missed as unnecessary. The statute did not provide for the case of a company *bona fide* wound up, whose affairs were afterwards discovered not to have been fully wound up.

LORD PRESIDENT — The Act of Parliament does not confer on the Court jurisdiction to declare when a company shall be held to be dissolved; on the contrary, the Act itself states the condition under which dissolution occurs. The thing works automatically. Needless to say, it will be for the Court to determine, should the question arise, whether in a given case the statutory conditions have existed which produce dissolution, and also whether the expiry of the three months terminates the liquidation to the effect of precluding the Court from issuing further orders. The *Crookhaven* case was not an application to the Court to declare *ab ante* that the liquidation should not terminate; the Court was there asked to do something regarding which it was predicated that it would have the effect of keeping the liquidation open. In the present application we are not asked to do anything except to declare. Mr Campbell has made an application, which is now before Lord Stormonth Darling, asking the Court for an operative decree of payment, and about that application I will only say that it seems a highly plausible contention that the application will keep the liquidation open. But we cannot pronounce in advance about that application, as to which we have had no opportunity of judging, that it will have the effect that is claimed for it. It seems to me that we should be going entirely out of our way to pronounce an abstract finding of that kind which might turn out to be misleading and dangerous.

I am therefore for refusing the application, without the addition of the words "as unnecessary" which Mr Campbell asked for, but as incompetent.

LORD KINNEAR—If any question should arise for judicial decision as to the legal consequences of the proceeding which has been remitted to Lord Stormonth Darling, that question may be decided by the Lord Ordinary or by the Court when it arises. But we cannot decide such a question by anticipation, nor until we know the form in which it will be raised, and the substantial interests which it may involve. In the meantime this appears to me not to be an application to the Court to decide any question which has arisen. It is rather an appeal to the *nobile officium* of the Court to interfere and suspend the operation of certain provisions of the statute, on the assumption that they may have a certain effect which one party says they must have, and which the other party does not admit. I am clearly of opinion that we have no power or discretion to interfere in this way, and that any question that competently arises for judicial decision must be decided when it does arise, and not before.

LORD ADAM and LORD M'LAREN concurred.

The Court refused the petition as incompetent.

Counsel for the Petitioner — Campbell, Q.C.—Graham Stewart. Agents—Cairns, M'Intosh, & Morton, W.S.

Counsel for the Respondent — Clyde—Kemp. Agents — Duncan Smith & Maclaren, S.S.C.

Friday, July 1.

SECOND DIVISION.

[Sheriff-Substitute of Forfarshire.

KNIGHT STEAMSHIPS COMPANY, LIMITED *v.* FLEMING, DOUGLAS, & COMPANY.

Shipping Law—Delivery of Cargo—When Delivery Completed so as to Relieve Ship from Liability for Subsequent Damage to Cargo—Provisions of Bill of Lading—Custom of Port.

By the bill of lading of a consignment of jute, part of a large cargo consigned to various consignees, it was provided that the bales were to be delivered from the ship's tackles (where the ship's responsibility shall cease) at the port of Dundee, and also that if the goods were not removed from the steamer immediately she was ready to unload, the master or agent was "to be at liberty to land and warehouse the same" at the risk and expense of the owners of the goods. The consignment in question was discharged at a berth assigned by the harbourmaster, and when taken from the ship's tackles was in good order and condition. Owing to the sheds and quays becoming blocked, the harbour porters, who were in the service of the Harbour Trustees but were paid by the consignees of the cargo, took some of the jute in question to a roadway and piece of waste ground where it suffered damage from damp and mud. The consignees' clerk was in attendance during the discharge. The jute was not removed from this place by the consignee for a considerable time. There was no averment of custom of the port or trade on record, but evidence was led to the effect that in the case of such cargoes the various consignments were landed indiscriminately, and that before any particular parcel was removed by the consignee it had to be checked by the ship's clerk. The shipowners did not give any order to the harbour porters as to the disposal of the jute after it had been taken from the ship's tackles. In an action by the shipowners for a balance of freight the consignee pleaded that part

