berately conferred on them. I see no reason at all to question the soundness of the conclusion arrived at by the Courts in Scotland.

LORD MACNAGHTEN—I am of the same opinion.

LORD JAMES OF HEREFORD—I only wish to add one word to what has been said by my noble and learned friends. In concurring in this judgment I think there are some expressions used by the Lord Ordinary to which assent ought probably not to be given in the exact terms used in his judgment. He seems really to shut out the power of review to an extent which I think would be dangerous if it were accepted. There is a power of review in one sense, I will not say of the exercise of their discretion, but where, as Lord Stormonth Darling says, it is clear the bye-law does exceed the powers given, then of course such power to review does exist. For instance, in the case referred to by the learned counsel which Lord Coleridge decided—*Heap* v. *The Rural Sanitary Authority of the Burnley Union*, 12 Q.B.D. 617—where a bye-law laid it down that no pig should be kept within fifty feet of a dwelling-house, of course that would prevent any cottager practically from keeping pigs at all, and there the power of review was exercised and the bye-law was set aside. In the same way here, I think we should be careful to say that we do not shut out the power of review where the power of review had been and ought to be properly exercised. That being so, I assent to the judgment as delivered by Lord Stormonth Darling in the terms in which he has given it.

LORD ROBERTSON—Questions of this kind have frequently arisen in the Scotch Courts, and the principles upon which they proceed are identical with those upon which the Courts in this part of the country have proceeded. They are perfectly well ascertained, and I do not think they require declaration.

The question in the present case seems to me not to admit of argument, and I am bound to say after the long speech we have heard from the learned counsel I do not think it has been argued in any proper sense of the term.

LORD ATKINSON—I concur. I think it is perfectly clear upon the construction of the sections and the bye-law that the bye-law is not *ultra vires*, and I see nothing to show that it is unreasonable.

LORD COLLINS—I concur.

Appeal dismissed with costs.

Counsel for the Pursuers, Reclaimers and Appellants — Crabb Watt, K.C. — T. B. Morrison, K.C. Agents — Borland, King, Shaw, & Company, Writers, Glasgow—Dove, Lockhart, & Smart, S.S.C., Edinburgh—Balfour, Allan, & North, London.

Counsel for the Defenders and Respondents—The Lord Advocate (Shaw, K.C.)—Talbot, K.C. Agents—Donaldson & Alexander, Writers, Glasgow—Simpson & Marwick, W.S., Edinburgh—Grahams, Currey, & Spens, Westminster.

COURT OF SESSION.

Saturday, February 2.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

AKTIESELSKABET "LINA" *v.* GEORGE V. TURNBULL & COMPANY.

Harbour—Ship—Harbour and Dock Rates — "Convenience" — Ship Coming into Harbour to be Handed over to Charterer —Leith Harbour and Docks Act 1892 (55 *and* 56 *Vict. cap. clxxvii*), *Schedule B, Branch I, and Schedule C* (4).

The statutory regulations of a harbour provided that all vessels entering the harbour "only for safety, convenience, or repairs, shall be charged half rates, but if they shall land or take on board goods or remain in the harbour or docks above one month they shall be charged full rates."

Held that a vessel bound under charter-party "to be placed at the disposal of the charterers" there, entering the harbour for that purpose, was not entitled to the reduced charge.

Ship — Charter-Party — Time Charter — Quarantine—Liability of Charterers to Pay Hire while Vessel in Quarantine.

A vessel which had been hired under a time-charter for employment between ports in the United Kingdom and on the Continent was detained in one of such ports for some days under quarantine. The charter-party made provision for the hire ceasing in certain events, but did not mention "quarantine." It contained, however, a clause "mutually excepting" "restraints of princes and rulers," &c.

Held that the charterers were liable for hire for the period during which the vessel was so detained.

