of the charter-party, I do not think it necessary to consider any of the cases to which we were referred. I need only add that the cases of *Lockhart* and *Guy* confirm the view which I have taken as to the meaning of the word demurrage in this charter-party.

Lord Adam—I concur in the result arrived at by Lord Rutherfurd Clark, and for the reasons stated. This is an action against the charterers of this vessel for alleged wrongful detention at the port of loading. The vessel reached the port of loading about the 15th of August, but she was not loaded with her cargo and did not sail for San Diego until the 2nd December. Now, it is clear that the charterers' liability for the loss arising from this undue detention of the ship cannot be got rid of unless that liability can be transferred from the charterers to the cargo. I think, however, it is quite clear that the clause in the charter-party will not bear the construction proposed by the defenders unless demurrage is to be held as including undue detention. The case accordingly turns upon the interpretation which is to be put upon this word. I agree with the reading proposed by Lord Rutherfurd Clark, and think that apart from the word demurrage being used here in its strictly legal sense, it should always be so read unless there is something in the terms of the deed which demonstrates that it was the intention of the parties that it was to be interpreted in a different and in a wider sense.

Lord President—This portion of the charter-party may be viewed as containing either one or two clauses. If it be dealt with as containing two clauses, then the one may be taken as the counterpart of the other—that is to say, the cessation of the charterers' liability was to be given in exchange for a lien over the cargo. The question therefore between the parties here turns, as has been pointed out, on the construction which is to be put upon the word demurrage. *Prima facie* it is a stipulated payment contracted for in the charter-party, in respect of which the vessel may be detained in dock for a certain time beyond the lay-days. It is said, however, that the word is used in this charter-party in another and in a wider sense, and that it was intended by the word demurrage to cover damages for undue detention of the vessel. If no demurrage, in the strict sense of the word, had been stipulated for, then there might have been a good deal to say for this use of the word, but a little further on in the charter-party demurrage is stipulated for as matter of contract, not at the port of loading, but at the port of discharge.

In considering whether a lien of the kind contended for by the defenders has been validly constituted or not, it may be well to consider what the effect might be of adopting one construction of the word demurrage rather than another. If we look at the pursuers' claim we see it is based partly on the defenders' negligence, as set out in article 4 of the condescendence, and partly on the fouling of the ship's bottom in consequence of the delay caused by this negligence (Cond. 5). Now, these two grounds of claim suggest that their settlement depended upon the determination of certain facts. When the ship reached her destination, was there fouling? What was it caused by, and what was the expense to which the owners were put thereby? It is clear, I think, that if an inquiry of this kind was to proceed while the cargo was still on board, the consequences would be most serious to all parties; and yet if there was to be a lien over the cargo for damages in the event of these being found due, then clearly the cargo could not be discharged until these questions of fact had been determined. In construing demurrage, then, in this charter-party all these considerations must be kept in mind, and I have no doubt that looking to the circumstance that the word is used again in the deed, and that there can be no question that upon this subsequent occasion it is used in its strict legal sense, that it was the intention of the parties that when used in the clause which we have had to construe it was not intended to cover damages for the undue detention of this vessel.

Lord Mure and Lord Shand were absent from illness.

The Court adhered.

Counsel for the Pursuers—Asher, Q.C.—C. S. Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Defenders—Balfour, Q.C.—Ure. Agents—Hamilton, Kinnear, & Beatson, W.S.

Wednesday, March 20.

SECOND DIVISION.

KIPPEN'S TRUSTEES *v.* LEITCH AND OTHERS.

Succession—Vesting—Heritable and Moveable—Conversion—Power of Sale.

