legally liable. Meanwhile the master had applied to the Provost and Magistrates of Leith, as admirals thereof, for warrant to land and warehouse the plastic, and had obtained warrant on 13th July to do so. The landing and warehousing of the plastic was completed on the morning of 17th July.

Thereafter delivery of the cargo belonging to Gillespie & Cathcart began, and was continued till 23d July, when it was stopped in consequence of the master demanding, and Gillespie & Cathcart refusing, immediate payment of the sum of £600 mentioned in the interlocutor above quoted. Gillespie & Cathcart maintained that payment and delivery should take place from time to time, *simul et semel*, and that the master and owners of the ship were not entitled to be paid the whole £600 at once, lest it should turn out that there was not cargo on board belonging to them corresponding to £600 of freight. On 27th July, however, they sent to the master, through their agents, this guarantee, in pursuance of their agents' letter above quoted, undertaking that they would make a guarantee:—"Dear Sir,—We guarantee you payment of any further sum than what is paid and consigned in terms of the interlocutor in this case of date 17th July, if any, and for which it may be established that the shipowner was entitled to retain the goods referred to in the bills of lading founded on, or for which said goods, or consignees thereof, were legally liable, but this without prejudice to pleas of parties." Then followed a testing clause in usual form. It was further arranged that they should go on paying on delivery at the rate stipulated in the charter-party, and consign in addition to the sum of £500 mentioned in the interlocutor of the Sheriff-Substitute, a sum corresponding to any difference between the amount they should so pay

and the £600. On 27th July, accordingly, delivery was resumed, and the discharge was completed on 31st July.

The master and owners obtained warrant from the Provost and Magistrates of Leith to sell the plastic already landed and warehoused as above mentioned, and thereafter sold it by public roup at a price of £75—a sum insufficient to pay the expense of landing.

Thereafter, to determine the various questions between them and the consignees, the owners of the ship raised this action against Kaselack, Alsen, & Co. and Gillespie & Cathcart. The conclusions of the summons were—(1) For declarator that under the charter-party and bills of lading they were entitled to retain the goods shipped on board the vessel until payment of all freight and demurrage due under the charter-party, and in particular until payment by Kaselack, Alsen, & Co. of (1) £21, 2s. 6d., being a balance remaining due of £477, 2s. 6d., the proportion of freight corresponding to the goods mentioned in the charter-party after deduction of £456 paid to account at Leith; (2) of £660, 0s. 3d., the unpaid balance of freight of the plastic shipped under the charter-party; (3) of £190 as demurrage at the Guano Islands, from 13th January, the day after the expiry of the lay-days, till 18th February, the day after the vessel left the islands; (4) of £57, 2s. 6d., the balance of the cost of victualling six men in the service of the charterers while at the islands; (5) of £133 for detention of the vessel at Leith. The summons also concluded against Gillespie & Cathcart for the five sums above mentioned, under deduction of the sum of £500 consigned as already stated, and of £144, being the balance of a deposit for £600 on 27th July.

The pursuers pleaded, *inter alia*—"(1) The pursuers having a lien over the said cargo for all freight, dead freight, and demurrage, were entitled to retain the same until payment of the freight and demurrage claimed. (4) The defenders Gillespie & Cathcart, under their said letter of guarantee, having guaranteed payment of the pursuers' claims, and the pursuers' claims being well founded, the pursuers are entitled to decree as concluded for, with expenses."

The argument of the defenders with regard to the alleged detention at the Guano Islands is above explained. They denied that there had been any delay attributable to their fault at Leith, and therefore disputed liability for demurrage at that port. They disputed the alleged lien over their goods for any of the sums sued for, and particularly they disputed that the pursuers had any claim for freight of the plastic, which they alleged to have been improperly put on board instead of the guano which they had offered the master. Assuming the plastic to have been rightly put on board, and that the pursuers had a claim against them for its freight, they maintained that it had been sacrificed at a small price without due notice of the sale, and that they were entitled to set off against the pursuers' claims its true value at the date of the sale.

After a proof the Lord Ordinary pronounced this interlocutor:—"Decerns against the defenders (1) for the sum of £660, 0s. 3d., being the unpaid balance of freight; and (2) for the sum of £101, 6s. 8d., being demurrage at Leith; with interest on said two sums at 5 per cent. per annum from 31st July 1880 until payment: Further, grants warrant to and ordains the Clydesdale Banking Coy. to make payment to the pursuers of the sums consigned in their hands under the deposit-receipts, and of the interest which has accrued thereon, in payment *pro tanto* of the said sums and interest, and grants warrant for delivery of the said deposit-receipts to the pursuers or their agents that they may obtain payment accordingly: *Quoad ultra* assoilzies the defenders from the conclusions of the summons, and decerns," &c.

