to be construed according to its terms, and as far as the words used in it are ordinary words we understand them ourselves, but if technical words are used we must go to authority, and especially look at the instrument itself, and see where the word is used in different places, and give it, if possible, the same meaning throughout. Here we have the term "fallow" occurring, but it is a remarkable fact that except in one place it is contrasted with green crop, and when this is the general use of the term in the lease it is to be presumed that it is the same in the clause in dispute, if nothing appears plainly to contradict the presumption. The clause in dispute is not very precise or accurate, but it is not sufficient to overturn the rest of the ease, where fallow is contrasted with green crop—that is the prevailing tendency of the lease. It must also be borne in mind that the tenant makes this claim as something exceptional and unexampled, to make up for an unusual detriment he suffered. Now if parties go into unusual contracts they should be very precise in the terms used.

LORD ORMIDALE—I concur. The hardship to the tenant was pressed upon us, but then it must be borne in mind he was not bound to have a green crop at all, and if he had sown none would have had all the compensation stipulated for. Why did he incur that loss?

LORD JUSTICE-CLERK—I also concur, on these grounds—(1) In the lease itself "fallow" is distinguished from green crop. (2) The evidence negatives the contention of the tenant. (3) As the tenant had the benefit of the crop grown on the land, the principle of his claim is abandoned.

Counsel for the Pursuer—Charles Scott and Black. Agent—David Curror, S.S.C.

Counsel for the Defender—Watson and Mackay. Agents—Dundas & Wilson, C.S.

Thursday, May 21.

FIRST DIVISION.

[Lord Shand, Ordinary.

JAMES HENRY MITCHELL AND OTHERS *v.* WILLIAM BURN AND OTHERS.

Ship—Charter-party—Bill of Lading—Contract.

Certain foreign merchants chartered a vessel from shipowners who had no domicile in Scotland, along with the services of the crew and of the captain, who had authority to sign bills of lading on behalf of the charterers. The shippers of a cargo of sugar, for which the captain had signed a bill of lading, raised an action in the Court of Session for breach of contract against the shipowners, which they endeavoured to found by arresting in the hands of their own assignees in Glasgow certain sums which, as they alleged, were due by them to the shipowners as freight. *Held* that there was no contract between the shippers and the shipowners, and consequently that no sums belonging to the latter had been arrested.

The pursuer of this action, James H. Mitchell, was a planter in Jamaica, the other pursuers being Messrs Gillespie & Co., merchants in London. The defenders were William Burn, John Stavers and William Heslop, owners of the ship "Northumberland," and residing furth of Scotland. The object of the action was to recover the sum of £1500 in name of damages for breach of a contract to deliver a certain quantity of sugar, the contract being constituted by the bill of lading granted for the shipment. It was alleged that a large portion of the sugar had been washed away altogether, while that which was delivered was to a great extent damaged by salt water. In order to found jurisdiction against the defenders, the pursuers arrested a considerable sum of money in the hands of Messrs Turnbull, Williamson & Co. merchants in Glasgow, who, as the pursuers averred, were indebted to the defenders on account of freight. The pursuers put in the following minute:—"(1) That the 'Northumberland' was chartered as stated in the first article of the defenders' statement of facts, and that No. 17 of process is a true copy of the charter party, and shall be held as equivalent to the original, and that said charter party was acted upon by the charterers and owners both on the homeward and outward voyages. (2) That the firm, Anderson, Anderson, & Company, mentioned in said charter party, acted in entering into said charter party as the agents for Messrs Davidson, Colthirst & Company, merchants, Jamaica. (3) That the shippers of the cargo, Mr Harvey and Mr Mackinnon, were aware of the facts admitted in the preceding articles before they loaded the homeward cargo on board the 'Northumberland' and received the bills of lading therefor—that said bills of lading were signed by the captain at the request of the charterers, in terms of the obligation to that effect in the charter party; and that the terms of freight under the bills of lading had been previously arranged between the said shippers and charterers."

