nication, such as it is, was made to the counsel and to the solicitor who were taking down the evidence. Under those circumstances it seems to me that it comes within the whole mischief of the supposed liability of a witness for what he has stated. I do not care whether he is what is called a volunteer or not, if he is a person engaged in the administration of justice, on whichever side he is called his duty is to tell the truth and the whole truth. If he tells the truth and the whole truth it matters not on whose behalf he is called as a witness—in respect of what he swears as a witness he is protected. That cannot be denied, and when he is being examined for the purpose of being a witness, he is bound to tell the whole truth according to his views, otherwise the precognition, the examination to ascertain what he will prove in the witness-box, would be worth nothing.

Under those circumstances it appears to me that there is but one point in this case, namely, whether the preliminary examination of a witness by a solicitor is within the same privilege as that which he would have if he had said the same thing in his sworn testimony in Court. I think the privilege is the same, and for that reason I think these judgments ought to be reversed, and I move accordingly.

LORD JAMES OF HEREFORD—I concur in the result which has been arrived at, and for the reasons which have been expressed by my noble and learned friend on the Woolsack.

LORD ROBERTSON concurred.

Interlocutor appealed from reversed with costs.

Counsel for the Pursuer and Respondent—Haldane, K.C.—C. D. Murray. Agents—Drummond & Reid, W.S., Edinburgh—Neish, Howell, & Haldane, London.

Counsel for the Defender and Appellant Campbell, K.C.—Younger, K.C.—Agents—J. P. Watson, W.S., Edinburgh—A. & W. Beveridge, Westminster.

Friday, August 4.

(Before the Lord Chancellor (Halsbury), Lords Macnaghten, Davey, James of Hereford, Robertson, and Dunedin.)

LORD ADVOCATE *v.* EARL OF MORAY'S TRUSTEES.

(*Ante*, February 2, 1904, 41 S.L.R. 267, and 6 F. 347.)

Revenue—Estate-Duty—Entail—"Person having a Limited Interest"—Heir of Entail in Possession—Estate-Duty Paid by Heir of Entail in Possession, but not Charged by Him on the Estate—Liability of Executors of a Deceased Heir of Entail for Estate-Duty on Instalments of Estate-Duty Paid by Him—Finance Act 1894 (57 *and* 58 *Vict. cap.* 30), *sec.* 9 (6).

The Finance Act 1894 by section 9 (5) makes provision that the person required to pay the estate-duty in respect of any property shall have power to raise the amount of such duty by the sale or mortgage of or a terminable charge on the property or any part thereof. Section 9 (6) enacts—"A person having a limited interest in any property, who pays the estate-duty in respect of that property, shall be entitled to the like charge as if the estate-duty in respect of that property had been raised by means of a mortgage to him."

Held 1st (approving the judgment of the First Division in *Laurie*, February 22, 1898, 25 R. 636, 35 S.L.R. 496) that an heir of entail in possession is "a person having a limited interest" in the estate in the sense of the statute; and 2nd (*diss.* Lord Robertson—*rev.* judgment of the First Division) that the executors of a deceased heir of entail are liable for estate-duty upon instalments of estate-duty paid by him, although no steps had been taken by him to perfect the charge on the estate, the instalments forming by force of the statute, and without any such steps being taken, a charge upon the estate transmissible by him and carried to them.

Opinion (*per* Lord Dunedin) that the charge upon the entailed estate formed by the instalments of estate-duty paid by the heir of entail in possession could be perfected by his executors by means of adjudication.

Statute—Interpretation—Application of Imperial Statute to Scotland—Imperial Statute Conceived in Terms Inappropriate to Scotland.

Observations on the application to Scotland of an imperial statute conceived in terms inappropriate to Scotland.

The case is reported *ante ut supra.*

The Lord Advocate (pursuer) appealed.

