his house, locked the door, and left the house; that on the following day, finding his wife at the house, he again turned her out, and said that if she came back he would kill her; that he immediately thereafter removed the whole furniture from that house to a house in a neighbouring village two miles distant—New Cumnock; that he lived at New Cumnock for about a year, and thereafter left New Cumnock without communicating to the pursuer where he was going; and that from the time he turned the pursuer and her child out of doors in June 1882 he has never asked the pursuer to return to live with him, communicated with her in any way, or done anything towards the support and maintenance of the pursuer and her child. These facts being proved, I am of opinion that they amount in law to wilful and malicious desertion, which having been persisted in for more than four years, entitles the pursuer to decree of divorce in respect of such desertion.

If the pursuer had agreed to live apart from her husband, I need scarcely say that she would not have been entitled to the remedy of divorce, nor would she have been entitled to divorce if all she could allege and establish was ill-usage however gross. For that state of matters the law provides a different remedy. But if desertion is established, as I think it is here, then the fact that the injured wife did not desire to return to her husband at any time or during the whole time of his desertion, does not thereby deprive her of her right to a divorce. If he had *bona fide* invited her to his house, and offered to renew conjugal cohabitation at any time during the four years, then his desertion would have ceased. But if the desertion is maliciously persisted in by one spouse for the period of four years, in my opinion the state of mind of the other spouse during that period is immaterial, provided always that the conduct of that spouse does not establish that the living separate is agreed to. In short, in my view the injured spouse is not bound to do anything to bring the desertion to an end. In the present case (although in the view I have expressed it is not material to this decision) I hold it is proved that the pursuer was willing to return to her husband, the defender, if he had asked her.

I think, differing from the Lord Ordinary, that the pursuer should have decree as concluded for.

LORD PRESIDENT—I agree in the opinion of Lord Rutherfurd Clark.

The Court adhered.

Counsel for the Pursuer—Dundas—Crabb Watt. Agents—Simpson & Marwick, W.S.

Counsel for the Defender — Salvesen — Wilton. Agent—Thomas M'Naught, S.S.C.

Friday, February 2.

SECOND DIVISION.

[Sheriff of Lanarkshire.

WILLS & COMPANY *v.* BURRELL & SON.

Ship—Charter-Party—Freight—Charterers Held not Entitled to Freight of Cargo Stowed on Deck by Master.

By charter-party it was agreed between the owner and the charterers of a ship that the ship was to load a complete cargo at Glasgow and proceed therewith to Trinidad and Demerara, where, on discharging the outward cargo, she was to load a complete cargo to be conveyed and delivered at London. For the round voyage the charterers were to pay a slump freight of £1425. The owners guaranteed that the ship would carry 1400 tons dead weight cargo outwards, and 1550 tons dead weight cargo home. The ship had liberty to call at any port for coals.

The voyage was completed, and the dead weight cargo guaranteed duly carried and delivered. On the homeward voyage the ship put in at St Michaels for coal, and while coaling the master took on board and stowed on deck a quantity of pineapples, the freight for which from St Michaels to London amounted to £76, 18s. 11d.

The charterers of the ship refused to pay the freight stipulated in the charter-party, except under deduction of the sum earned by the carriage of the pineapples, contending that they had hired the entire ship for the round voyage for the slump sum of £1425, and that everything which the ship earned on the voyage belonged to them.

Held that the freight earned for the carriage of the pineapples belonged to the shipowners and not to the charterers, and that the latter must pay the former the slump freight of £1425 stipulated in the charter-party without deduction.

By charter-party dated 1st February 1893 it was "mutually agreed between G. H. Wills & Company of the good steamship called the "Castro," of the measurement of 725 tons nett register or thereabouts, bound Stockton, now Elba, guaranteed 1400 tons d.w. cargo outwards, and 1500 tons d.w. cargo homewards if d.w. cargoes provided, and Burrell & Son of Glasgow, merchants. That the said ship being tight, staunch, and strong, and every way fitted for the voyage, shall, with all convenient speed, sail and proceed to Glasgow, or so near thereunto as she may safely get, and there load, from the factors of the said merchants, a full and complete cargo of lawful merchandise, which the said merchants bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and being so loaded shall there-