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 5th January* 1874.—The Lord Ordinary having considered the cause, Finds that the pursuers by the arrestments founded on have not attached any funds belonging to the defenders; sustains the defenders' plea of no jurisdiction; dismisses the action, and decerns; finds the pursuers liable to the defenders in expenses, and remits the account thereof when lodged to the Auditor to tax and report.

"*Note.*—The pursuers of the present action in April 1872 shipped a quantity of sugar on board of the vessel 'Northumberland, belonging to the defenders, then in Jamaica, to be conveyed to this country; and the object of the action is to recover damages, estimated at £1500, in respect of the defenders' alleged failure to implement the contract or obligation constituted by the bill of lading granted for the shipment,—the pursuers averring that part of the sugar shipped was not delivered, and that part was delivered in a damaged condition, injured by sea water.

"The defenders, the owners of the vessel, reside in England, and are not liable to the jurisdiction of this Court on the ground of domicile. The pursuers however maintain that they have created jurisdiction against the defenders by virtue of arrestments which have been used in the hands of Messrs Turnbull, Williamson & Co., merchants in Glasgow, who were indebted, as the pursuers allege, to the defenders in a considerable sum on account of freight. The defenders deny that Turnbull, Williamson & Co. were their debtors, and maintain

that the arrestments did not attach any funds belonging to them.

"The alleged debt by Turnbull, Williamson & Co. to the defenders is stated to have arisen from the fact that certain quantities of goods were shipped on board of the defenders' vessel at Jamaica by James Harvey, for which the captain of the vessel, on 18th April 1872, granted the bill of lading, No. 20 of process; that this bill of lading was endorsed to Turnbull, Williamson & Co., who afterwards, as assignees of the shipper, applied for and obtained delivery of the goods on the arrival of the vessel at Greenock, and thus became liable for the freight due under the bill of lading. It is admitted by the minute No. 37 of process that the freight payable under the bill of lading referred to was unpaid, and was therefore due by Messrs Turnbull, Williamson & Co. at the date of the arrestments; but the defenders deny that the unpaid freight was due to them, and allege that it was due and payable, not to them as owners of the vessel, but to Messrs Davidson, Colthirst & Co., merchants, Jamaica, by whom the ship had been chartered.

"The question of jurisdiction depends upon whether the freight payable by Turnbull, Williamson & Co., was due to the defenders, the owners of the vessel, or not. If it was due to them, then it has been arrested, and jurisdiction has been founded by the arrestments. If it was due, not to the owners, but to the charterers, the arrestments have not attached any fund belonging to the defenders, and there is no jurisdiction against them.

"The facts on which the question of jurisdiction arises are admitted by the minute No. 22 of process. In November 1871 the defenders' vessel, the 'Northumberland,' then lying at Swansea, was chartered by Messrs Anderson & Co. of London, as agents for Messrs Davidson, Colthirst, & Co. of Jamaica, to ship a cargo of coals for Jamaica, and there to load a general cargo, to be brought to some port in the United Kingdom, all on the terms stated in the charter-party No. 17 of process. The vessel proceeded to Jamaica accordingly, in terms of this charter-party, and brought home a general cargo. When the cargo was shipped at Jamaica the shippers were aware of the terms of the charter-party; the terms of freight under the bills of lading were arranged between the shippers and the charterers; and the bills of lading, which are for rates of freight different from those specified in the charter-party for the same classes of goods, were signed by the captain at the request of the charterers, in terms of an obligation to that effect in the charter-party, and the shippers were aware of this.

"On this admitted state of the facts, the pursuers maintained that by the bill of lading signed by the captain a contract was entered into between the owners of the vessel and the shippers of the goods, by which the owners on the one hand bound themselves safely to carry and deliver the goods, and the shippers, on the other, undertook to pay freight to the owners. The defenders maintain that the contract was made, not with them, but with the charterers, and that the captain in signing the bills of lading acted as the agent of the charterers.

"The Lord Ordinary is of opinion that the defenders' contention is well-founded; that the effect of the contract was to create liability on the part of the shippers of the goods for the freight, not to the owners, but to the charterers of the vessel, and that consequently there was no debt due by the shippers, or their assignees Messrs Turnbull, Williamson, & Co., to the defenders, and so the arrestments used did not attach any funds.

