the Board of Trade at the instance of either party. Sec. 23 prohibits the company from making any charge for the return of empty trucks, or for forwarding empty trucks for the purpose of being loaded. Thus the services in relation to these matters, which were formerly gratuitous, are now by force of the statute included in the contract of carriage. In the present case the Railway Company admits that a coal truck belonging to Messrs Phillips & Company was unduly detained on the railway, and that in consequence Messrs Phillips & Company hired an emergency truck for which they had to pay. Messrs Phillips & Company brought an action in the County Court to recover the sum so paid from the company. The company having offered a smaller sum, which was refused, contends that the difference that has arisen must be determined by arbitration, and that Messrs Phillips & Company have no other way of enforcing their claim. Messrs Phillips & Company say that what they are claiming is special damage, and that a claim for special damage does not fall under sec. 6, even if a claim for breach of contract be within it. The first question, and in my opinion the only real question, is, Has the claim of Messrs Phillips & Company arisen under the section. At first sight it would seem that the answer must be in the affirmative. But for the section the claim could not have arisen at all. The claim is for undue detention. The substance of the claim is not affected by the measure of damages which the claimant seeks to apply. The claim must therefore, as it seems to me, come under sec. 6, unless there is something in the section itself to exclude it. It was argued that a claim for special damage is excluded by force of the words "by way of demurrage." The appellants contend that these words cannot have that effect. As I understood their argument, their view was that these words add little or nothing to the meaning of the provision. I agree that they do not exclude special damage if there be a case for it. But I hesitate to say that the words are superfluous. It seems to me that they have a definite meaning and a definite purpose. What does "demurrage" mean. I am content to take the meaning from the considered judgment of the Court of Exchequer in *Lockhart* v. *Falk* (33 L.T. Rep. 96, L.R. 10 Ex. 135). The question there turned on the construction of a charter-party. The judgment was delivered by Cleasby, B. "The word 'demurrage,'" said the learned Judge, "no doubt properly signifies the agreed additional payment (generally per day) for an allowed detention beyond a period either specified or to be collected from the instrument; but it has also a popular or more general meaning of compensation for undue detention." Here it cannot have its proper signification. It must mean compensation for undue detention. But it imports, I think, or connotes something more. Considering the source from which the word is borrowed and the subject to which it is commonly applied, I think that it denotes that a truck unduly detained is to be regarded (just like a ship under charter) as a profit-earning chattel—as a vehicle running for profit and unduly detained in the course of its journey without any fault on the part of its owner. If this be the true explanation of the use of the word "demurrage" in sec. 6, the enactment is plain enough, and it must be competent for the arbitrator in case of difference to award a reasonable sum for detention, whether the sum claimed would in an action at law fall under the head of ordinary or special damage. It was not seriously argued that the action could be maintained if the difference between the parties is one arising under sec. 6. I am therefore of opinion that the County Court Judge was right in holding that he had no jurisdiction, and that his order should be restored, with costs here and below.

LORDS ROBERTSON, ATKINSON, and COLLINS concurred.

Appeal sustained.

Counsel for the Appellants—Cripps, K.C. —Lush, K.C. —Schiller. Agent—R. R. Nelson, Solicitor.

Counsel for the Respondents—S. T. Evans, K.C.—Bailhache. Agents—Burn & Beveridge, Solicitors.

HOUSE OF LORDS.

Thursday, February 6.

(Before the Lord Chancellor (Loreburn), the Earl of Halsbury, Lords Macnaghten and Atkinson.)

JAMES NELSON & SONS, LIMITED *v.* NELSON LINE, LIMITED.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Ship—Charter-Party—Lay Days—Computation—Exception of Holidays—Work in Fact Done on Holidays.

A charter-party provided "seven weather working days (Sundays and holidays excepted) to be allowed by owners to charterers for loading."

Loading took place on two holidays, but there was no evidence of any express agreement under which the work was carried on, or at whose instigation it took place.

Held (*rev.* judgment of Court of Appeal) that the two days in question were not to be counted as lay days.

Ship—Charter-Party—Lay Days—Computation—Charter-Party Providing for Fortnightly Sailings—Agreement as to Commencement of Lay Days.

A more or less obscure agreement of the nature of a charter-party entered into between the owners of a line of steamships and charterers was made with respect to a fortnightly service of steamers between A and B. The agree-

ment provided that on the arrival of each steamer at her loading berth at A the charterers were to receive notice that she was ready to load, and that the lay days were to commence twelve hours after the receipt of such notice.

