which was applicable to the words he used. There were various technical phrases which could only be explained by the law of New Zealand, and it was therefore proper to have the whole will construed by that law —*Thomson's Trustees* v. *Alexander*, December 18, 1851, 14 D. 217; *Trotter* v. *Trotter*, June 10, 1829, 3 W. & S. 407.

The third party argued—Assuming that Mr Smith's domicile was Scotland, there was no reason why the ordinary rule that the law of the domicile governs the construction of the will should be put aside—Storey's Conflict of Law, 661; Bar's International Law, 476. The will was validly drawn up by the New Zealand solicitor, the only person to whom Smith could go in order to have his wishes put into shape by a professional man; it was therefore valid to convey moveable property in Scotland, and must be construed by the law of Scotland—*Purvis' Trustees* v. *Purvis' Executors*, March 23, 1861, 23 D. 812. The same rule obtained in England—*Anstruther* v. *Chalmer*, February 6, 1826, 2 Simon's Rep. 1; *Enohin* v. *Wylies*, April 3, 1862, 10 Clark's Rep. (H.L.) 1. Although there were some technical words in the will that did not afford sufficient indication of the intention of the testator to induce the Court to hold that it must be construed according to New Zealand law—*Bradford* v. *Young*, April 30, 1885, 29 L.R., C.D. 617. All the facts were against the idea that the testator wished any other law than that of Scotland to govern the construction of his settlement.

At advising—

LORD YOUNG—The first question submitted by the parties for the determination of the Court involves a question of fact, and is therefore a question we cannot determine under a special case. But the parties agreed at the bar that it should be held as admitted that Melville Babington Smith was domiciled in Scotland at the date of his death. With that admission I have no hesitation in answering the second question. I am of opinion that Mr Smith's will must be construed and his testamentary succession regulated by the law of Scotland, that being the law of his domicile, and there being nothing in Mr Smith's will, or in the circumstances attending its execution, to indicate any intention on his part that his testamentary succession should be regulated by any other law.

LORD RUTHERFURD CLARK and the LORD JUSTICE-CLERK concurred.

The Court pronounced this interlocutor:—

"The Lords having considered the special case, and heard counsel for the parties thereon, in respect the parties by their counsel admit that Melville Babington Smith was domiciled in Scotland at the date of his death, Answer in the affirmative the first of the questions stated in the case; and with regard to the second question are of opinion that his testamentary succession is regulated by the law of Scotland: Find and declare accordingly, and decern."

Counsel for the First and Second Parties —Goudy—Cullen. Agent—James Forsyth, S.S.C.

Counsel for the Third Party—C. K. Mackenzie — Hunter. Agents — J. C. & A Stewart, W.S.

Thursday, July 9.

SECOND DIVISION.

[Sheriff of the Lothians.

KRUUSE AND OTHERS *v.* DRYNAN & COMPANY.

Ship—Charter-Party—Demurrage.

A charter-party provided, "the cargo . . . to be discharged as quick as the vessel can discharge," and prescribed £8 per day as the rate of demurrage. The vessel arrived in port early on the morning of Wednesday. The cargo was not discharged until the afternoon of the following Monday, although the time actually occupied in discharging was twenty-six hours.

In an action against the shippers they contended that the delay was owing to the failure of a railway company to supply them with waggons.

Held that the defenders must accept responsibility for the delay, and that they were liable in demurrage for four days.

The steamship "Aage" of Nyburg, owned by Wilhelm Kruuse and others in Denmark, arrived in Bo'ness Roads with a cargo of pit-props upon the evening of Tuesday, 2nd September 1890, and on the morning of 3rd September, at four o'clock, entered the dock, when the harbour-master appointed her a discharging berth on the south side of the harbour. She was ready to begin discharging at six o'clock that morning. After some delay it was found that A. B. Drynan & Company, shipbrokers and pit-wood importers, Bo'ness, were the parties to whom the cargo was consigned, and they began discharging upon Wednesday at two o'clock in the afternoon. The discharging was not completed until 6 p.m. on Monday 8th September, although the time actually occupied in the work was twenty-six hours.

The owners of the vessel raised an action against the consignees for £32 sterling, being the amount of demurrage for four days at £8 per day.

The charter-party—which was in the Danish language, and the translation of which was admitted by both parties to be correct—was in these terms—"4. The cargo to be loaded as quick as vessel can receive, and to be discharged in Bo'ness as quick as the vessel can discharge. ready to discharge, and should the vessel over this time be detained, then is payable for every lay-day £8, besides freight, &c. 5.