His Lordship pronounced this opinion—"The first question is as to the right of the pursuers to recover £660 of freight for the shipment of plastic. They say that it was carried under the charter-party, and therefore that the freight is due to them in terms of that contract. The defenders maintain that the master improperly refused to take on board guano, and that then he made an arrangement with a person of the name of Foverty, under which he took on board this plastic, to save loss to all concerned, and that it was carried, not under the charter-party, but on the ship's account. I have to consider, in the first place, whether or not the master refused to take guano tendered to him by the charterer, and I am of opinion that he did not. I think, on the evidence, that the commodity that was tendered was not merchandise in the sense of the charter-party at all, and that the captain was not bound to take it even upon the offer of payment that was made by the charterer, because I doubt much whether he was in a position to fulfil it, and because there were no means of taking such stuff from the shore to the ship with safety to the boats. The plastic was, I think, shipped under an arrangement to which the charterer was a party, or, in other words, was shipped as cargo instead of guano. Therefore I am of opinion the freight is due under the charter-party. The pursuers have a lien over the cargo for the whole freight, and that being so, the pursuers are entitled to decree for the sum of £660. I may add that I do not think that there is evidence to show that the master unjustifiably refused to go to the island of Quettana. The next claim is for £190 in name of demurrage before or during loading. This involves a question of fact; but there is a preliminary question in law raised. There is a condition in the charter-party that no claims for demurrage will be allowed unless notice in writing is given to the charterer's agent when getting sailing orders on the coast. It is not disputed that this is a binding clause; but it is said it only could operate when the ship reached Monte Video, where she could get her final sailing orders for a home port, or some port of discharge. I do not think so. I think the meaning of it is that the ship was to go to the coast from Monte Video. Monte Video was not the 'coast' in the sense of the charter-party at all; that is the plain meaning of the word 'coast' in one part of the charter-party. The vessel was to be employed going about from place to place on the coast as the charterer directed, and then when the ship was full, and she got her final sailing orders from the coast, the captain was bound to give in writing notice of his claim of demurrage to the charterer, who accompanied the ship, and if he did not, then I think the owners are not entitled to enforce it. Mr Stephens, charterer, accompanied the ship during the voyage. I am of

opinion that there is no lien over cargo for the claim of £51, and therefore the defenders are entitled to absolyitor." [His Lordship then dealt with the question of the detention at Leith, and the guarantee given by the defenders.]

The defenders reclaimed, and argued—(1) The evidence showed that the master had wrongfully refused to receive on board guano tendered to him under the charter-party. If so, no freight would be due. Although the terms of the charter-party were imported into the bill of lading, that did not make every part of the cargo liable for the whole freight so as to make the defenders liable for the freight of the plastic. There were here three separate bills of lading, and separate liability for freight under them—Maclachlan on Shipping, 3d ed., p. 434; *Sodergreen* v. *Flight*, rep. in *Hanson* v. *Mayer*, 6 East. 614 (see p. 622); *Porteous* v. *Watney*, *infra*. The charter-party gave a lien for dead freight, but dead freight did not mean unliquidated damage for short shipment, which was the meaning pursuers had to put upon it here. It meant in a legal sense stipulated damage per ton of the vessel not filled up—*Gray* v. *Carr*, 6 L.R. Q.B. 522. See also Abbot on Shipping, 12th ed. 234, and *Foster* v. *Colby*, 3 H. and N. 705 (Baron Watson's opinion); Maclachlan on Shipping, 512. "Dead freight" in this charter was surplusage. There was nothing to which it could apply. (2) As to demurrage. There were here no *termini habiles* for claiming demurrage. That was liquidated penalty irrespective of fault if a ship was delayed beyond the lay-days. Here that was not stipulated, and the pursuers' case was one for damages for detention through defenders' fault.

