the will of 1878, for the will of 1885 had been admittedly revoked by the testator while the will of 1878 was extant at the date of his death and there was no averment that he had instructed or authorised its revocation. Testamentary writings only became operative at the date of the testator's death. The will of 1885 having been revoked prior thereto never became operative and could not revoke the will of 1878. The correct inference from the revocation of the will of 1885 was that the testator had intended to revoke the whole of it including the clause in it revoking prior settlements, and therefore that he intended the will of 1878 to remain effective. The only Scots case in point was *Howden* v. *Crichton*, July 8, 1815, F.C., in which no decision on the point was given, but the opinions were all in favour of the defenders. M'Laren on Wills and Succession, vol. i, p. 411, was to the same effect. The present case was distinguishable from *Whyte* v. *Hamilton*, 1881, 8 R. 940, 18 S.L.R. 676, *affd.* 1882, 9 R. (H.L.) 53, 19 S.L.R. 688, and *Colvin* v. *Hutchison*, 1885, 12 R. 947, 22 S.L.R. 632, where the question was whether looking to the nature of the deed, *e.g.*, a list of names and figures, it was testamentary or not, *i.e.*, of what did the testator's will consist, and in those cases a full proof was competent. It was not competent to prove by parole what the testator's statements "wishes" and "beliefs" were with regard to the will of 1878 while it stood unrevoked—*Hannay's Trustees* v. *Keith*, 1913, S.C. 482, 50 S.L.R. 386; *Chalmers* v. *Chalmers*, 1851, 14 D. 57, *per* Lord Justice-Clerk Hope at p. 61; *Gray* v. *Gray's Trustees*, 1878, 5 R. 820, 15 S.L.R. 571; *Robb's Trustees* (*cit.*), *Bankes* v. *Bankes' Trustees*, 1882, 9 R. 1046, 19 S.L.R 785, and *Pattison's Trustees* v. *University of Edinburgh*, 1888 (O.H.), 16 R. 73, were referred to. The English law as to the effect of the revocation of the revoking will as not setting up the will revoked was the result of a special enactment—The Wills Act 1837 (1 Vict. cap. 26), section 22. *Keen* v. *Keen*, 1873, L.R. 3 P. & D. 105, was distinguishable, for it was admitted in the present case that the later will was destroyed *animo revocandi*. Jarman on Wills, vol. i, p. 143, *et seq.*, was referred to.

Counsel for the pursuer were not called on.

LORD PRESIDENT—I am of opinion that in the circumstances of this case the Lord Ordinary has taken the safer and better course. None of the decisions cited to us is directly in point, and before embarking upon the large field of law which has been so fully opened up by Mr Wilson, I think it is desirable that we should be in possession of the facts of the case. I therefore propose to your Lordships that we adhere to the Lord Ordinary's interlocutor.

LORD MACKENZIE—I concur.

LORD SKERRINGTON—I also concur.

LORD CULLEN—I agree.

The Court adhered.

Counsel for the Pursuer (Respondent)—Chree, K.C.—R. C. Henderson. Agent—R. W. Cockburn, W.S.

Counsel for the Defenders (Reclaimers)—Wilson, K.C.—A. M. Mackay. Agents—Coutts & Palfrey, S.S.C.—Charles T. Nightingale.

Saturday, November 23.

SECOND DIVISION.

[Lord Hunter, Ordinary.

TH. FRONSDAL & COMPANY *v.* WILLIAM ALEXANDER & SONS.

Ship — Charter-Party — Demurrage — Lay-Days — Exceptions — "Provided Steamer can Discharge."

The terms of a charter-party provided that the charterers of a ship were to unload its cargo of timber at the rate of one hundred standards per day "always provided steamer can . . . discharge at this rate." Owing to shortage of labour at the port of discharge the ship was detained beyond the stipulated number of lay-days. *Held* (1) that as there was no fault on the part of the shipowners the charterers were liable to pay the demurrage, and (2) that the words quoted did not relieve the charterers, as they referred to the structural capacity and fittings of the vessel and not to the supply of labour.