A testator by trust-disposition and settlement, dealing with his whole estate, directed his trustees "to pay to my said wife, in case she shall survive me, for her own use and disposal, out of the capital of the trust-estate, any sum or sums of money she may require, not exceeding in all the one equal half of the residue and remainder of the trust-estate, and that at any time, or from time to time, as she may desire." He also directed his "trustees at the first term after his wife's death, if she survived him, to pay and assign to her heirs, executors, and assignees the balance, if any, which shall remain unpaid to her of the equal half of the free residue and remainder of the trust-estate, after reckoning the payments out of capital which may have been made to her by my trustees." . . . The trustees were empowered, "for accomplishing the purposes of this trust," to sell and dispose of the truster's whole estate, heritable and moveable, and convert it into money. His wife survived, and died leaving a testament disposing of her whole moveable estate without having asked or received any money from the capital of her husband's estate. Part of said estate consisted of house property, which remained unconverted during the widow's lifetime, but was sold after her death.

Held that the widow's right to half of her

husband's estate was moveable, and that half of the price realised for the house property fell under her testament.

Duncan Kippen, spirit merchant, 25 Richmond Place, Edinburgh, who died on 24th April 1879, by his said trust-disposition and settlement and relative codicils conveyed to and in favour of certain trustees therein mentioned his whole heritable and moveable means and estate in trust under the burdens, with the powers and provisions, and for the uses, ends, and purposes therein mentioned.

The fifth purpose of the trust was—"For payment to my wife the said Mrs Janet Mackintosh or Kippen, if she shall survive me, during all the days of her life thereafter, of the free yearly interest, dividends, or other annual income of the trust-estate above conveyed (after payment of my deathbed and funeral expenses, the expenses of this trust, and any legacies or bequests I may leave as aforesaid), and that half-yearly as the same shall be received, beginning the first term's payment thereof at the first term of Whitsunday or Martinmas which shall happen after my death."

By the sixth purpose of the trust the truster directed and appointed his "trustees to pay to my said wife, in case she shall survive me, for her own use and disposal, out of the capital of the trust-estate, any sum or sums of money she may require, not exceeding in all the one equal half of the residue and remainder of the trust-estate, and that at any time, or from time to time, as she may desire, but declaring that in case any such payments are made to her, the liferent above provided to her shall be restricted to the liferent of the remainder of the residue."

By the seventh purpose of the trust the truster directed and appointed his "trustees, at the first term of Whitsunday or Martinmas which shall happen six months after the death of my wife, in case she shall survive me, to pay and assign to her heirs, executors, and assignees the balance, if any, which shall remain unpaid to her of the equal half of the free residue and remainder of the trust-estate, after reckoning the payments out of the capital which may have been made to her by my trustees under the sixth purpose of the trust, and which are to be imputed towards payment of said half;" and further, in the event of his said wife predeceasing him, he thereby directed his "trustees, at the first term of Whitsunday or Martinmas which shall happen six months after my death, to pay and assign to her heirs, executors, and assignees the said one equal half of the free residue and remainder of the trust-estate."

Lastly, with regard to the other equal half of the residue and remainder of the trust-estate, he thereby directed and appointed his said "trustees, at the said term, to divide the same into six equal shares, and to pay and assign the same as follows, *videlicet*:—One-sixth share thereof to my brother the said Robert Kippen, whom failing to his children equally between them, share and share alike; another sixth share," &c. The said trust-deed also contained the following clause—"And for accomplishing the purposes of this trust, I hereby specially authorise and empower my said trustees and their foresaids to sell and dispose of my whole estate, heritable and moveable, real and personal, hereby conveyed, and to convert it into money, and that either by public sale or private bargain," &c., all as more fully set forth in said trust-disposition and settlement and relative codicils.

The truster, who had no children, was survived by his wife the said Mrs Janet Kippen, and under said deed she enjoyed the liferent of the residue of her husband's estate until her death, which occurred on or about 12th January 1888. She did not request, and did not receive, any payments out of the capital of the trust-estate as provided for by the sixth purpose of the trust.

The residue of the trust-estate at the truster's death, *inter alia*, consisted of certain house properties in Buccleuch Place and Gladstone Place, Edinburgh, which were sold in February 1888, with entry at Whitsunday 1888, and realised respectively £550 and £404. One equal half of these sums fell to be retained by Mr Kippen's trustees to be disposed of in terms of the last purpose of the trust. A difficulty arose as to the disposal of the other half of these sums, amounting to £477.