Argued for pursuers—(1) It was clear upon the evidence that the cargo tendered by the charterer and refused by the captain was nothing but stones mixed with a little guano dust. If so, the captain was justified in refusing to load it (*a*) because it was not lawful merchandise in the sense of the charter; (*b*) because it was dangerous to load into the boats. But in any event the charterer had waived his right to insist on loading the stones, and had entered into an agreement with Foverty to fill up the ship with plastic. The master had not made any bargain with Foverty, and had no authority to alter the charter-party under which the voyage was prosecuted—*Burgon* v. *Sharpe*, 2 Campb. 529. (2) Assuming the plastic to have been shipped under the charter-party, its plain terms gave a lien over the whole cargo for the freight of any portion. Hence the guano was liable to be retained for the freight of the plastic though consigned to different persons. This construction of the words giving the lien had never been the subject of express decision, but had always been assumed to be the true one—*Small* v. *Moates*, 9 Bing. 574; *Gilkison* v. *Middleton*, 26 L.J. C.P. 209; *Fry* v. *Chartered Bank of India*, 35 L.J. C.P. 306. The consignees of the guano had notice in their bills of lading that the charter-party and all its conditions had been imported as against them—*Wegener* v. *Smith*, 24 L.J. C.P. 25; *Carr* v. *Gray*, L.R. 6 Q.B. 522; *M'Lean & Hope* v. *Fleming*, 43 Jur. 565, 9 Macph. (H.L.) 39; *Porteous* v. *Watney*, 3 Q.B. Div. 534. (3) By the terms of the guarantee Gillespie & Cathcart had come under an absolute obligation to pay the lien debt. Apart from the guarantee, the defenders would not have been liable beyond the value of the cargo consigned to them, but no such qualification could be read into the guarantee. The defenders could not demand delivery except on payment of the lien debt, and they took the risk of its exceeding the value of the cargo. (4) The defenders were also liable for damages.

The Court made avizandum.

At advising—

Lord Craighill—The interlocutor reclaimed against was partly in favour of the pursuers and partly in favour of the defenders. The latter alone have reclaimed, and three questions have been submitted for the judgment of the Court—(1) Whether the goods belonging to the reclaimers Kaselack, Alsen, & Company, on board the "Lewis M. Lamb," were liable to the ship for the freight of another portion of her cargo? (2) Whether these goods were subject to a lien for demurrage, or for damages on account of unreasonable detention at the port of discharge? and (3) Assuming there was no lien on the goods for such demurrage or damages, whether the reclaimers, or either of them, are or is liable for that claim? Upon those questions there has been a long and able argument, in the course of which numerous authorities, some on one and some on others of these questions, were cited, and having carefully considered all that has been said, and all that has been adduced, the conclusions to which I have come are now to be explained.

I. As to freight—The facts here are not in controversy. The "Lewis M. Lamb" was chartered by a person of the name of Stephens, and the charter-party is printed. In that document there is a clause by which it is provided "that the owners shall have an absolute lien on the cargo loaded on board for all freight, dead freight, and demurrage;" and there is another declaring "bills of lading to be signed by the captain for cargo when presented to him, but at not less than the charter rates." The vessel under this contract proceeded on her voyage, and at the place or places appointed there were taken on board three quantities of guano, for which the captain granted the bills of lading now held for value by the reclaimers Kaselack, Alsen, & Company. After this guano had been shipped, there was loaded to complete the cargo 350 tons of plastic-clay, for which a bill of lading was given to a person of the name of Foverty. Who he was is uncertain, and the probability seems to be, that whoever he was, he was in this matter only another name for Stephens, the charterer of the ship. Be this as it may, no Foverty appeared at Leith, the port of discharge, nor did the charterer appear to claim the plastic, the consequences of which were (1) that the plastic remained on board after the persons to whom it belonged should have taken delivery; (2) as the guano belonging to the reclaimers was under the plastic, its delivery was delayed; and (3) as the freight of the plastic was not paid, and there was a doubt whether that part of the cargo was of value sufficient to secure the ship, the pursuers claimed a lien on the guano for such freight. The Lord Ordinary has decided that the guano was subject to this lien, and has decerned against the reclaimers for payment, and I concur in this part of his interlocutor.

