only two children of the Dymocks alive, viz., Robert Lockhart, who was born in 1842, and John Gray, who was born in 1844. The deed was executed in 1862, and both these young Dymocks were then alive, but they died soon afterwards—one, Robert Lockhart, predeceased both parents, and the other, John Gray, survived his mother, but predeceased his father. So the question is, whether the fee of the £6000 settled on the Dymock family vested in these young men on the death of the testator, or whether, by their predeceasing their parents, it lapsed and went to the next of kin? The clause in the deed of directions directs the trustees to pay to "Elizabeth Gray or Dymock, wife of Robert Dymock, Esq., Procurator-Fiscal of the city of Edinburgh, exclusive of her husband's *jus mariti* and power of administration, the yearly interest or produce of the sum of £6000 of my capital stock of the Bank of Scotland, and in the event of her predeceasing her husband, to pay the said yearly produce to him during his life."

Now if the clause had stopped here the fee would have certainly been undisposed of. But the clause goes on to make a gift in favour of the children. "And on the death of the survivor of them, I direct the capital of said stock to be paid or transferred to their child or children who may be then alive, in such shares, if more than one, as the parents may have appointed jointly during their life, and failing such appointment by them jointly, as the survivor of them shall appoint, which also failing, among the said children equally."

Now it seems to me that this is a direction to pay the capital of the stock to the child or children who are alive at the death of the longest liver of the parents. It means that the person or persons then alive are to take, and nobody else. The gift is to the persons or person alive at a certain event, and therefore it is impossible to say that there was any vesting before that event happened.

Some other provisions of the deed were referred to in argument, but I think that they all bear as strongly on the one side as on the other. Take, for example, the provision to Mrs Swan. The direction is "to pay to Mrs Penelope Ogle or Swan, my niece, wife of James Swan, assessor of the shire of Renfrew, the interest of £12,000, to be invested by them in stock of the Banks of England or Scotland, or in landed security in Scotland, and that during her life, exclusive of the *jus mariti* and power of administration of her husband, and exclusive of his creditors, and after her death to pay the same to her said husband, if he survive her, during his life, and after his death to pay the capital sum to their children, in such shares as they, or failing their doing so, the survivor of them, shall direct in writing, or failing thereof, to the said children equally." Now, in reference to this clause it was argued that it was the intention of the testator to make the same kind of provision for the Dymocks as is here made for the Swans; but, unfortunately for the contention, the wording of the clauses stand in clear contrast to each other. So, as little light is thrown upon the matter by the other clauses of the deed, I think that we must take the clear meaning of the words of the clause. Taking the clause in this way, it is plain that nothing vested in any child who died before the last survivor of the parents. I am therefore of opinion that the first question must be answered against the first party.

The second question is, whether, supposing the bequest to have lapsed, the residuary legatees take? or whether there is intestacy as regards this fund? Now in the deed there is a proper residuary bequest, for the testator directs the residue of his estate to be divided into four equal parts, two whereof are to be paid to Mrs Swan, one to Mr Gray, and one to Mrs Dymock. The presumption is always against intestacy; and there is nothing here to prevent the residuary bequest from sweeping up everything which would otherwise have gone to the heir *in mobilibus*.

The other Judges concurred.

The Court held that the bequest of the capital of the £6000 stock of the Bank of Scotland had lapsed, and that the said sum formed part of the residue of Mr Storie's trust-estate.

Counsel for the First Party—Watson. Agents—J. & A. Hastie, S.S.C.

Counsel for the Second Party—Miller and Lancaster. Agents—Mackenzie & Kermack, W.S.

Counsel for the Third Party—Asher and J. A. Reid. Agents—Leburn, Henderson, & Wilson, S.S.C.

Saturday, February 22.

SECOND DIVISION.

[Lord Gifford, Ordinary.

LORD ADVOCATE (FOR BOARD OF TRADE) *v.* CLYDE STEAM NAVIGATION COMPANY.

Merchant Shipping Act, 1854 — *Registration of Tonnage—Permanent closed-in space.*

Certain alterations on a steam-ship necessitated a new registration, owing to increase of tonnage thereby. *Held*, that in computing the increase the space between a hurricane deck and the ordinary deck did not fall to be reckoned,—not being a "permanent closed-in space" in terms of the Act.