of his consignment had been damaged to an amount equal to the sum sued for through the fault of the shipowners in putting down the cargo in an improper place. *Held* (1) at common law, and (2) in terms of the clause in the bill of lading as to the responsibility of the ship, that the shipowners were not responsible for damage sustained by the jute at the place where it was put by the harbour porters after it was taken from the ship's tackles, in respect (1) that delivery to the consignees was completed when the bales were taken from the ship's tackles by the harbour porters, who were in so taking delivery acting as the servants of the consignees, and was not postponed until each particular parcel had been checked by the ship's clerk; (2) that the clause in the bill of lading as to landing and warehousing the cargo conferred a privilege but did not impose a duty upon the shipowner to take action with regard to the cargo after it was landed; and (3) *per* Lord Moncreiff, that in addition the consignee was barred by having delayed for an unreasonable time to remove his jute.

British Shipowners Co., Limited v. *Grimond*, July 4, 1876, 3 R. 968, *followed.*

Avon Steamship Company, Limited v. *Leask & Company*, December 18, 1890, 18 R. 280, *distinguished.*

This was an action brought in the Sheriff Court, Dundee, at the instance of The Knight Steamships Company, Limited, against Fleming, Douglas, & Company. merchants, Dundee, in which the pursuers craved decree for the sum of £61, 7s. 6d., being the balance of freight due by the defenders as consignees of part of a cargo of jute discharged from the pursuers' steamer "Knight Bachelor" at Dundee.

The defence was that some of the jute consigned to the defenders had sustained loss and damage to the extent of the sum sued for through the fault of the pursuers, and that the defenders were consequently entitled to deduct that sum from the amount of the freight.

The defenders averred — (1) that the "Knight Bachelor" discharged her cargo at a wharf or jetty which was intended for landing imported cattle, and which was not suitable for the landing of jute, there being no sufficient shed accommodation; (2) that the jute received injury from being discharged during wet or snowy weather; and (3) that part of the defenders' jute was discharged by the pursuers or those for whom they were responsible on to a roadway to the west and a piece of vacant ground to the east of the byres attached to the jetty where the ship was discharging; that this piece of vacant ground was in process of being reclaimed from the bed of the river Tay, and consisted of mud dredged from the river, mixed with ashes and other rubbish; that it was soft, wet, uneven, and unprotected from the weather; that both it and the roadway were quite unsuitable for laying jute upon; that precautions were not taken to prevent injury to the defenders' bales; and that in consequence 435 of them were damaged by damp and mud. The allegation No. 2 was not ultimately persisted in, and the Court, on appeal, found in fact that the berth allotted was suitable for the discharge of the "Knight Bachelor's" cargo.

A proof was allowed, the result of which may be summarised as follows:—The bills of lading held by the defenders provided that the jute was "to be delivered subject to the exceptions and conditions hereinafter mentioned, in the like good order and condition from the ship's tackles (where the ship's responsibility shall cease) at the aforesaid port of Dundee." Among the exceptions and conditions referred to was a clause in the following terms:—"The goods to be taken delivery of from the steamer immediately she is ready to unload, and if the goods are not thereupon removed by the consignee, the master or agent is to be at liberty to land and warehouse the same, or, if necessary, to discharge into hulk, lazaretto, or hired lighters at the risk and expense of the owners of the goods."

The "Knight Bachelor" arrived at Dundee on 13th January 1897 with a cargo consisting of 42,045 bales of jute belonging to several different consignees, part of which cargo, amounting to 6497 bales, was consigned to the defenders. Upon her arrival she was assigned a berth for discharging her cargo by the harbourmaster.