The Leith Harbour and Docks Act 1892 (55 and 56 Vict. c. clxxvii), sec. 58, *inter alia*, enacts—". . . It shall be lawful for the Commissioners, and they are hereby authorised, to demand, levy, collect, and receive from the owners, proprietors, or consignees of all goods, merchandise, wares, or commodities whatsoever, which shall be imported into or exported from the harbour and docks . . . of Leith . . . in any ship, vessel, bark, boat, lighter, or otherwise, the rates specified in Schedule (A) to this Act; from the owners of every ship, vessel, bark, boat, or lighter coming into or going out of the harbour and docks or precincts of the port aforesaid, or the agents or managers of such owners, the rates on vessels specified in Schedule (B) to this Act, both sub-

ject to and in conformity with the regulations applicable to such Schedules (A) and (B) contained in Schedule (C) to this Act. . . ."

Schedule (B), Branch I, "Rates on Vessels," provides a charge "Per register ton per inward voyage in each year between Whitsunday and Whitsunday;" and for all vessels "from Norway, Sweden, Denmark, Holstein, Hamburg, Bremen, Holland, and Flanders that is within the Baltic, and no further south than Dunkirk" the charge is 5d. "first eight voyages in year per ton."

Schedule (C), *inter alia*, contains the following regulation (No. 4):—"All vessels entering the harbour and docks (including Newhaven) only for safety, convenience, or repairs, shall be charged half rates, but if they shall land or take on board goods, or remain in the harbour or docks above one month they shall be charged full rates. . . ."

Aktieselskabet "Lina" of Christiania, Norway, registered owners of the steamship "Lina," and Oluf Martin Mohn, her managing owner, brought an action in the Sheriff Court at Edinburgh against George V. Turnbull & Company, merchants, Leith, the charterers of the said steamship, in which they sought to recover (1) £6, 19s. 7d., and (2), £23, 15s. 8d., two sums which had been deducted by the defenders when paying her hire.

The charter-party of the said steamship, *inter alia*, provided—"That the former party agree to let, and the latter agree to hire, the said steamship or vessel for the term of *six* calendar months, commencing from the 5/10*th* day of *May* 1905, at which date she is to be placed with clear holds at the disposal of the charterers at Leith . . . she being then tight, staunch, and strong, and every way fitted for the service, and being maintained by owners with a full complement of officers, seamen, engineers, and firemen necessary for a steamer of her tonnage and class, to be employed in such lawful trades between such ports in the United Kingdom or on the Continent *including White Sea and both coasts of Mediterranean Sea—regular Hamburg coal trade excluded*—as charterers or *their* agents shall direct, on the following conditions:—1. That the owners shall provide and pay for all provisions and wages of the captain, officers, engineers, firemen, and crew; and shall pay for the insurance on the vessel, and for all necessary stores, including fresh water required for the engine-room, and provide and pay for the necessary equipment for the proper and efficient working of the said steamer, maintaining her in a thoroughly efficient state for and during the service. *Owners to pay Norwegian Consular expenses.* 2. That the charterers shall provide and pay for all the coals, fuel, port charges, pilotages, agencies, and all other charges and expenses whatsoever except those before stated. 3. . . . 4. That the charterers shall pay for the use and hire of the said vessel at the rate of £295 *Br. Stg. less* 2½ *per cent. address comm.* per calendar month, commencing on and from the day of her delivery as aforesaid, and at and after the same rate for any part of a month, hire to continue from the time specified for commencing the charter until her re-delivery to owners (unless lost) in the same good order and condition as when accepted (fair wear and tear only excepted) at a port in the United Kingdom or Continent between Hamburg and Bordeaux inclusive. 5. . . . 12. That in the event of the loss of time from a deficiency of men or stores, breakdown of machinery, or damage preventing the working of the vessel for more than twenty-four running hours, the payment of hire shall cease from the time the breakdown, &c., occurred until she be again in an efficient state to resume her service, but should the vessel be driven into port or to anchorage by stress of weather or from any accident to the cargo, such detention or loss of time shall be at the charterers' risk and expense. 13. The Act of God, the King's enemies, fire, restraints of princes and rulers, and all and every other dangers and accidents of the seas, rivers, navigation, and machinery, of whatever nature and kind soever, always mutually excepted. . . ."