Messrs Th. Fronsdal & Company, Bergen, owners of the s.s. "Hansa," *pursuers*, raised an action against Messrs William Alexander & Sons, timber merchants, Ayr, *defenders*, for payment of the sum of £490, being the amount of demurrage incurred through the detention of the "Hansa" at the port of Ayr beyond the stipulated number of lay-days.

The defenders pleaded, *inter alia*—"3. Any delay in discharging having been caused by the failure of the steamer to give delivery at the rate provided for in the charter-party, the defenders should be assoilzied."

The *facts* of the case appear from the opinion of the Lord Ordinary (HUNTER), who on 7th February 1918, after a proof, decerned against the defenders for the sum sued for.

Opinion.—"In this action the owners of the s.s. 'Hansa' sue the charterers of that vessel for payment of £490 as demurrage for the detention of the ship at the port of Ayr for seven days beyond the lay-days allowed for discharge of the cargo.

"Under a charter-party between the pursuers and the defenders, dated 5th October 1915, it was, *inter alia*, agreed that the 'Hansa' should proceed to Archangel, there load a cargo of wood, and thereafter proceed to Ayr and deliver the same.

"In terms of the charter-party it was provided that the cargo was to be discharged 'at the rate of not less than 100 stds. per day counting from steamer's arrival at the respective ports, and notice of readiness

given in writing during business hours, and permission to load granted whether berth available or not, always provided steamer can load and discharge at this rate, . . . but according to the custom of the respective ports.'

"The cargo of the ship consisted of 625·090 standards of deals and 5486 standards of ends, totalling 630·576 standards.

"As discharge at a daily rate enables the number of lay-days to be fixed as soon as the quantity of the cargo is known, and is equivalent to fixing the number of lay-days beforehand (Lord Sumner in *Rowlor Steamship Company, Limited* v. *Love & Stewart, Limited*, 1916, 2 A.C. 527, at p. 535, 1916 S.C. (H.L.) 199, 53 S.L.R. 706), the stipulated time for discharging amounted to 6⅓ days.

"The 'Hansa' arrived at Ayr upon Wednesday, 17th November 1915. Notice of readiness to discharge was duly given. The steamer was ready to discharge at 10 a.m., and discharging actually commenced at 3 p.m. on 17th November 1915, but was not completed until 6 p.m. on Thursday 2nd December 1915.

"The cause of delay in discharge is proved to have been shortage of labour. There was not a sufficient number of labourers available either to enable the ship to perform her part of the discharge, which admittedly was to dump the cargo on to the quay, or to allow of the defenders taking more expeditious delivery. No fault for this state of matters is attributed to the pursuers or to those for whom they are responsible.

"It is well settled that where a merchant has undertaken to discharge a ship within a fixed number of days he is liable in demurrage for any delay of the ship beyond that period, unless such delay is attributable to the fault of the shipowner, or those for whom he is responsible. The risk of delay arising from causes for which neither of the contracting parties is responsible is with the merchant. This rule has been applied in a number of English cases—*Budgett & Company* v. *Binnington & Company*, [1891] 1 Q.B. 35; *Thiis* v. *Byers*, 1876, 1 Q.B.D. 244; *Porteous* v. *Watney*, 1878, 3 Q.B.D. 227; and *Straker* v. *Kidd & Company*, 1878, 3 Q.B.D. 223.

"It is not necessary for me to examine these cases in detail. Lord Salvesen in *Gimle* v. *Garland & Roger*, 1917, 2 S.L.T. 254, had to consider the application of the principle involved in them where delay arose from shortage of labour which impeded the joint operation of discharge. I agree with the conclusion at which he arrived and with the reasons given by him for arriving at that conclusion.

"The defenders, however, contended that the words 'provided that the steamer can discharge' imply a modification of the otherwise absolute obligation imposed upon them. In *Northfield Steamship Company* v. *Compagnie L'Union des Gaz*, [1912] 1 K.B. 434, the Master of the Rolls, dealing with the words 'provided the steamer can deliver,' said 'They only deal with the rate of discharge of the cargo when once the discharge has begun, and are concerned with what I may call the mechanical facilities of the steamer for delivery.' L. J. Farwell in the same case said the words 'refer to the structural capacity and fittings of the vessel, not to her position in the harbour or to the supply of labour from the shore available for the consignees.' I am unable to see that the circumstance that the word in the present case is 'discharge' and not 'deliver' affords any ground for distinguishing between the two clauses. I think what was said by the learned Judges in the passages I have quoted affords a correct interpretation of the clause in the present charter-party. It was admitted that the mechanical fittings of the 'Hansa' were such as to admit of the vessel under normal circumstances being discharged within the period fixed by the charter-party. I therefore repel the defences and grant decree for the amount sued for."