Held that the clause which regulated the commencement of the lay days must be read with due regard to the fact that the agreement was for fortnightly sailings, and that accordingly the charterers were under no obligation to begin loading a vessel until a date which would suit an interval of fourteen days between the sailings.

Appeal from a judgment of the Court of Appeal (VAUGHAN WILLIAMS and BUCKLEY, L.JJ., MOULTON, L.J., dissenting), reported (1907) 2 K.B. 705, affirming a judgment of CHANNELL, J., reported (1907) 1 K.B. 788.

The facts sufficiently appear from their Lordships' considered judgments *infra*.

LORD CHANCELLOR (LOREBURN)—In this action the plaintiffs, appellants here, claim dispatch money for days saved in loading two steamships of the defendants, the "Highland Heather" and the "Highland Enterprise." They also claim a return of demurrage money paid under duress, and the defendants counterclaim for still more demurrage on the same vessels. The relevant facts are very few. By an agreement of the 18th June 1904 (which will have to be considered presently) the plaintiffs were bound to load frozen meat and offal on these two ships and on others forming a two-weekly service from the River Plate to England. The "Highland Heather" was ready to load on the 5th March 1906, and the defendants, the shipowners, asserted that the lay days began on the 6th March. The "Highland Enterprise" was ready to load on the 14th March, and defendants asserted that the lay days began on the 15th March. On the other hand, the plaintiffs (charterers) asserted that the lay days began on the 7th March and the 21st March respectively. The ground of difference really amounted to this: in the shipowners' view the lay days began to run when they had berthed their vessel and given a twelve hours' notice. In the charterers' view that was subject to a condition, namely, that the vessels tendered for loading should be tendered at such times as were suitable to two-weekly sailings, with intervals of fourteen days between each sailing. Minor questions as to whether holidays were to count as lay days, and as to an exception of strikes, were raised, but the first and main question was that which I have stated. The contract which must regulate this controversy is dated the 18th June 1904, and is called a charter-party. It is an agreement by the shipowners to supply and by the charterers to fill a part of each vessel. The rest of the space was to be filled with cargo of others. To begin with, let us see what this contract is, taken as a whole. It has already been considered by this House in another appeal (*Nelson Line Limited* v. *James Nelson & Sons, Limited, supra*), and a part of it found so ambiguous that on one point effect could not be given to the words used. Still, the main purpose of the document is fairly clear. The owners bind themselves to run a two-weekly line of steamers from the River Plate to Liverpool, and a monthly line from the River Plate to London. They also agree that the sailings from the River Plate shall be at intervals of fourteen and thirty days respectively. I say no more about the London sailings with the thirty days' interval, for Liverpool sailings at a fourteen days' interval alone are in question here. This is under the second clause of the agreement. The charterers bind themselves to ship in each vessel sailing in the lines above mentioned so much frozen meat and offal as will fill certain insulated chambers. So much is, I think, pretty clear. Then comes the question which lies at the root of this litigation. What are the duties under this contract of the shipowners and charterers respectively as to the time when the several vessels of these lines are to begin loading and the lay days are to commence and the charterers are bound to load? The clauses dealing with these important details have to be considered, but in considering them we must bear in mind, as it seems to me, that the obligations to load and to give facilities for loading are all obligations in reference to a regular two-weekly service, with intervals of fourteen days between the sailings as provided by clause 2 of the agreement, and must be construed in reference to that. Apart from clause 2 there are three clauses providing for these matters. By clause 1 the owners engage as from the date when their respective vessels arrive in the River Plate, and are ready to load outwards, to place the vessels of the line at the disposal of the charterers for the carriage of the frozen meat. Nothing can be clearer. The charterers are to be the first to load this space reserved to them in the vessels as soon as they are ready to load. But then comes clause 7. Under that clause each steamer, either before or after loading meat from the charterers, may load for the owners' benefit meat or any other cargo of any kind for her intended voyage at any port or ports in the River Plate or tributaries or on the east coast of South America. This clause 7 absolutely contradicts clause 1. I am compelled to give effect to it, and I can only conclude that the shipowners' obligation under clause 1 is subject to their right to break it under clause 7. So that the charterers are not to be the first to load the vessels if the shipowners choose first to load for their own benefit some other goods. If the shipowners do not so choose (which I understand to be this case), then the charterers are the first to have the vessel at their disposal. That being so, clause 6 remains to be considered. It provides that on arrival of each steamer at her loading berth (fixed by the charterers) in the River Plate, notice shall be given to the charterers or their agents in writing of her readiness to load. The notice is not to

