Friday, July 19.

FIRST DIVISION.

MACLEAN'S TRUSTEES *v.* MACLEANS.

Succession—Vesting—Period of Payment—Substitution in Moveables.

A testator in his settlement directed his trustees to pay over the free yearly income of his estate, both heritable and moveable, to his son. In the event of the son dying without lawful issue the trustees were directed to convey the testator's heritage and his plate and pictures to J. M., son of his brother J. M., and the lawful heirs of his body, whom failing to G. M., a younger son of his brother J. M., and the lawful heirs of his body. With regard to the residue of his estate, the testator appointed his trustees, "in the event of my son dying without lawful descendants of his body, and within twelve months after that event, or so soon thereafter as circumstances will permit, . . . to apportion and divide the said residue among the children of my said brother J. M. equally." Then followed this declaration—"That the share of succession effeiring to the said residuary legatees shall become vested interests in their persons at and only upon the period of payment above mentioned." The testator's personal estate amounted to £48,000, which was all capable of early realisation except a sum of about £5000. The testator's son died without children. J. M., the testator's nephew, survived him between five and six months, and then died unmarried and intestate. At the time of his death the trustees had not conveyed the heritable estate or the plate and pictures to him, nor had they divided the residue.

Held (1) that the plate and pictures fell to be conveyed to the testator's nephew G. M., along with the heritage, as substitute heir of provision; and (2) that a share of the residue vested in the person of the testator's nephew J. M.

Mr Hugh Maclean of Westfield and Hythehill, in the county of Elgin, died on 8th April 1885, leaving a trust-settlement. By its terms the trustees were directed, after payment of debts, and making provision for certain alimentary annuities, to pay over the free yearly income of the estate, both heritable and moveable, to the testator's son John Alexander Maclean during all the days of his life, and if John Alexander Maclean should predecease his wife to pay her an alimentary annuity of £300 during her life. The testator further provided—"*Eighth*, After the death of the said John Alexander Maclean, my son, and within a period of twelve months after that event shall occur, if he shall leave lawful issue, I hereby direct my said trustees to dispone and convey my said lands and estates of Westfield, Inchshaggarty, and Inchbrock, particularly above described, and my dwelling-house at Hythehill, with offices and garden, and my plate and pictures, to the eldest son of the said John Alexander Maclean, and the lawful heirs of his body, whom failing to the second son of the said John Alexander Maclean, and the lawful heirs of his body. . . . And in regard to the residue of my estate, if it should happen that the said John Alexander Maclean should leave more than one lawful child of his body, I hereby direct and appoint my trustees, after the lapse of twelve months from the death of the said John Alexander Maclean, to divide and apportion the said residue of my estate among the said children equally and share alike, the heir succeeding to the estates of Westfield, Inchshaggarty, and Inchbrock being entitled to receive an equal share of the residue of my estate along with the other children. . . . *Ninth*, In the event the said John Alexander Maclean should die without any lawful descendants of his body, then and in that event I hereby direct and appoint my said trustees, within twelve months after the death of the said John Alexander Maclean, or so soon thereafter as circumstances will permit, after making due provision for all the annuities, legacies, and bequests herein contained or referred to, and for the complete fulfilment of this my deed of settlement, to dispone and convey my said lands and estates of Westfield, Inchshaggarty, and Inchbrock, specially above described, and my dwelling-house of Hythehill, offices and garden, with my plate and pictures, to James Maclean, my nephew, son of the said James Maclean, my brother, and the lawful heirs of his body; whom failing to George Maclean, my nephew, a younger son of the said James Maclean, my brother, and the lawful heirs of his body; whom also failing to my nearest lawful heirs whomsoever; and with regard to the residue and remainder of my means and estate, I, in the event of my son dying without lawful descendants of his body, and within twelve months after that event, or so soon thereafter as circumstances will permit, direct and appoint my said trustees to apportion and divide the said residue among the children of my said brother James Maclean, equally and share and share alike, whom I hereby appoint to be my residuary legatees, declaring hereby that the member of the family succeeding to my said heritable estate of Westfield and others, specially above described, shall also be entitled to a share of the residue along with the others." The truster then made provision for the case of children of predeceasing children, and then followed this declaration, "that the share of succession effeiring to the said residuary legatees shall become vested interests in their persons at and only upon the period of payment above mentioned."