The defenders reclaimed, and argued—The case must be ruled by the law of contract, and as there was no failure to perform any contractual obligation the defenders were not liable in demurrage. The English rule of law which in cases where the number of lay-days was fixed imposed an absolute liability on the charterer even in the case of circumstances outwith his control, had never been explicitly accepted in Scotland until the case of *Gimle* v. *Garland & Roger*, 1917, 2 S.L.T. 254. Historically the English rule of law was an excrescence superimposed on the original law of England in the course of recent decisions, limiting the shipowner's liability to cases of negligence, and thereby importing the law of delict into the law of contract—*Armitage* v. *Insole*, 1850, 14 Q.B. (A. & E.) 728; *Thiis* v. *Byers*, 1876, 1 Q.B.D. 244; *Porteous* v. *Watney*, 1878, 3 Q.B.D. 227; *Straker* v. *Kidd & Company*, 1878, 3 Q.B.D. 223; *Budgett & Company* v. *Binnington & Company*, [1891] 1 Q.B. 35; Carver on Carriage by Sea, p. 786, section 611. In any event these cases did no more than lay down a certain canon of construction, notwithstanding which the Court must always construe the particular contract of affreightment—*Rickinson, Sons, & Company* v. *Scottish Co-operative Wholesale Society, Limited*, 1918, 1 S.L.T. 329, *per* Lord Mackenzie at p. 336. The pursuers could not enforce performance of the stipulation in their favour without showing that they had fulfilled their part of the contract—*Johnston* v. *Robertson*, 1861, 23 D. 646. But further, *esto* that the general rule was as contended for, it was displaced by the particular words of the charter-party in the present case, which was intended to safeguard the defenders in the contingency which actually had arisen, namely, the temporary shortage of labour at the port of discharge. The case of *Northfield Steamship Company* v. *Compagnie l'Union des Gaz*, [1912] 1 K.B. 434, founded on by the Lord Ordinary, was distinguishable on the facts and the law applicable thereto, and there was no other case with a similar clause to the present one.

Argued for the pursuers—The defenders could only succeed if they proved fault on the part of the pursuers, and they had

failed to do so—*Gimle* v. *Garland & Roger* (*cit.*); *New Steam Tug Company* v. *M'Clew*, 1869, 7 Macph. 733, 6 S.L.R. 460; *Hansen* v. *Donaldson*, 1874, 1 R. 1066, 11 S.L.R. 590, *per* the Lord Justice-Clerk and Lord Ormidale; *Holman* v. *Peruvian Nitrate Company*, 1878, 5 R. 657, 15 S.L.R. 349, *per* Lord President Inglis and Lord Shand; *Whites* v. *Steamship "Winchester" Company*, 1886, 13 R. 524, *per* Lord Shand at p. 535, 23 S.L.R. 342; *Abchurch Steamship Company, Limited* v. *Stinnes*, 1911 S.C. 1010, *per* Lord President Dunedin at p. 1014, 48 S.L.R. 865; *Dampskibsselskabet Danmark* v. *Poulsen & Company*, 1913 S.C. 1043, *per* Lord Dundas at p. 1048, 50 S.L.R 843; *Rowtor Steamship Company, Limited* v. *Love & Stewart, Limited*, [1916], 2 A.C. 527, *per* Lord Sumner at p. 535, 1916 S.C. (H.L.) 199, at p. 201, 53 S.L.R. 706; Carver on Carriage by Sea, p. 788, section 612; Bell's Prin., section 432; 1 Bell's Comm. (M'Laren's ed.), p. 622. In the absence of fault on the part of the shipowner an absolute obligation rested upon the charterer to discharge the ship's cargo within the stipulated number of lay-days, and this undertaking he had failed to perform. The law of England on this matter as laid down by Carver in Carriage by Sea had been accepted in Scotland, as was clearly demonstrated by the cases cited. The words founded on in the charter-party could not excuse the defenders as they did not apply to shortage of labour, but referred solely to the mechanical appliances of the steamer. Neither the ship's crew nor the ship's appliances for unloading were to blame for the delay in the unloading operations. The pursuers could not be held responsible for the shortage of labour due to the prevailing war conditions. The evidence had proved that the steamer could be unloaded at the rate of one hundred standards per day. There being no special contract here there was no reason why the ordinary and accepted law of contract should not apply—*Mackay* v. *Dick & Stevenson*, 1881, 6 A.C. 251, *per* Lord Blackburn at p. 263, 8 R. (H.L.) 37, at p. 40, 18 S.L.R. 387.