The *facts* of the case are given in the findings in fact (accepted by parties as correct) contained in the following interlocutor pronounced by the Sheriff-Substitute (HENDERSON) on 30th November 1905—"*Finds in fact*—(1) that by time charter, dated 28th April 1905, the defenders hired from the pursuers the steamship 'Lina' for a period of six months, commencing between 5th and 10th May 1905, the hire to be paid half-monthly in advance; (2) that the charter-party provided that at the date of delivery the vessel was 'to be placed with clear holds at the disposal of the charterers at Leith in such dock, or wharf, or place' . . . 'as the charterers may direct;' (3) that on 8th May 1905 the 'Lina' was taken delivery of by the charterers at Leith; (4) that the vessel had arrived in Leith in ballast from Kallundborg, in Holland, and had entered the harbour and port of Leith in that state for delivery to the charterers; (5) that on 15th May the charterers sent the pursuers a statement as to the half-month's hire, made up as at 12th May, in which they deducted from the hire payable £13, 19s. 2d., being the sum of 5d. per ton which they had paid to the Leith Dock Commissioners as the rates due under the 'Leith Harbour and Docks Act 1892, Schedule (B), Branch I., Rates on Vessels,' according to which vessels from Holland which entered Leith were so chargeable; (6) that thereafter, on 8th June, the charterers, when rendering their statement with regard to the half-month's hire then due, deducted £23, 15s. 8d. sterling, being, as they stated, two and a half days' hire for the time when the vessel was detained in quarantine at a port in Spain; (7) that the pursuers as owners and hirers out of the vessel objected at the time to each of the deductions above claimed by the charterers, and that they have now raised the present action to recover (*a*) one-half of the 5d. per ton paid as dock dues on the 'Lina,' and (*b*) the whole of

the amount deducted while the vessel was in quarantine: In these circumstances, *Finds in law*—(1) that the pursuers have failed to establish that, upon a true construction of the charter-party and of the Leith Harbour and Docks Act 1892, they are entitled to repayment of one-half of the tonnage rate paid upon their vessel by the charterers, and assoilzies the defenders from said claim accordingly; but (2) that they are, under the conditions of their contract with the charterers (defenders), entitled to repayment of the sum improperly deducted in name of detention during quarantine: Therefore grants decree against the defenders for the sum of £23, 15s. 8d. sterling in terms of the conclusions of the petition: Finds the pursuers entitled to expenses: . . ."

On an appeal by the defenders the Sheriff (MACONOCHIE), on December 21, 1905, pronounced an interlocutor in which he recalled his Substitute's first finding in law, giving the pursuers decree for the sum of £6, 19s. 7d., and *quoad ultra* affirmed his Substitute's interlocutor, the defenders to pay the expenses of the appeal.

The defenders appealed, and argued—(1) The defenders were justified in deducting the sum first sued for, £6, 19s. 7d. Under the provisions of Schedule B (Branch I), by which the rates chargeable were enacted and governed, the rate payable by all vessels coming from Holland to Leith was 5d. per ton for the first eight voyages in each year. Accordingly the rate payable by the 'Lina,' unless she could be brought under some exception, was 5d. She did not fall under the only exception, that contained in Schedule C, Regulation 4, whereby half-rates only were to be charged, for "safety" and "repairs" were not in question, and as to "convenience," it could not be said that a vessel which had, under the terms of a charter-party, to be placed "at the disposal of the charterers at Leith," entered that harbour "only for convenience." (2) The defenders were also justified in deducting the sums second sued for, £23, 15s. 8d. By article 13 of the charter-party "restraints of princes and rulers" were mutually excepted. This meant that loss thereby occasioned lay where it fell, *i.e.*, on the ship. Quarantine was a restraint of princes—Carver on "Carriage by Sea," 4th ed., art. 82, p. 100; "*Il Progreso*," 1892, 50 Fed. Rep. 835; *Brunner* v. *Webster*, 1900, 5 Com. Cas. 167; Scrutton on Charter-Parties, 5th ed., art. 82, p. 187—and the loss accordingly fell on the ship and her owners. The ship was not during the period of quarantine at the disposal of the charterers, who accordingly ought not to have to pay hire for that time—*Whites* v. *Steamship Winchester Company*, February 5, 1886, 13 R. 524, 23 S.L.R. 342.