At delivering judgment—

LORD CHANCELLOR—This case turns upon the 6th sub-section of section 9 of the Finance Act 1894. As I understand it, the question is whether a sum of £37,740 which had been paid by the late Earl of Moray in respect of estate-duty formed a transmissible interest so that the Crown could claim duty upon it.

Two questions of a very different character appear to me to arise—one is whether the heir of entail, as the Earl was, is a limited owner within the meaning of the 6th sub-section. I do not think it necessary to discuss that question at length, inasmuch as I understand that that point has been decided in Scotland, and I see no reason to question the propriety of the decision.

The other question appears to arise in respect of the appropriateness of the mode and manner by which the statute is to be effective in Scotland. Now, to my mind the objection is of a character that would apparently displace the authority of the Legislature in respect of the technology of

one part of the United Kingdom. I quite admit that for a time I certainly was very much impressed by Mr Clyde's argument that, apparently by common consent among those who are familiar with Scotch forms of conveyancing, the language of the statute is absolutely inappropriate. I think one learned Judge even goes so far as to say that it is unmeaning. I cannot quite concur in that, because although it may be very inappropriate language, I do not think that anyone can really doubt what the meaning of the statute is, and if, although inappropriate language is used, it is known what the meaning of the Legislature is, that meaning must be obeyed in whatever form it may be necessary to adapt the practice of conveyancers to the particular thing that is to be done.

Now, the question here is whether this is a charge, or can be made a charge, upon the estate in respect of which the late Earl did pay £37,740. I observe that those familiar with the subject are able to point out modes by which the thing can be effected although the language by which it is directed is absolutely inappropriate to Scotch conveyancing. To my mind the whole question has been expounded with great precision and accuracy by my noble and learned friend Lord Dunedin, whose judgment I am about to read. It is quite clear that whether you call it a charge, or by whatever word you choose to signify it, the thing meant is obvious enough, and the justice of it, if there be justice in it, is manifest enough. A limited owner having to pay for something which is not entirely his own, the Legislature has thought it right that there should be a charge upon the estate in respect of which he has paid it for such and such an amount. That is an intelligible proposition, although I notice that my noble and learned friend Lord Robertson points out what would be the injustice of the arrangement. If it could be said that one person is paying upon the property of another person, I cannot help thinking that the injustice, if there be injustice, is inherent in the nature of the statute and does not arise from the construction which is to be placed upon it. One mode of illustrating and manifesting that, I think, is this, that if the question arose in England no lawyer would entertain any doubt that it could be properly effected; and is any difference to be made because it is in another part of the United Kingdom to which the Act equally applies, and because the language of conveyancers in that part of the kingdom must be admitted to be absolutely inappropriate to the thing that is to be done? As regards the substance of the matter, when one looks through the mere technology and sees what is intended to be done, the thing is obvious enough.

Under these circumstances it appears to me that the enactment of the Legislature must be obeyed and that the judgment of the Court below ought therefore to be reversed.

LORD MACNAGHTEN—I am not at all insensible to the grave difficulties which have been pointed out so forcibly by the learned Judges in Scotland. But I cannot think that those difficulties are insuperable. It must be borne in mind that the Act which your Lordships are now called upon to construe in its application to Scotland applies equally to the whole of the United Kingdom. It is a taxing Act. It must be presumed to have been the intention of Parliament to make the incidence of the taxation the same in Scotland as in England and Ireland, and to extend the same measure of relief, such as it is, to limited owners called upon to discharge a burthen on the inheritance wherever the property burthened may be situated.

Your Lordships may remember that much the same sort of question arose in *Lord Saltoun's* case (3 Macq. 659), which was referred to in this House not long ago in *The Special Commissioners* v. *Pemsel* ([1891] A.C. 531). In *Lord Saltoun's* case the Succession Duty Act 1853 came under consideration, and it was held by this House, reversing the judgment of the Court of Session, that an extrinsic technicality—a technical rule of Scotch feudal conveyancing—must be disregarded when its effect would be to produce inequality. I may, perhaps, be permitted to remind your Lordships of a passage in the judgment of Lord Wensleydale in that case, in which his Lordship, speaking of the decision then about to be pronounced, used these words—"This decision, though it would do violence to some of the best established doctrines of Scotch law if the present question were one of conveyancing. may yet be well admitted in the construction of an Act intended to impose corresponding duties on succession happening under two different systems of law."