be given until a certain temperature is attained in the insulated chambers, which is to be maintained up to the time of shipment commencing. Twelve hours after such notice (subject to the point of temperature, which is not raised here) the lay days are to commence, and provisions for demurrage and dispatch money are appended. Now the main controversy in this case is raised on this clause. The shipowners say that they are entitled to take their vessel to the loading berth when they please, and that as soon as they have given the notice (always subject to the point of temperature), then twelve hours later the lay days begin. They maintain that they may give such notices at intervals of, say, seven, or twenty-one, or even twenty-eight days, or at less than seven days' interval, and that the charterer is bound to load on pain of paying demurrage, and that clause 6 is wholly independent of clause 2. One mitigation, and only one, do they admit. If the notices are given at such times as to frustrate the commercial adventure altogether—in that case alone, they say, the charterer may refuse to load with impunity. If there was any breach of clause 2, which required an interval of fourteen days between the days of sailing, then, they say, they may be compensated for by damages, but it is not a ground for refusing to load. On the other hand, the charterers maintain that the second clause must be read with the sixth clause and must control it, and that they were under no obligation to begin loading a vessel until such date as would suit an interval of fourteen days between the sailings. In my opinion the charterers' contention ought to prevail. Indeed, the shipowners flinch from pushing their own argument to its logical conclusion. If, as they contend, the sixth clause is quite independent of the second clause, I do not see why any limitation should be placed upon their right to berth the vessel and give notice to load at any time. Their admission that if given at such a time as to frustrate the commercial adventure the notice may be disregarded, partially relieves their argument from being utterly impracticable and unbusinesslike. But it also shows, what is to my mind plain on other grounds, that clause 6 is not an independent clause, and that some limitation must be placed on the liberty to berth and give notice, which in the language of that clause, standing by itself, is unrestrained. I think that the limitation is that the berthing and the notice must be at such times as will suit an interval of fourteen days between the sailings from the River Plate. In other words, it must be a berthing and a notice appropriate to a service of steamers sailing every fortnight with intervals of fourteen days. Mr Hamilton enumerated the contingencies which might arise between notice and sailing, as if to show that it was not possible so to fix a berthing and a notice as to be sure that it would square with sailings at fourteen days' interval. I do not think that there is any real business difficulty; but that is what, in my view, the shipowners have contracted to do, and there are plenty of exceptions which might relieve them in proper cases. Also the obligation is fairly elastic. It is not that there must be fourteen days between the notices, but such a period as is appropriate to sailings at an interval of fourteen days. For the whole agreement is dominated by the central fact that everything is arranged for a two-weekly service, with regular sailings, and it is unnecessary to repeat that in every clause. In substance, therefore, I think that the charterers are right, and that, subject to two other points, they are entitled to judgment on their claim and counter-claim in respect of dispatch money and demurrage. The second point is a very short one. Under the agreement holidays are not to count as lay days. In fact there were some holidays during which one of the ships was loaded by the charterers with the consent of the master. No special arrangement was made. But the Court of Appeal held (apparently regarding it as a point of law) that an agreement to treat the holiday as a working day, and so count it among the lay days, ought to be inferred from the mere fact of working by consent. This inference seems to have been drawn in other cases, and those cases were treated as binding in law. In my view it is a question, not of law, but of fact, whether or not there was an agreement varying the terms of the charter-party and providing that the holidays in question should count as lay days. I am unable to see any evidence of such an agreement. Very likely it was convenient to both sides to do what was done. I do not believe that it entered into the heads of either that they were making such an agreement as is suggested. At all events there is no proof of it, and therefore the charter-party, which excludes holidays, must prevail. In regard to the last point, that some allowance is to be made for strikes, this House cannot entertain it, for it was not decided by Channell, J., or argued in the Court of Appeal. It must go to be determined as an issue in the action. In the result, I move your Lordships to allow this appeal, and that judgment be entered for the plaintiffs for the sums of £80 and £182, 10s. in their claim, and also for the plaintiffs on the counter-claim, subject to the issue whether the discharge of the "Highland Heather" and "Highland Enterprise," and in consequence their arrival at the plaintiffs' factory, was delayed by strikes and the consequent congestion of shipping, as alleged by the defendants. And that this House declare that the said issue, not having been decided either by Channell, J., or by the Court of Appeal, or by this House, remains to be decided in this action, and that the aforesaid judgment be, if necessary, altered accordingly. And that the respondents do pay to the appellants their costs here and below, subject to any order that may be made by the Court determining the issue left undetermined by this House for costs arising in consequence of such issue.