Argued for the respondents (pursuers)—(1) The pursuers were entitled to payment of the sum first sued for, £6, 19s. 7d., which the defenders were not justified in deducting. Under sec. 58 of the Act, Schedule B was to be read subject to and in conformity with Schedule C. Regulation 4 of Schedule C showed that landing or taking on board goods, or, what was not here in question, staying more than a month, were the criteria of the exigibility of full rates. The "Lina" did not fall within these categories. She neither came to land goods, for her holds were clean, nor, so far as concerned the owners, to load. The charterers were not bound to load at Leith, but might have done so anywhere within the permitted geographical area. Accordingly as regards the owners the "Lina" must be held to have come in for safety or convenience or repairs, and safety and repairs being out of the case must be held to have come in for convenience. The result of upholding the defenders' contention would be that they would, without payment of rates for the "Lina," have got the use of the harbour. (2) Nor were the defenders justified in deducting the sum second sued for, viz., £23, 15s. 8d., being the hire payable for the vessel while detained in quarantine. *Whites* v. *Steamship Winchester Company, cit. sup.*, did not apply. It was the case of a freight charter, and the vessel had never been at the disposal of the charterers—was never an arrived ship. The charter here in question was a time charter, and the charterers after selecting a port and ordering the captain, who was bound to obey their order, to proceed there, were not entitled thereafter to refuse to pay the hire due for the period of detention through quarantine. The charterers had a wide choice of ports free of quarantine restrictions. Article 12 detailed in full the occasions upon which hire was to cease. That it was to cease in circumstances quite different from those provided for was not to be implied. Article 13 was not to apply to the cesser of hire at all, but applied where performance of the various obligations *hinc inde* contained in the charter-party was rendered impossible by restraint of princes, &c.—*Hough* v. *Herd*, 1885, 54 L.J., Q.B. 294.

At advising—

LORD JUSTICE-CLERK — Upon the first question in this case, viz., whether the owners of the "Lina" are liable for the whole or only for one-half of the dock dues of the "Lina" when she came to Leith in fulfilment of her chartering conditions, I am of opinion that the conclusion at which the Sheriff-Substitute arrived was right and that the reversal of his judgment by the Sheriff was erroneous.

Tonnage rates necessarily became due when the "Lina" was brought to the port by the owners, which they had to do in order to fulfil their contract to deliver the ship to the charterers. But the owners maintain that only half dues were exigible, because in the circumstances the 4th regulation in Schedule C of the Leith Harbour and Docks Act applies. By that regulation vessels entering only for safety, convenience, or repairs, shall only be liable for half rates. It is plain that neither the first nor the third categories apply, and therefore the owners' contention must be tested by the words "only for . . . convenience."

I am unable to hold that the "Lina" came into the harbour for convenience only. To me it seems quite erroneous to hold that a vessel which is brought into a harbour because her owners are under contract to deliver her there to those who have chartered her, can be held to be there for convenience only. She is brought there because her owners are bound to bring her there by their contract, in order that the charterers may take her over to be used in their business. I therefore think that on this part of the case we ought to revert to the judgment of the Sheriff-Substitute.

Upon the second question I agree with the views of the Sheriff and Sheriff-Substitute. The charterers taking the control of the vessel to do their work during a certain time, the owners fulfilled their part of the contract if they provided a staunch seaworthy vessel capable of doing the sea-work stipulated for. The question then comes to be, is a vessel which is detained in quarantine under such a contract debarred from claiming freight during the days of quarantine. There is no clause which declares this in terms, and therefore it can only be made out by inference. I am unable to find in the charter-party anything from which such an inference could be reasonably drawn to exclude such days from the running of the time for which freight is to be paid. I therefore am in favour of adhering to the judgment of the Sheriff on this part of the case.