With these remarks I would ask your Lordships' attention to the language of the enactment which your Lordships have to apply to the case under consideration. The Finance Act 1894, section 9, sub-section 6, declares that "a person having a limited interest in any property who pays the estate duty in respect of that property, shall be entitled to the like charge as if the estate duty in respect of that property had been raised by means of a mortgage to him." He has, therefore, a statutory charge upon the property of the same effect and validity as if the charge had been created by a mortgage duly executed by a person or persons capable of creating such a charge. As applied to England and English land the enactment is too clear for argument. The charge arises automatically. A person who is declared by statute to be entitled to a charge on doing a certain act gets the charge on doing the act by virtue of the statute. Nothing more is required to be said or done to perfect his security.

Now, one has to apply this provision to land in Scotland in respect of which the owner, being a limited owner, has paid the duty. The Courts in Scotland hold, and as it seems to me rightly hold, that an heir of entail in the position of the late Lord

Moray is a limited owner. If the land in respect of which the duty was paid had been in England or Ireland he would undoubtedly have had a charge for the amount paid. Why should he be at a disadvantage because the land in respect of which the duty is paid is situated in Scotland? The notion of charging Scottish property in this way may perhaps (to use Lord Wensleydale's language) "do violence to some of the best established doctrines of Scotch law." But still Parliament is omnipotent. The Courts in Scotland must give effect to the statute. I have no doubt that those Courts on a proper application could find some means of perfecting the security by a declaration duly recorded, or perhaps in some more appropriate way.

I need say nothing further upon this point, because I have had the advantage of reading the judgment of my noble and learned friend Lord Dunedin, and if I may say so with all respect I agree in it entirely.

I think the Crown is entitled to judgment, and the appeal ought to be allowed.

LORD DAVEY—I hope that I have fully appreciated the views taken of this case by the learned Judges in the Court of Session and so powerfully put before us by Mr Clyde in his argument for the respondents. The reasons given by the learned Judges for their judgment undoubtedly oblige your Lordships to consider this case with some anxiety. I find myself, however, unable to agree in the conclusion arrived at and expressed in the interlocutors under appeal.

The question in this appeal is whether the late Lord Moray at the time of his death had a vested transmissible interest in the sum of £37,740, paid by him for instalments of the estate duty which had become payable by him to the Crown on the family settled estate to which he had succeeded as heir of entail in 1895. And the answer to the question depends primarily on the right construction of section 9 (6) of the Finance Act 1894. By sub-section (1) of that section the estate duty is made a first charge on the property in respect of which the duty is leviable. By sub-section (5) a person required to pay the estate duty is empowered to raise the amount of such duty and any interest and expenses by sale or mortgage of the property, or any part thereof. Sub-section (6) is in the following words:—"A person having a limited interest in any property who pays the estate duty in respect of that property shall be entitled to a like charge as if the estate duty in respect of that property had been raised by means of a mortgage to him."

It has been argued that an heir of entail, though under a strict entail, is not a person having a limited interest in the entailed estate. The contrary has been decided in the case of *Laurie*, 25 R. 636. It is true he is in law a fiar, but subject, however, to the fetters on his power of disposition. It is true also that means have been provided by the Legislature by which he can free himself from the fetters under certain onerous conditions, but so long as they remain he has, in my opinion, only a limited interest within the meaning of the Act.