At advising—

LORD SALVESEN—On the main question raised in this case my decision in the case of *Gimle* v. *Garland & Roger*, 1917, 2 S.L.T. 254, appears to be precisely in point. We have had a fuller citation of authorities in the present case, but I cannot say that it has in any degree shaken the view I formed and expressed in that case.

The only point which is special is as to the construction of the words in the charter-party—"always provided steamer can load and discharge at this rate." The defenders contend that this clause is to be read under reference to the actual conditions that prevailed at the port of discharge, and as through shortage of labour the steamer was unable to give delivery at the stipulated rate of 100 standards per day, the claim of demurrage fails. If this be the true construction it practically annuls the absolute obligation entered into by the charterer to discharge at the rate of 100 standards per day. I cannot so read the clause. I agree with Lord Justice Farwell, in the case cited by the Lord Ordinary, that the words refer to the structural capacity and fittings of the vessel and have no relation to the supply of labour. The clause, I think, was inserted to protect the consignee in case under normal circumstances, notwithstanding all due diligence was used, the arrangement of the steamer's holds or her equipment for discharge made it impossible for 100 standards to be taken out daily. It is admitted here that if this construction be the sound one the defenders have no case upon the facts. I accordingly reach the same conclusion as the Lord Ordinary and on the same grounds.

LORD JUSTICE-CLERK—Two questions were argued before us under this reclaiming note.

In the first place, the general question whether when the discharge could not be completed within the stipulated time because of shortage of labour, which prevented the cargo from being put over the ship's side on to the quay, as well as preventing the merchant from taking delivery and removing the cargo, the merchant was still liable for demurrage. On record the defenders averred that "owing to the failure of the owner to employ sufficient labour, the steamer was unable to discharge the cargo at the stipulated rate." It was not, however, maintained before us that this deficiency of labour was due to any fault on the part of the owner. On the contrary, it was conceded that the cause of the delay was that the labour was not to be had, and that there was no blame attachable to the owner in respect of the amount of labour employed. I think in these circumstances the Lord Ordinary was right in applying the rule of law to which he refers. That rule has been, I think, authoritatively settled by many cases, and is, in my opinion, concluded by authority so far as we are concerned.

The second point was as to the effect of the special terms of the charter, particularly as to the construction of the words "provided that the steamer can load and discharge at this rate," which occur in a clause inserted by the defenders' broker, as explained by the witness Logan. I do not think the words referred to are in themselves sufficient to displace the general rule. If that was to have been done, very different language should, in my opinion, have been employed. The construction contended for by the defender would to a very large extent destroy the obligation undertaken by the defender, which bound him to discharge in a specified number of days. In my opinion these words have not that effect. I am of opinion that the view taken in the case of *Northfield*, referred to by the Lord Ordinary, is sound and applies in the present case.

I am therefore of opinion that the reclaiming note should be refused.

LORD DUNDAS—I agree. If the questions argued by Mr Sandeman and his learned junior were open, they would, in my judgment, be well worthy of consideration; but I think that if Mr Sandeman is to prevail it must be in the House of Lords, because so

far as this Court is concerned the weight of authority is too strong for him. I am therefore for adhering to the interlocutor reclaimed against.

LORD GUTHRIE—I think with Lord Dundas that, so far as we are concerned, the case is ruled by authority.

The Court refused the reclaiming note and adhered to the interlocutor of the Lord Ordinary.