This case came up by reclaiming-note against the interlocutor of the Lord Ordinary (Gifford). The questions involved had reference to the steamship 'Bear,' the property of the Company, and to the mode in which the registered tonnage thereof should be calculated. The Board of Trade sought in their summons to have it found "that the proper registered tonnage of the steamship 'Bear' of Glasgow, belonging to the defenders, ascertained in accordance with the rules for the admeasurement of tonnage prescribed by 'The Merchant Shipping Act, 1854,' is not less than 585·46 tons, conform to certificate of survey and measurement by Martin Costelloe, the surveyor of shipping at Glasgow, appointed by the Commissioners of Customs to superintend the survey and admeasurement of ships under 'The Merchant Shipping Act of 1854,'" and, further, "that the tonnage of the said steamship, as registered in the 'Register Book' kept by the registrar of shipping at Glasgow, as described in the certificate of registry No. 99 in 1870, granted to the defenders in terms of said Act, was erroneously computed at 331·97 tons, and that said ship has been properly re-measured in terms of the certificate of survey and measurement foresaid, and that the said register book and certificate of registry should be corrected accordingly."

It was stated for the pursuers that certain alterations on the ship had increased her tonnage largely; but the defenders, while admitting that certain alterations had been made, denied the right of the pursuers in a re-measurement to calculate the tonnage on principles asserted to be different from those which formed the basis of the original measurement. The alterations made had given an increase of 58·79 to the proper register tonnage of the 'Bear,' but the claim of the Board would have had the effect of adding about 189 tons to the register tonnage.

In the statement of facts for the defenders, the real question at issue was set forth as follows—

"The ship 'Bear,' which was built on the Clyde, was contracted for by the defenders in January 1870. She was intended for the coasting trade, having on the ordinary upper main deck the usual air-openings, companions, gratings, scuppers, port-holes, hawser-holes, pumps, sounding-rod holes, shoots for coals, and shoots for ashes, sluice-valves, feed for water-tanks, and large openings in the bulwarks, with mere doors attached by hinges. The vessel was built according to the latest improvements. In particular, a hurricane deck was constructed covering portions of the ordinary deck, making the ship more safe, and insuring the greater comfort of the passengers generally, especially of steerage passengers, and also so far protecting cattle and other live stock, but not forming a spar or third deck, and not increasing the carrying capacity of the vessel, and not forming a closed-in space in the sense of the statute, but having, on the contrary, a variety of permanent openings. In the forward part of the ship there was a cut of no less than 26 feet across the deck, 13 feet 9 inches fore and aft, and 7 feet 2 inches deep. When the ship was ready she was measured by the officials of the Customs, acting under and in conformity with instructions by the Board of Trade, and was registered as No. 99 in 1870, of the tonnage of 331·97, and as having two decks, 'the upper one being deemed incomplete.' The usual certificate to that effect was delivered to the defenders. The principle on which the measurement was made was conformable to the statute, as well as to the mode in which the statute had been uniformly acted on from the time it came into operation, and on the faith of which the 'Bear,' and large numbers of other vessels of this class, had been constructed."

The case thus turned on whether the 'Bear' was to be regarded as a "two-decked" or a "three-decked" ship. Whether, in a word, the space between the tonnage-deck and the upper or spar-deck, intervening between the aft end of the forecastle and the front poop, was or was not to be measured in conformity with the provisions of the Merchant Shipping Act 1854. On 18th May 1872 the Lord Ordinary, before answer, remitted to Mr Mumford, Lloyd's surveyor, Glasgow, to report "as to the present state and position of the main deck of said vessel, and of the erections, structures, and coverings thereon, as far as the same relate to or bear upon the question as to the measurement for the registered tonnage of the said steamship; and, in particular, to compare the said steamship with the model No. 11 of process, and to make such alterations on or addition to the said model as he may think necessary to show the existing state of the said ship in reference to the question of measurement, with power, if necessary, to make any further or additional model; and further, to report on any matter of structure of the said ship which either party may suggest as bearing upon the question at issue, and requests the reporter to return his report *quam primum*."

The interlocutor and Note of Lord Gifford in the previous case of *The Leith, Hull, and Hamburg Steam Packet Company* v. *The Board of Trade, &c.*, of date 30th January 1872, were printed in an appendix as follows—"The Lord Ordinary having heard parties' procurators, and having considered the closed record, the report by Thomas H. Eastlake, Esq., the objections thereto, and whole process—Repels the objections stated by the defenders to Mr Eastlake's report, in so far as said objections are directed to specific statements contained in said report upon matters of fact relating to the structure of the ship in question, or of erections or coverings thereon; *Quoad ultra* finds that the said objections do not render necessary or expedient any further remit to Mr Eastlake or to any other reporter, and refuses the defenders' motion for such further remit: Finds and declares in favour of the pursuers in terms of the whole declaratory conclusions of the summons, and decerns: And in reference to the petitory conclusion of the action, finds that the pursuers' steamship 'Danzig' ought to be re-measured in terms of the preceding declaratory judgment, and in terms of 'The Merchant Shipping Act, 1854,' and Acts and Regulations relative thereto, and, if necessary, appoints the case to be enrolled for further procedure in reference to said re-measurement: Finds the pursuers entitled to expenses, and remits the account thereof when lodged to the auditor to tax and to report.