The discharge began on 13th January 1897, and finished on the 31st of that month. About that time a very large quantity of jute arrived at Dundee, and the consignees had some difficulty in getting their consignments taken away as quickly as they were discharged. The ship was not, however, discharged with any unusual rapidity, as upon former occasions she had discharged similar cargoes in a smaller number of days than she took upon this occasion.

The whole of the jute consigned to the defenders was discharged from the ship except one bale, for which credit was allowed to the defenders by the pursuers. The jute was put on the quay or jetty alongside which the ship was lying by the ship's tackle. With the exception of the bale before mentioned, all the jute consigned to the defenders was in good order and condition when it was taken off the ship's tackles at the quay. From the place where the bales were put by the ship's tackles they were removed by the harbour porters. These porters were appointed by the Harbour Trustees, and were subject to their rules and regulations. They were paid by the consignees of the cargo.

The cargo was discharged just as it lay in the hold, and as it was consigned to various different consignees it was not possible for each particular consignee to get immediate possession of the particular bales belonging to him from the ship's tackles. The bales bore quality marks, and private marks, and each merchant had to get from the general mass of bales landed the

particular bales which belonged to him, or bales of the particular quality to which he was entitled. Before any parcel of bales could be removed it had to be checked by the ship's clerk so as to make sure that the consignee was getting his own parcel, and no more.

During the first part of the discharge the harbour porters removed the bales from the ship's tackles to the sheds and byres adjoining the jetty, but before long these places got filled up, and the porters then put the bales upon the open quay, and when all the available space there was occupied, they wheeled the bales to the vacant ground and roadway referred to in the defenders' averments. Until the day before the ship finished discharging the weather was frosty, and the ground was hard and dry, but upon Friday, 30th January, the frost broke, and the weather became wet and sleety. No bales were placed upon the roadway after the frost broke. Some of the bales belonging to the defenders were placed upon the roadway and the vacant ground, and there sustained damage from contact with water and wet mud to the extent of £61, 7s. 6d. The defenders did not remove all their jute till 16th February. The defenders' clerk was in attendance at the quay while the discharge was proceeding.

The defenders had the damaged jute classified, and deducted the amount of the damage from the freight. With this exception the whole of the freight claimed was paid.

The pursuers caused the following notice to be posted in the notice book of the Dundee Royal Exchange Reading Room;—"14/1/97. — *s.s.* '*Knight Bachelor*' *from Calcutta.* Consignees of cargo will please note that on account of insufficient shed accommodation cargo is being landed on open quay, and they are requested to remove same at once as steamer will not be responsible for any damage the jute may sustain after being landed." They also inserted a similar notice in the advertisement columns of the *Dundee Advertiser* and *Courier* newspapers.

By No. 57 of the Dundee Harbour Bye-Laws, no goods (except timber) discharged from any vessel are to be allowed to lie on any of the quays or in any of the sheds during a longer period than forty-eight hours, and if any goods are not removed within that time, the harbourmaster or superintendent or any sergeant of police is authorised to remove them at the expense or risk of the owners or consignees.

The defenders maintained upon the evidence that by the custom of the port of Dundee with regard to the discharge of such cargoes as the one in question, the consigner was not allowed to take away his goods until they had been checked and identified or allotted by the ship's clerk, and until he had the permission of the ship's clerk to remove them. There was no averment to this effect upon record. The defenders contended that in consequence of this custom delivery of the goods was postponed until the consignees had authority from the ship's clerk to remove their bales.

The defenders also maintained upon the evidence that by the rules of the port the harbour porters were not allowed to take any orders except from the ship until they had the permission of the ship's clerk to load a particular bale upon the consignee's cart; that the harbour porters were consequently subject to the orders and control of the ship up to that point; that in this case it was in pursuance of orders from the ship that the defenders' bales were placed upon the roadway and the vacant ground where they sustained damage, the head porter, before putting any bales upon these places, having consulted the ship's agent, and having been directed by him to wheel the jute there; that the porters were paid extra by the ship for doing so; and that the vacant ground and roadway were not proper places for storing jute. They further maintained upon the proof that they were prevented from getting away the jute which was lying on the vacant ground owing to its being underneath bales belonging to other consignees, which was the result of its being not only placed by the porters upon an improper place, but piled up there one bale upon the top of another. Generally they maintained that in order to give the ship a quick discharge, the cargo had been put out much quicker than the consignees could take it away, and that the proper places for putting jute having become in consequence blocked, the cargo was simply dumped down anywhere without any regard to the legitimate interests of the merchants.