The truster's widow left a testament dated 15th October 1883, by which she appointed certain parties her executors, with full power to them "to intromit with my whole moveable estate and executry of every description," and to pay the debts, and pay and deliver the legacies therein mentioned, and whatever residue there might be "of my said means and estate falling under this testament," she ordained the same to be divided as therein mentioned, as more fully set forth in said testament.

The sum of £477 was claimed by Mrs Kippen's executors on the ground that on a sound construction of the trust-disposition and settlement the bequest made by the seventh purpose thereof was moveable, and passed to her testamentary executors. On the other hand, the sum was claimed by James Mackintosh, the heir-at-law of Mrs Kippen, on the ground that the bequest was heritable, and passed to her heir-at-law.

In these circumstances Duncan Kippen's trustees did not feel justified in paying this sum without obtaining the opinion and judgment of the Court, and accordingly a special case was prepared by the said trustees of the first part, Mrs Kippen's executors of the second part, and Mrs Kippen's heir-at-law of the third part, to have the following question of law answered by the Court, viz.:—"Is the said sum of £477 to be regarded as moveable or heritable, and to whom does it fall to be paid?"

Argued for the executors—The right which vested in the widow upon her husband's death was a right to moveables. All the words used in Mr Kippen's trust-deed, *e.g.*, "pay and assign," were applicable to moveables. He only gave his widow right to demand payment of certain sums of money, not to demand a conveyance of his heritable estate. The words "pay and assign" always pointed to conversion unless there were specialties in the deed showing that conversion was not intended. The truster here spoke of "income," "dividends," "interest," not of heritage. The purposes of the trust could not have been carried out without converting the estate into money. The two equal halves could not have been determined unless the houses had

been sold. The number of the heritable subjects, the number of the beneficiaries, and the whole provisions of the deed made conversion indispensable, so that even if the rule laid down in the case of *Buchanan* v. *Angus*, and recognised in the case of *Sheppard's Trustee*, were followed, the executors were entitled to succeed, but there were specialties in the latter case, which was only decided by a majority of the Judges consulted—*Weir* v. *Lord Advocate*, June 22, 1865, 3 Macph. 1006, and *Baird* v. *Watson*, Dec. 8, 1880, 8 R. 233.

Argued for heir-at-law—It might have been necessary to convert if Mrs Kippen had made a claim in her lifetime, but until her death the property remained heritable. She knew it was heritable, and her share of it must go to her heir-at-law. There was no necessity to convert after her death. It might be troublesome to prepare the necessary conveyance of the heritable property without conversion, but it was possible. Since the case of *Sheppard's Trustee* v. *Sheppard, &c.*, July 2, 1885, 12 R. 1193, the rule laid down by the House of Lords in the case of *Buchanan* v. *Angus*, May 15, 1862, 4 Macph. 374, governed such cases, and it only allowed conversion where "indispensable to the execution of the trust." The number of beneficiaries interested would not infer conversion unless there was an indication in the deed that conversion was intended—*Duncan's Trustees* v. *Thomas*, March 16, 1882, 9 R. 731. There was no such intention expressed here—*Auld* v. *Anderson*, Dec. 8, 1876, 4 R. 211.

At advising—

Lord Justice-Clerk—Duncan Kippen, who died on 24th April 1879, left a trust-disposition and settlement dealing with his whole estate. The only purposes of that settlement with which we are at present concerned are the sixth and seventh. By the sixth he directs his trustees "to pay to my said wife, in case she shall survive me, for her own use and disposal, out of the capital of the trust-estate, any sum or sums of money she may require, not exceeding in all the one equal half of the residue and remainder of the trust-estate, and that at any time, or from time to time, as she may desire." . . .