The cargo to be delivered free alongside the ship, and delivered again in Bo'ness, at such a place and in such manner which agrees with the usual custom for vessels of similar draught and with similar cargo. The vessel shall be moored where charterer or receivers shall point out."

The pursuers' contention was that the delay in discharging arose from the fact that the consignees were not able to take delivery as fast as the ship was able to discharge. The consignees contended (1) that the arrival of the ship had not been properly advised, nor had they the bill of lading or charter-party; (2) that the berth on the south side of the harbour to which she had been ordered was not the usual or proper place for discharging a cargo of pit-props by the custom of the port; (3) that a great loss of time was occasioned by the failure of the North British Railway Company to furnish them with waggons; (4) that the ordinary time for unloading a cargo of pit-props was four days.

The pursuers pleaded—"(1) The said steamship 'Aage' having been detained in discharging in said port of Bo'ness for four days over and above the period within which she could have been discharged, through the failure of the defenders to take delivery as fast as she could discharge in terms of the charter-party libelled, the defenders should be found liable in the demurrage sued for, with interest and expenses as concluded for. (2) The demurrage sued for having been incurred in terms of the charter-party libelled, decree should be pronounced as craved."

The defenders pleaded—"(2) The master was not entitled to give, or the defenders to take, delivery of the cargo until presentation of the bill of lading. (3) This being done on Friday morning the 3rd September by the defenders, the lay-days or discharge of the vessel should only count from and after that date. (4) The receivers were entitled to twenty-four hours' notice before receiving the cargo, counting from Wednesday at noon, when the master arranged with Mr Ommundsen, the defenders' manager, as stevedore, to discharge his vessel. (5) The defenders having discharged the cargo in less than four days, are not liable in demurrage to the pursuers."

A proof established the facts found by the Sheriff-Substitute and Sheriff. The harbour-master proved that there was no custom of the port as to cargoes of pit-props.

The Sheriff-Substitute (MELVILLE) found "that the pursuers' steamship 'Aage' was unduly detained in unloading her cargo and deck load of pit-props in Bo'ness harbour for three days. viz., Friday 5th, Saturday 6th, and Monday 8th September 1890 (excluding Sunday 7th, which was not a working day), and that the sum of £8 per day is due for demurrage in terms of the charter-party: Therefore decerns against the defenders in favour of the pursuers for the sum of £24 sterling, to account of which appoints the sum of £20 consigned in the hands of the Clerk of Court on 10th October last to be paid over to the pursuers, &c.

"*Note.*—The Sheriff-Substitute is of opinion that the ship might have been discharged on Wednesday 3rd, Thursday 4th, and the morning of Friday the 5th September, while from the evidence it was the following Monday evening before the discharging was completed. He also thinks the pursuers are not responsible for the want of railway waggons, which the defenders allege was the cause of the delay."

The defenders appealed, and upon 29th April the Sheriff (RANKINE) pronounced this judgment—"Recals the Sheriff-Substitute's interlocutor of 9th January 1891: Finds that the pursuers' steamship 'Aage' was berthed in Bo'ness harbour early in the morning of Wednesday 3rd September 1890, and was ready for discharge of cargo at 10 a.m. on that day: Finds that in ordinary circumstances a reasonable period for unloading would have been twenty-six hours: Finds that thirteen hours fall to be added in calculating the duration of said period on account of unavoidable delay due to lack of waggons, for which the defenders were not responsible: Finds that said period lapsed during the course of Saturday 6th September 1890: Finds that the cargo was not fully discharged till the afternoon of the following Monday: Finds that the rate of demurrage prescribed in the charter-party was £8 per day: Finds that the defenders are liable to the pursuers in demurrage for two days, being £16, subject to payment of expenses as hereinafter found due, &c.

"*Note.*—The charter-party as translated is somewhat obscure, which may be accounted for by the fact that the form used contemplated the fixing down of lay-days, from the close of which the period of demurrage should run, while the gap left for the number of lay-days has not been filled in. It must therefore be assumed that the intention was to allow a reasonable time for unloading at Bo'ness 'as quick as the vessel can discharge,' and to calculate the demurrage from the lapse of that time. In estimating this reasonable time it is proper (as has been assumed in the proof and argument) to figure on working hours. Again, it appears to be plain that the ship cannot be allowed to suffer from the negligence of the consigners or freighters in not forwarding news by post or telegraph in time to enable the consignees or their agents to prepare for discharging. Lastly, the custom of Bo'ness is expressly incorporated into the contract; and no one seems to have taken exception at the time to the berthing of the steamer at the south side of the harbour, which was probably on a balance of advantages the more expeditious discharging place, in spite of the risk of stoppage under the port rule known to both parties against unloading pit-props on the quay.

