made within six months of the discovery of the injury. In some respects this is a better, in others perhaps a worse, remedy than that under the general statute. I am not required to determine whether the frontagers and abutters are by reason of the enactment of section 73 confined to this as their sole remedy, or may elect between it and a claim under the Railway Clauses Act, or may claim under both. But even were it assumed in favour of the reclaimers that their view is sound, the argument which excludes the frontagers and abutters from section 6 does not touch injured persons who are neither frontagers nor abutters. In the case of the frontagers and abutters the argument is that the one remedy is practically inconsistent with the continuance of the other, and must be held to come in substitution of it. But it will hardly do to say, because the frontagers and abutters who get a new remedy have the old withdrawn, that the old remedy is also to be held as withdrawn from people who get nothing in its place. Of course, the thing might have been done, but what we have got to consider is, whether, in the words of the special Act, section 6 of the Railways Clauses Act, as affecting the respondents, is inconsistent with section 73 of the special Act. I find no implication in section 73 to lead to the conclusion contended for.

The 74th section was also referred to. So far as it goes it seems adverse to the reclaimers. It confers on the company the right, and the duty when required, to underpin houses in order to avoid injury to them; and this section is not limited to houses fronting or abutting the streets in or under which the subway goes. But by sub-section 8 it is provided that nothing in the enactment, nor any dealing with property in pursuance of it, shall relieve the company from the liability to compensate under the Lands Clauses Act, or under any other Act.

I agree in the remarks of the Lord Ordinary about sections 50 and 68, as well as with the rest of his Lordship's opinion, and I think that his interlocutor should be adhered to.

LORD ADAM — I agree on the same grounds.

LORD M'LAREN—I also concur.

LORD KINNEAR—I am of the same opinion. The respondents complain that their property has been injured by the complainers in the exercise of their statutory powers. The injuries are said to have been caused by the construction of the railway, and they are such as would have been actionable if the operations which are said to have caused them had not been authorised by Act of Parliament. The respondents therefore have a relevant case to support the claim for compensation under the 6th section of the Railways Clauses Act. But it is said that the provisions of that section have been varied by the 73rd section of the special Act, in such a manner as to deprive persons in the position of the respondents of all claim for compensation for injury done to their property, while, on the other hand, their right to recover damages for such injury as for an actionable wrong is effectually excluded by the statutory powers.

I agree with your Lordship for the reasons you have stated that the 73rd section of the statute has no such effect.

In the case of *The Vicar of St Sepulchre in re Westminister Bridge*, Lord Westbury laid down a rule for determining whether an enactment in a general Act is varied or excluded by the special Act. If the particular Act gives in itself a complete rule on the subject the expression of that rule would undoubtedly amount to an exception of the subject-matter of the rule out of the general Act. Now, the question is, whether the 73rd section of the special Act does or does not amount to what Lord Westbury describes as a complete rule on the subject. It may or may not be a complete rule with reference to the particular persons or rights which are alone dealt with, that is to say, persons whose premises adjoin or abut upon the streets or roads in which the subway is constructed, but it provides no rule whatever for the rights of other persons—persons in the position of the respondents. I agree, therefore, with your Lordships that it is entirely beside the present question to plead the provisions of section 73 of the special Act.

The Court adhered.

Counsel for the Complainers—Asher, Q.C. —Orr Deas. Agent—W. & J. Burness, W.S.

Counsel for the Respondents—Dundas—Aitken. Agents—Forrester & Davidson, W.S.

Wednesday, June 26.

SECOND DIVISION.

[Sheriff of Lanarkshire.

LITTLE *v.* STEVENSON & COMPANY.

Ship—Charter-Party—Demurrage—Commencement of Lay-Days—Notice that Ship Ready to Receive Cargo.

A charter-party provided that the "River Ettrick" should proceed to Bo'ness and there receive . . . a full cargo of coals . . . the coals to be loaded in sixty running hours. . . . If longer detained, demurrage to be paid at 12s. 6d. per hour . . . lay-days to count from the time the master has got ship reported, berthed, and ready to receive cargo, and given notice of same in writing to charterers or their agents.

