quantity of a specific flour. If that was the contract made, then it is plain that the pursuers never were in a position to implement it, for they had not any of the specific flour which they were professing to sell, and they could not implement it by buying other flour in the market. If, on the other hand, there was a mistake on their part as to the balance of flour which their traveller said they had on hand, then there was no contract, and the pursuers are not entitled to enforce any contract against the defender.

But further, I am very strongly inclined to think that the flour which was sold was sold for a particular purpose, and that the pursuers knew the purpose for which it was wanted, and represented it as sufficient for that purpose. Now, I am also satisfied that if it was not sufficient for that purpose, that it was not a "straight" flour.

The Court pronounced the following interlocutor:—

"Find that the contract of sale libelled had reference to a balance represented by the pursuers as remaining in their hands of a lot of flour, part of which had been bought from them by the defender in the month of January preceding: Find that at the date of the said contract no such balance existed: Therefore dismiss the appeal, of new assoilzie the defender from the conclusions of the action," &c.

Counsel for Pursuers (Appellants) — Ure — Craigie. Agents—Ker & Smith, W.S.

Counsel for Defender (Respondent)—Gloag—Low. Agents—Ronald & Ritchie, S.S.C.

Wednesday, October 28.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

SALVESEN & COMPANY *v.* GUY & COMPANY.

Shipping Law — Charter-Party — Proviso for Charterer's Liability to Cease on Loading of Cargo—Lien—Demurrage.

A charter-party provided — "charterer's liability to cease as soon as the cargo is shipped in terms of this charter, captain having an absolute lien on the cargo for all freight, dead freight, and demurrage." The ship arrived and delivered her cargo. *Held* that this clause of the charter excluded a claim against the charterer for demurrage and detention at the port of loading, since it imported that all liability should "cease" to be enforceable after the cargo was shipped, in respect of the counter stipulation for a lien.

By charter-party, dated 4th December 1880, between the pursuers Salvesen & Co. and the defenders Guy & Co., it was mutually agreed that the good ship or vessel called the "Matador," then in Rotterdam, should proceed to Mobile Bay in ballast, and there load, from the factors of the defenders, a full and complete cargo of square hewn $\frac{\text{and}}{\text{or}}$ sawn pitch pine timber, and being so loaded, should proceed to a safe port in the United Kingdom as ordered. Freight was to be payable at certain times stipulated by the charter-party. "Twenty working days are to be allowed the merchants (if the ship be not sooner despatched) for loading, and the cargo to be unloaded as customary at port of discharge in not exceeding sixteen like days, and ten days on demurrage, over and above the said laying days, at nine pounds per day. . . . Charterers' liability to cease as soon as the cargo is shipped in terms of this charter, captain having an absolute lien on the cargo for all freight, dead freight, and demurrage." The ship was ordered to Limerick, and the cargo was delivered to the defenders' orders.

This action was thereafter brought by Salvesen & Co. to recover £108, as due for twelve days' delay at £9 a day, ten of the days being the demurrage days and two being additional days, for which damage at the same rate was asked.

The pursuers alleged that the lay-days began on 22d March and ended on 14th April, and that the loading was not completed till 26th April, or twelve days beyond the lay-days.

The defenders besides other defences which did not require to be disposed of relied on the terms of the charter-party, and pleaded, *inter alia*—"(2) The pursuers having contracted that the defenders' liability should cease as soon as the cargo was shipped in terms of the charter-party, the defenders are entitled to absolvitor."

By interlocutor of 26th May the Lord Ordinary (KINNEAR) sustained the second plea-in-law for the defenders, and assoilzied them from the conclusions of the action.

"*Opinion.*—This action is brought upon a charter-party in which 'twenty working days are allowed . . . for loading, and the cargo to be unloaded as customary at the port of discharge, in not exceeding sixteen like days, and ten days on demurrage, over and above the said laying days,' at a certain fixed rate. The pursuers aver that the loading was not completed until the twelfth day after the lapse of the specified loading days, and the action is brought for demurrage, and for damages at the same rate for detention for two days beyond the demurrage days properly so called. The question is, whether the defenders are not relieved of liability by a stipulation in these terms—'Charterer's liability to cease as soon as the cargo is shipped in terms of this charter-party, captain having an absolute lien on the cargo for all freight, dead freight, and demurrage.'