"Applying these rules, I cannot throw the point of time at which the duty to commence unloading set in further forward than 10 a.m. on the Wednesday, when, according to the harbour-master and other

witnesses, the vessel was entered at the Custom House. Secondly, the case being one of those in which lay-days are not prescribed, the rule laid down in such decisions as *Postlethwaite*, 5 App. Cas. 529, and *Wyllie*, 13 R. 92, applies. It must be assumed—though there is little evidence on the point—that the defenders did all they could in pressing the railway company to furnish sufficient waggons, for they had no contrary interest, and the pursuers do not accuse them of negligence. Mr Ommundsen's estimate of thirteen hours as the amount of delay thus caused is explicit, and, as I think, trustworthy. The nominal period for discharge may for the purposes of the case be fixed at twenty-six hours. Adding this period to the thirteen hours of unavoidable delay the number of working hours after 10 a.m. on the Wednesday, from which the defenders cannot be held liable as *in mora*, is thirty-nine. This, calculated on a twelve hours' day beginning at 6 a.m., brings the parties down to 1 p.m. on the Saturday, at which hours if these views be correct the whole cargo should have been out. Thereafter the demurrage period commences, and must in terms of the charter-party be calculated by days, *i.e.*, according to a fixed rule of interpretation, running, not working days, since the vessel if unloaded might have sailed off in ballast. Saturday was a lay-day, *i.e.*, a day during which discharge might go on without liability for delay, and therefore cannot be counted among the demurrage days. So that these are two in number—Sunday and Monday—and the sum due is £8 per day, or £16 in all."

The pursuers appealed, and argued—It was proved that the proper time for the discharge of this ship was twenty-six hours, because that was the time actually taken; therefore the discharging ought to have been done on Friday forenoon at 12 o'clock, and the pursuers were entitled to demurrage after that, that is, four days, because the days were counted from 12 noon. Sunday also must be counted. There was no custom of the port averred, and no custom imported into the charter-party. If the north side was the proper one upon which to unload pit-props, the shippers ought to have seen that the ship was sent there. The ship-master only obeyed the orders of the harbour-master. If the railway company did not supply sufficient waggons to enable the shippers to carry out their contract, that was not a matter which concerned the shipowners at all—*J. & A. Wyllie* v. *Harrison & Company*, October 29, 1885, 13 R. 92.

The respondents argued—No delay was incurred that could be helped. The principal delay arose from the railway company not forwarding waggons, and for that delay the defenders were not liable. The custom of the port was incorporated into the charter-party, and the custom of the port was to unload timber props on the north side of Bo'ness harbour, but here the "Aage" took up a position on the south side of the harbour, from which it was not so easy to unload her.

At advising—

LORD JUSTICE-CLERK — I think the Sheriff-Substitute was right. It was plain that the vessel could have been discharged in twenty-six hours after she came to her berth, because that was the time that was actually occupied when the operation was once begun, and I think that the causes which led to the delay were not causes for which the defenders can excuse themselves. The chief claim which the defenders put forward is on the ground that they were prevented from taking delivery by the want of waggons from the railway company. This claim may have been well grounded, but I take it that that was a matter for them to manage, and not for the ship. I think the case of *Wyllie* v. *Harrison* has no application here. There is no proof that there is any custom of the port in unloading pit-props at Bo'ness at all. The harbour-master was specially asked the question, and he could give no evidence of such a custom. I think in the circumstances that demurrage for the whole time sued for, viz., four days, should be charged against the defenders, as the Sheriff-Substitute made a mistake in excluding Sunday.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

The Court pronounced this interlocutor:—

"Sustain the appeal: Recal the interlocutor of the Sheriff-Substitute of date 9th January 1891, and the interlocutor of the Sheriff of date 29th April 1891: Find that the pursuers' steamship 'Aage' was unduly detained in unloading the cargo and deck load of pit-props in Bo'ness harbour for four days, viz., Friday 5th, Saturday 6th, Sunday 7th, and Monday 8th September 1890, and that the sum of £8 per day is due for demurrage in the terms of the charter-party: Therefore decern against the defenders in favour of the pursuers for the sum of £32 sterling, to account of which appoint the sum of £20, consigned in the hands of the Clerk of the Sheriff-Court on 10th October last, to be paid over to the pursuer," &c.

Counsel for the Appellants—Salvesen—Dick Peddie. Agents—J. & A. Peddie & Ivory, W.S.

Counsel for the Respondents — Deas. Agents—Boyd, Jameson, & Kelly, W.S.

END OF VOLUME XXVIII.