with proceed to Trinidad and Demerara to discharge and reload at Demerara and/or Trinidad to London, or so near thereunto as she may safely get, and there deliver the same on being paid freight as follows:—Lump sum Fourteen hundred and twenty-five pounds (£1425) for the round voyage, charterers paying all expenses on the round, excepting coals, wages, stores, victualling, and insurance, ship giving use of winches, winchmen, and maintaining steam. All repairs, damage, &c., to steamer for owners' account. . . . Steamer to have liberty to tow and assist vessels in all situations, and to call at any port or ports for coals, and for other necessary supplies. Average, if any, to be settled according to York-Antwerp rules. The master to sign bills of lading, including negligence clause at any other rate of freight without prejudice to this charter. The freight to be paid as follows:—Say £500 advance 14 days after sailing, balance in cash on delivery of the cargo in London. . . . Charterers to have option of sending steamer into Barbadoes on outward voyage, paying £20 extra, also option of sending steamer into Barbadoes, Grenada, or St Vincent after loading at Trinidad on homeward voyage paying £20 extra for each place, also option sending steamer into Havre, paying £20 extra. If required, steamer to have liberty to take some bunker coals in holds outwards properly separated. Owners to have the option of reducing homeward cargo to 1500 tons dead weight, guaranteed lump sum to be reduced to £1400 for the round."

The "Castro" duly proceeded to Glasgow, performed the said voyage, carried the amount of cargo guaranteed, and earned the freight of £1425. On her homeward voyage the ship called at St Michaels for bunker coal as she was entitled to do under the charter-party, and while she was coaling, the master took on board and stowed on deck a quantity of pineapples, the freight for which, from St Michaels to London, after deducting expenses incurred, amounted to £76, 18s. 11d.

Messrs Burrell & Company refused to pay the freight, except under deduction of the freight earned by the carriage of the pineapples, holding that the freight so earned belonged to them, because they had hired the entire ship for the round voyage, and that everything which the ship earned on the voyage belonged to them.

Messrs G. H. Wills & Company thereupon raised an action against Messrs Burrell & Company for the balance of freight which they refused to pay.

On 23rd October 1893 the Sheriff-Substitute (GUTHRIE) pronounced the following interlocutor:—"Finds that according to the true meaning and intention of the charter-party the freight paid for the carriage on deck of the 'Castro' of pineapples from St Michaels, on the homeward voyage, is due to the shipowners and not to the charterers: Therefore repels the defences, and decerns against the defenders for the sum of £76, 18s. 11d. with interest as craved."

The defenders appealed to the Court of Session, and argued—The lump freight paid by them was a rent paid for the use of the ship. They were therefore entitled to the full carrying capacity of the ship—"*The Norway*," July 20, 1865, 3 Moore's Privy Council Reports (N.S.) 245, opinion of Lord Justice Vaughan Williams, p. 265; *Robinson* v. *Knights*, May 31, 1873, L.R., 8 C.P. 465, Justice Keating's opinion, p. 467. Pothier's Traites de Droit Civil, seconde edition, ii. 377. The master had no right to receive other goods on board without the freighters' consent, and without accounting to him for the freight of such goods—Bells' Commentaries, &c. (7th ed.), i, 587; Abbott on Law of Merchant Ships (13th ed.), p. 267-268. The charterer of a whole ship was bound to put on board as many goods as would enable the ship to make the voyage safely—*Hunter* v. *Fry*, April 28, 1819, 2 B. & A. 421. But with this qualification a charterer paying a slump sum for the use of a ship was entitled to put on board as much or as little cargo as he pleased, and that he had not put on board as much as he was entitled to do under his contract, gave the master no right to let the unoccupied space to some one else, without accounting to the charterers for the freight so carried. Under the terms of the charter-party, the master acted on behalf of the charterers when he took the pineapples on board, and the freight earned by the master's act belonged to them—Parsons on Shipping, i. 297; *Marquand* v. *Banner*, April 21, 1856, 25 L.J. Q.B. 313.

Argued for the pursuers and respondents—This charter-party did not operate as a demise of the ship. An example of a case where a demise of the ship was held to have been made was *Meiklereid* v. *West*, February 21, 1876, L.R., 1 Q.B.D. 428, while *Sandeman* v. *Scurr*, December 22, 1866, L.R. 2 Q.B. 86, furnished an example of a case where the charter-party did not operate as a demise of the ship. The present case was similar to the latter. Indeed, it had been only contended that the charterers were entitled to the carrying capacity of the vessel. But the deck was not a part of the vessel where the charterers were entitled to stow goods, and the pineapples having been carried on the deck, the charterers were not entitled to profit derived from them—*Towse* v. *Henderson*, January 26, 1850, 19 L.J. Exch. 163, 4 Exch. 890; *Matheson* v. *Nicol*, June 5, 1852, 21 L.J. Exch. 323, 7 Exch. 929; *Neil* v. *Ridley*, April 27, 1854, 9 Exch. 677. If the pineapples had caused damage to the charterers' cargo, then they would have had a claim for damages, but that was not suggested. The contract had been fulfilled by the owners carrying all the goods put on board by the charterers in safety to their destination. "*The Norway*" and *Robinson* v. *Knights* did not touch this case. In these cases the contract was for the use of the ship, while here the contract was to carry and deliver safely a specified cargo.