"If I had to decide this question for the first time, and independently of authority, I should have thought it one of difficulty, since there is apparent force in the pursuers' argument that the stipulation is meant to exempt the charterer from such liability alone as may have accrued after the cargo has been shipped. But clauses of this description have been judicially construed in numerous cases in England, where it has been decided that in such cases the charterer cannot be sued for delay in loading a cargo, the words 'liability to cease' being construed to mean cease to be enforced, and not cease to accrue, and an equivalent advantage being given to the shipowner by the stipulation for a lien over cargo for demurrage, which he would not have but for the agreement. The principle is stated by Mr Baron Bramwell in *Francesco* v. *Massey*, L.R., 8 Exch. 106—'The charter contained a clause that on load-

ing the cargo the charterer's responsibility should cease, the captain having a lien for freight and demurrage. It is impossible to say that this would not give a lien for demurrage incurred at the port of loading as well as at the port of discharge, and so for the demurrage sued for. And it seems impossible to hold that the matters as to which the liability was to cease were not the same as the matters as to which the liability was given.' The same view was adopted in the cases of *Kish* v. *Corry*, L.R., 10 Q.B. 553; *French* v. *Gerber*, L.R., 2 C.P.D. 247; and *Sanguine* v. *The Pacific Steam Navigation Company*, L.R., 2 Q.B.D. 238.

"It is said that these decisions are inapplicable, because in the contract in question there is no lien except for freight and for demurrage properly so called, and no agreement for demurrage except at the port of discharge, but this construction of the demurrage clause is in my opinion untenable. I think it clear that, according both to the grammatical construction and to the received construction of the words, the provision for ascertaining the demurrage days applies both to the discharging days and to the loading days, and accordingly the pursuer's claim, as explained in his condescendence, is not for unliquidated damages only, but for demurrage and subsequent detention. I must hold therefore that the shipowner has a lien for demurrage at the port of loading.

"Again, it is argued that the provision for exemption was only to take effect if the cargo were shipped in terms of the charter, and that this condition was not satisfied if the loading was not completed within the specified working days. But this also is an inadmissible construction. The charterer's exemption from liability may well be made contingent upon his loading the stipulated cargo, because it is only in respect of his lien upon such cargo that the shipowner agrees to discharge him. But when the full cargo agreed upon has been shipped, the condition is in my opinion satisfied irrespective of the time which may have been occupied in loading.

"I am unable therefore to distinguish either the demurrage clause or the absolving clause from the corresponding clauses in the charter-parties construed in the decisions to which I have referred, and I have no doubt that I ought to follow these decisions whatever might be my own impression as to the normal meaning of the words in question, not only because of the deference which is due to the opinion of many eminent Judges, but because contracts of this kind are framed with reference to decided cases, and when clauses that are of common occurrence have been judicially construed they must thenceforward be assumed to have been intended in the sense assigned to them by the decisions. It is impossible that such a contract should have a different meaning in Scotland from that which has been given to it in England.

"But assuming the decisions to be applicable to any extent, it is said that the stipulated lien and the corresponding exemption from liability will apply only to demurrage in the strict sense of the term, and not to detention for loading beyond the fixed number of demurrage days. But I think this is against the plain meaning of the words. The charterer's exemption is not confined to liability upon any particular ground. He is relieved generally from liability—that is, from all liability under the contract. The only ambiguity in the clause arises from the use of the word 'cease,' because that might possibly have been construed to mean cease to accrue, and in that case a cause of action which had already vested would not be defeated by the condition. But when once it has been ascertained that the exemption applies to causes that have accrued before the loading of the cargo, I see no sufficient reason for confining it to liability for demurrage proper as distinguished from liability for detention. I agree that it cannot reasonably be supposed that the shipowners intended to relieve the charterers from paying damages for a delay for which they are to have no remedy by the lien as against the consignees of the cargo. But the answer is that suggested by several of the learned Judges in the cases referred to, and particularly by the present Master of the Rolls in *Kish* v. *Corry*, that the lien clause ought to be extended so as to include in the lien for demurrage a lien for detention in the nature of demurrage. It must be observed that this question has nothing to do with the distinction between liability for delays in loading and liability for delays in discharging. It would arise in exactly the same way, and must be determined upon the same grounds in a case of detention beyond the fixed demurrage days at the port of discharge. I think the only satisfactory solution in either case is that propounded by Mr Justice Brett, with whose reasoning upon this point I entirely concur. It is true that the effect of the lien cannot be decided in this case so as to affect the consignee of the cargo. But it is impossible to decide that the shipowner has abandoned his right of action against the charterers without considering whether he has not stipulated for an equivalent remedy against the cargo."

The pursuers reclaimed, and argued—This was not a shipment 'in terms of this charter,' because the cargo was not shipped within the lay-days stipulated in the charter-party. That distinguished the present case from the various cases which had occurred in England, where a similar general question had frequently arisen.

Authorities—*Petersen* v. *Lotinga*, 28 L.T. 267; *Banister* v. *Breslauer*, L.R., 2 C.P. 497; *Gray* v. *Carr*, 1871, L.R., 6 Q.B. 522; *Christophersen* v. *Hansen*, L.R., 7 Q.B. 509; *Lister* v. *Van Haansbergen*, 1 Q.B. Div. 269; and cases cited by the Lord Ordinary.

Counsel for the respondents were not called upon.