"In the case of the ordinary contract to carry merchandise constituted solely by bill of lading, *locatio vehundarum mercium*, without the intervention of any charterer, the owners of the vessel and the shippers of the goods, or their indorsees under the bills of lading, are under direct liability to each other. In the case of a simple letting of the vessel, *locatio navis*, by which, as sometimes occurs under a time-charter, the possession of the vessel is taken over for all purposes by the charterer, who puts his own servants as captain and crew on board, it is equally clear that the owner of the vessel has no responsibility to the shippers of goods, and no contract with them. The charterer is owner *pro hac vice*, and the captain signs the bills of lading for him only. The present lies between these two well-defined cases, in the former of which there is clearly a contract between the shippers and the owners, and in the latter between the shippers and the charterers of the vessel.

"The defenders maintain that by the charter-party entered into the contract made was that of *locatio navis et operarum magistri et nauticorum*, in which, using the language of the English authorities, there was a demise of the ship by the owners to the charterers, the effect of which was to make the charterers the owners of the vessel for the time, and the contracting parties with the shippers of goods. It is not said by the defenders that under the arrangement entered into the master and crew of the vessel acted entirely and solely for the charterers. On the contrary, it is not disputed that in a question between the shipowners and the charterers, the owners were under an obligation to navigate the vessel with ordinary care, and that for this purpose the master and crew remained the servants of the shipowners. It follows, that if goods had been lost or injured in consequence of a breach of this obligation, liability would have attached to the owners in a question with the charterers; and so, as the owners continued to navigate the vessel, if a collision had occurred through the fault of the captain, they, and not the charterers, would have been responsible to the owners of any other vessel injured for the consequences. The argument comes in short to this: that while the captain remained the servant and representative of the owners in the navigation of the vessel, he became the agent and representative of the charterers in receiving the homeward cargo from the shippers, and in granting to them bills of lading undertaking to carry and deliver their goods safely. Further, the defenders did not in their argument dispute, as the Lord Ordinary understood, that in such a case as this, where, unlike the *locatio navis*, the captain to some important effects continues to represent the shipowners, these owners and the shippers of goods would come under mutual responsibility to each other if the shippers were in ignorance of the existing charter-party, and so had no reason to suppose the captain was contracting on behalf of any one but the owners, whose servant the captain undoubtedly was to some effects. In the present case, however, any question as to what might be the result of ignorance on the part of the

shippers of the existence of the charter-party is excluded, for, as already explained, the terms of freight under the bills of lading were arranged directly between the charterers and the shippers, who were aware of the existence and terms of the charter-party.

"The argument maintained for the pursuers is, that under the charter-party there was no demise of the ship, but that the charterers acquired only a right to have goods carried on board at a fixed rate, with the privilege of stipulating with others, for their own benefit, to have higher and different rates of freight, and the right to require the captain of the vessel to grant bills of lading, on behalf of and as representing the owners, to third parties, at such rates of freight as they might arrange. It is maintained that under the charter-party the charterers became entitled to require the owners of the vessel, through the captain, to enter into a separate contract with each shipper of goods, to be embodied in bills of lading, by which the captain, on behalf of the owners, undertook the safe carriage and delivery of the goods. As to the owners' rights, on the other hand, in a question with these third parties, it is pleaded that they were entitled to demand and receive the freight, subject to an obligation to account to the charterers for the amount received; and if the charterers had in the meantime received the freight, or granted a discharge of it, it was argued that the shipowner's liability directly to the shipper for delivery of the goods remained unaffected.