On 17th October the shipowners intimated in writing to the charterers that the vessel had left for Bo'ness, and requested them to have the cargo forward on the 19th. The "River

Ettrick" arrived in Bo'ness Roads on the 19th, but was not allowed to enter the dock owing to its crowded state. The fact of her arrival was known to the charterers' agent, who was also agent for the ship. On 21st October a berth became unexpectedly vacant in the dock owing to the cargo for another vessel not being ready, and this berth would have been given to the "River Ettrick," although it was not her turn, if her cargo had been forward. As her cargo was not forward, the "River Ettrick" failed to obtain this berth, and no other berth became available for her until the 26th, on which date she was docked. Her loading was completed on the 28th.

Held that the charterers were not liable to the shipowners in demurrage, in respect (1) that the lay-days did not commence to run until the vessel entered the dock, that being the usual place for shipment of cargo at Bo'ness; and (2) that no notice in writing had been given to the charterers in terms of the charter-party, that the vessel was reported, berthed, and ready to receive cargo.

Observed that, where there are stipulated lay-days and the ship is in the usual place for shipment or discharge of cargo, the charterers or shippers take the risk of all contingencies which may delay the ship, but that the risk of not getting to the ordinary place of shipment is a risk which with its consequences falls upon the ship.

By charter-party dated 5th October 1893, entered into between J. Little & Company, Glasgow, agents for James William Little, shipowner, Glasgow, registered owner of the s.s. "River Ettrick" of Glasgow, and D. M. Stevenson & Company, coal exporters, Glasgow, it was provided "that said ship being tight, staunch, and every way fitted for the voyage, shall proceed as soon as possible to Bo'ness, and there receive, in one or more lots as ordered, at the berth pointed out by charterers' agent, if required, a full cargo of coals. The charterers hereby agree to supply the said cargo. . . . The coals to be brought alongside in forty-eight [extended by subsequent agreement to sixty] running hours, and delivery to be taken as fast as steamer can deliver, weather permitting, and Sundays and holidays excepted in both cases. . . . If longer detained, demurrage to be paid at 12s. 6d. per hour unless detention arises from a lock-out, strike, restriction, accident, stoppage, idle time or holidays at any works, mine or mines with which vessel may be booked, railway strikes, breakdowns, or detentions, accidents to loading machinery, strikes, holidays, or idle time, or any cause beyond merchants' control delaying the obtaining, providing, loading, or discharging of cargo. . . . Lay-days to count from the time the master has got ship reported berthed and ready to receive or deliver cargo, and given notice of same in writing to charterers or their agents during business hours, say between 9 a.m. and 5 p.m., but loading time not to count while bunkering or discharging inward cargo, nor during idle time or holidays, nor between 2 p.m. on Saturdays and 7 a.m. on Mondays, nor during time, if any, during which loading is stopped through ship being aground."

On 17th October 1893 James Little & Company sent the following notice to the charterers—"'*River Ettrick*.'—We beg to advise you that this steamer left Harwich to-day at 1 o'clock for Bo'ness, to load a cargo of coals under your charter for King's Lynn. Please arrange to have coals forward for Thursday, and despatch her as quickly as possible."

The "River Ettrick" proceeded to Bo'ness and arrived outside the dock at 8·30 on 19th October 1893. In consequence of the crowded state of the dock, she was not allowed to enter and lay outside in the roads. She was reported to the harbour authorities as having arrived at Bo'ness, and was within the jurisdiction of the custom-house.

The charterers had booked the "River Ettrick" with James Nimmo & Company's collieries, and on 20th October the local agent at Bo'ness, who represented all the parties—charterers, shipowners, and coal-masters—opened up traffic for her by announcing to the railway company that she was ready to receive cargo.