LORD STORMONTH DARLING—The owners of the Norwegian steamship "Lina" raised this action in the Sheriff Court of the Lothians and Peebles against the charterers to recover two sums which, as they say, were improperly deducted by the charterers when they remitted the first half-monthly freight payable under the charter. There are thus two distinct questions raised by the action, the first being whether the dock dues payable on the vessel entering Leith Docks for the purpose of delivering her to the charterers are payable wholly, or only to the extent of one-half, by the owners; and the second question being whether the charterers are entitled to deduct from the hire due by them a portion of it applicable to certain days during which the ship was detained in quarantine at a Spanish port.

The late Sheriff-Substitute (Mr Henderson) decided the first question against the owners, and assoilzied the defenders from the claim by the owners to recover one-half of these dock dues, but he decided the second question in favour of the owners, and gave decree for the sum improperly retained by the defenders in respect of detention during quarantine. The Sheriff was of a different opinion as regards the first question, but agreed with his Substitute as regards the second. I am of opinion that we ought to affirm the judgment of the Sheriff on the second question, as to which both are agreed, but that on the first question we should return to the judgment of the Sheriff-Substitute.

The first question depends on the language of the Leith Harbour and Docks Act 1892 and relative schedules. Now, the rates payable on vessels under Schedule B being tonnage rates, and being a charge necessarily payable by the owners before they could fulfil their obligation under the charter-party to place the vessel "at the disposal of the charterers at Leith," the owners can only make out a case for half-rates as against full rates by pointing to some exception in the Act or its schedules. Accordingly, they found on Schedule C, Regulation 4, the leading provision of which is—"All vessels entering the harbour or docks (including Newhaven) only for safety, convenience, or repairs shall be charged half rates." The Sheriff admits that safety or repairs being out of the case, the question depends on whether the "Lina" can be said to have come in for "convenience" in the sense of the Act, and he reaches the conclusion that she must be held to have come in for convenience (or, to put it more literally, "only for convenience"), because he holds that every ship which is not coming in to land or take on board goods falls within the reduction to half rates. It is here that I take leave to differ from the learned Sheriff. I think the simpler test is the positive one whether she comes in only for convenience, and this can never be said of a vessel which comes in because she is bound to come in.

The second question depends on the terms of the charter-party and on the ordinary rules of maritime law. Both Sheriffs lay stress on this being a time charter, and in my opinion that affords a sufficient ground of judgment. The owners had no voice in the question as to what ports (within the defined limits) their ship was to be sent to, and the correlation of that limitation was that hire should go on at a certain rate so long as they continued to furnish a seaworthy ship capable of performing its stipulated service. Quarantine may or may not be a "restraint of princes and rulers," but even if it is, and as such is "mutually excepted," it does not follow that payment of hire calculated by time should be suspended during the whole course of its continuance. There is no substantive stipulation to that effect either in article 4 or article 12 of the charter-party, where you would naturally expect to find it if it were intended. The argument for the charterers is a mere matter of inference from the terms of article 13, and in my opinion the inference is not warranted by the provisions of the charter-party read as a whole.

LORD LOW—I am of the same opinion, and for the reasons stated by your Lordship.

LORD KYLLACHY was absent.

The Court recalled the interlocutor of the Sheriff dated 21st December 1905; found in fact and in law in terms of the findings in fact and in law in the interlocutor of the Sheriff-Substitute, dated 30th November 1905; ordained the defenders to make payment to the pursuers of the sum of £23,

15s. 8d., with interest thereon at 5 per cent., and decerned, finding the pursuers entitled to expenses in the inferior Court since 30th November 1905, and to two-thirds of the expenses in the superior Court.

Counsel for the Pursuers (Respondents)—Aitken, K.C.—F. C. Thomson. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Defenders (Appellants)—Dickson, K.C. — Horne. Agents — Beveridge, Sutherland, & Smith, S.S.C.

Tuesday, February 5.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

TRAIN *v.* BUCHANAN'S TRUSTEES.

Succession—Trust—Discretion of Trustees—Direction to Pay "either the Whole or only a Portion of the Annual Revenue," subject to Discretion of Trustees—Scope and Exercise of Discretion.