"The Lord Ordinary is of opinion that the arrangement constituted by the charter-party amounted to a letting or demise of the ship, so as to make the charterers the owners for the time, in a question with third parties who became shippers of goods for the homeward voyage. It is true the charter does not in express terms let 'the ship' itself, and that the master continued to be in charge, navigating the ship on behalf of the owners in fulfilment of their obligations under the charter-party. But, on the other hand, the entire use of the ship as a means of conveyance or carriage—the entire stowage room or accommodation—is let and given up to the charterers, who might make such arrangements as they thought fit with third parties as to the use of the stowage-room in the shipment of goods, and might require the captain to sign bills of lading at any rate of freight, and even at nominal rates only, if they had thought proper; and the charter contains a further clause, which deprives the owner of any right of lien over even the freight which the charterers might fix; for the freight payable to the owners is not exigible until two months after the unloading and delivery of the homeward voyage. There appear to have been three cases in England in which a freight clause expressed in similar terms to that contained in the present charter occurred, and in these cases it was held that the shipowner had thereby renounced any right of lien he might have maintained over the freight, and that even the assignees in bankruptcy of the charterers were entitled to recover the freight from the shippers, in competition with the shipowner.—*Alsager and others (assignees of Evans and others), bankrupts*, v. *The St Katherine's Dock Company*, 1845, 14 Meeson & Welsby, p. 794; *Foster* v. *Colby*, 1858, 28 Law Journal (Exchequer), p. 81; and *Shand and others* v. *Sanderson*, 1859, ib., p. 278.

"The argument maintained by the pursuers really amounts to this, that in order to constitute a demise of the ship, the ship must be let or demised in terms expressly letting, not the storage accommodation, or the use of the ship, but the ship itself. The Lord Ordinary cannot, however, adopt the argument as sound. If the entire use of the ship be contracted for, with power to put goods on board at any freight, or without freight, if the charterer thinks fit, and the entire service of the ship is thus given up, it appears to the Lord Ordinary that this is substantially a letting or demise of the ship itself as a carrying subject, notwithstanding that the owners are bound to keep up the ship, and to supply a captain and crew, with the requisite stores for navigation. The possession of the ship, or of the storage accommodation, which is really the same thing, is thereby hired by the charterer, and let by the owner, just as a house or a store may be let or demised by letting the entire use of it, or the entire accommodation within it, with or without the services of the owner's servants. This construction of the present contract appears to the Lord Ordinary to receive great additional strength from the freight clause, which deprives the shipowner of any claim to lien; and it makes no difference that the freight stipulated is not a slump sum, or so much a month, but is to be estimated at certain rates on the different classes of goods carried. The important consideration is, that the charterer may fix his own rates with third parties as he pleases. The captain no doubt represents the owners, and does so, in the view of the Lord Ordinary, not only in the navigation of the vessel on her voyage in terms of the charter-party, but even in receiving the cargo, for the owners have bound themselves to receive the cargo from the charterers, and the captain is their servant in the vessel who fulfils this obligation as their representative, giving up to the charterers the stowage room or accommodation which they have hired. But although, to this extent, he receives the cargo in fulfilment of the owner's obligations, as the owner himself must do if he acted as captain of his own vessel, yet in a question with third parties, shippers of goods, he receives the goods as representing the charterers with whom the shippers have made their arrangements and contracts. The terms of freight are fixed by the charterers, because the contract of carriage is made with them, and the captain under their orders, as their agent, signs the bills of lading. This view of the effect of such a charter-party as the present has been adopted in a number of cases in England, of which the leading case is that of *Newberry* v. *Colvin*, 1830. This case was originally decided in the King's Bench, where it was held that the bill of lading bound the owner of the ship so as to subject him to liability for the value of goods shipped but not delivered; but after full consideration the decision was reversed in the Exchequer Chamber (7 Bingham's Cases, 190), and the propriety of the reversal was afterwards affirmed in the House of Lords, 1832 (1 Clark & Finnelly, p. 283). In that case, as it appears to the Lord Ordinary, there was less room for holding that there was a demise of the ship than in the present, for the owner had a supercargo on board, with power to dismiss the captain; he had reserved to himself a part of the tonnage of the ship, and was entitled to have his freight paid or secured on the arrival of the ship in her port of final discharge. The owner had, by the charter-party a first claim on the freight pay-