As the bills of lading granted to the reclaimers,

by the words "other conditions as per charter-party," imported into these documents the conditions of the charter-party, the meaning of the clause in that instrument by which there was secured to the ship "an absolute lien" on the cargo loaded on board "for all freight, dead freight, and demurrage," was on this part of the case the only question raised for decision. The reclaimers contended that, as regards freight at any rate, this clause merely imported the preservation of the ship's lien such as it was at common law. Thus, if the cargo should belong only to one person, all parts of it would be under lien for full freight; but if to several, the portion belonging to each would be liable only for its proper share of freight. I cannot, however, so read the contract, because the clause, so far as freight is concerned, would be rendered insensible by that interpretation, and a reading which issues in such a result can seldom, if ever, be taken to be the true construction. The purpose of the clause is obvious enough. What was to be provided against was the consequences of the loading of goods by, and the granting of bills of lading to, others than the charterer. Had there been no such clause, their part of the cargo would have been under lien only for a part of the freight, and to prevent this restriction of liability all concerned acted as they did. The cargo laden on board—all parts of the cargo—the whole comprehending every part—is to be liable for all freight. That undoubtedly would have been the result in a question with the charterer, but the same must be the result as regards the reclaimers also, seeing that the conditions of the charter-party have been imported into their contract with the ship constituted by the bills of lading. There is no authority for the reading contended for by the reclaimers. The *dictum* of Baron Watson in *Foster* v. *Colby*, 3 Huddleston and Norman, 718, which was cited in the argument for the reclaimers, when read in the light afforded by the facts of that case, will not bear their interpretation. But further, we must have in view the necessary effect of this clause as a whole on the reclaimers' contention. If the whole cargo is not to be liable for the freight of every part, is the owner of cargo who may not be in fault to be answerable for demurrage incurred through the fault of the owner of another part at the port of delivery? This could not but be if the true reading of the clause were that each part of the cargo was under lien, and the whole cargo was not under lien, for the default of the owner of that part. But this result would be in direct contradiction to the decision, first, of Justice Lush, and secondly, of the Court of Appeal, in the case of *Porteous, &c.* v. *Watney, &c.*, March 8 and July 2, 1878, Law Reps., 3 Q.B. Div. 227 and 534, by which it was decided that the defendants, who were in the same position as the defenders here, were "liable for demurrage, although they were prevented from getting their goods by the delay of other consignees." We could not say that "cargo" in this clause of the charter-party means one thing as the subject of lien for demurrage, and another thing as the subject of lien for freight, and consequently the interpretation of the clause as regards the latter, which apart from authority is not at all doubtful, is illustrated by what as regards the former has been decided by the Courts in England.

II. As to demurrage, properly so-called, there are no *termini habiles* in this charter-party for such a claim at the port of discharge. No lay-days are specified in connection with the discharge of the cargo, nor is the rate at which, if the proper time should be exceeded, the delay is to be paid for. Damages for unreasonable delay might notwithstanding be incurred, but that would not be demurrage in the sense—the technical or proper sense—of the clause, the import of which is the matter under consideration. The decision and opinions in the case of *Gray* v. *Carr*, January 15, 1871, 6 Q.B. 522, are important, and indeed may be said to be conclusive authority upon that point. This much in relation to demurrage I have said out of deference to the argument presented to us from the bar on that subject, but even the little I have said is not required for the purpose of judgment on the present occasion, because demurrage, as distinguished from damages for undue or unreasonable detention, are not sued for in this action.

III. The pursuers, however, make damages for such detention an item of their claim. [His Lordship went on to find the defenders liable in a sum of £44, 6s. 8d. for this detention, in place of £101, as the Lord Ordinary had done.]

Lord Young—The important general question which was argued before us was, whether by the terms of the charter-party, which were candidly admitted to be imported into the bills of lading, the cargo on board was all subject to lien for freight of the whole cargo—*i.e.*, whether for the owners' claim for freight they had a lien over every part of the cargo put on board? The provision in the charter-party on that subject is admittedly imported into the bill of lading, and I agree with Lord Craighill that the import of that provision is to subject the whole cargo to a lien for whole freight—that is, every part of it to a lien for the whole—and therefore on the first point I agree with the opinion which his Lordship has delivered.

As to the question of demurrage—the other question of general interest in the case—the pecuniary interest in it, in the opinion of Lord Craighill, is a little over £40. I confess my own opinion is that by the terms of this charter-party the cargo is not subject to lien for demurrage. Demurrage is a technical term, though it is sometimes, indeed not unfrequently, used in other than a technical sense as meaning delay in loading or unloading a ship. Whoever blameably delays a ship unduly either in loading or in unloading is responsible to the owner, who suffers by the delay. That may without the least impropriety be called demurrage. But demurrage in its technical sense is a name applicable to the case only where a contract is specific as to a time for loading or discharging, and it is agreed that a certain sum is to be fixed for every day in excess of that time, and so you have the matter liquidated from the beginning. Thus, if ten days are allowed in which to load, and more time is taken from any cause whatever, for every day beyond the ten days so much is payable; and so also with unloading, for every day beyond the stipulated time which the unloading lasts so much has to be paid, whatever be the cause of the delay. It is no more inconvenient to give a lien for that than it is to give a lien for freight. But it is obviously inconvenient to give a lien for an il-

liquid claim of damages for wrongful detention of a vessel, since in that case the question of wrongfulness has to be entered upon, and the amount reasonably due has to be ascertained. I do not say that the giving of such a lien is incompetent, though it is in practice never done, but it is obviously most inconvenient, while the giving of a lien for demurrage, confining that expression to the meaning which I have explained, is not so in the least. [His Lordship was further of opinion that there was no claim for damages for detention, and that in any event the terms of the guarantee given by Gillespie & Cathcart could not make them liable in all for a sum beyond the value of the cargo, viz., £473.]