John Alexander Maclean died on 12th January 1888. The fact of his death was at once communicated to James Maclean, who was then acting Commissioner of the Courts of Requests and Police Magistrate, Jaffna, Ceylon. So soon as he could make the necessary arrangements he came home, arriving in this country in the beginning of April. Both at the date of John's death in January, and when James arrived in this country in April 1888, the estate of Westfield consisted of the farm of Westfield, in the occupation of a tenant holding under lease granted by the first parties for nineteen years from Whitsunday 1886, at a rent of £330, and the farms of Surradale and Orchardfield in the natural occupation of the first parties as proprietors in trust, at a rental of £740; and the personal estate under the charge of the first parties, out of a gross total of

£48,000 odds, included a number of stocks and shares which could be easily and quickly realised, and £20,950 of heritable securities convertible into cash on three months' premonition prior to a term of Whitsunday or Martinmas. The only asset of importance in point of amount which was not capable of early realisation was the stock, crop, and implements on the farms of Surradale and Orchardfield, the amount of which was a little over £5000. At the request of James the first parties let the same on a lease for nineteen years from Whitsunday 1888 as to the houses, grass, and fallow-land, and at the separation of the crop from the ground as to the land under grain crop. James died intestate on 24th June 1888. He was unmarried, but was survived by an older brother and sister, Hugh Maclean and Elizabeth Maclean, and by a younger brother George Maclean. At the time of his death the parties of the first part had not made the conveyance in his favour of the heritable estate specified in the ninth purpose of the trust, with the plate and pictures as directed in the said ninth purpose, nor had they apportioned and divided the residue of the estate.

Questions having arisen as to the distribution of the estate, the present case was presented to obtain the judgment of the Court by (1) the testamentary trustees of the testator, (2) George Maclean, and (3) Hugh Maclean and Elizabeth Maclean.

The second party maintained that the residue could only vest on actual payment, and that consequently no share therein vested in James. He also contended that he had the exclusive right to the plate and pictures, as being part of the subjects falling to be conveyed to him with the heritage as heir of provision under the settlement.

The third parties maintained that the provisions in the testator's settlement in favour of the deceased James Maclean vested in him on the testator's death, subject to defeasance in the event of John Alexander Maclean being survived by lawful descendants, or otherwise that the said provisions vested in James Maclean at the death of John Alexander Maclean. They admitted that the second party took the heritage originally belonging to the testator as heir-at-law of James Maclean, but contended that the plate and pictures fell into residue, or, at all events, fell to be dealt with in the same manner as the residue. They further maintained that in ordinary course the residue of the estate should have been apportioned and divided among the residuary legatees before James' death, and that the fact of this not having been done could not prejudicially affect their interests in the succession.

The first parties contended (1) that by the terms of the settlement they were not bound to divide the residue until twelve months from John's death had elapsed, and (2) that in ordinary course it was not practicable to do so sooner, having regard to the magnitude of the estate and the nature of the investments; to the facts that until the crop of 1888 of the farms of Surradale and Orchardfield had been reaped, and the proceeds got in, and the rents of Westfield falling under John's executry had been collected, the residue in the sense of the settlement had not been ascertained, and they could not proceed to apportion and divide.

The following questions were submitted for the opinion of the Court—"(1) Did a share of the residue vest in the person of the deceased James Maclean? (3) Do the plate and pictures form part of or fall to be dealt with in the same manner as the residue, or do they fall to be conveyed to the second party along with the heritage?"

