lence, or fright, or consequent injury, the defender is liable in damages as for assault in respect of his laying hold of the pursuer and pulling him out of the field. It is said that this was illegal and culpable, and amounted to an assault.

In dealing with this part of the case, so put separately, in which the conduct of the defender must be viewed as free from all unnecessary violence, I think the lapse of nearly a year before the action was brought is a fact not without some importance.

I do not advert to the question, whether the junior pursuer, as son of the tenant of the farm, was entitled to kill rabbits. He was not known to be the son of the tenant; he had hid the gun in a stook; he refused to give his name; and the defender was entitled to deal with him temperately and without violence, as an intruder and a trespasser.

Whether considered with reference to the provisions of the Day Trespass Act, 2 and 3 Will. IV., cap. 68, sec. 3, or at common law, I am of opinion that, in the circumstances, the defender was not guilty of any wrong in merely apprehending the pursuer and removing him from the ground without violence—without more force than was necessary for his removal.

On the whole matter I am satisfied that the judgment of the Sheriff is right.

LORD KINLOCH concurred.

Agents for Pursuers—Milroy & Hampton, S.S.C.
Agents for Defender—Morton, Whitehead & Greig, W.S.

Wednesday, February 2.

HILLSTROM *v.* GIBSON & CLARK.

Charter-Party—Lightening of Vessel—Custom of the Port—Deletion—Delivery of Cargo—End of Voyage. It was provided in the charter-party of a vessel that she should "proceed to a safe port, or so near thereunto as she may safely get and lay afloat at all times of tide, and deliver the same, and so end the voyage." The master was directed to take the vessel to Glasgow; but on her arrival at the Tail of the Bank, off Greenock, it was found that she drew a foot and a-half more water than she could get in Glasgow harbour at low tide. It was proved that in such circumstances it was customary to unload vessels in part, and for the vessels then to be taken to Glasgow. In this case, however, the words "according to the custom of the port" were deleted from the charter-party. *Held* (*diss.* Lord Deas), the master was not entitled to insist on delivery of the cargo at the Tail of the Bank, but was bound to allow the consignees to lighten the vessel of part of her cargo, and then to proceed to Glasgow—this being reasonable and customary.

By charter-party entered into at Alexandria between the pursuer, as master of the ship "Frey," and certain parties as charterers thereof, the "Frey" was chartered to carry a cargo of beans and wheat from Alexandria to a safe port to be specified to the master, "or so near thereunto as she may safely get, and lay afloat at all times of tide, and deliver the same, and so end the voyage." The words "according to the custom of the port" originally stood between "same" and "and," but had been deleted. The defenders were consignees of the cargo, and indorsees of the bill of lading. On the arrival of the ship at Falmouth the master received orders to take her to Glasgow. But on her arrival at the Tail of the Bank, off Greenock, it was found that the ship drew about a foot and a-half more water than was to be had in Glasgow harbour at low tide. In these circumstances the master refused to endanger the safety of the vessel by taking her to Glasgow except on payment of £45 above freight, and required the defenders to take delivery of the cargo at the Tail of the Bank. This they refused to do. Eventually the ship was lightened of sufficient cargo to allow her to be taken to Glasgow; and the pursuer brought this action to have the defenders decerned to pay him £129, 12s. 6d., being 15 days' demurrage at £6 per day, as stipulated in the charter-party, and the dues incurred in taking the vessel from the Tail of the Bank to Glasgow and back. The Sheriff-Substitute (DICKSON), and, on appeal, the Sheriff (GLASSFORD BELL), found for the pursuer.

The defenders appealed.

MILLAR, Q.C. and R. V. CAMPBELL for them.

SHAND and ORPHOOT in answer.

At advising—

LORD PRESIDENT—The vessel arrived at the Tail of the Bank on the 25th of November; and the question then arose,—Was the master bound to carry the vessel further, or might he remain at the Tail of the Bank and deliver the cargo there, although there was no quay suitable for the purpose there? The answer to this question depends upon the construction to be put upon the charter-party. The charter-party is of the ordinary kind; but there is one peculiarity in it arising from the deletion of the words "according to the custom of the port." It is admitted if the vessel had gone to Glasgow with a full cargo on board that she could not have lain in safety at low water. Her draught of water was 17 feet 9 inches at the Tail of the Bank; but at Glasgow, the water being fresh, she would have drawn 18 feet 1 inch. And as at Glasgow she could only have got about 16 feet of water at low tide, it is certain that, laden as she was, she could not with safety have come up to Glasgow. Now it is shown that the general custom in such cases is to lighten the vessel sufficiently to allow of her coming up to Glasgow. The words "according to the custom of the port," however, were deleted from the charter-party. If they had not been deleted the pursuer would have been bound to have allowed his vessel to be lightened and then to have gone on to Glasgow. But, as it is, we must hold that the master was not bound by any custom of the port of Glasgow.