On the construction of the 6th section two general observations may be made. First, the section applies to England and Scotland alike, and should, I presume, receive the same construction on both sides of the Tweed. And I think that the same principle applies as was laid down in this house with regard to the Succession Duty Act (*Lord Braybrooke* v. *Attorney-General*, 9 H.L. 150), that the Act is not to be construed according to the technicalities of the law of England or Scotland, but according to the popular use of the language employed. Secondly, it should be pointed out that the words "charge" (in this connection) and "mortgage" are not technical words in England any more than in Scotland. As regards this subject-matter a charge in popular language is a burden on land, or the right to have a sum of money with which the estate is burdened raised out of it. A mortgage is but a security for money lent.

As to the meaning of the words in sub-section (6), apart from any technical difficulties of application, I should have thought there could not be any difference of opinion. They appear to me to mean that the limited owner who has paid the duty is put in the same position as if he had lent the money for the purpose on the security of a mortgage of the estate to himself. And I think the sub-section gives him all the rights of the holder of a valid and effectual security on the property. To construe the words as meaning only that he may give himself such a charge seems to me at variance with the plain meaning of the language used, and to give no effect to the words at the end of the section which the Legislature has used for the purpose of defining the nature of the charge to which the limited owner has become entitled on payment.

It humbly appears to me irrelevant to discuss whether such a charge or burden could be created by one individual in favour of another without prescribed formalities. This charge is created by the Legislature, and similar charges have been created by other taxing Acts. It does not appear to me a sufficient answer to say that the charge in the Succession Duty Act is in favour of the Crown. It makes no difference in the discussion of the means of effectuating the charge whether the holder of the charge is the Crown or a subject. What the rights of the holder of a valid security are it is not necessary for me to say. Nor are your Lordships required in the present case to say by what means the intention of the Legislature may be effected. It would be for the Court of Session to determine whether it would give effect to the statutory charge by adjudication or by the appointment of a judicial factor to receive the rents and profits, or by directing the sale of the property and ordaining the person in whom it is vested to convey or in some other way. But I have no doubt of the competency as well as

the duty of the Court of Session when the question arises to give effect to what I am constrained to hold is the plain meaning of the statute. And I am fortified in so thinking by the judgment of my noble and learned friend Lord Dunedin, which I have had the opportunity of perusing,

I am, therefore, of opinion that the late Earl had at the time of his death a transmissible title to a sum of £37,740, to be raised out of the entailed estate. It is said that by the disposition of his will he released his right in that sum to his successors in the estate. I express no opinion whether he did so. But assuming that he did, it makes no difference to the right of the Crown to duty whether the sum in question passed to one person or another.

I am, therefore, of opinion that the appeal of the Crown should be allowed.

LORD JAMES OF HEREFORD—I concur with the three judgments which have been submitted to your Lordships.

LORD ROBERTSON—I agree with the judgment of the Court of Session. I had prepared a reasoned opinion, but your Lordships have decided the case, and I should be only occupying time unnecessarily if I read it.

LORD DUNEDIN—[Read by the LORD CHANCELLOR]—The facts in this case are simple and undisputed. The late Edmund Earl of Moray succeeded as institute of entail in possession to large landed estates in Scotland in the year 1895. Under the provisions of the Finance Act 1894 he was liable to pay estate and settlement estate duty in repect of the estates. He chose to avail himself of the option given by section 6 (8) of that Act to pay by means of sixteen half-yearly instalments. He died in June 1901, having at that time paid eleven of the said instalments, amounting to £37,740 out of his own funds. This action is now raised by the Crown against the defenders, who are the trustees and executors of the said Edmund Earl of Moray under a trust-disposition and settlement conveying his property to them, and asks for estate-duty and legacy-duty on the said sum of £37,740. The learned Judges of the First Division of the Court of Session have assoilzied the defenders in respect that in their view the late Earl took no steps during his life to make the £37,740 a charge on the landed estate in favour of himself and his executors, and that, he not having done so, no right to do so passed to his executors.

I am not able to agree with their view, which seems to me not to give proper effect to the provisions of the Finance Act, and is further, I think, not consistent with the judgment of the same Division in the case of *Laurie*, to which I shall presently advert.