Argued for the first and second parties—(1) As regards the residue—The testator had expressly postponed the period of payment, which was the declared period of vesting, till after John Alexander Maclean's death. The provision was that the trustees were to divide the residue "within twelve months after that event, or so soon thereafter as circumstances will permit." The testator meant by this to give his trustees twelve months from John's death in which to realise, and as much additional time as circumstances rendered necessary. That was the only reasonable contention, and derived aid from the provisions under the 8th purpose as to the residue in the event of John leaving issue. In these circumstances he had directed the trustees to make the decision "after the lapse of twelve months from the death" of John. He clearly anticipated that the trustees would require twelve months at least for realisation of the estate. That being the sound construction of the claim in question, no vesting had taken place in James, who only survived John six months, unless it could be shown that the trustees had unduly delayed to realise—*Howat's Trustees* v. *Howat, &c.*, December 7, 1869, 8 Macph. 337, and 42 Scot. Jur. 116; *Sutherland's Trustees* v. *Clarkson*, October 29, 1874, 2 R. 46; *Thorburn* v. *Thorburn*, February 16, 1836, 14 S. 485, and 8 Scot. Jur. 239. The case of *Ferrier* did not conflict with the cases of *Howat's Trustees* and *Thorburn*—*Ferrier* v. *Ferriers*, May 18, 1872, 10 Macph. 711, and 44 Scot. Jur. 390. (2) As regards the plate and pictures—A testator had the power to impress a substitution on his personal estate, and it was always a question of intention whether he had done so. Though the presumption of law was against a substitution in moveables, and in favour of a conditional institution, that presumption might be overcome. There was undoubtedly a substitution impressed on the heritable estate here, and the testator dealt with the plate and pictures along with the heritable estate. Plate and pictures, also, were not like money, of an evanescent character, but were as definite in character as heritage. In this the testator had evidently intended a substitution, and it should be given effect to, the first beneficiary not having evacuated the destination—*Ramsay* v. *Ramsay*, November 23, 1838, 1 D. 83.

Argued for the third and fourth parties—(1) As regards the residue—Vesting took place at John Alexander Maclean's death. That was the period of payment. The trustees were directed to realise so soon after John's death as possible. James therefore having survived John by six months had taken a vested interest in the residue—*Ferrier* v. *Ferriers*, May 18, 1872, 10 Macph. 711,. and 44 Scot. Jur. 390. The survivance of the period of payment was the important element—*Bryson's Trustees* v. *Clark, &c.*, November 26, 1880, 8 R. 142. In all the cases cited by the other parties the direction was

—"In the event of" (the person nominated) "predeceasing me or dying before receiving payment." In *Thorburn's* case, 14 S. 487, Lord Corehouse expressed himself thus—"Mr Thorburn directs that as soon after his death as may be thought prudent. . . his trustees shall divide the residue . . . among his brothers and sisters. If the deed had stopped there, there would have been room to hold that as John Thorburn survived his brother his share should be holden as vested whether the trustees had actually proceeded to the allocation." That doctrine was directly applicable here. In any view, the trustees could and ought to have realised before James' death, and paid him his share, which must therefore be held to have vested in him. (2) As regards the plate and pictures—The beneficiaries' interests in them must be the same as if the trustees had done their duty and conveyed them without undue delay. The presumption of law which was against a substitution in moveables was not displaced here. The presumption was not displaced by the fact that the plate and pictures were conveyed by the same clause as the heritage—*M'Dowall* v. *M'Gill*, June 19, 1847, 9 D. 1284, and 19 Scot. Jur. 555; *Bailie* v. *Grant*, May 21, 1859, 21 D. 838, and 31 Scot. Jur. 465; *Walker's Executors* v. *Walker*, June 19, 1878, 5 R. 965; *Campbell* v. *Campbell*, June 19, 1740, M. 14,855; *Brown* v. *Coventry*, June 2, 1792, Bell's Octavo Cases, 310, and M. 14,863.