The pursuer on the other hand maintained upon the evidence that the defenders' jute suffered damage through being left lying for an unnecessary length of time on the vacant ground and roadway; that the reason why it was so left was not because of any delay on the part of the ship's clerk (no such delay being proved), or on account of their being unable to get at their bales, but because owing to the large quantity of jute then being landed at Dundee, and the consequent difficulty of obtaining cartage and warehouse accommodation, they had no means of taking it away, and no place to take it to, and because in this state of circumstances they simply left their bales lying on the quay in defiance of the harbour regulations. They also maintained that the harbour porters were in the employment of the consignees.

By interlocutor dated 4th April 1898 the Sheriff-Substitute (CAMPBELL SMITH), after certain findings in fact and law to the effect that delivery of the jute did not take place till the ship's clerk had permitted particular bales to be separated and transferred to the carters or other servants of the consignees, that until then the ship was not freed from the duty of taking proper care of the jute, and that in this case, prior to delivery, the jute had suffered damage through their fault, sustained the defenders' claim of damage and plea of compensation, found no debt due, and therefore assoilzied the defenders, with expenses.

Note.—"It seems to me that the law applicable to the present case is to be found

in the cases of *British Shipowners* v. *Grimond*, 3 R. 968, and *Avon Steamship Co.* v. *Leask & Co.*, 18 R. 280. The former case resembles the present in many details, and was pressed upon me in argument as conclusively settling the whole case in the pursuers' favour, although a judicious silence was observed regarding the small element of unloading in wet weather. Beyond question there are many superficial points of resemblance, but the evidence has appeared to me to necessitate a different verdict upon the central issue of fact, *videlicet*, the question of completed delivery, and therefore the application of a different principle of law. I can accept the law unhesitatingly in regard to holding the ship liable for putting the jute ashore in sleet or snow when in the course of delivery through the air. I cannot follow it without violence to the positive conviction that it is clearly proved that delivery in this case was not completed in fact, as the Court appear to have held it to have been in that case by the adoption of the dogma that passing the ship's rail operated complete delivery. No doubt in both cases the jute was passed over the ship's side; but in this case after it so passed it was injured by wet and mud before the defenders had the opportunity to take delivery of any part of it, or to ascertain specifically what part of it was their property, or to be their property. I therefore think the principle of justice, strictly and chiefly applicable to the present case, must be found in the second case. Part of the cargo in that case, which was salt in bulk, and all delivered over the ship's side, was delivered into the water, and that kind of sure but questionable delivery was not found to free the ship from the ordinary liability of carriers. That salt never reached its owners. The jute in this case eventually through the avenue of ship's tackle, harbour porters, and ship's clerk, was put on wheels for its owners, but before it had been selected from the hotchpotch of jute for them it had been defiled by various applications of more or less dirty water, and a good deal depreciated in value. The 'Knight Bachelor' carried a cargo of 42,045 bales of jute to consignees, or more than five times the number carried by the 'British Princess' to Grimond and three other consignees, and arrived when Dundee harbour was crowded. At the time it was being unloaded several other ships were unloading jute in different parts of Dundee harbour. There was a scarcity of cartage and hardly any spare warehouse accommodation. Limited though it was, the harbour porters, despotic themselves, and despotically selected by the Harbour Trust, were too busy to afford time to pile the bales and so utilise the stinted warehouse and pier accommotion. Even the quay was overcrowded with goods and carts, and in order to find space on which to put down the cargo of this ship and let it go off for new cargoes as fast as possible, part of that cargo was put down all over a roadway with gutters at the side that ran with water whenever there was a heavy shower, and also upon a site reclaimed from the Tay, and made of dredgings from the river, furnace cinders, and the general rubbish of the town. When this reclaimed, but still waste, ground was selected as a place for storing jute, it was hard with the hardness of a month's hard frost, and it was a tolerably safe place so long as the frost lasted, but in this country frost cannot be expected to last many months at a time, and it seems to me that it was a piece of grave imprudence on the part of those ruling this discharge of jute to assume that it was unlikely that the frost would not give way before the jute could be removed. There is some not very satisfactory evidence that the ground was sprinkled with sawdust to the depth of about an inch. An inch of new or of old waxcloth, or of boards, might have been a somewhat effectual protection against the melting of the ice permeating this floor of frozen mud, but I think nothing less than a row of 3-inch battens, or three or four rows of deal boards, should have been trusted as effective dunnage on ground like this, and I doubt if less should have been used to bridge the possible pools and gutters of the roadway. Had the bales of jute, with the proper marks, been selected, and the lorries of the consignees been waiting, I see no objection to this frozen mud as a *locus* for the delivery of the jute, but I do hold it to be an outrage to common sense and reason for any carrier for hire, or without it, to lay down the goods of unknown owners upon ice however thick, or upon frozen rubbish and water, and leave it to the risk of destruction, and to escape from making reparation if it has been destroyed, on the strength of any technical definition of complete delivery. The bill of lading, in the absence of the consignee, authorises the ship warehousing the goods at the consignee's expense, and how could the consignee fail to be absent when he did not know where to find his goods?