The question, I think, is solved by the 9th section of the Act. Before I examine the terms of the section it may be well to make some general observations on the principle of construction which a Scottish court is obliged and bound to apply to such a statute. The Finance Act of 1894 is an imperial statute applying to England and Scotland alike. It is useless not to recognise the fact that such statutes are usually framed by draftsmen but little conversant with the forms and requirements of conveyancing in Scotland, and that the phraseology which they employ is apt to be directed by the law of England with which they are familiar.

In such circumstances the Scottish Court must do its best to give effect to the meaning of the statute, not by treating English law terms as unmeaning symbols, but as terms which, although not terms of art in Scotland, may be taken as words of ordinary popular signification, and as such are capable of application to the Scottish system.

It is true that the defect of expression is sought in some cases—and this is one of them—to be remedied by the provisions of an application clause. But an application clause is an aid to interpretation, not a code, and accordingly if it is defective the Court is not thereby absolved from the duty otherwise cast upon it. I have thought this observation necessary, especially in view of what the Lord Ordinary has here said in his judgment about upsetting the fundamental rules of conveyancing. If the meaning of the statute is clear, then the Court must try and square the rules of conveyancing with that meaning as best it can, and nothing short of sheer impossibility will warrant it coming to the conclusion that a provision whieh professes to be imperial is denied in Scotland the effect which it has in England. I am far, however, from suggesting that these principles have been hitherto ignored by the Court of Session. On the contrary, they have applied them, as I shall presently show, to this very section in the case of *Laurie*. And further, they have consistently done so in all cases other than those of entail which involve settlement duty. There is no definition of settled property in the application clause (section 23). And if we turn to the general definition clause (section 22) we find in (*h*) and (*i*) a definition which as a term of art is utterly meaningless to a Scottish conveyancer, but which the Court has had no difficulty in applying as popular phraseology to the form of Scottish conveyancing.

I proceed to examine the provisions of section 9. The 6th sub-section of that section is in these terms—"A person having a limited interest in any property who pays the estate-duty in respect of that property shall be entitled to the like charge as if the estate-duty in respect of that property had been raised by means of a mortgage to him." I do not understand it to be seriously doubted that an heir of entail answers to the description of a person having a limited interest. His interest, although that of a fiar, is that of a fiar limited by the prohibitive, resolutive, and irritant clauses of the title under which he holds—and it was so held by the First Division in the case of *Laurie*. That being so, the only point remaining is, what is the meaning of the words "*entitled* to a charge?" Does this mean that he is in right of a charge, or does

it mean that he is in the position to do something which will create a charge, but that until that something is done there is no charge in his favour?

I think the first alternative is the just view. In the first place, I arrive at that result viewing the matter as one of mere construction of the words used. To say that a person is entitled to a charge "as if the duty *had* been raised by a mortgage in his favour" seems to me clearly to denote an actual charge and not a faculty to make one. So far from agreeing with the Lord Ordinary, who thinks the words analogous to the words used in the entail statutes dealing with the power to charge improvement expenditure, I think they are in direct contrast to them, and the same may be said of the words authorising the charge of widows' and children's provisions. These will be found respectively in the 18th and 21st sections of the Rutherfurd Act, and the words are—"It shall be lawful for the heir of entail in possession to charge." Under such a form of expression it obviously was a *res mercæ facultatis*. Under the present the natural inference is, I think, the other way.

In the second place, I am assured by those of your Lordships who are more conversant than I am with the rules of English conveyancing that there could be no doubt that the words used would create an actual charge on English land. *Prima facie* therefore I think it follows that the same result should be reached in Scotland.

This brings me to the last point on which really the judgment of the Court below turns. Is this question of a "charge" without any provision for its entering the records so repugnant to the law of Scotland as to exclude so far as Scotland is concerned the construction which the words would otherwise suggest?