At advising—

Lord President—By the settlement of Hugh Maclean of Westfield the object of the testator is expressed to be that his eldest son John Alexander should be restricted to an alimentary liferent of the estate, but that after his death the estate generally is to go to his children. It turned out, however, that John Alexander had no children, and therefore the question we have to determine really arises upon the death without issue of John Alexander Maclean. Now, the part of the settlement which refers to that contingency is to be found under the ninth head, which is introduced by these words—"In the event the said John Alexander Maclean should die without any lawful descendants of his body, then, and in that event, I hereby direct and appoint my said trustees, within twelve months after the death of the said John Alexander Maclean, or so soon thereafter as circumstances will permit, after making due provision for all the annuities, legacies, and bequests herein contained or referred to, and for the complete fulfilment of this my deed of settlement, to dispone and convey my said lands of Westfield, Inchshaggarty, and Inchbrock, specially above described, and my dwelling-house of Hythehill, offices and garden, with my plate and pictures, to James Maclean, my nephew, son of the said James Maclean, my brother, and the lawful heirs of his body, whom failing to George Maclean, my nephew, a younger son of the said James Maclean, my brother, and the lawful heirs of his body." Now, as to the construction of that part of the clause I think there is very little room for question. I cannot doubt that George Maclean is called, either as a conditional institute or as substitute, as the case may be. If James Maclean predeceased John Alexander, of course he could not take, and George Maclean would take as conditional institute. But James Maclean survived the death of John Alexander by six months, or nearly so, and accordingly the right to the heritage vested in him, and upon his death intestate, and without having done anything in the way of evacuating the substitution, the substitution took effect in favour of George Maclean. With regard to the pictures and plate, they are within precisely the same destination as the heritable estate itself, and the direction is to dispone and convey the estate of Westfield "with my pictures and plate." There is no doubt about the intention of the testator to combine the two to prevent their separation, and a substitution in movables is quite an effectual and regular mode of settling property of this description, provided always that that substitution is not defeated. I hold therefore that George Maclean as substitute heir of provision is entitled to the estate of Westfield and the pictures and plate as one indivisible subject.

But then there occurs another question, arising partly out of the construction of what I have already read, but partly also out of the construction of what follows—"With regard to the residue and remainder of my means and estate, I, in the event of my son dying without lawful descendants of his body, and within twelve months after that event, or so soon thereafter as circumstances will permit, direct and appoint my said trustees to apportion and divide the said residue among the children of my said brother James Maclean, equally and share and share alike, whom I hereby appoint to be my residuary legatees." Now the question put upon the construction of that part of the clause is, whether the share of this residue vested in James Maclean, the nephew of the testator. James Maclean survived the death of John Alexander. I think John Alexander's death was in January, and James Maclean's death was in June, so that he survived five months at all events, and the question is whether during that time the share of the residue vested in James Maclean. The direction to pay or divide or apportion — the words are all used—is that it shall be done within twelve months of that event—that is, the death of John Alexander, or so soon thereafter as circumstances will permit. But then there must be taken in connection with that also the further declaration which follows this clause, in which it is "declared that the share of the succession effeiring to the said residuary legatees shall become vested interests in their persons at and only upon the period of payment above mentioned." There is no period of payment—no precise period of payment—mentioned in the deed, the direction being to divide within twelve months of the death of John Alexander, or so soon thereafter as circumstances permit. Now, the word "thereafter" admits of two constructions; it may mean either after John Alexander's death, or after the expiry of twelve months from John Alexander's death. My opinion is that it has the former meaning, not only from the expression in this clause itself, but from the contents of the deed. The expression regarding the twelve months is that the division is to take place within twelve months. That being so, it may take place at any time within twelve months; it may take place within one month as well as at the expiry of twelve months,

because it is not on the expiry of twelve months that it is to take place, but at any time within twelve months; and it seems to me therefore that when the testator gives permission and implied direction to divide within twelve months at any time when it shall be practicable, he could hardly at the same moment and in the same breath have said, "or at any time after twelve months." The same expression occurs in regard to the disposition of the heritable estate. It is an appointment within twelve months after the death of John Alexander Maclean, or so soon thereafter as circumstances will permit. There I think the meaning is the same. There is another part of the deed in which a different expression is used, and which I think was intended to have a different meaning. It is in regard to the residue of the estate in the event of John Alexander Maclean leaving more than one lawful child of his body. In that case the testator directs his trustees after the lapse of twelve months from the death of John Alexander Maclean to divide the proportion. There his meaning is obviously different. Again, with regard to the conveyance of the heritable estate in the event of John Alexander Maclean predeceasing him, he directs that the heritable estate shall be conveyed to the eldest son of John Alexander Maclean within the period of twelve months after that event. So that these expressions stand in contrast with the one which is used with regard to the division of the residue among the children of John Alexander Maclean if he has any; and upon the whole of that I come to the conclusion that it is in the power of these trustees—and indeed it is almost a direction—it is implied—that they should divide the estate as soon as possible, as soon as circumstances will permit after the death of John Alexander Maclean.