"*Note.*—The Lord Ordinary is fully sensible of the very wide and general importance of the question raised in the present action. He feels that the decision will not only affect the pursuers and the particular ship now in question, largely diminishing the dues and burdens payable on said ship, and the expense of trading with the vessel, but will also govern the cases of other ships similarly constructed, and not only so, but will affect the plan and structure of steamships which may hereafter be built. The question may even influence beneficially or injuriously the safety and sea-going qualities of steam vessels, and thus indirectly it touches the highest interests of life and property.

"The Lord Ordinary feels bound, however, to a great extent to disregard these considerations, and to confine himself to the fair and sound construction of the statutory provisions contained in the Merchant Shipping Act of 1854, with the relative Acts and Regulations. If these statutory provisions, fairly read and applied, are injurious to shipping interests, and still more, if they produce or encourage a dangerous or unseaworthy construction of vessel, the remedy is with the Legislature and not with the Court.

"At the same time, it gives the Lord Ordinary satisfaction to think that, so far as he can understand the matter, the judgment now pronounced, while undoubtedly favourable to ships constructed like the 'Danzig,' will not lead to danger either to passengers or to cargo. It appears to the Lord Ordinary that a ship with deck coverings like those with which the 'Danzig' is fitted is not thereby rendered unsafe, but that the coverings contribute to its safety in heavy seas; provided always (and this is a proviso which applies to all

ships whatever) that it be not overloaded, and that its cargo is not improperly distributed.

"The leading provision which is made the subject of construction in the present action is the 4th sub-section of the 21st clause of the Merchant Shipping Act, 1854 (17 and 18 Vict., cap. 104). The opening words of the sub-section provide for the measurement of certain spaces on or above the upper deck of the vessel. In the present action there is no question relating to spaces below the upper or weather deck. The words of the Act are —'If there be a break, a poop, or any other permanent closed-in space on the upper deck available for cargo or stores, or for the berthing or accommodation of passengers or crew, the tonnage of such space shall be ascertained as follows.' The rules for measurement are then given.

"The words above quoted do not seem to be affected by any regulations made or issued under the authority of the Act. It appears that such regulations exist, though they are not mentioned on record.

"The steamship 'Danzig' has a poop or closed-in space on the after part of the upper deck. It has also a forecastle or closed-in space for the crew constructed on the upper deck at the bow of the vessel. There are also certain deck-houses amidships for the accommodation of the officers, and for other purposes. Regarding all these there is no question. They are all measured in the tonnage, or, as it might with more accuracy be called, the roomage of the ship, each hundred cubic feet of space being called a ton.

"As the ship was originally constructed, there were, and there are still, a bridge and a hurricane deck, both of which constitute partial coverings of the upper or weather deck of the vessel; but the spaces under the bridge and under the hurricane deck, so far as not enclosed into deck-houses, was not measured, and as the ship was originally made, it was admitted would not be measurable under the statute. So stood the ship when finally measured in 1866, her tonnage then being at 466·65 tons.

"In 1870 a round-house was built for steerage passengers, and this being measured added about 20 tons, making the whole tonnage 480·48 tons, but still no attempt was made to measure the covered spaces under the bridge and hurricane deck. In the beginning of 1871 the pursuers constructed an additional covering over the upper deck of the vessel, extending from the after end of the forecastle, and joining with the front edge of the bridge. The custom-house authorities immediately claimed that this made the whole space so covered a closed-in space in the sense of the statute, and that it fell to be measured and added to the tonnage. After some communings this was ultimately done, and the added tonnage came to no less than 84·78 tons. It is of this addition that the pursuers complain, and to try the question the present action has been brought.

"In the Lord Ordinary's view the question depends on the words of the statute, and on a comparison of the statutory words with the actual condition and structure of the vessel. He found it necessary to make a remit to Lloyd's surveyor to ascertain some disputed matters of fact relating to structure; but he declined to allow a proof at large, which would have embraced a great many matters. The interlocutor of remit was affirmed of this date (2d December 1871).

"The reporter, Mr Eastlake, has made a very clear and distinct report, which, with the model in process, and with the admissions on record, seem to embrace all the elements necessary for judgment. The defenders have objected to Mr Eastlake's report, and they asked a new remit to him, or to some one else. The Lord Ordinary has refused this motion. The objections resolve themselves into two classes. *First*, Those which allege that Mr Eastlake has reported wrongly on matters of fact within his own observation as to the structure of the vessel. The Lord Ordinary sees no ground for this class of objections, and he repels them. The second class of objections is that Mr Eastlake has omitted to report upon a great variety of matters specified. The Lord Ordinary has carefully gone over all those matters, and he thinks that they may either be assumed as fairly within the knowledge of the Court, or that they are immaterial to the question at issue. No new remit therefore seems necessary.