A testator directed his trustees to set aside and hold a certain sum and to pay to a beneficiary during his lifetime "either the whole or only a portion of the annual revenue thereof, and that subject to such conditions and restrictions, all as my trustees in their sole and absolute discretion think fit;" and on the beneficiary's decease to pay the sum, "with any revenue accrued thereon that has not been paid" to the beneficiary, to the beneficiary's children; and failing such children, the sum "and accumulations of revenue, if any," were to fall into residue.

In an action against the trustees by an assignee of the beneficiary, in which he claimed certain accumulations of income on the ground that the beneficiary had right thereto, the trustees never having of set purpose decided what portion of the annual revenue the beneficiary was to receive and having paid him only trifling sums, *held* that the testator's intention was that any revenue not paid to the beneficiary should be accumulated; that the payment to the beneficiary was in the discretion of the trustees; that it was not necessary that the trustees should have decided of set purpose from year to year what portion of the annual revenue the beneficiary was to receive, provided they exercised the discretion and that reasonably; and that such reasonable discretion having been exercised, the action fell to be dismissed.

Circumstances in which held that the actings of trustees were a reasonable exercise of the discretion conferred on them.

On August 8, 1904, Isabella Train, residing in Eskbank, brought an action of reduction, count, reckoning, and payment against, *inter alios*, Alan Ernest Clapperton, writer, Glasgow, and others, the trustees and executors of Hugh Buchanan, sometime wine and spirit merchant, Dumbarton Road, Glasgow. Train was assignee, in respect of a bond and assignation in security for £650, of Andrew Buchanan, 65 Yorkhill Street, Glasgow, the next-of-kin and heir-at-law of the said Hugh Buchanan, his brother. She sought to reduce Hugh's trust-disposition, or alternatively to obtain a count, reckoning, and payment with regard to the provision therein in Andrew's favour, but on learning of a prior unrevoked will she dropped the reductive conclusion.

The provision in Hugh Buchanan's trust-disposition in favour of Andrew Buchanan was—"(*Third*) I direct my trustees to set aside and invest in their own names, as trustees, a sum of £5000, and to pay to my brother Andrew Buchanan, during his lifetime, either the whole or only a portion of the annual revenue thereof, and that subject to such conditions and restrictions, all as my trustees in their sole and absolute discretion think fit: And after the decease of my said brother I direct my trustees to hold and apply, pay and make over, said sum of £5000, with any revenue accrued thereon that has not been paid to my said brother, less the expenses of administering and dividing said funds, to or for behoof of the whole lawful children of my said brother equally among them: . . . And in the event of my said brother Andrew dying without leaving lawful issue who shall take a vested interest as aforesaid, said sum of £5000 and accumulations of revenue, if any, less expenses of administration as aforesaid, shall fall into and form part of the residue of my estate."

Hugh Buchanan, the testator, died on 25th June 1899, and his trustees had since paid to Andrew Buchanan certain small sums which together came to about £24.

The pursuer, *inter alia*, pleaded—"(6) The defenders not having exercised their discretion as to the amount of income to be paid, within a reasonable time, are barred from exercising it now to the prejudice of pursuer; *or* otherwise, the defenders are bound to exercise their discretion annually, and as they have not hitherto done so, the whole annual income of Andrew Buchanan's provision up to the present date is due to him or to pursuer as his assignee, and available for the payment of pursuer's claim."

The defenders, *inter alia*, pleaded—"(7) In any view any claim to the revenue of the said provision competent to the pursuer as assignee of the said Andrew Buchanan is subject to the discretionary powers conferred on the defenders by the testator."

The facts with regard to the defenders' administration of the trust estate are given in the opinion of the Lord Ordinary (SALVESEN), who on 19th January 1906 pronounced an interlocutor, *inter alia*, finding "that the pursuer is entitled to the whole free revenue under deduction only of the sum of £24 of the capital sum of £2865, 3s. 6d., being the amount available to meet the provision of £5000 in favour of Andrew Buchanan, and that from 25th June 1899 to 2nd June 1904," &c.