Now that being so, the nature of the testator's estate comes to be very important. If it had been of such a mixed character that it really could not be ingathered and divided except after a long period of administration, I can quite understand that that would influence the construction of this clause. I think it would suggest probably that the "thereafter" meant to give a large discretion to the trustees as to the time within which they could realise, and that they might either realise and divide within the twelve months or after the twelve months, as they found convenient and practicable. But if we find, as I think we do, that the estate of the testator is very easily realisable, and is just of that description which can be realised quite well within an ordinary period, say within six months of the testator's death, which is the period very frequently allowed to trustees, or even within a shorter period, then that carries one's mind in favour of the construction which I have put upon the word "thereafter," so as to give the direction this meaning—"Realise and divide as soon as possible. You shall do it at anyrate within twelve months, there can be no difficulty about that, but do it as soon as you can after the death of John Alexander without issue." Now, what is the nature of the estate as we have it disclosed in the statement made of the personal estate as at the death of John Alexander? We have about £20,000 worth of heritable bonds. These are very easily realisable. In the first place, the trustees had plenty of time before the term of Whitsunday after the death of John Alexander to call up those bonds, or if that was inconvenient and undesirable from the nature of the arrangement made at the granting of the security, they could at all events get their market value by transfer or assignation. Nothing can be more easily realised than such estate. Then the bulk of the estate otherwise consists of stocks and shares, which are in the market every day, which can be sold at any time whenever convenient to the trustees; and really the only asset of the estate that is of the smallest importance in point of amount that could not be at once realised is the farm stock, crop, and implements of two farms. The amount of these is a little over £5000, and the amount of the entire estate is £48,000. Is the division of this estate to be tied up and nothing done because it is impossible at once to realise the farm stock, crop, and implements? I do not think that is a fair way of dealing with a direction of this kind. It seems to me that the true meaning of the testator, and of the words he has used, is that when the bulk of the estate is fit to be divided, when it has been realised and in such a shape that it can be done, then it is to be divided. The declaration that the shares of the residue are to become vested interests at and only upon the period of payment above mentioned does not involve any difficulty, because there is no fixed time of payment, as I have said, and it cannot mean—at least I think it does not mean—that nothing is to vest until it is actually paid if it be in a condition fit for distribution. If the estate is in the hands of the trustees, fit for division, and capable of division, then I think it is the duty of the trustees to divide; and if that duty is imposed upon them, their mere delay in the performance of that duty will make no difference on the rights of parties, because they were under an obligation to divide as soon as they could, and therefore the period of payment being fixed as the date of vesting merely means that when the period has arrived at which the trustees are in a condition to divide, then the right shall vest. I am therefore for answering the first question in the affirmative.

The second question has been withdrawn, and with regard to the third question I have already expressed my opinion that the plate and pictures fall to be dealt with in the same manner as the heritable estate, and are inseparable from it.

Lord Mure—I am of the same opinion, that this first question put to us should be answered in the affirmative, namely, that the residue vested in James Maclean—that is, his share of it—and I do so upon the same construction of the clause in the settlement that your Lordship has referred to. I think in the whole of that ninth purpose the event in view is the death of John Alexander, and I think the words in the residue clause "within twelve months after that event, or so soon thereafter as circumstances will permit," may be read within twelve months after the death of John Alexander, or so soon after his death as circumstances will permit. In that view of it, and seeing that the residue admitted of being realised before the death of James Maclean, I think the share may be fairly held to have vested in him by the operation of that clause.

On the third question I agree with your Lordship that the plate and pictures form part of and fall to be dealt with as part of the residue.