He therefore refused to go up to Glasgow, or to have the vessel lightened at the Tail of the Bank. He said, if his vessel was lightened of part of the cargo there, it was giving him two ports of discharge. Now at the Tail of the Bank, where the ship was lying, there is no quay or accommodation for unloading. Large vessels lie at anchor there, and the cargoes of some vessels are unloaded there in the way the master of the "Frey" wished. But these cargoes are shipped into smaller vessels, which go by the Union Canal to Grangemouth. Now the Tail of the Bank is not a natural place for a ship to discharge her cargo. With a sudden gale arising there would be great risk of disaster to the ship and cargo. There is therefore nothing in the way of custom or propriety to be said in

favour of the "Frey" delivering her cargo at the Tail of the Bank.

I am not aware of any rule of law settling this case; and no case has been cited ruling the one before us. The solution of the question, therefore, is simply what is reasonable under the circumstances. It is the ordinary construction of a charter-party, a point of no difficulty. The contention of the master—that putting out some of the cargo at Greenock was giving the vessel two ports of discharge—is not worth much consideration. What took place was only unloading or lightening the vessel to the extent of one-fifth. Now custom is excluded. But if we see that it is customary to unload in part at the Tail of the Bank, we cannot exclude it from our consideration. I therefore think that it was reasonable that the shippers should have been allowed, at their own expense, to unload in part, in order that the vessel might be able to get up to Glasgow.

Lord Deas—This is a case of novelty and difficulty; and I am disposed to come to a different conclusion from what your Lordship has arrived at. I do not see how we can come to a different conclusion from the words of the charter-party. The words are—"shall therewith proceed to a safe port, or as near thereunto as she may safely get, and lay afloat at all times of tide, and deliver the same, and so end the voyage." It is not immaterial that the words "according to the custom of the port" are struck out; and we must assume that it was purposely done. It was not unreasonable that a foreign master going to what might be a port he knew nothing about should insist on their being stuck out.

It is admitted when he came to the Tail of the Bank he had come as near to Glasgow as where he could lie afloat safely at all times of the tide. And it is plain he was not bound to go up, in respect that it was shown to be the custom of the port to lighten vessels of part of their cargo there. But the result of your Lordship's judgment is to hold the master bound by the custom of the port to do the thing that, by deletion of the words, he was freed from the necessity of doing.

The question is, Was the voyage ended when he had gone as near Glasgow as he could? Your Lordship seems to attach the words "end the voyage" to the delivery of the cargo. But the delivery of the cargo takes place when the voyage is ended. The delivery does not constitute the end of the voyage, but follows it. And therefore the voyage is not to be held as not ended simply because the place happens not to be the most suitable for discharging the cargo.

Your Lordship seems to hold that the charter-party is to be adhered to only so far as reasonable, and therefore that the master was bound to let his vessel be unloaded in part if he had no interest injured thereby. But his interest was injured. The voyage was lengthened, and other points were mentioned in the argument shewing how materially his interest was injured. It would have been reasonable that the defenders should have complied with the pursuer's request, and paid him the £45 in respect of the difference it would have made to him in coming up to Glasgow.

If it had been proved that it was the custom at all other river ports to lighten in part at the mouth of the river in order to allow the vessel to come up, then it would have been reasonable for the defenders to argue that, though this clause had been deleted from the charter-party, it should be given effect to. But this is not proved, and I do not think it is said to be the case. It is therefore presumable that it is not the case. And therefore it seems to shew that it is not reasonable to hold the master so bound.

Upon the whole matter, I agree with the interlocutors and the very able and explicit notes of the Sheriffs, and feel it therefore unnecessary to go further into the question. I have come to this result not without difficulty, but I agree with the Sheriffs in the view that they hold.