able under the bills of lading, to cover the freight due to him under the charter-party. The decision in this case has the high authority of Chief-Justice Tindal and Lord Tenterden. It has since been followed by the cases of *Marquand* v. *Banner*, 1856, 25 L. J. (Queen's Bench), p. 313, and *Schuster* v. *MacKellar*, 1857, 26 L. J. (Queen's Bench), p. 281, in the latter of which the judgment of the Court was given by Lord Campbell, to the concluding part of whose opinion the Lord Ordinary specially refers. The decision of this case turned on the effect of a mate's receipt given for goods; but the Court took up and fully considered the question of the owner's liability under a bill of lading granted in pursuance of such a charter-party as occurs in the present case, and were clearly of opinion that the charterer, and not the owner, was the party responsible. In neither of these cases had the shipowner expressly given up all right of lien by a clause postponing the payment for two months after the vessel's discharge, as in the present charter-party.

"The pursuer founded on the cases of *Gilkison* v. *Middleton*, 1857, 26 L. J. C. P. 209; *Foster* v. *Colby*, 1858, 28 L. J. Exch. p. 81; and *Shand* v. *Sanderson*, 1859, *ib.* p. 278, above referred to—in all of which the shipowner's claim of lien over the freight payable by the shippers was sustained to the extent mentioned in the bills of lading. These cases, it is said, show that the right of lien exists, and it is pleaded that this right can only arise where the shipowner is in possession of the goods which he retains; and if the owner be in possession through the captain, it is said to be the necessary result that the charterers have no possession, and there is therefore no demise of the ship. With reference to this argument and to these cases, the Lord Ordinary has, in the first place, to observe that in all of these cases the authority of *Newberry* v. *Colvin*, and the other two cases above noted, which followed it, is expressly recognised. There is no indication that the Court meant to decide anything at variance with what had been deliberately settled after full argument in the Exchequer Chamber and House of Lords; and even if this were otherwise, the Lord Ordinary is of opinion that the weight of authority and the sound principle applicable to such a case as the present is to be found in the decision of the cases of *Newberry*, *Marquand* v. *Banner* and *Schuster* v. *Mackellar*. In the next place, it is to be noted that in the cases of *Gilkison* and of *Foster*, founded on by the pursuers, there were express provisions in the charter-party giving to the shipowner a lien over the freight payable to the charterers, while the clause, which in effect excludes or renounces such a claim in the present case, is a strong element in support of the view that the ship was demised. In the case of *Shand* v. *Sanderson*, the effect of a similar freight clause was the subject of some argument, but the case was decided on other grounds; and in this case, as well as that of *Foster*, the holders of the bill of lading consented to make payment of the bill of lading freight, which was all that the owners were held entitled to demand.

"Again, it is to be further observed that in each of the three cases in which the shipowner's right of lien was recognised to the limited extent of the freight specified in the bills of lading, the charterers had become bankrupt, or had actually committed a breach of their obligations to the shipowner. It appears to the Lord Ordinary that where the charterers have so acted, *e.g.*, by dishonouring bills granted by them to the owner in payment of freight, a right would in equity emerge or arise in favour of the owner which otherwise might not exist, viz., the right to call on the captain, as his servant in charge of the ship and her cargo, to take and hold possession of the goods on board for the rent or hire, that is, the freight, due to them, and to decline to allow the goods to be removed till at least the freight specified in the bills of lading should be paid to them. In such a question, the shippers of the goods could have no interest, unless, indeed, they had paid the freight in *bona fide* to the charterers themselves, in which case it appears to the Lord Ordinary that the right of lien would be lost, and it appears to be only just and equitable that the shipowners whose servant is in charge of the ship should be able to assert and vindicate such a right of lien in a question with the charterers' creditors or assignees in bankruptcy. The case of *Alsager* v. *The St Katherine Dock Co.* shows that such a right of lien cannot be effectually pleaded in England, even on the charterer's bankruptcy, where the charter-party contains a clause postponing the payment of the freight until two months after the delivery of the cargo, which is deemed equivalent to the renunciation of the right of lien. There are principles of the law of Scotland applicable in the case of bankruptcy which might lead to a different result, for where there is *debitum in presenti solvendum in futuro*, the creditor, on his debtor's bankruptcy, may exercise a right of retention not otherwise competent; and assuming that the captain's relation to the owners would enable them to call upon him to take possession of the cargo on the bankruptcy of the charterers, it would appear to follow that even in the case of such a freight clause, a right of lien might be maintained for payment of the freight mentioned in the bills of lading. On these general grounds, it appears to the Lord Ordinary that the existence of the right of lien in any case in which the charterer fails in his obligations under the charter-party to the owners, does not conflict with the view that there was a demise of the vessel, and that the captain, in granting the bills of lading, acted only for the charterers.