Lord Shand—I am of the same opinion also, that the first question should be answered in the affirmative. That question relates to the residue, and, as your Lordship has pointed out, there is a very special clause there which declares that "the share of succession effeiring to the residuary legatees shall become vested interests in their persons at and only upon the period of payment above mentioned." The question we have to determine is, what is that period of payment? The word period is not a very accurate term to use with reference to the payment. I read it as meaning only upon the term or time of payment above mentioned, referring to one point of time. Now that depends upon the earlier clause of the deed, on which your Lordship has commented. The particular clause requiring to be construed is this:—"In the event the said John Alexander Maclean should die without any lawful descendants of his body, then, and in that event, I hereby direct and appoint my said trustees within twelve months after the death of the said John Alexander Maclean, or so soon thereafter as circumstances will permit." It is clear that the word "event" there refers to the event of the son dying, and the only question of difficulty is whether the word "thereafter" refers to the word "event" or to the words "twelve months" which immediately precede it. I am disposed to think with your Lordships that the word "thereafter" refers to "event" and not to the "twelve months," so that the clause would read in this way:—"In the event of my son dying without lawful descendants of his body, within twelve months after that event, or as soon after that event as circumstances will permit." If the clause be so read it rather appears to me that it would result that one might read this deed as making the death of John Alexander, his son, the period of vesting, because after all, that would simply come to be a direction to this effect:—"I leave the residue of my estate to be divided amongst those persons as soon as circumstances will permit." And if that be so, I take it that in a case where there was no other direction, the vesting would be held to take place at the death. But I am clear that in any view that may be taken of this deed, looking to the nature of the estate, vesting did apply, because even if you read the clause in the other way suggested, namely, "within twelve months after that event, or as soon after the expiry of twelve months as circumstances will permit," the purpose that may be said to be expressed there is that that is a direction giving twelve months if it is required to realise the estate, but nothing more. But there is no direction, such as your Lordship pointed out occurred in the other part of the deed, to divide after the lapse of twelve months; it is all within that period. Accordingly I hold with your Lordship that if the estate is of such a nature that really (with the exception of a comparatively small amount of the whole that is divisible) one can see that it may be divided a short time after the testator's death, it shall be held to have been so divided, or, at all events, that that is the time or term of payment at which it should be divided. Well, John Alexander Maclean died in January, but the estate could all have been realised admittedly, with the exception of the crop and stock at the succeeding term of Whitsunday 1888. The bonds could all have been called up, because there was time for three months' premonition, and the other parts of the estate were clearly realisable, and therefore at Whitsunday 1888 this estate was in a condition to be divided and was divisible, and James Maclean surviving until June following, I am of opinion that the share of the residue vested in him.

I entirely concur in your Lordships' view upon the third question, which is the only other one we have to answer.

Lord Adam—I arrive at the same result, although perhaps not quite by the same road as your Lordships. I do not put the same construction upon the first clause relating to residue; my view of its construction is rather this, that the direction is to pay the residue in the event of the son dying without lawful descendants within twelve months after that event. So far as that goes, I read that as a direction to pay, not at twelve months, but as soon as circumstances will permit within twelve months. I think that is the meaning of that clause—at any time within twelve months, or as soon as circumstances will permit within twelve months. If that be the meaning of that clause, if you go on to read the next clause, "so soon thereafter as circumstances will permit," putting the meaning on the word "thereafter" which your Lordship proposed, namely, as referring to the event of the death, and as meaning as soon after the death as circumstances will permit, that is just in my mind repeating again what has already been directed by the first branch of the clause, which I do not think is a natural reading, and therefore it occurs to my mind that the antecedent of "thereafter" is "twelve months," and I would read the clause so—as a direction to pay within twelve months after the death of the son, or so soon after the twelve months as circumstances will permit.

But although that is my reading of the clause, it appears to me practically to come to the same thing, because to my mind it is a direction by the truster to pay and divide as soon as circumstances will permit. That is practically on either construction of the clause what it comes to, and I do not think the different views of the possible construction of the clause is at all material as to the result.

Then we come to the other clause, "declaring that the share of the succession effeiring to said residuary legatees shall become vested interests in their persons at and only upon the period of payment above mentioned." I think that refers back to the period of actual payment, and not to any other time, as sometimes occurs in these cases, but although I think it refers to the period of actual payment, it is in this case not when payment is actually made but when payment ought to have been made subject to the direction of the truster, because that is what is meant by such a clause by the period of payment. Now, in this case, looking at the estate which we have to deal with here, it is quite obvious that the great bulk of it might have been

realised and ready for payment within a short time after the death of John Alexander Maclean. Nearly eight-ninths of it might have been realised and ready for division long before Whitsunday 1888, and if that be so, I agree with your Lordship that the vesting of the estate, or payment of that portion of the estate which can be realised, is not to be delayed because a fraction of it is not ingathered or capable of being ingathered. I am therefore of opinion that the whole of the estate vested certainly before the Whitsunday term and before the death of James Maclean.