Lord Justice-Clerk—In the result I agree substantially with Lord Craighill, and his opinion, except with regard to the amount of demurrage, is in affirmance of the interlocutor of the Lord Ordinary. The Lord Ordinary has decerned for £660 of unpaid balance of freight, and also for £101 of demurrage. I do not understand the Lord Ordinary to have found that there was any lien for that unpaid part of the demurrage, but to have found defenders liable on the ground that they unduly delayed the unloading of the ship, and thereby delayed the ship itself. On the general questions argued I do not think it necessary to say much, for I think the principles are settled, and are indeed somewhat elementary, though we had an able and learned argument on the question to what extent the separate parts of the cargo are liable for the whole freight. That is a kind of question which has been often debated. But where the stipulation is under a charter-party, and the bill of lading bears express reference to the conditions of it, and one of these conditions is that the whole cargo is liable for freight, there is no question at all. The argument rather proceeded on a confounding of two different things, viz., liability to lien where the ship is under charter-party, and the liability where the ship is a general ship, and the cargo is the property of different owners, with separate interests and separate bills of lading. In the last case each shipper and assignee is liable for his assignee and no more, but in regard to the ship under a charter-party, on the other hand, the charterer is undoubtedly liable for the whole freight, and Baron Watson, in the case to which we were referred, is right in saying that it has been questioned whether where there is no express stipulation of the charter-party, or where the bill of lading had not specially referred to the conditions of the charter-party, the assignee or endorsee of the bill of lading is in the same position as the charterer—a question not altogether settled yet. Therefore on that matter there is no doubt, and therefore the consignees at Leith were bound to have admitted liability for the freight of the whole, that being their legal obligation. The next point, as to demurrage, is as little doubtful. There was no real demurrage. There was no such question here. But if the defenders delayed the vessel they are bound to pay a reasonable sum for that detention. I have great sympathy with the views as to the guarantee of Gillespie & Cathcart which Lord Young has expressed. The pursuers' conduct in accepting Foverty as a shipper, which I think he never really was, and in putting into the bill of lading the name of one who, as they knew very well, would not appear to ask delivery at the port of discharge, was very questionable, and I would be inclined to prevent the charterer from being liable for that freight. But as to reforming this agreement, which has been reduced to writing and acted upon, I should hesitate very much, whatever its ultimate effect might be, to interfere with the contract.

The Lords pronounced this interlocutor:—

"Recal the . . . interlocutor: Ordain the defenders Gillespie & Cathcart to make payment to the pursuers of the sum of £660, 0s. 3d., being the unpaid balance of freight, together with interest thereon, at the rate of five per centum per annum from 31st July 1880 until payment: Assess the demurrage at Leith at £44, 6s. 8d.: Ordain the defenders Kaselack, Alsen, & Co. and Gillespie & Cathcart to make payment to the pursuers of that sum, with interest thereon at the rate of five per centum per annum, from 31st July 1880 until payment: Grant warrant to and ordain the Clydesdale Banking Company to make payment to the pursuers of the sums contained in the deposit-receipts, and of the interest that has accrued thereon, in payment *pro tanto* of the sums above specified, and interest thereon; and ordain the said deposit-receipts to be delivered to the pursuers or their agents that they may obtain payment accordingly: *Quoad ultra* assoilzie the defenders from the conclusions of the action, and decern: Find the pursuers entitled to one-half of the expense incurred by them prior to the date of the interlocutor reclaimed against," &c.

Counsel for Pursuers and Respondents—Thorburn—Salvesen. Agent—Boyd, Macdonald, & Co, S.S.C.

Counsel for Defenders and Reclaimers—Trayner—Dickson. Agent—J. Campbell Irons, S.S.C.

COURT OF JUSTICIARY.

Tuesday and Wednesday, December 27–8.

GLASGOW CIRCUIT.

[Lord Deas.

H. M. ADVOCATE *v.* FERGUSON.

Justiciary Cases—Murder—Culpable Homicide—Insanity—Weakness of Mind.

A weak state of mind which borders on insanity but does not amount to it, does not entitle a panel to an acquittal, but may, if the jury shall see cause, allow them to return a verdict of culpable homicide upon an indictment charging the panel with murder.

Circumstances in which, under the above direction from the Judge, a jury found a panel guilty of murder as libelled, but recommended him to mercy on account of his being a person of weak mind.

Thomas Ferguson was charged with the crime of murder, in so far as he had attacked and assaulted his wife, and with a knife or other sharp instru-