"After the best consideration which the Lord Ordinary can give, he is of opinion that the space under the new covering which has been constructed on the 'Danzig' is not in the sense of the statute 'a break, a poop, or any other permanent closed-in space on the upper deck, available for cargo or stores, or for the berthing or accommodation of passengers or crew.' His grounds for this opinion are shortly the following:—

"(1.) The space in question is not a 'break' or 'poop.' Of course it is not a 'poop,' but there was originally some question whether it might not be a 'break,' though the word is not reported upon by Mr Eastlake. It seems clear, however, that a break is an interruption or termination in structure of the deck, and as the deck remains unbroken from poop or forecastle, it was not ultimately contended that that word applies.

"(2.) The space is not 'a permanent closed-in space.' In one sense the covering may be said to be 'permanent,' for it is not intended to be removed, and access is given through it by a hatchway; but then the space is not in any fair sense 'closed-in.' The space is not shut off from the deck as a round-house or deck-house is, but though covered, it is just part of the weather deck as before. Leaving out of view for the present the water-ports, mooring-pipes, mooring-bits, and scuppers, all of which open under the covering, it is sufficient to observe that the space is not at all closed in aft, and that there are no means for closing it aft. No doubt the round-house on the deck is at the aft end of the covered space, but on either side of the round-house there is left 5 feet 7 inches of clear deck leading under the covering, and these spaces are always open. In short, the covered space, though closed more or less on three sides, is open on the fourth side—that it is open aft—and this seems enough to prevent it from being in the sense of the statute a 'closed-in space.' It is true that the words must be reasonably construed, and the Lord Ordinary would not have touched the decision of the surveyors if there had been a mere pretence of leaving openings to evade the statute. He thinks, however, that this cannot be contended, and that there is in the present case a clear distinction between a covered or sheltered space and a 'closed-in space.'

"(3.) In another sense the space in question is not closed-in, because it remains really part of the main-deck of the vessel, which is at least sometimes

needed for the working or management of the ship. The water-ports open into this space, and though they may be closed more or less tightly (even tallow may be used to make the door fit sweetly and closely), they cannot be made, and are not intended to be made, water-tight. The mooring-bits and mooring-pipes are under the covering, and although they are only used when the ship is moored in harbour, or at moorings, they are really on the weather-deck. The scuppers open into the space in question, and they must always be left open, for however tight the ports and mooring-pipes may be made, water will always flow in—for example, from aft or beam seas—and must have a way of escape. One of the pumps is worked under the covering, and although the defenders in their objections say it is only a small pump, it is not the less one of the ordinary deck appliances. In short, notwithstanding the covering, the deck under it remains deck as before, although necessarily the sails are worked from the top of the covering.

"(4.) It is admitted by the minute in process that the space under the bridge which was not measured before is now included in the 84·78 tons. It was conceded that this is wrong, but the concession can hardly stop there, for the space under the bridge opening only aft is quite as much 'closed-in' as the space under the new covering, which opens aft in precisely the same way.

"(5.) The Lord Ordinary concedes at once that the case might be quite different if additional coverings were put abaft the bridge, and abaft the hurricane-deck, connecting the whole with the roof of the poop. The front of the poop would then close in the aft end, and thus close in the whole space from forecastle to poop, and supply what is wanting now, a closing of the end or fourth side. If this were done there would be room for maintaining that an entire new deck had been constructed, whether it be called a spar-deck or an awning-deck; and possibly it would not be enough merely to leave scuppers and mooring-bits as they were originally, to exclude the space below from being considered as one of the 'tween-decks of the ship. Indeed, ultimately, the question might come to be one of degree, and when such a question arises the Court will not lightly interfere with the judgment of the official surveyor. The present case, however, is not run up to any such point.

"(6.) The space in question is not, in the sense of the statute, available for cargo. The word 'cargo,' it is thought, does not mean deck cargo, for deck cargo is cargo carried on deck, and spaces for deck cargo, in cases where such cargo is lawful, are not to be measured. There is nothing in itself illegal in carrying some kinds of cargo on deck, with proper and usual precautions, although certain rights arise in regard to risk and liability with deck cargo different from ordinary cargoes. Indeed some things must always be carried on deck, either from their size or structure, or from their dangerous qualities. Now it seems clear that the space in question is not available for perishable cargo. Mr Eastlake's report explains this, and it is plain that every aft or beam sea shipped would, by the motion of the vessel, be sent washing the whole length of the deck. It is true deck cargo will be carried better under the covering, and cattle more comfortably and more safely, than without it; but this is not enough to make the space measurable. The same result might be attained in a lesser degree by heightening the bulwarks, without a covering at all; but this would never make a space above deck measurable as tonnage. The place will always be in stormy weather more or less a wet place. Beam seas will always wash there, and even the dipping of the bows in rough weather will send water in by the scuppers and ports.