Counsel for Defenders and Reclaimers—Sandeman, K.C.—Hunter. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for Pursuers and Respondents—Moncrieff, K.C.—J. A. Maclaren. Agents—Macpherson & Mackay, S.S.C.

Saturday, November 23.

SECOND DIVISION.

[Lord Dewar, Ordinary.
[Lord Sands, Ordinary.

BARKER AND OTHERS *v.* WATSON'S TRUSTEES AND OTHERS.

Succession — Legacy — Condition — "Living Together as Husband and Wife"—Construction—Impossible Condition.

A testator by a codicil to his will provided that if at the date of his death his daughter should not be reconciled to her husband, the provision which he had made in favour of her children should suffer abatement. By a subsequent codicil he provided that they were not to be regarded as reconciled "unless they are living together as husband and wife." At the date of the second codicil and also at the date of his death his daughter by her husband's desire was undergoing treatment for the drug habit in a home. There was one child by the marriage and, the daughter having been subsequently divorced and having re-married, two children by her second marriage. *Circumstances* in which, in an action of declarator at the instance of the daughter and her former and present husbands as guardians of her children against the testamentary trustees and the other beneficiaries, *held*, after a proof (*reversing* judgment of Lord Sands, Ordinary, *dis.* Lord Salvesen) (1) that the spouses were not living together as husband and wife at the date of his death in the sense of the codicils, and (2) that the condition was not an impossible one.

Francis James Barker, doctor of medicine, London, as guardian of his infant child Margaret Frances Shelley Barker; Sydney Thornton Darrell, as guardian of his infant children Lionel Charles Thornton Darrell and Hubert Watson Darrell; and Mrs Elizabeth Mary Watson or Barker now Darrell, for her interest as the mother of the infant children and as an individual, *pursuers*, brought an action against Thomas Watson M'Nab Watson, C.A., Glasgow, and others as the trustees acting under the holograph trust-disposition and settlement of Mrs Darrell's father, the late John Ebenezer Watson, Glasgow, and against Thomas Watson M'Nab Watson as an individual and curator and tutor to his two children, and against Mrs Margaret Watson or Campbell and Mrs Isabella Lilburn Watson or M'Cowan, daughters of the testator, and their husbands as their curators and administrators-in-law, *defenders*. The pursuers sought to have it found and declared that the provisions made by the testator in his holograph trust-disposition and settlement with regard to the disposal of the fee of the residue of his estate were not validly revoked, cancelled, or altered in any way by his codicil dated 21st March 1900 and his codicil dated 12th July 1900, or by either of such codicils; or alternatively that at the time of the death of the testator his daughter Mrs Elizabeth Mary Watson or Barker now Darrell was reconciled to her husband Francis James Barker, that they were living together as husband and wife within the meaning of the testator as expressed in the codicils, and that accordingly the codicils in so far as they purported to revoke, cancel, or alter the rights and interests of Mrs Darrell's children as beneficiaries under the holograph trust-disposition and settlement in the fee of the said residue of his estate never became operative.

By his trust-disposition and settlement the testator directed his trustees to divide the whole residue of his estate, which amounted to about £72,000, equally among his children, one son and three daughters, and their issue as follows:—The share falling to his son to be paid to him absolutely, and the shares falling to his daughters to be held by his trustees for their liferent use and their children in fee *per stirpes*, with a reversion in default of issue for surviving children and the issue of predeceasers. By the two codicils of which reduction was sought the testator provided, *inter alia*, as follows:—

"21st March 1900.

"I hereby declare and provide with regard to my daughter Elizabeth Mary (Mrs Barker) that if at the time of my death she should not be reconciled to her husband she is to have the liferent use of her share of the estate as before provided, but at her death the sum of £5000 shall be set aside by my trustees, the yearly interest of which shall be paid to her child or children equally, if more than one, in liferent, and to their children *per stirpes* in fee. . . . The difference between the said £5000 and the share liferented in my said daughter shall be added to the capital of my estate and divided among my son and other daughters and their descendants as provided with respect to the other portion of my estate."

"12th July 1900.

"I don't consider Frank and Bee (Mrs Barker) reconciled as referred to in codicil to my settlement unless they are living together as husband and wife."