As regards the plate and pictures, I concur with your Lordship.

The Court found and declared that a share of the residue vested in the person of the deceased James Maclean.

Counsel for the First and Second Parties—Gloag—Low. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Third Parties—Sir C. Pearson. Agents—Macpherson & Mackay, W.S.

HOUSE OF LORDS.

Tuesday, December 18, 1888.

(Before Lord Chancellor (Halsbury), and Lords Watson and Macnaghten.)

MACKILL AND OTHERS *v.* WRIGHT BROTHERS & COMPANY.

(*Ante*, vol. xxiv. p. 618; and 14 R. 863.)

Ship—Charter-Party—Marginal Note—Guarantee as to Ship's Capacity—Stowage of Machinery and Coal.

By charter-party between Wright Brothers & Company and Mackill and others it was agreed that Mackill's vessel should proceed to Glasgow and there "load all such goods and merchandise as the charterers should tender alongside for shipment not exceeding what she could reasonably stow and carry," &c. The freight was fixed at a lump sum of £2200, and it was provided—"Owners guarantee that the vessel shall carry not less than 2000 tons dead weight;" and further—"Should the vessel not carry the guaranteed dead weight as above, any expenses incurred from this cause to be borne by the owners, and a *pro rata* reduction per ton to be made from the first payment of freight." The ship was intended for a general cargo, partly of railway locomotive machinery, and the parties agreed upon and endorsed on the margin of the charter-party a note specifying the "largest pieces" of machinery, and their number, weight, and measurement, which the cargo was to contain. Wright Brothers & Company tendered a cargo not exceeding 2000 tons dead weight, including locomotives and tenders, two lots of coal, and general goods. The large pieces of machinery exceeded the number stated in the marginal note. The vessel sailed with dead weight of 1691 tons. It was admitted that her capacity equalled the guarantee, and also that 2000 tons dead weight of the cargo tendered could not have been carried without packing the coal along with the machinery, which was not done. Wright Brothers & Company claimed a deduction in the freight, and Mackill and others raised this action for the balance unpaid.

Held (*rev.* the judgment of the Court of Session) that the marginal note was information afforded to the shipowners for the purposes of the contract; the cargo tendered was not such as was expected, as the bulk exceeded the proportion of dead weight indicated by the marginal note, and as it was owing to this that the vessel carried less than the guaranteed dead weight, Wright Brothers & Company were not entitled to the reduction claimed, and were liable in the whole freight as stipulated.

Held further (*aff.* the judgment of the Court of Session), that it was not proper stowage to stow coal among machinery unless with the consent of the shippers of the coal and of the machinery, and that the *onus* of obtaining such consent was on the charterers.

This case is reported *ante*, vol. xxiv. p. 618, and 14 R. 863.

Mackill and others appealed.

At delivering judgment—

Lord Chancellor (Halsbury)—My Lords, the question in this case arises on a charter-party dated the 28th of May 1886.

The owners of the screw-steamer "Lauderdale" (the appellants) and the charterers (the respondents) agreed upon the face of that document that the "Lauderdale," then on a voyage, should proceed to Glasgow and there load all such goods and merchandise as the charterers or their agents should tender alongside for shipment. The whole of the vessel was to be at the disposal of the charterers except room for 80 tons extra bunker coal.

By the charter-party the owners guaranteed that the vessel should carry not less than 2000 tons dead weight of cargo. It was also further provided that a regular stevedore and clerks, as customary, to be appointed by the charterers, should be employed by the owners to stow and take account of the goods received on board.

The freight was to be a lump sum of £2200, and it was provided that should the vessel not carry the guaranteed dead weight as above, any expense incurred from this cause to be borne by the owners, and a *pro rata* reduction per ton to be made from the first payment of freight.

I have omitted to notice for the moment the marginal note upon the charter-party, with which I propose to deal separately.

The vessel reached Glasgow on the 5th of June 1886. The cargo included machinery, consisting of locomotives and tenders, and two parcels of coal of 100 tons and 370 tons respectively. On the loading of the vessel being completed it was found that only 1691 tons of cargo had been shipped.

The respondents maintain that the appellants are responsible for the short shipment, and claim