At advising—

LORD TRAYNER—[*After stating the circumstances*]—I am of opinion that the

claim thus made by the charterers is quite untenable.

The charter-party in question cannot be regarded as amounting to a demise of the vessel. Some of its clauses are quite inconsistent with the idea of any such thing being contemplated, and indeed the counsel for the defenders admitted in the course of the debate that he could not contend that there had been a demise of the vessel, taking that phrase as it is usually understood. The view maintained for the defenders rather was, that they had hired the whole carrying space of the vessel for the round voyage, and that whatever was carried in the course of the voyage was carried for their benefit. The answer to that contention, however, which seems to me to be conclusive, is, that under such a charter-party as we have now before us, the carrying space contracted for is only the usual carrying space below hatches. The deck is never regarded as carrying space to the use or benefit of which a charterer is entitled, unless specially stipulated for. It was not stipulated for in the present case, and therefore anything of the nature of cargo stowed and carried upon deck was not occupying space to which the charterers had any claim. If they had no claim to occupy the space themselves or with their own cargo, they can have no claim to the freight of goods there carried. But what is an equally conclusive answer to the defenders' demand is this, that they have got all they contracted to get for their slump freight, and must therefore pay the slump freight without deduction. What they contracted for was that the ship would receive a full and complete cargo at the loading ports named, and carry that cargo to the specified ports of delivery, while the owners guaranteed that the vessel would stow and carry to and from these ports deadweight cargo, if provided, up to a certain weight. That specified cargo was supplied by the charterers, and was received and carried by the vessel, and the defenders have no complaint to make on this head. They must therefore fulfil their counter-obligation by paying the stipulated freight.

I could have understood a claim for damages at the defenders' instance if the guaranteed weight of cargo had not been carried, or if the loading space below hatches had been occupied by goods taken by the master of the vessel to the exclusion of goods which the charterers had tendered for carriage, or if the carrying of the pineapples on deck had been to the injury of the charterers through delaying the arrival of their cargo, with consequent loss of market or fall in market price. No such ground of damage is seriously put forward, and certainly no damage has been established. But even if it had, it would have been a claim for damages for breach of contract which the defenders would have had, not a claim for freight. Freight they could not claim unless they were owners of the vessel, or were in the position of owners *pro tempore* by the demise of the vessel, and the defenders cannot claim either character. The authorities cited by the defenders have very little bearing upon the question here raised. In the case of "*The Norway*"—followed in the case of *Robinson*—it was decided that where a slump freight was stipulated for a single or a round voyage, the full amount was payable, although from a cause for which the ship was not responsible less than a full cargo was delivered. The opinion in the former case by Lord Justice Vaughan Williams, that the slump sum although called freight was "more properly a sum in the nature of a rent to be paid for the use and hire of the ship," must be read in connection with the special facts of the case in which it was delivered. The charter-party in "*The Norway*" expressly bore that the slump freight was "for the use and hire of the vessel." The charter-party in *Robinson's* case was not expressed in the same terms, but what was decided—and alone decided—in both cases, as I have already stated, was this, that where a slump freight was stipulated, that was due and payable without regard to the quantity of cargo delivered at the port of discharge. No question was raised or decided as to whether "the entire vessel" for which the rent or hire or freight was paid, included more than the usual carrying space. That question could not have been raised in *Robinson's* case, for there there was a distinct stipulation by the charterers for a right to carry deck cargo. A passage in Bell's Commentaries was also cited (i. 587). But that passage, I think, can only be read as applicable to the case of a demise of a ship, a phrase not used by Bell, but not used probably because the phrase was not in common use among Scotch lawyers in his time. The passage, however, is descriptive of what is now called a demise of the ship, and correctly states the rights which are conferred on the charterer by a charter which amounts to a demise. But if Professor Bell uses the words "entire ship" as meaning something less than "demise" imports, the passage is still no authority in support of the defenders' claim. For reading "entire ship" as entire carrying space, that would not, according to recent authorities, include the deck.

I think the judgment appealed against should be affirmed.

LORD JUSTICE-CLERK—That is the opinion of the Court.

The Court refused the appeal.

Counsel for the Pursuers—Graham Murray, Q.C. — Guthrie. Agents — Morton, Smart, & Macdonald, W.S.

Counsel for the Defenders — Sol.-Gen. Asher, Q.C.—Dickson. Agents—Webster, Will, & Ritchie, S.S.C.