"(7.) The space in question is not 'available for berthing or accommodation of passengers or crew.' A berth means generally, or at least often, a sleeping place, and that must be, or should be, reasonably dry. Passengers under the coverings would plainly not have dry berths of it. Though partially sheltered, they would to all intents and purposes be deck passengers, just like the cattle; and badly as crews are sometimes accommodated, it can hardly be said that under this covering they would in any sense be lodged or berthed.

"Without going into further details, and specially reserving other cases where attempts may possibly be made to evade the fair meaning of the statute, the Lord Ordinary thinks that in the present case the pursuer's demand is well founded, and should be given effect to. Fairly looked at, and reasonably used, the covering does not enable the ship to carry more tonnage—using the word in the sense of cargo—than before, but only to carry its former complements better and easier; and it is to be hoped that a comparative freedom from ordinary forward seas will not tempt the owners to load to a deeper load line than they would otherwise have done.

"The Lord Ordinary has only given decree in terms of the declaratory conclusions. If his judgment is acquiesced in or affirmed, no further difficulty will arise: but if it should, any question of detail may yet be disposed of under the petitory conclusions. If the pursuers are right, they seem to be entitled to expenses."

On 12th November 1872 the Lord Ordinary (GIFFORD) pronounced the subjoined interlocutor and note, with a reference to the Note in the case of the 'Danzig,' as above quoted:—

"The Lord Ordinary having heard parties' procurators, and having considered the closed record, the report by Mr Mumford, No. 12 of process, and whole process—Finds that, according to the sound construction of 'The Merchant Shipping Act, 1854,' and relative Regulations, the space above the main or tonnage deck of the steam-ship 'Bear,' intervening between the aft end of the forecastle and the front of the poop, ought not to be measured or included as part of the register tonnage of the said steam-ship, reserving to measure any separate deck-house constructed on the main deck between said points; and to this extent and effect assoilzies from the declaratory conclusions of the action, and decerns: And, with the above finding, appoints the cause to be enrolled, that parties may agree upon, or that a remit may be made to ascertain the measurement in conformity with the above finding: Finds the defenders entitled to the expenses hitherto incurred by them, and remits the account thereof, when lodged, to the Auditor of Court, to tax the same and to report.

"*Note.*—The Lord Ordinary had occasion to consider the questions raised in the present process in a similar action, which he decided in the beginning of the present year.

"The question related to the steam-ship 'Danzig' of Leith, and the Lord Ordinary's judgment is dated 30th January 1872. This judgment was ac-

quiesced in by both parties, and the 'Danzig' was measured in conformity therewith.

"The Lord Ordinary still adheres to the views expressed in the Note to his judgment in the case of the 'Danzig,' and as the question in the present action turns upon the same clauses in the Merchant Shipping Act, and involves the same considerations, the Lord Ordinary ventures respectfully to refer to his interlocutor and note of 30th January 1872, which he holds as repeated here. It is No. 19 of the present process.

"But although the questions and principles raised in the present case relative to the steamship 'Bear' are of the same nature as those formerly raised relative to the steam-ship 'Danzig,' still, as the construction of the ships is somewhat different, the application of the principles and rules of the statute must be carefully considered in relation to the actual structure of the steam-ship 'Bear,' and the Lord Ordinary must acknowledge that he feels there is much greater difficulty and nicety in dealing with the 'Bear' than with the 'Danzig.'

"Indeed it was very ingeniously and forcibly urged by the pursuers that in reference to the 'Bear' there was just the element which was awanting in the case of the 'Danzig,' viz., a complete closing in of the whole space under the awning deck, by planking both fore and aft, while in the 'Danzig' there was always an opening aft, and it was maintained that the 'Bear' was just an instance of the case put under the fifth head of the Lord Ordinary's note in the 'Danzig' case, and no doubt it is just here that the difficulty of the case arises.

"On the whole, however, the Lord Ordinary has come to be of opinion that the space under the awning deck of the 'Bear,' including the space forward between the forecastle and the awning deck, and the space aft between the awning deck and the poop, are not measurable for tonnage under the statute. Of course the Lord Ordinary leaves out of view any engine-rooms or deck-houses under the awning deck, which, as closed-in spaces, fall to be separately dealt with.