At advising—

Lord President—The Lord Ordinary has in this case pronounced a very clear and distinct judgment, and I for my part do not see any reason to doubt its soundness. Numerous English decisions have been cited, and though we are not bound by them, yet as the principles upon which they were decided are the same in this country as in England, and as this branch of law has been carefully considered, and the law upon the subject matured in England, these decisions are entitled to and will receive due weight. The rule of law settled by these cases is this, that when you have such a clause as this in a charter-party, by which it is stipulated that the "charterer's liability is to cease as soon as the cargo is shipped

in terms of this charter, captain having an absolute lien on the cargo for all freight, dead freight, and demurrage," it has the effect of discharging the charterer of all liability, whether the liability has accrued before or after the shipment of the cargo, while the captain has a corresponding lien on the cargo for claims for freight, dead freight, and demurrage, which otherwise could have been enforced against the charterer. The only difference between this case and those which were cited lies in those words in the clause of the charter-party which I read, "as soon as the cargo is shipped in terms of this charter," and accordingly all turns upon the construction which is to be put upon the words "in terms of this charter." When the shipper has brought to the ship's side a cargo and has loaded her, then his liability is, by the terms of this charter-party, to cease, because the vessel is then loaded "in terms of this charter," and to extend the shipper's liability further would, I think, be to put too strict an interpretation upon a mercantile document. I think therefore that the Lord Ordinary's judgment is right.

LORD MURE concurred.

LORD SHAND—It is practically conceded, and if it were not it has been authoritatively decided, that if the clause in this charter-party had stopped at the word "shipped" the present action would not have been maintainable against the charterer. The English cases show this, that the liability of the charterer for demurrage would have ceased, and instead the captain would have had an absolute lien on the cargo. But it is said that in consequence of the words which follow, "in terms of this charter," a peculiarity has arisen, and further, that as the lay-days had been exceeded, the cargo on that account had not been shipped in terms of the charter. I think that that is too critical a construction of the terms of this charter-party. There may have been delay in loading the vessel, but the contract makes full provision for such delay, and imposes an obligation to pay demurrage. Because the lay-days have been exceeded that is no reason for saying that the shipper has not shipped a full cargo in terms of his charter-party.

LORD ADAM was absent on Circuit.

The Court adhered.

Counsel for Pursuers—Asher, Q.C.—Thorburn—Salvesen. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for Defenders—D.-F. Balfour, Q.C.—C. K. Mackenzie. Agents—Hope, Mann, & Kirk, W.S.

COURT OF JUSTICIARY.

Wednesday, October 28.

GLASGOW CIRCUIT COURT.

(Before Lord Adam.)

H. M. ADVOCATE *v.* ARMITAGE.

Justiciary Cases—Culpable Homicide—Culpable Negligence—Death by Poison Accidentally Supplied by Druggist.

Circumstances in which a chemist and druggist, who had accidentally supplied a powder containing a deadly poison instead of one of an innocuous character which was asked for, with the result that his customer died immediately after taking the powder, was found *not guilty* of culpable homicide.

George Armitage, chemist and druggist in Greenock, was indicted at the Glasgow October Circuit, for the crime of culpable homicide, "in so far as being a chemist or druggist carrying on business in or near Hamilton Street, Greenock, and it being your duty in your capacity of chemist and druggist aforesaid to exercise due care and caution in the dispensing of drugs and medicines," and having on a day in August 1885 been asked to supply to George M'Lean, on behalf of his mother, the deceased Jane Warden or M'Lean, "a liquorice powder, being a substance not dangerous to life, you did supply in place thereof a quantity of powder commonly known as *nux vomica*, containing strychnine, a highly poisonous substance and dangerous to life, the particular quantity so sold, supplied, or dispensed by you being to the prosecutor unknown, but it being a fatal and poisonous quantity." The indictment then went on to state that the powder had been delivered to the deceased Jane Warden or M'Lean wrapped in a paper labelled "Compound Liquorice Powder, dose one or two teaspoonfuls in water as required, George Armitage, dispensing chemist," and had been used by her in accordance with these directions, as a result whereof she immediately or soon thereafter died, and was thus culpably killed by the accused.

No objection was stated to the relevancy of the indictment. It was proved that the deceased (who was in a critical state of health from various ailments) had sent for liquorice powder and obtained a powder consisting of *nux vomica*, the active principle of which is strychnine. The accused himself sold the powder. It contained more than sufficient strychnine to destroy life, and it was not disputed that this was the cause of death. The *nux vomica* bottle was kept on the same shelf as the liquorice bottle, and was of the same size and appearance, but the label was somewhat different. It had no particular place on the shelf. In gaslight *nux vomica* powder is exceedingly like liquorice, and this sale was made late in the evening after the gas was lit. It was proved by skilled evidence that while in Edinburgh such poison was not kept beside innocuous drugs, but in a special case or part of the shop, it was quite common in the west of Scotland to keep them together and trust to care in dispensing to avoid any risk therefrom. The prisoner was proved to be a very careful experienced chemist, who bore the highest char-