EARL OF HALSBURY—This instrument has been already the subject of disputed construction before your Lordships' House, with the result that the particular part then under debate was not considered to be susceptible of any definite meaning. It is, however, only justice to the draftsman to consider what it was sought to do by this agreement. It consists of thirty-six clauses and two schedules. It was sought to regulate the rights and duties of eleven vessels, whereof the bills of lading were to form part of the agreement (sec. 22). Inasmuch as it primarily had to do with the importation of frozen meat, provisions are inserted with reference to the machinery appropriate to such a business and the maintenance of the proper temperature; the agreement is to operate in turn as the charter-party of each of the vessels in the schedule, and it recites that, "whereas the owners have services of cargo and live stock steamers which they are running or propose to run as a two-weekly line from the River Plate to the Port of Liverpool and as a monthly line from the River Plate to the Port of London, and the charterers have agreed to ship their output for the United Kingdom of frozen meat and offal by the said lines, and the owners have agreed to carry same on the conditions hereinafter contained." In the second section it is again expressly provided—"The service of the lines hereunder is, subject as hereinafter provided, to be a two-weekly one to the Port of Liverpool and a monthly one to the Port of London, having the sailings at intervals of fourteen and thirty days respectively, and to last for one year from the 1st January 1904, and to be subject to continuance as hereinafter provided." It seems to me that the main purpose and design of the arrangement was the maintenance of this two-weekly line to the respective ports interested. This brings one to the question where the clauses of this very complex document come into conflict, as they may, and as, indeed, I should have thought must, do sooner or later; and I agree with the Lord Chancellor as to what, as matter of construction, must be the result. The second point seems to be the more important one. I do not mean the more important one as between these parties, but as matter of general application, since I do not think that we shall have more such documents as this to construe. I mean the claim to treat as matter of fixed law the justice of lay days being counted when, though holidays, they were used by the charterer for the loading of one of the ships. I entirely agree with the Lord Chancellor in refusing to infer something of which there is no evidence. I do not deny that there are some things so commonly known and practised, so universal, that without evidence other than the transaction itself one infers a contract. What the parties do is itself, in the face of such a known course of dealing, evidence of their agreement. It is enough here to say that this does not come within the category to which I refer. I do not know whether it was more for the convenience of one or the other or of both that this work should go on notwithstanding the holidays. I concur also in the rest of the Lord Chancellor's judgment.

LORDS MACNAGHTEN and ATKINSON concurred.

Appeal sustained.

Counsel for the Appellants—R. Isaacs, K.C.—J. R. Atkin, K.C.—Leslie Scott. Agents—C. Russell & Co., Solicitors.

Counsel for the Respondents — J. A. Hamilton, K.C.—Horridge, K.C.—Maurice Hill. Agents—Rawle, Johnstone, & Co., Solicitors.

PRIVY COUNCIL.

Tuesday, February 12.

(*Present*—The Right Hons. Lords Macnaghten, Robertson, Atkinson, and Collins, and Sir Arthur Wilson.)

DOUGLAS MENZIES *v.* UMPHELBY AND OTHERS.

(ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.)

Will—Construction—Several Documents—Approbate and Reprobate — One Document Dealing with Scotch, the Other with Australian Estate—Widow—Legal and Testamentary Rights.

Whether a person leaves one testamentary writing or several testamentary writings, it is the aggregate or net result that constitutes his will or the expression of his testamentary wishes. Accordingly, when the law of approbate and reprobate falls to be applied, it is the net result of the testamentary writings which the law protects from invasion.

A, a domiciled Scotchman, died possessed of large estates both in Great Britain and Australia. He left two trust-dispositions and settlements in Scotch form, the one relating exclusively to British, the other to Australian estate. Taken together they formed a complete disposal of his estate. A separate body of trustees was constituted for each trust, and each document contained a declaration that "these presents shall be construed and administered according" in the one "to the law of Scotland," in the other "to the laws of New South Wales."

His widow, who received benefits under both deeds, in an action in the Court of Session in Scotland repudiated the provisions in her favour in the Scotch deed and obtained decree for her legal rights. Thereafter she claimed the bequests made to her in the Australian will.

Held that, on the principle of approbate and reprobate, she was barred from making the claim.