"Two views were urged by the pursuers, both leading to the conclusion that the whole space between forecastle and poop fell to be measured and included in the tonnage of the ship.

"*First*, It was maintained that, looking to the structure of what is called the upper or awning deck of the 'Bear,' with the coverings which connected that deck with the forecastle in front and with the poop behind, the whole really formed in the sense of the statute (section 21, sub-section 5) 'a third deck, commonly called a spar deck.' Of course, if this is the case, then the whole space under the spar deck must be measured in terms of said sub-section 5.

"The answer to this seems to the Lord Ordinary to be satisfactory, that the covering in question is not a 'spar deck,' but only 'parts of an awning deck.' This is expressly reported by Mr Mumford, whose report has not in any particular been objected to.

"Now, an awning deck, as its very name implies, is quite different from a spar deck. Its purpose is not to form a third deck, constituting a hold or between decks below it, but merely to form a shelter or awning for the main or weather deck, which remains complete as before. Nothing can be carried on the top of the awning deck, which is not in any way protected by bulwarks, but which is a mere cover stretched over the proper bulwarks of the ship, and thus sheltering as an awning does the main deck of the ship. The scuppers and other usual openings are all on the main deck, just as if there was no awning deck, and there is no provision for closing these so as to make the space between the main deck and the awning deck in any sense of the word one of the 'tween decks of the ship.

"It would be most unjust to deal with this awning deck, or parts of an awning deck, as if it were a third or spar deck, for this would be to compute the tonnage of the ship as if she might be loaded so as to sink her main or middle deck below the water line—a thing utterly impossible with the 'Bear,' as is fully explained by Mr Mumford in the last answer of his report, and in the sketch annexed thereto.

"The Lord Ordinary therefore, in the face of Mr Mumford's report to the contrary, cannot hold the 'awning deck' or 'partial awning deck' of the 'Bear' to be a 'spar deck' under the statute. But—

"*Second*, The alternative view was chiefly insisted in by the pursuers, that at all events the space under the awning deck was a 'closed-in space' or 'permanent closed-in space' in the sense of sub-section 4 of section 21 of the statute and relative regulations. It was ingeniously contended that the plankings or gangways, by means of which the cuts or gaps fore and aft of the awning deck might be closed up in a storm, were permanent closings, just as a door or hatchway is a permanent closing, though they are made to open and to shut.

"This seems to the Lord Ordinary to be the only difficult point in the case. But the Lord Ordinary has come to the conclusion that these plankings, which after all are only occasionally used, do not constitute a permanent closed-in space within the meaning of the Act.

"They are only used in storms, and to avoid or prevent to a great extent seas from being shipped on the main deck. They are not caulked, and cannot be laid so as to exclude the water. The doors at the sides also would admit large quantities of water, varying according to the pressure, and the space below could not possibly in a storm be kept dry. Now, to justify measurement, the space to be measured must not only be 'permanent' or 'permanently closed in,' but it must be 'available for cargo, or stores, or for the berthing or accommodation of passengers or crew.' This does not refer to deck cargo or deck stores, the space for which is never measured, but to perishable cargo, which must be kept dry; and it is plain from Mr Mumford's report that such cargo could not be stored there, nor could passengers or crew be berthed there. Still further, the space is to a large extent necessary for the working of the vessel, and for accesses to the engine-room, coal and ash shoots, and to some of the pumps and sounding rods. The statute never intended such spaces to be measured as available for cargo.

"In the whole circumstances, therefore, and while feeling that the case is attended with nicety, the Lord Ordinary adopts the view of the defenders. If it could have been shown in this case, or if it shall appear in any other case, that an attempt is made merely to evade the provisions of the statute, and to get the benefit of a proper hold or 'tween decks, without having it measured, the Court will at once defeat such an attempt. Even

when the matter comes to be a nice question of degree, the Court would be slow to interfere with the judgment and discretion of the Board of Trade officials, but in the present case it appears to the Lord Ordinary that they are seeking to include as tonnage measurement space which, according to the sound view of the statute, cannot be considered as such."

Against this interlocutor a reclaiming note, of date November 19, 1872, was presented by the Board of Trade.

At advising—

LORD JUSTICE-CLERK—The question involved in this case is of some novelty. The action is one at the instance of the Lord Advocate, as representing the Board of Trade, and the summons concludes to have it found and declared that the steamship 'Bear' of Glasgow is of a tonnage not less than 585·46 tons, and that the defenders, the owners, are bound to deliver up a former certificate of registry, under the penalty that, if they fail to do so, the vessel shall no longer be considered a British vessel, or entitled to the privileges of one.