By the seventh he directed his trustees at the first term after his wife's death, if she survived him, "to pay and assign to her heirs, executors, and assignees the balance, if any, which shall remain unpaid to her of the equal half of the free residue and remainder of the trust-estate, after reckoning the payments out of capital which may have been made to her by my trustees under the the sixth purpose of the trust."

The trustees were, "for accomplishing the purposes of this trust," empowered to sell and dispose of the truster's whole estate, heritable and moveable, and convert it into money.

Mrs Kippen survived her husband, and died in 1888, having never applied for or received payment out of the capital as provided in the sixth purpose of the trust.

The residue of the trust-estate consisted, *inter alia*, of certain house property in Edinburgh which has been sold since Mrs Kippen died. One-half of the price is £477, and in this special case we are asked to decide whether it is heritable or moveable. On the one hand her heir claims it as heritable, on the other her executors under her will, which conveyed her whole moveable estate, claim it as carried thereby to them.

I have come to be of opinion that the contention of the heir cannot receive effect. The trustees were directed under the husband's trust to allow the widow to draw out of the capital, sums to the extent of one-half thereof—to find for her sums of money up to half that value. She did not indeed exercise the right, being satisfied with what the income of her husband's estate, given her under the fifth purpose of his settlement, afforded her, but she had such a right, to which the trustees had no answer. All they could ask was reasonable time to convert estate into money and pay it to her. I think that shows that her right was moveable, and if it was moveable it fell within her testamentary conveyance of her whole moveable estate.

Lord Young concurred.

Lord Lee—The leading purposes of the testator's settlement are, *first*, to give his wife a liferent of the whole trust-estate, and, *second*, to pay to her, in case she survive him, "for her own use and disposal," any sum or sums not exceeding a half of the residue, it being provided that her liferent shall be restricted to the remainder, but but that if she does not personally receive the half the balance unpaid shall be paid to her heirs, executors, and successors. It was also provided, *thirdly*, that if she predeceased the testator "the said half of residue shall be paid to her heirs, executors, and assignees;" and in the *fourth* place, that the trustees were to divide the other half of the residue at the first term after the death of the longest liver into six parts, which were to be given among the testator's own relatives.

If the wife had predeceased the testator, or if her share of residue did not vest in her, I think that conversion would not take place under the deed in the circumstances stated.

But my opinion is that a vested right to the extent of one-half of the residue was conferred on the wife herself by the terms of the deed.

I think she had a power of disposal to that extent either by assignation or testament, and that this is made clear by the terms of the first portion of the seventh purpose, which directs that in so far as she shall not have personally received the amount it shall be paid—as unpaid balance belonging to her—to her heirs, executors, and assignees.

It appears to me that the case of *Clark's Executors* v. *Paterson*, 14 D. 141, which has always been regarded as authoritative, proceeds on a principle entirely applicable to the present case. That principle is stated by Lord Fullerton as follows (p. 145)—"There may be cases in which a destination to heirs and assignees and a power of testing are not conclusive in favour of vesting, but these must be cases in which the words of the deed cannot be reconciled to vesting. . . . . But postponed payment is as consistent with vesting as with not vesting. I apprehend that when a legacy is so granted that the legatee has the power of testing upon it, or assigning it; to all intents and purposes that legacy vests unless there is the strongest evidence of intention that it shall not vest."

Accordingly that case has been treated by the

writers on the law of testamentary succession as a leading authority, for the proposition that a destination to heirs and assignees of the legatee implies that the legacy is to vest immediately. It in no way conflicts with the decision in *Bell* v. *Cheape*, May 21, 1845, 7 D. 614. For in *Bell* v. *Cheape* it was clear, and was conceded (as appears from the opinion of Lord Mackenzie), that there could be no vesting, the legatee having predeceased the period of vesting.

Such being my opinion on the effect of the deed, I think that the legacy stood vested in the person of Mrs Kippen as moveable estate belonging to her at the time of her death, being merely a claim to the sum which she might have demanded during her life. The amount and position of the estate, as explained to us, were such as permitted of the sum being paid without selling the heritable subjects, and I think that her right to it is carried by her testament as a part of her moveable estate.