"The evidence of the pursuers has been arranged and adjusted to the end of enabling all the facts of this case to be packed into the limits of the decision against the Grimonds. No pressure that I know of, hydraulic or spiritual, can enable that feat to be accomplished. The delivery at the ship's side during the discharge of the 'Knight Bachelor,' was one of the most hopelessly impossible of miracles. That such delivery was expected without any exception by the owners is certainly not to be inferred from the bill of lading. No doubt that document says that the goods are to be delivered from 'the ship's tackles (where the ship's responsibility shall cease),' but subject to 'exceptions and conditions,' one of which gives the master power to warehouse or discharge into lighters goods of which the consignee has not at once taken delivery, 'at the risk and expense of the owners of the goods,' and another is to retain the goods by way of lien in security of charges due by the owners. How to give effect to either of these conditions if delivery is effected by passing the ship's side, may have been discovered but has not yet

been expounded. The intelligent commercial gentleman who acted as agent for this ship certainly did not know it, for in the exercise of the ship's lien he lodged 50 bales of the defenders' jute in a warehouse in security for the balance of the freight now sued for, but after much logical reflection of course, and it may be some legal advice, he came to see that, if these 50 bales were delivered to their owner when they passed the ship's rail, the ship could have no continuing lien over them; therefore to show the consistency of his faith in the magical effect of passing the ship's rail, he (in surrender of the right of lien) gave up these bales to the defenders, and now trusts the abstract principle in preference to the bill of lading and the right to lock up in security 50 bales of concrete jute. The power given in the other condition to place goods in warehouses and in other safe places rather seems to exclude the power of placing them on thin ice, or on frozen mud, or in any way risking their destruction before complete delivery has become possible and actual.

"The pursuers do not deny that the defenders' jute suffered through the carelessness or fault of some person or persons. They indicate that the harbour porters and the defenders themselves are both to blame, the former in laying down the jute in dangerous places, and the latter in not taking it smartly enough out of these places. I have a suspicion that the defenders were not so prompt in lifting the goods as they might have been from the frozen mud, but they had the excuse of not knowing where to find jute with the proper marks, and in not being able to get at it for superincumbent jute even when they knew where it was. I have not found clear proof of any fault or slackness on their part.