It seems that this vessel, the 'Bear,' was built on the Clyde, and registered in 1870 in usual form. Her tonnage was then registered as 331·97. She thereafter was engaged in the trade between the Clyde and Ireland. Owing to some alterations in the cabin accommodation of the ship, it became necessary for her again to be registered; and on this occasion the surveying officers, by directions it is said of the Board of Trade, increased her registered tonnage to the amount specified in the summons, that is, from 331·97 to 585·46. It seems not to be disputed that the greater part of this addition arises from the surveyor having included a space between the forecastle and the poop as being subject to measurement which had not been so included in the former survey. The owners have resisted this addition, and hence the present action has been brought.

The question involved depends on the meaning of two sub-sections of one af the clauses of the Merchant Shipping Act, 17 and 18 Vict. c. 104. There had been previous statutory provisions on the subject, but this statute introduces, from section 20 to section 29, very detailed rules for ascertaining the tonnage of vessels prior to their entering the register. I need not go over the process in detail, but the object is by ascertaining the cubic contents, and thereafter reducing them by a given formula, to ascertain, not the absolute, but the relative carrying capacity of the vessel for many important purposes. These general rules suffer modifications, first, in the case of a vessel "having a break or poop, or other permanent closed-in space, on the upper deck available for cargo or stores, or for the berthing or accommodation of passengers or crew," which case is provided for in sub-section 4 of section 21; and secondly, if the ship has "a third deck, commonly called a spar deck," which is provided for in sub-section 5 of the same section. There are other modifications of the general rule in regard to engine space and otherwise, which need not be referred to. The question which we have to consider is, whether this vessel has a third deck, commonly called a spar deck, in the sense of sub-section 5, or whether the space in question is a break or poop, or other permanent closed-in space, on the upper deck, in the sense of sub-section 4?

The Lord Ordinary has not allowed a proof of the averments of parties, but remitted to Mr Mumford, Lloyds' surveyor, to report on the vessel. The defenders, the shipowners, were anxious to have a proof; but this was resisted on the part of the pursuer, and the case now comes to us as a concluded cause on Mr Mumford's report. I am not disposed to disturb the Lord Ordinary's course in that matter, although the report, which is very able and distinct, leaves some facts not altogether cleared up. The state of the vessel is so clearly described in the report and in the very lucid Note of the Lord Ordinary, that I shall content myself with very shortly expressing my opinion on the two questions which are thus raised for judgment.

I am of opinion, in the first place, that the raised portion of the vessel above the main or tonnage deck is not a third deck in the sense of the fifth sub-section of the 21st section. It is quite true that when the openings in this upper construction are covered, there is a continuous platform from stem to stern. It also appears that the ship is to a large extent worked from the top of this upper deck, although it is also true that the main or tonnage deck retains to some extent the character of a weather deck, and that the scuppers or outlets for water are placed there, and not on the upper deck. But the conclusive ground on which it is impossible to hold that this covering or platform, although capable of being made continuous from stem to stern, can be considered as a third deck, is, that the doors at the termination of each of the openings in the space in question, which reach down nearly to the level of the main deck, are not so constructed as to be capable of resisting the pressure of the sea. The answer of Mr Mumford to the last question makes it clear that the result of this is that it is impossible to load the vessel to the depth to which, if this were a proper third deck, she ought to admit of being loaded. It would also seem that the fact of the scuppers being placed in, and opening from, the main deck has the same effect. If the vessel were loaded to the depth to which a three decked vessel ought to be capable of being loaded, she would not be seaworthy.

The second question is one of more difficulty. The words of sub-section 4 are singularly deficient in precision; but, taking the report which we have as the only evidence in the case, I am unable to say that the space in question is a permanent closed-in space which is available for cargo or stores, or for the berthing or accommodation of passengers or crew. I think the space is permanent, notwithstanding that the covering of the two openings is removeable. It is capable of being permanently used in its closed condition, and that is all which is required by this section. It is certainly also closed in where the planks are laid across these openings. But then, on the information we have before us, I cannot affirm the proposition that this space is available for cargo—understanding thereby perishable cargo—or for the berthing of passengers or crew; and for this simple reason, that, as this vessel is constructed, the space in question is not water-tight—it is not protected from the action of the water while at sea. The report brings out quite distinctly that the doors are not of sufficient strength to resist the action of the sea or to exclude the water, and that the covering is in no respect adapted to protect or secure the space below from injury by the waves. The only doubt which I have had in this matter is