Lord Ardmillan—The questions raised in this case are of great importance, and of some difficulty; and we have the benefit of most able and elaborate Notes from the learned Sheriffs, who have very carefully considered the case, and fully appreciated the difficulties which it presented. We have also had ample and ingenious argument from Counsel.

I have arrived at the same conclusion as your Lordship in the Chair, and am of opinion that the defenders are entitled to absolvitor.

The ship "Frey," of which the pursuer is master, was chartered at Alexandria to carry a cargo of beans to Falmouth "for orders." The charter-party is dated "Alexandria, 15th August 1863." The defenders, Gibson & Clark, purchased the cargo at Falmouth, and gave the "orders" for Glasgow. She proceeded to the Clyde accordingly, under the order to Glasgow. She reached the "Tail of the Bank," an open roadstead about 22 miles from Glasgow, on or about 26th December 1863, with her full cargo; and the master there ascertained that she drew so much water that, with her full cargo, she could not lie afloat in Glasgow harbour at all times of tide. With reference to this position of matters, it is necessary to attend to the provisions of the charter-party under which the ship left Alexandria, and according to which she was bound to proceed, under such orders as she might receive at Falmouth.

The right construction of the charter party is the first step towards a right decision of the case—(*Reads and explains charter-party*). I do this very briefly, as I agree with your Lordship in your explanations.

The ship must go *to* the safe road, *or* so near as she may safely get and lay afloat at all times of tide, and "deliver the same"—that is the cargo—the whole cargo which she carries. In this charter-party *two* ports are mentioned—(1) Alexandria, the port of lading, where the lading or receiving is to be "according to the custom of this port," viz., Alexandria; and (2) the port to be named in the orders to be received at Falmouth, if a safe port, or as near as she could safely get and lay afloat, where delivery is to be "according to the custom of that port." The "custom" is thus mentioned with reference to the two ports, the one of lading, and the custom relating to lading, and the other the port of discharge or delivery, and the custom relating to delivery.

In this instance, the second of these references to the custom, that at the port of discharge, was struck out by consent. I hold it as not here, and as intentionally omitted.

In so far as any rule in regard to the mode, time, and place of delivery of the cargo, rests on any specialty in the custom of the port of Glasgow, I am of opinion that we cannot consider it. I discard it altogether.

But, on a fair construction of the charter-party,

with reference to the facts of the case, I am of opinion that, apart altogether from local custom of port in regard to delivery, the master was bound to consent to any moderate and reasonable lightening of the ship, which would admit of his going to Glasgow safely. If the ship as loaded could safely go to Glasgow the master was bound to take her.

A charter-party is a mercantile or maritime contract, to which the principles of equity are pre-eminently applicable. When the master took orders to go to Glasgow as the port of discharge, he, knowing what water his ship drew with her full cargo, and knowing what water could be had in Glasgow harbour, was bound to go to Glasgow and deliver there if he could do so with safety. No fair reading of the charter-party can exempt him from that obligation. The lightening the ship of one-fifth of her cargo was intended to facilitate the voyage, and undoubtedly enabled him to proceed safely, and to float at all times of tide in the harbour of Glasgow.

If he had thrown, as by jettison, part of his cargo overboard, thus lightening the ship, or if by arrangement he had delivered a part at some place before entering the Clyde, so that, when he reached the Tail of the Bank the ship could have safely proceeded to Glasgow, and would have found water to float at all times of tide, then I do not think it could be seriously doubted that, being lightened so as to be safe, he was bound to proceed to Glasgow.

I do not think that under this charter-party there are two or more ports of discharge. Nor do I think that the charterers or consignees could compel partial delivery or division of cargo for their own interest or convenience. But if, by a moderate and reasonable amount of lightening, at the expense of the consignee, the safety of the passage to Glasgow harbour could be secured, and the great bulk of the cargo could be delivered according to contract, then I think it would be contrary to equity to permit the master to refuse to lighten, or to refuse to proceed to Glasgow after lightening.