"But perhaps the most complete answer to the argument of the pursuers, founded on the existence of the owner's right of lien, as recognised in the case of *Gilkison* and others, is to be found in the view clearly expressed by Lord Campbell in delivering the opinion of the Court of Queen's Bench in the case of *Schuster*, above mentioned, which had been tried before him at *nisi prius*. The view there stated is, that although the charter-party in substance amounts to a demise of the ship, and the captain in signing the bills of lading acts for the charterers, yet, concurrently, there exists a right of lien for freight in the owners, unless it has been renounced. It appears to the Lord Ordinary that the existence of such a right is not inconsistent with the fact that the ship has been demised, when due weight is given to the circumstance, that the captain holds the double capacity of servant to the owners, with charge of the ship, and even of the cargo to the extent of fulfilling the shipowner's obligations, and also of agent for the charterers on their behalf to sign bills of lading in such terms as to freight as the charterers fix. The passage in Lord Campbell's judgment to which the Lord Ordinary refers is the

following:—(26 L. J., Queen's Bench, 288) 'Notwithstanding some early conflicting decisions, it seems now settled by a numerous class of cases from *Newberry* v. *Colvin* to *Marquand* v. *Banner*, that where there is a hiring of the ship according to the second form above specified, with the intention that the charterer shall employ the ship for his own profit, when the master signs bill of lading he does so as the agent of the charterer, not of the owner. But still the owner being in possession of the ship by his master and crew he has rights in respect of this possession—as to claim a lien on goods on board for freight due to him—and he is liable for the acts and negligence of the master, as master, irrespective of the contracts entered into by the master with the shippers of goods as agents for the charterer.'

"In the case of *Sandeman* v. *Scurr*, 1866 (Law Reports, Queen's Bench, vol. ii. p. 86), which was referred to by both parties in the argument, there are expressions in the opinion of Chief Justice Cockburn, who delivered the judgment, which seem to support the view that with a charter-party such as occurs in the present case (leaving out of view the clause postponing the sum of the payment of freight), there is no demise of the ship. The Lord Ordinary does not read the opinion as a decision to that effect. With much respect for the very learned judge referred to, it appears to the Lord Ordinary that the language of the earlier part of the opinion, in which the expressions referred to occur, is open to the observation, that it seems to go further than was intended when the judgment is considered as a whole. The case appears to the Lord Ordinary to have turned entirely on the absence of all knowledge on the part of the shippers of the goods of the existence of the charter-party under which the vessel had been put up as a general ship and the cargo taken on board. If there had been such knowledge, he thinks the decision would clearly have been the other way, and it would have been held that the contract constituted by the bill of lading would not have bound the shipowners, but would have bound the charterers only, for whom the captain truly acted in signing the bill of lading. If there was no demise of the ship, express or implied, and the storage accommodation was truly held by the owner, who alone received possession of the goods through the captain, then there was no occasion to consider the question whether the shippers of the goods knew of the charter-party or not; for assuming that they did know its terms, they would have learned that they were dealing with the owners only as in possession of the vessel, and not with the charterers. But the learned judge proceeds on the fact of the ignorance of the shippers of the existence of the charter-party as the determining ground of the decision. The plain inference from the opinion is, that if there had been knowledge in place of ignorance, there would have been no contract to bind the owners in a question with shippers. Thus his lordship says, pp. 96 and 97, 'It is on this ground that our judgment is founded. We think that so long as the relation of owner and master continues, the latter, as regards parties who ship goods in ignorance of any arrangement whereby the authority ordinarily incidental to that relation is affected, must be taken to have authority to bind his owner by giving bills of lading. We proceed on the well known principle, that where a party allows another to appear before the world as his agent in any given capacity, he must be liable to any party who contracts with such apparent agent in a matter within the scope of such agency.' And he subsequently adds, 'It may be that as between the owner, the master, and the charterer, the authority of the master is to sign bills of lading on behalf of the charterer only, and not of the owner;' but adds, that until the fact that this, as the true arrangement between the parties, is brought to the knowledge of the shipper of goods, he has a right to look to the owner of the vessel as the party with whom his contract has been made. These expressions, and the reference to the cases of *Newberry* and *Schuster* both above referred to, which are noticed without any remark which could affect their value as authorities, indicate that the arrangement constituted by the charter-party was regarded as a demise of the ship, which, if known to the shippers, would have affected them, and have satisfied the Lord Ordinary that the case proceeded entirely on the ground of the shipper's ignorance of the charter-party.