whether, although this is undoubtedly the state of the vessel as she appeared when surveyed, she might not, with very little mechanical contrivance, be made entirely water-tight as to the space in question: and I observe that Mr Mumford, when asked the question whether these openings might not be made water-tight by being covered by tarpaulins, does not answer the question, but contents himself with saying that there is no evidence of any fastenings having been provided or adopted for that purpose. If it had appeared that the nature of the construction of these openings was such that any ordinary appliances might have secured and protected the cargo below, I should have thought that the existing state of the vessel was a mere evasion of the Act. But we are left without any evidence on that matter, and the Crown has asked for a judgment on the case as it stands. The defenders, on the other hand, entirely deny that they have used or can use this space for the purposes of the stowage of perishable cargo. They say, and I have no reason to doubt the statement from the evidence before me, that the main object of covering the space in question is to protect the deck cargo, namely, the cattle, which form a main staple of their trade between the Clyde and Ireland. The clause in the statute can only be read as applicable to perishable cargo, which requires to be protected during its transit; and there seems little doubt on the description of the vessel which is given us that, as it stands, the space in question would not be a proper or legitimate place in which to stow perishable cargo.

Something was said in the debate as to the effect of the closing in of the space in question in a case of general average. I think it unnecessary to deal with this illustration, because I think it inapplicable. It may quite well be, looking to the more modern views on the subject, that the removal of the deck cargo from a position where it would impede the navigation of the vessel, and the additional protection afforded by the covering, might entitle the owner to the benefit of general average, although the space might be entirely unfitted for the stowage of perishable cargo, or for the berthing of passengers.

This is not so clear a case as that of the 'Dantzig,' but I concur in the Lord Ordinary's judgment.

LORD COWAN—There is no averment on record that this erection was capable of being rendered water-tight the moment the vessel went to sea, and that the provisions of the Act might thus be evaded. There is no such case here at all; and, looking to Mr Mumford's report, it is impossible to arrive at any conclusion except that of this being a "two-decked" rather than a "three-decked" vessel. It could not be safely loaded down to a point at which, had it been really "three-decked," there would have been no danger in loading it. I concur on the whole case in your Lordship's views.

LORDS BENHOLME and NEAVES concurred.

The Court pronounced the following interlocutor:—

"Refuse said note, and adhere to the interlocutor complained of, with additional expenses; and remit to the Auditor to tax the same, and to report: *Quoad ultra* continue the cause.

Counsel for Pursuers—Lord Advocate (Young), Q.C., Solicitor-General (Clark), Q.C., and Rutherford. Agent—W. J. Sands, W.S.

Counsel for Defenders—Watson and Lancaster. Agents—Webster & Will, S.S.C.

Tuesday, February 25.

FIRST DIVISION.

[Lord Mure, Ordinary.

JOHNSTON *v.* JOHNSTON.

Disposition—Approbate and Reprobate—Election.

A husband, in his trust-disposition and settlement provided, "in respect of the provisions in favour of my wife hereinafter contained, I recommend and enjoin her, in the event of her surviving me, to discharge or abstain from exacting" a certain liferent to which she had right. In a subsequent clause of the deed the husband gave to his wife the liferent of the whole remainder and residue of his estate. The husband being dead—*held* that his widow must make her election between these two liferents.

This was an action of declarator, count, reckoning, and payment, at the instance of John Johnston, Glasgow, against Mrs Marion Waddell or Johnston and others. The only question which came before the Court at this stage was, whether if the defender—who was the pursuer's mother—accepted of certain provisions in her husband's settlement, she was bound to discharge or abstain from exacting certain liferent to which she was otherwise entitled. The facts of the case, in so far as they bear upon this point, are clearly set forth in the following interlocutor and note of the Lord Ordinary:—

"10*th December* 1872.—The Lord Ordinary having heard parties' procurators, and considered the closed record and proof, with the joint minute of admissions, and whole process—Finds that according to the true meaning and intention of the trust-disposition and settlement of the late William Johnston, executed in the year 1865, the defender Mrs Johnston is entitled to take the benefit of the provision of residue made to her in liferent under the said deed, only on the footing and condition *inter alia* of her discharging or abstaining from exacting the liferent of the lands of Easter Cardowan, conveyed by the said William Johnston, her husband, in 1856, to himself and his wife in conjunct liferent, and to the pursuer and his heirs and assignees whomsoever in fee. And before further answer, appoints Mrs Johnston to state within three weeks from this date whether she elects to take the liferent of the residue provided to her by her husband's settlement, or to claim the liferent of the said lands of Cardowan; and reserves in the meantime all questions of expenses.

"*Note.*—The question upon which parties are here at issue has been raised in the following circumstances. In the year 1856 the late William Johnston, the pursuer's father, purchased, with funds belonging to himself, but which he appears to have acquired through his wife, the defender Mrs Johnston, the lands of Easter Cardowan, the conveyance of which was taken to himself and his wife 'in conjunct liferent for their liferent use allenarly, and John Johnston (the pursuer) their