At 6 a.m. on 21st October a coal-loading berth became available for the "River Ettrick." In consequence of a pressure of engagements James Nimmo & Company failed to provide a cargo for the ship. As her cargo was not forward the "River Ettrick" did not get the berth available on the 21st October, and it was given to another vessel which had arrived after her.

No other berth became available for the "River Ettrick" until the 26th October. She was docked on that date, berthed for loading on the 27th, and was loaded and sailed on the 28th.

In these circumstances the shipowners contended that the "River Ettrick" had been detained for ninety-four hours more than she ought to have been in loading, and demanded demurrage at the rate of 12s. 6d. per hour, amounting to £58, 15s. The charterers denied their liability under the charter-party, and the owners thereupon raised an action against the charterers for the above sum in the Sheriff Court at Glasgow.

After a proof, which established the facts which are narrated above, the Sheriff-Substitute (BALFOUR) on 1st August 1894 pronounced an interlocutor in which he found the defenders liable in demurrage.

The defenders appealed to the Sheriff (BERRY), who on 30th March 1895 pronounced the following interlocutor—"Recals the interlocutor appealed against: Finds that by charter-party dated 5th October 1893, the defenders chartered from the pursuer the steamship 'River Ettrick' to carry a cargo of coal from Bo'ness to King's Lynn: Finds that the coals were to be brought alongside in forty-eight, or, as was afterwards arranged, sixty running hours, and if longer detained demurrage

was to be paid at 12s. 6d. per hour, unless detention arose from certain specified causes: Finds that it was further provided that lay-days were to count from the time the master had got the ship reported berthed and ready to receive or deliver cargo, and given notice of the same in writing to the charterers or their agents during business hours, say between 9 a.m. and 5 p.m.: Finds that the vessel arrived at Bo'ness Roads on the 19th of October, the pursuers agents having on 17th October sent notice to the defenders that she had left Harwich that day, and would be ready to receive her cargo on Thursday the 19th: Finds that the defenders had booked the vessel with Messrs Nimmo & Company's collieries, and that the local agent at Bo'ness, who represented both the ship and the charterers, on 20th October opened up traffic for her with the railway company as ready to receive cargo: Finds that a coal-loading berth was available for her at 6 a.m. on Saturday 21st October, and she could have got that berth if her cargo had then been forward, but that not being the case the berth was given to another vessel which had arrived after her: Finds that the 'River Ettrick' lay in the roads until she was docked on Thursday 26th October, and that the delay was caused by the failure of the defenders to provide a cargo on the 21st, but she was put by the shipowner at the disposal of the charterers, and would have entered the dock and been berthed on 21st October if the coal had been ready for her: Finds that the shipowner was not responsible for her not being berthed on the 21st but that the delay was caused by the charterers having arranged with Nimmo & Company for a cargo of coals which that firm did not deliver in consequence of their other engagements, with which the shipowner had no concern: Finds, under reference to note, that none of the exceptions in the charter-party excludes the charterers' liability to provide a cargo of coal by the 21st October, and that the number of hours during which the 'River Ettrick' was detained beyond the time allowed by the charter-party, and for which demurrage is chargeable against the defenders, is seventy-six, and that demurrage for that number of hours at 12s. 6d. per hour, the rate mentioned in the charter-party is due to the pursuer, or in all £47, 10s.: Therefore decerns against the defenders in pursuer's favour for said sum of £47, 10s. stg., with interest at the rate craved," &c.

The defenders appealed, and argued—No demurrage was due because (1) no notice had been given in writing to the charterer or their agents that the ship was reported berthed and ready to receive cargo. This was a condition-precedent to the right to claim demurrage. Opinion of Lord Rutherfurd Clark in *Lamb* v. *Kasclack, Alsen, & Company*, January 31, 1882, 9 R. 485; *Harris* v. *Heywood Gas Coal Company*, July 3, 1877, 14 S.L.R. 605. (2) It could not have been reasonably anticipated that a berth would be available for the "River Ettrick" on the 21st October, and therefore the charterers were not to blame because the coalmasters had failed to supply the coals. (3) The ship was not an arrived ship on 21st October. It had not entered the dock at Bo'ness. An arrival in the roads was not an arrival at Bo'ness under the charter-party. The ship must get within the dock before it could be called an arrived ship—*Tapscott* v. *Balfour*, November 23, 1872, L.R., 8 C.P. 46; *Dahl* v. *Nelson, Donkin, & Company*, January 13, 1881, L.R. 6 App. Cas. 38; *Murphy* v. *Coffin & Company*, December 13, 1883, L.R., 12 Q.B.D. 87.