I think it contrary to the meaning of the trust-settlement to recognise a right in her heir-at-law to dispute her power of testing upon the amount bequeathed to her under the description of "a sum or sums of money not exceeding one-half of the residue and remainder of the trust-estate."

Lord Rutherfurd Clark was absent.

The Court pronounced the following interlocutor:—

"The Lords having considered the special case, and heard counsel for the parties thereon, are of opinion that the sum of £477 mentioned in the question therein stated is moveable: Find and declare accordingly, and decern."

Counsel for the First and Second Parties—Guthrie—Gunn. Agents—Whigham & Cowan, S.S.C.

Counsel for the Third Parties—D.-F. Mackintosh, Q.C.—Young. Agents—John Baird, L.A.

Wednesday, March 20.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

LAMING & COMPANY *v.* SEATER AND OTHERS.

Ship—Charter-Party—Rights of Mortgagees.

Mortgagees of a ship are entitled to prevent her sailing under a charter-party if their security would thereby be materially prejudiced.

The owner of a steamship, who had obtained advances by mortgages upon the ship, sent her in October to have certain repairs executed. In February, with the view of paying for such repairs, he got additional advances from the same parties by increasing the amount of their mortgages. He made a part payment of their account to the shipbuilders, and gave promissory-notes for the balance, and he also granted them a second mortgage over the ship. The shipbuilders in return renounced any right of lien they might have over the ship, and undertook to have her ready for sea within one month. The owner further undertook to keep the ship insured in favour of the mortgagees, but this was never effected.

Upon 15th April, and while he was still in possession of the ship, the owner chartered her to a firm of merchants for a voyage. On 22nd April the mortgagees entered into possession, declined to give up the ship to the charterers, and on 20th June the ship was sold under the orders of the Court of Session.

The ship was unfit for sea in April, and probably until the middle of August, when she was delivered to the charterers.

Upon 27th June the charterers demanded immediate delivery as they had re-chartered the vessel, and the sub-charterer was pressing them for delivery, and upon 4th July they brought an action against the new registered owner and the mortgagees for delivery, and failing delivery for damages. After delivery had been made in August they restricted the action by minute of 15th November to one of damages.

Held (Lord Lee *diss.*) that the defenders should be *assoilzied*, as the mortgagees had only protected and rendered effectual their legal rights, which would have been materially prejudiced had the vessel been allowed to sail uninsured and in an unseaworthy condition.

Process—Amendment of Record—Court of Session Act 1868, *sec.* 29.

An action was raised to have a steamship forthwith delivered to the pursuers, "or alternatively, in the event of the defender . . . failing so to deliver to the pursuers the said steamship," to have the whole defenders found liable in damages. After evidence had been led, which dealt with damage sustained before the raising of the action, and judgment had been pronounced in the Outer House, the pursuers and reclaimers moved to be allowed to substitute for the words quoted above, the words "and in any event."

Held that the amendment was incompetent, as thereby a "larger sum" and "another fund than that specified in the original summons" would be submitted to the adjudication of the Court.

By charter-party dated 9th October 1886 Messrs William Hunter & Company, shipowners, 12 Waterloo Street, Glasgow, chartered the steamship "Mula," of which Mr William Hunter was the registered owner, to Messrs Alfred Laming & Company, steam shipping agents, 8 Leadenhall Street, London, for a voyage from the United Kingdom to the Mediterranean and back. The voyage under the charter-party was to commence on 25th October 1886, at which date the "Mula" was to be placed at the disposal of the charterers at Tyne, Tees, or London, in their option, the vessel being then in every way fitted for the service. The ship was not delivered to the charterers in terms of the charter-party, but by agreement dated 15th April 1887 the parties thereto agreed that the charter-party should remain in force, the hire being reduced to £240 per calendar month for the first