The lightening is just a mode of enabling the master safely to fulfil his contract; and the true object and meaning of the provisions for the contingency of being unable to reach the port in safety were just to secure the ship from peril. The safety of the ship was protected by the stipulations, and, in point of fact, the ship was kept safe. That was secured by the lightening her of a part of her cargo. Extreme cases have been put in argument. But the question is to some extent a question of degree, because it is a question of equitable obligation, and of reasonable conduct. I do not say that four-fifths of the cargo could have been taken out of the ship at the Tail of the Bank, or even one-half of the cargo, and then that the ship could have been required to proceed with the remainder; we must in dealing with an equitable contract consider the fairness and reasonableness of the proceeding. I speak not of custom of the port, but of the reason of the thing, when I say that delivery of the whole of this cargo in the open Firth at the Tail of the Bank, 22 miles from Glasgow, and where there is no quay, could not have been reasonably forced by the master upon the consignees; and, on the other hand, I think that the lightening of the ship of one-fifth of the cargo, and the proceeding in safety to Glasgow with the remainder, would have been fair and reasonable on the part of the master. It would have been fulfilment of the contract according to its just and fair meaning.

I so construe this charter-party as to permit and support this fair, reasonable, and equitable, procedure.

I have examined the decisions and authorities quoted, and I have arrived at the conclusion that there is no authority, in point of law, to the contrary of what I have explained as the equity of this contract, and of this case. There is no decision, and no institutional authority, to support the proposition, that the ship owner can escape from his contract by refusing to lighten the ship to the moderate extent of one-fifth of the cargo, so as to be enabled safely to deliver the four-fifths that remain.

Lord Kinloch—The substantial question raised in this case is, whether the pursuer, the master of the ship "Frey," was entitled to insist on delivering his cargo at the Tail of the Bank; or whether he was bound to do at first that which he did at last (although reserving all questions of right), namely, to allow his ship to be lightened by discharge of part of the cargo, so as to be enabled to lie afloat at all times of the tide in Glasgow harbour, and there to make full delivery.

It was admitted at the bar, on the part of the master, that if he was legally bound to allow the ship to be lightened and to proceed with her so lightened to Glasgow, no demurrage is due, there remaining enough of running days after the demand made on him to that effect. In the opposite view, a calculation of the running and lay days would become indispensable.

By the charter-party executed at Alexandria the vessel was bound, after loading her cargo, to proceed to "a safe port in the United Kingdom of Great Britain and Ireland," according to the orders to be received by the master at Queenstown or Falmouth. It is added "or so near thereunto as she may safely get and lay afloat at all times of the tide, and deliver the same, and so end the voyage."

It is said that the words "according to the custom of the port" were originally in the charter-party, and purposely deleted before the parties signed. This appears to have been the fact. But I think the fact only material to shew more clearly that the shipmaster did not bind himself, as a matter of direct obligation, to conform to the custom of every port to which he might be ordered, leaving his obligation of delivery to be ruled by the common law. The case, I think, is not substantially different from what it would have been had the words never been inserted at all. If the words had not appeared deleted as they now do, I doubt if it would have been competent to prove that the parties had talked of inserting them and ultimately resolved on leaving them out, which would just be to prove the communings anterior to the executed deed.

When the vessel arrived at the Tail of the Bank, which is an open roadstead, more than 20 miles from Glasgow, it became manifest, and is not disputed, that she was too deeply laden to lie at all times afloat in the harbour of Glasgow. It does not very clearly appear from the evidence that she might not have sailed without injury a great deal nearer to Glasgow. But unquestionably she could not, with her full cargo, lie at all times afloat in Glasgow harbour. On the other hand, it was proved by the actual fact that after being relieved of a

part of her cargo, estimated at the bar to amount to about one-fifth of the whole, she was enabled to lie afloat in the harbour at all times of the tide.

I am of opinion that in point of law the master was bound to allow his ship to be lightened, and to proceed with her to Glasgow, as the shippers of the cargo demanded. I come to this conclusion on the simple ground that this was nothing more or less than fulfilment of the charter-party after a fair and reasonable construction. The charter-party formed a mercantile contract, and must have put on it, not a strict and technical, but a fair and liberal interpretation, consistent with equity and good faith.