"If there had been such ignorance in the present case the Lord Ordinary is disposed to think the shipowner would have been liable to fulfil the obligations contained in the bill of lading. It is more than questionable whether he had a corresponding right to demand freight, and to insist on a right of lien even in a question with third parties, shippers of goods. His liability in such a case arises from his allowing persons to deal with the captain, who is in charge of the vessel, and his servant, without any notice to them that the vessel or her storage accommodation has been let to another for whom the captain also acts as agent. But although liability may arise in this way, it does not follow that any right to freight arises in his favour. It seems to the Lord Ordinary to be clear that the charterer might discharge the freight after satisfying the shippers of his right to do so by production of the charter-party; and if so, it seems to follow that the shipowner has not acquired a legal right to demand the freight.

"The Lord Ordinary has further to observe, that he regards the case of *Sandeman* v. *Scurr*, in the view which he has taken, as an authority favourable to the defenders, because he thinks the terms of the opinion show that the knowledge of the shippers (which is admitted in the present case) would have been held to relieve the owners from all responsibility. The same observation occurs on the case of *Newberry* v. *Colvin*, the case of the *St Cloud* before Dr Lushington (Brougham and Lushington's Admiralty Reports, p. 4), and the case of *Schuster*; the case of *Major* v. *White*, 1835, 7 Carrington and Payne, p. 40, is also a strong authority to the same effect, for the clear view there expressed by Baron Parke, that 'if the defendants can show that the charter-party was written within the knowledge of the shipper of the goods at the time the goods were put on board, the defendants, as the owners of the ship, will not be liable in this action,' followed several years after the case of *Newberry*, with which he must have been familiar, had been affirmed in the House of Lords.

"The Lord Ordinary has only further to observe, that many—perhaps all—of the grounds of judgment on the plea of no jurisdiction, apply equally to the ground of action here maintained. Supposing the defenders had been domiciled in this country, and were thus liable to the jurisdiction of the Court, they plead that they are not liable for the sums sued for, in respect that the contract con-

stituted by the bill of lading was not entered into with them, but with the charterers, inasmuch as the shippers of the goods were quite aware that the vessel was put up by the charterers as a general ship, and made their arrangements with the charterers accordingly. For any mere breach of contract the charterers, and not the owners, would be responsible. The case is laid entirely on breach of contract, and not on delict: and even if the merits could be reached, the views held by the Lord Ordinary would entitle the defenders to absolvitor. But, of course, the question of jurisdiction must be first disposed of; and as the Lord Ordinary holds there is no jurisdiction because there were no funds due to the defenders arrested, he has decided nothing more in the case.

"The Lord Ordinary regrets that his judgment has extended to so great length. The case, however, is one of importance, and, so far as the Lord Ordinary is aware, of novelty in the law of this country: and he has felt it to be due to the parties that he should deal carefully with the full argument submitted to him, and should state his views of the decisions in the English Courts. These decisions were represented by the defenders as conflicting with each other, but he thinks it will be found that this is not the case when they are thoroughly examined."

The pursuers reclaimed.