The first and most obvious consideration is that the very same thing is done by the first sub-section of the same 9th section as regards the whole duty in a question with the Crown.

I do not find that the learned Judges suggest that the charge effectuated by the first sub-section is a bad charge. I am not overlooking the fact that the words are slightly different—"shall be a charge" instead of "is entitled to a charge." The difference is accounted for by the fact that the nominative in the first sentence is a thing and in the second a person. But the point, be it remembered, is not, for the moment, construction, it is feasibility. A charge which does not enter the records is in view of our Scottish system very inconvenient, but inconvenience is not impossibility. And I do not wonder that the Judges did not express doubts as to the validity of the charge effected by sub-section 1, because it is only the echo of the 42nd section of the Succession Duty Act. It is everyday practice in the investigations preparatory to preparing the conveyance following upon a minute or other bargain of sale to ask for the Succession Duty accounts in order to be satisfied that this unrecorded yet possible burden does not affect the lands, and if authority for this statement be needed it will be found in the instructions to the prudent conveyancer given at p. 721 of the late Mr Montgomery Bell's standard work on Conveyancing, where, after pointing out the possible existence of terce and courtesy (both burdens which do not enter the records), he specially adverts to the burden created by the Succession Duty Act.

But further, I think the point is in truth necessarily decided by the case of *Laurie*, 25 R. 636, if that case is closely examined. In that case an entail proprietor in possession had paid the estate-duty, and he presented a petition to the Court for authority to charge the estate with a bond and disposition for the amount. In his petition as first presented he founded on the Finance Act alone, and the petition was reported against as incompetent by the reporter appointed by the Court on the ground that the application clause 23 (18) did not apply, being limited to persons in whom the estate was not vested, and that the statute gave no other warrant for executing a bond and disposition in security.

The petitioner then amended his petition by founding on the 11th section of the Entail Amendment Act of 1868. That section—I paraphrase it for brevity's sake—enacts that when there are entailer's debts or other debts or sums of money which might lawfully be made chargeable by adjudication or otherwise on the fee of the estate, the Court may on the application of the heir in possession authorise bonds and dispositions in security for the amount to be placed on the estate. Upon this amendment the Court granted the prayer of the petition, the case having been reported by Lord Pearson to the First Division. The point is put clearly and in a single sentence by the Lord Ordinary, when, after quoting the 11th section of the Entail Act as above, he says—"The question is whether the statutory charge held by the petitioner (*i.e.*, in virtue of the 9th section of the Finance Act) is a debt falling within that category. The reporter is of opinion that it is, and I agree with him." This is affirmed by Lord Adam, who gave the judgment of the Inner House, and who says (p. 642)—"It may be that the Entail Statutes did not contemplate a debt of this nature, but I am of opinion with the Lord Ordinary that it falls within the description of debts specified by the statute, that the petitioner is creditor in a debt which may be lawfully made chargeable upon the fee of the entailed estate, and therefore that the petition is competent and ought to be granted."

I confess I am utterly unable to reconcile this with the view now taken by the same learned Judge that the debt itself is a *res mercæ facultatis*. The only warrant for putting in force the eleventh section of the Entail Act was the existence of an actual debt, not a facultative power of creating a debt. In other words, *Laurie's* case in terms decides that an heir of entail who

pays the estate duty is in virtue of the provisions of the Finance Act in the position to lead an adjudication. But an adjudication which is a common law remedy can only proceed on actual as distinguished from contingent debt.

Accordingly, as I think *Laurie* was well decided, it, in my judgment, rules the present case.

I cannot help adding that I think that much of the difficulty experienced by the learned Judges in the Court below arises from their not having for the moment sufficiently distinguished between the question of whether a thing is a charge, and whether that charge is so perfected according to the forms of conveyancing as to make a marketable security good against all possible competitors. It is in this latter matter that the Scottish system of the records is so important. But the law of Scotland is not strange to rights which are truly consummated, not *res mercæ facultatis*, but which yet are not perfected as regards security. A personal title to land is a familiar example. I do not say that the charge here is of that class. What I have said about the Succession Duty Act points the other way. But for the determination of this case it would be sufficient if the right was of that class, and the whole of the remarks as to the impossibility of a charge which did not enter the records would be beside the mark.