Argued for the pursuers—The interlocutor appealed against should be affirmed. (1) The ship never was berthed on the 21st, and therefore no notice could be given that it was berthed in terms of the charter-party. They gave written notice of all that it was possible to give on 17th October. The agent for the charterers at Bo'ness knew that the ship had arrived there, and it was absurd to think that written notice of her arrival required to be given to him. (2) The charterers were responsible for the neglect of the coal owners in not having a cargo ready to be shipped on the 21st. (3) The ship was an arrived vessel. She had been reported as arrived and was under the jurisdiction of the port. If the charterers had had the coals ready for loading on the 21st, she would have been permitted within the dock on that day. It was therefore their fault that she did not get into the dock sooner than she did—*Ashcroft* v. *The Crow Orchard Colliery Company, Limited*, July 6, 1874, L.R., 9 Q.B. 540.

At advising—

LORD TRAYNER—In this case the pursuer, who is the owner of the steamship "River Ettrick," claims demurrage from the defenders on account of the undue detention of his vessel at Bo'ness, at which port she was, under charter-party, bound to take on board a cargo of coals from the defenders. At the time this action was raised, as appears from the correspondence, the defenders offered the pursuer a certain sum in settlement of his claim, which, however, was not accepted. The parties are now maintaining their respective rights, and it has to be determined whether the defenders are liable for demurrage, and if so, to what amount. The material facts are not in dispute. The vessel arrived in the roads off Bo'ness on the morning of the 19th October 1893, but in consequence of the crowded state of the dock she was not then allowed to enter the dock. She was docked however on the 26th, berthed for loading on the 27th, and loaded and sailed on the 28th. Notwithstanding the crowded state of the dock it happened that a loading berth became vacant on the 21st October in consequence of cargo not being forward for the vessel which then occupied the berth. The harbour-master explains that if coal had then been forward for the "Ettrick" she would have got that berth, although it would have been giving it to her "out of her turn, because there were other steamers before her." But the "Ettrick's" cargo was

not forward and accordingly she did not get the berth. Apart from this circumstance the "Ettrick" got the earliest berth which she could have claimed or got. In this state of the facts the pursuer maintains that the berth vacated on the 21st was lost to the "Ettrick" through the fault of the defenders in not having the cargo forward, and that the lay-days under the charter-party must be held to run from that date. If that view is sound, the pursuer would be entitled to decree for the amount claimed, subject to a possible deduction on account of what is called an "idle day." But the defenders say that they are not to be held liable for not having their cargo forward on the 21st, because from the crowded state of the docks it could not be reasonably anticipated that any berth would be available for loading the "Ettrick" so early as the 21st, and that it was by the merest chance that a berth did become vacant on that day. I am not prepared to sustain that contention. I think the charterer, or shipper of the goods, takes the risk of all contingencies which may delay the ship in the case where there are stipulated lay-days, and the ship is in the usual and ordinary place (not berth) for shipment or discharge of cargo. If therefore the "Ettrick" had been in dock on the morning of the 21st October, and failed to get the berth then vacated and consequently available for her by reason of the defenders not having cargo forward, I should have been of opinion that the lay-days had then commenced provided there was nothing in the charter-party to lead to another result.