Authorities—Maclachlan on Shipping, pp. 307, 308, 311; *Hutton* v. *Bragg*, 22d June 1816, 7 Taunt. 14; *Parish* v. *Crawford*, Maclachlan, p. 311; *Dean* v. *Hogg*, 13th Jan. 1834, 10 Bing. 345; *Christie* v. *Lewis*, 6th Feb. 1821, 2 Brod. and Bing. 410; *Belcher* v. *Capper*, 1842, 4 Mann. and Grang. 502; *Newberry* v. *Colvin*, and cases quoted by Lord Ordinary; *Erichsen* v. *Barkworth*, 2d Dec. 1858, Exch. Ch., 5 Jur., n.s., 517; Kent's Comm., iii., pp. 200, 308, 309, (10th ed.)

Defender's counsel was not called upon.

At advising—

Lord President—The simple question which we have to consider in deciding this case is whether the shipowners could maintain a direct personal action against the shippers for payment of the freight contained in the bill of lading. If they could not that settles the matter, for there is no further subject of arrestment. It does not in the least matter whether or not they had a right of lien over the cargo, or whether, but for the stipulation as to the term of payment, they would have had such a right. There may be such a right which would prevent a party demanding delivery till payment of the freight, but that is not said here. Again, there might be a good right of action against the shipowners for damages occasioned by the misconduct of the master, but it does not follow that there is a direct right of action here. Not one of these questions touches the case before us. I am clearly of opinion that as the shipowners are not entitled to demand payment of the freight under the bill of lading, so there can be no right of action against them. It is quite unnecessary to inquire to what class of charter party this belongs. The only contract into which the shipowners have entered is the charter party. The captain when he signed the bill of lading was the agent of the charterers. The shipowners had nothing to do with that contract, and could not enforce it; all they can enforce is the charter party, which is their contract with the charterers. The two contracts are quite distinct. Though the shipowners might have had a lien over the cargo till freight was paid, I am still of opinion that they have no right of action against the shippers. I agree with the result at which the Lord Ordinary has arrived, but not with the grounds of his judgment.

Lord Deas—I agree with your Lordship. The action is against certain parties who are not liable to the jurisdiction of the Court unless it can be founded against them. The question is whether the funds in the hands of the arrestees belong to the defenders, and that depends on whether the defenders have a direct personal right of action against the arrestees. I agree that the question of lien has very little to do with the matter. Can we hold that the arrestees are liable in a direct action by the defenders? The principle—said to be established in England that you must judge of every charter party by its own terms—is one of which I quite approve, and with which we agree in this country, and it seems to me that under this charter party a direct action would not lie.

Lord Ardmillan—The defenders are owners of the ship, and the question is whether good arrestments have been used in the hands of the shippers, that is to say, whether the freight is due directly to the owners of the ship or to the charterers. I agree that it is safer to avoid the various subtle questions which Mr Scott has raised and argued most ingeniously. The direct liability of the shippers was to the charterers; the contract with which they had to do was the bill of lading, to which the owners were not parties. The contract with which the owners had to do was the charter-party, and with that the shippers had nothing to do. I agree with your Lordships.

Lord Jerviswoode concurred.

The Court pronounced the following interlocutor:—

"Adhere to the interlocutor reclaimed against, and refuse the reclaiming-note; find the reclaimers (pursuers) liable in additional expenses, and remit to the Auditor to tax the amount thereof and report."

Counsel for the Pursuer—Dean of Faculty (Clark), Q.C., and Scott. Agent—A. Kelly Morison, S.S.C.

Counsel for the Defenders—Watson and Trayner. Agent—H. W. Cornillon,, S.S.C.

Friday, May 22.

FIRST DIVISION.

ADLINGTON *v.* THE INVERARAY FERRY AND COACH COMPANY (LIMITED).

(*Ante*, p. 479)

Process—Expenses—Jury Trial—Court of Session Act 1868 § 40.

In a case where a husband and wife brought an action for bodily injuries sustained by them under separate issues, and the wife recovered £25, and the husband one farthing—*held* that the husband was entitled to expenses, he not