Nothing, I think, could be more unreasonable than to insist that all the cargo should be delivered in the month of January in an open roadstead more than twenty miles from Glasgow; which not only involved great expense to the shippers in the way of lighterage, but was attended with no little risk. On the other hand, I think the shipmaster could suggest no real or tangible injury or peril to the vessel from the opposite course being followed. The vessel was bound to go to Glasgow if to that port she could safely get. If only four-fifths of the actual cargo had been laden she must have gone on to Glasgow without a moment's delay. In the case which actually occurred, there was no legitimate interest to object to the shippers placing her in the same position by lightening her to the extent of one-fifth. The vessel was only thereby enabled to make the voyage expressly engaged for. She was exposed to no accident which her owners did not voluntarily undertake. It is not proposed that any part of the expense of lightening the ship should fall on her owners; the shippers have discharged it all. It is admitted that the process, if followed out immediately on demand, did not extend the running days allowed for unloading more than the charter-party gave. In no point of view can it be said that the vessel incurred any loss or risk more than her owners contemplated. I am of opinion, therefore, that what the shippers demanded was just that fair and reasonable fulfilment of the contract which every mercantile contract involves. It is a fulfilment which I think squares with the very words of the contract. The vessel was to go to Glasgow, "or so near thereunto as she may safely get and lay afloat at all times of the tide." I think the words "as she may safely get," are reasonably to be construed to mean "as it is possible to take her with safety." And this possibility must be considered with reference to the due and usual method of accomplishing such safety. If the obstacle to her proceeding was a bar at the mouth of the harbour, which a slight lightening would enable her to surmount, I cannot think that the master would be entitled to refuse the lightening, and to insist on delivering the whole cargo in the open sea. The only interest secured to the ship by the charter-party was that she should not be required to go where she could not safely get, and should deliver no part of her cargo except where she could lie afloat at all times of the tide whilst doing so. As the shippers, by the proceeding taken by them, secured the vessel in both particulars, I am of opinion that they thereby took away from the master all ground of objection founded on these clauses of the charter-party.

It was pleaded for the master that what the shippers demanded involved delivery of the cargo at two different ports or places of discharge, in place of one only. I consider this argument to be a fallacy; and to beg the question in issue. The proceeding at the Tail of the Bank was not in any sound sense delivery of the cargo; it was lightening for the purposes of navigation. Had the proposal been to take out four-fifths of the cargo at the Tail of the Bank, and to go on with the remaining fifth, the shipmaster's argument would have had a great deal more of plausibility; for in such a case a great deal may depend on the difference of more and less:—it may draw that very distinction between lightening and discharging which is all-important in the case. If the ship had come up with her full cargo to the very entrance of the harbour; and had then been enabled to enter by a slight lightening, it never could have been said that this was delivery at two ports of discharge. In point of principle, I think that it can as little be said in the present case.

It was further pleaded for the master, that in going beyond the Tail of the Bank he would have been taking his ship, if insured, beyond the limits of the policy, because beyond her proper port of discharge; and that this affords a criterion in his favour, with reference to his obligation to go farther. In such a case it is said he would have gone up to Glasgow uninsured, which he was not bound to do. But this argument I again consider to be a *petitio principii*. If, on a sound construction of the charter-party, the Tail of the Bank was not the port of discharge, but Glasgow was so, and the process of lightening was nothing more than the due proceeding to enable the vessel to reach Glasgow, all argument from the supposed policy of insurance at once falls to the ground. In going up to Glasgow from the Tail of the Bank, (being enabled thereto by being lightened), the vessel was only prosecuting her intended voyage towards her port of discharge; and remained throughout under the protection of the policy, if such had been taken out.

This is to be said on the supposition (which is the only ground of the argument) that the terms of the supposed policy were identical with those of the present charter-party. But it is not an unimportant observation, that not only are policies in general worded very differently from charter-parties, but in estimating their effect very different considerations may come into operation. The policy in the usual case ceases to operate when the voyage, properly so called, terminates; that is, when the vessel arrives at the port of discharge, or, as is often said, twenty-four hours after being safely moored, and anterior to delivery of the cargo. The charter-party continues to operate until delivery of the cargo is made, and it is only then that the ship ends the voyage in the sense of the charter-party. This difference in the two instruments excludes an indiscriminate application to one of the principles applicable to the other; and warns of the exceeding peril of all arguments from analogy.

I am of opinion that the judgment pronounced in the Sheriff-court should be altered, and the defenders assoilzied from the conclusions of the action.

Agent for Pursuer—Henry Buchan, S.S.C.
Agents for Defenders—J. & R. D. Ross, W.S.