The defenders, however, maintain further that they are not liable in the demurrage claimed, (1) because on the 21st October the "Ettrick" had not arrived at the port of shipment provided in the charter-party; and (2), *separatim*, that the lay-days did not then commence because the ship had not given the notice required by the charter-party, from the date of which notice alone the lay-days commenced to count. I shall notice both of these views briefly, observing generally with regard to both that they depend on the terms of the charter-party which contains the contract between the parties. So far as regards the first, the provision in the charter-party is that the "Ettrick" should proceed "to Bo'ness, and there receive . . . a full cargo of coals." Now, in my opinion, that was a provision that the "Ettrick" should proceed to the usual and ordinary place of shipment or discharge of cargo at Bo'ness. If that usual and ordinary place was the roads off Bo'ness, then to the roads, but if that usual and ordinary place was the docks at Bo'ness, then to the docks. It is not disputed that at Bo'ness the usual and ordinary place of shipment is the docks, and accordingly until the "Ettrick" got into the docks she had not arrived at her charter port of shipment, until her arrival at which there was no obligation on the shipper to load the cargo, and the lay-days in which the cargo was to be loaded could not consequently commence to run. I have already said that after the ship has arrived, the risk of delay in loading through want of berth or other cause (not being the fault of the ship) is a risk which, with its consequences, must be borne by the shipper. But it is equally certain, according to the general rules of law, that the risk of not getting to the ordinary place of shipment (of which crowded docks preventing the ship from entering the dock is a familiar instance) is a risk which, with its consequences, falls upon the ship. My view, therefore, is that the lay-days did not and could not commence on the 21st October, because the "Ettrick" had not then reached the port of shipment provided by the charter-party.

With regard to the second point, the charter-party provides — "Lay-days to count from the time the master has got ship reported, berthed, and ready to receive or deliver cargo, and given notice of the same in writing to charterers or their agents during business hours." No such notice was given in writing to the charterers, for it cannot seriously be maintained that the pursuer's intimation of 17th October, the only written notice given by him to the defenders, that the "Ettrick" had left Harwich bound for Boness was an intimation of the kind provided or contemplated by the charter-party. It gave, and could give, no notice that the ship was "reported, berthed, and ready to receive cargo." The case of the "*Charles Steels*," recently decided in this Division of the Court, was referred to as bearing upon this part of the case. I confess I do not see its application. But to prevent any misapprehension I may repeat here, that if the reporting or berthing of the ship had been prevented or hindered by the act or fault of the defender, I should have been prepared again to hold that such a state of facts did not prevent the running of the lay-days, not because there had then been fulfilment of the obligation on the part of the ship, but because, the shipper by his act or fault having prevented such fulfilment, he could not take advantage to the detriment of another from what had been brought about by his own fault.

The result of my opinion is that the defenders are not responsible for the loss of the berth on the 21st October, the "Ettrick" not having then arrived at her port of shipment, and it not being intimated in writing that she was reported, berthed, and ready to receive cargo. It follows that the defenders are not liable in the demurrage sued for, seeing that the cargo was duly loaded within sixty hours (the charter-party period of forty-eight hours having been extended to sixty by agreement) after she entered the dock.

I think the judgment appealed against should be recalled and the defenders assoilzied.

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

LORD RUTHERFURD CLARK was absent.

The Court pronounced the following interlocutor:—

"Sustain the appeal, and recal the

interlocutor appealed against: Recal also the interlocutor of the Sheriff-Substitute dated 1st August 1894: Find that by charter-party dated 5th October 1893 the defenders chartered from the pursuer the steamship 'River Ettrick,' to carry a cargo of coal from Bo'ness to King's Lynn: Find that the coals were to be brought alongside in 48, or, as was afterwards arranged, 60 running hours, and if longer detained demurrage to be paid at 12s. 6d. per hour, unless detention arose from certain specified causes: Find that it was further provided that lay-days were to count from the time the master had got the ship reported, berthed, and ready to receive or deliver cargo, and given notice of the same in writing to the charterers or their agents during business hours, say between 9 a.m. and 5 p.m.: Find that the vessel arrived in Boness Roads on the 19th of October but was not able and was not allowed to enter said dock on account of the crowded state of the dock until the 26th of October, which day she was docked at 2·30 p.m.: Find that the loading of said vessel was completed on 28th October at 4 p.m.: Find that the 'River Ettrick' did not arrive at her charter port of shipment and that the lay-days did not begin to run until the said 26th day of October, when the 'River Ettrick' got into the dock: Find further that no notice was given in terms of the said charter-party to the defenders that the vessel was reported, berthed, and ready to receive cargo: Find that the defenders are not liable to the pursuer in any sum in name of demurrage: Therefore assoilzie the defenders from the conclusions of the summons, and decern."