I think there is no room for doubt that the terms of the application clause are defective, with the result that Lord Moray's trustees have in the present case an uncomfortable security. They cannot avail themselves of the procedure in *Laurie's* case, because they are not heirs of entail in possession who alone can invoke the aid of the 11th section of the 1868 Act. But they have the benefit of *Laurie's* judgment in so far as it finds that they as in right of all the assets of Earl Edmund are creditors in a debt which may be made to affect the fee by adjudication. Adjudication is not nearly such a complete or comfortable remedy to a creditor as the right of sale under a bond and disposition in security. But it is a remedy, and a remedy apart from the authority of *Laurie's* case, clearly, I think, available. I pressed Mr Clyde to say why it was not, and the only answer I understood him to give was that there was no personal debtor in the debt. But that is no answer at all, for although such proceedings are in modern times rare owing to the practical disappearance of the cumbrous forms of security, adjudication in old days was one of the recognised modes of making effectual a real burden or *debitum fundi* where also there is no personal debtor in the debt—Stair, iv, 51, 11.

The result of these views is that in my judgment there is no such impossibility in the law of Scotland in holding that a "charge" can be created on land by the words of a statute without executive provisions for enabling it to enter the record as to force me to withhold from the words what I think is their natural construction.

I am dispensed from considering the alternative view pled. On the whole matter I am of opinion that the appeal should be allowed, and judgment given for the Crown.

Interlocutor appealed from reversed with costs.

Counsel for the Pursuer and Appellant—The Attorney-General (Sir R. B. Finlay, K.C.)—The Lord Advocate (Dickson, K.C.)—A. J. Young. Agents—The Solicitor for Scotland of Inland Revenue (P. J. Hamilton Grierson)—The Solicitor for England of Inland Revenue (Sir F. C. Gore).

Counsel for the Defenders and Respondents—Clyde, K.C.—Macphail. Agents—Melville & Lindesay, W.S., Edinburgh—John Kennedy, W.S., Westminster.

Friday, August 4.

(Before Lords Macnaghten, Davey, James of Hereford, and Robertson.)

STROMS BRUKS AKTIE BOLAG AND OTHERS *v.* J. & P. HUTCHISON.

(In the Court of Session January 26, 1904, reported 41 S.L.R. 274, and 6 F. 486.)

Ship—Charter-Party—Penalty Clause—Breach of Contract by Shipowner.

A charter-party contained a clause, "penalty for non-performance of this agreement, estimated amount of freight on quantity not shipped in accordance herewith." The shipowner failed to send a ship for one of the shipments stipulated for. *Held* (*aff.* judgment of the First Division) that the shipowner was not deprived of his right to have an award of damages commensurate with the loss sustained.

Contract—Contract of Carriage—Breach—Measure of Damages—Special and General Damages.

Manufacturers of wood pulp in Sweden contracted by charter-party with shipowners for the carriage of a quantity of wood pulp "in August-September" (owners' option), the vessel being entitled after loading to call at other ports, to Cardiff. They also sold the same quantity of wood pulp to vendees, manufacturers at Cardiff, "mode and place of delivery," "c.i.f. Penarth Dock, Cardiff," "time of delivery" "August - September." The shipowners having failed to supply a ship, the vendees purchased at home the quantity of wood pulp and received from the charterers, as damages for breach of the contract of sale, the difference between the cost of so doing and the contract price. The charterers then sought to recover from the shipowners, who admitted the breach of their contract, but defended on the ground that the charterers were suing for special damages to which they were not entitled, inasmuch as the two contracts did not coincide, and had not in their summons sued for general damages.