Counsel for the Pursuer—Ure—Aitken. Agents—J. & J. Galletly, S.S.C.

Counsel for the Defenders—C. S. Dickson—Salvesen. Agents—Boyd, Jameson, & Kelly, W.S.

Wednesday, June 26.

FIRST DIVISION.

[Court of Exchequer.

MUSGRAVE (SURVEYOR OF TAXES) *v.* DUNDEE ROYAL LUNATIC ASYLUM.

Revenue—Inhabited-House-Duty—Exemption—Act 48 *Geo. III. cap.* 55, *Case* 4*—Lunatic Asylum Originally Founded by Subscription but Self-Supporting.*

Case 4 of 48 Geo. III. c. 55, exempts from inhabited-house-duty "any hospital, charity school, or house provided for the reception or relief of poor persons."

Dundee Royal Lunatic Asylum was originally founded by charitable donations, and was governed gratuitously. It possessed two small mortifications, out of the annual proceeds of which two indigent lunatics were in part maintained. The other inmates of the asylum consisted either of private patients paying board, or pauper lunatics for whom board was paid by the District Board of Lunacy, at a rate estimated to meet the cost of their maintenance and clothing. The accounts of the asylum showed that for some years the establishment had been maintained out of the board paid for patients without the aid of voluntary subscriptions. *Held* that the asylum being a self-supporting institution was not entitled to the exemption conferred by the clause above quoted.

At a meeting of the Income-Tax Commissioners for Dundee on 5th April 1894 the treasurer of the Dundee Royal Lunatic Asylum appealed against an assessment for inhabited-house-duty on £1300 as the full annual value of the Dundee Royal Lunatic Asylum for the year ending 24th May 1894, on the ground that the asylum was a charity and entitled to the exemption conferred by case 4 of 48 Geo. III. cap. 55, upon "any hospital, charity school, or house provided for the reception or relief of poor persons."

The Commissioners decided that the asylum was entitled to the exemption claimed, and the Surveyor of Taxes being dissatisfied with this decision, the present case was stated for the opinion of the Court of Exchequer, the question for the Court being—"Whether the Dundee Royal Lunatic Asylum is an hospital or house provided for the reception or relief of poor persons within the meaning of the Exemption stated under 48 Geo. III. c. 55, Case 4?"

The case contained the following statements:—"2. Hitherto the assessment for house-duty has been restricted to the portion of the asylum buildings estimated to have been used by private patients, amounting to £217.

"3. The asylum was originally founded in conjunction with an infirmary by charitable donations and subscriptions—a royal charter having been obtained in 1819 by which a body of contributors and donors were incorporated by the name of the Dundee Infirmary and Asylum. The corporation was to consist of two separate establishments, the estates and funds whereof were to be kept distinct from each other, the one to be called The Dundee Infirmary Establishment, and the other the Dundee Lunatic Asylum Establishment. As stated in the charter of 1819, the object of the infirmary was to provide for the relief of indigent sick and hurt persons, and the object of the lunatic asylum was to extend this relief to lunatics.

"4. In 1875 the directors of the asylum establishment applied for a charter separating the asylum from the infirmary establishment, and constituting the directors of the asylum a corporation. In the petition for the charter it was set forth that the asylum buildings had become insufficient for the purposes which they were intended to serve, and the new charter was desired in order that the