"As to the harbour porters, their position and duties are somewhat obscure. They are appointed by the Harbour Trust, but it does not seem that they are bound to obey anyone in particular, or to pay any attentive heed to the orders of those from whom they expect payment for the work they do in distributing the hotch-potch of jute tumbled out of the ship as fast as four steam-engines can do it. I am satisfied that they cleared the jute from the ship's side far more with the view to let the ship away as quickly as possible, than to keep the consignees' jute as safe as possible, and that no man's jute ought to have been put on the roadway or on the frozen mud without two or three inches of effective dunnage below it. I assume that the harbour porters are always well selected, but I am not able to assume that they have always been properly directed and advised. However I look upon them as part of the mere mechanism of delivery, and that the ship is bound to watch over the entire process of delivery. It did and does not seem to me that there is any serious dispute about the amount of damage done to the defenders' jute. My impression is that it must be considerably undercharged. The damage was not all caused in one way. It was caused by snow and rain as the bales passed between the ship's holds and the pier, by exposure to wet on the harbour porters' barrows, by wet derived from the roadway and the thawing mud. How much injury was done in each of these ways, and perhaps in other ways, I have no means of ascertaining. I assume it to be law that a carrier who delivers goods in an injured condition, and can prove no legal excuse for himself, must make reparation for the whole injury done to the articles with the care of which he has been entrusted—that, in short, he is bound to deliver in good order, or prove that he could not help it or was not bound to help it."

The pursuers appealed to the Court of Session, and argued—The delivery to the merchants was complete, and the shipowners' responsibility at an end when the bales were taken from the ship's tackles—*British Shipowners Company, Limited* v. *Grimond*, July 4, 1876, 3 R. 968; *Petrocochino* v. *Bott* (1874), L.R., 9 C.P. 355; *Thorsen* v. *M'Dowall & Neilson*, March 18, 1892, 19 R. 743. The fact that the goods had to be checked by the ship's clerk did not suspend delivery—*British Shipowners Company, Limited* v. *Grimond, cit.* The harbour porters were the servants of the consignee — *British Shipowners Company, Limited* v. *Grimond, cit.* The case of *Avon Steamship Company, Limited* v. *Leask & Company*, December 18, 1890, 18 R. 280, had no bearing upon the present, as in that case there was no delivery alongside, the salt falling into the sea before it reached the quay at all. Here it was not disputed that the cargo was put upon the quay and into the hands of the harbour porters in perfectly good condition. For what happened to it after that the pursuers were not responsible. This was the case at common law, but apart from that it was here specially stipulated in the bill of lading that the ship's responsibility was to cease when the goods were taken off the ship's tackles. But further, even if the pursuers were responsible for the cargo being put on the waste ground, they were not liable, in respect that the damage was caused not by the jute being put there, but by its being left there by the consignees until after the frost broke, their reason for doing so being not that they could not get it, but that owing to the large quantity of jute then arriving they had nowhere to put it. For loss so occasioned the pursuers were not responsible. The case of *Marzetti* v. *Smith & Son*, 49 L.T. 580, had no bearing upon the present.

Argued for the defenders and respondents—(1) The jute was damaged before delivery to the consignee was completed. Delivery was not complete until the goods were under the "dominion and control" of the consignee—*Meyerstein* v. *Barber* (1886), L.R.,2 C.P. 38, *per* Willes, J., at p. 50; Maclachlan on Shipping, 459. "Dominion and control" did not pass to the consignees here until the bales were checked by the ship's clerk. Up to that point the porters were under the orders of the ship. It was completely proved that by the custom of

the port the consignee was not entitled to take away his goods until they had been checked by the ship's clerk. In view of this fact *British Shipowners Company, Limited*, v. *Grimond* was an authority in the defenders' favour—see *per* Lord Justice-Clerk Moncreiff at p. 972. No custom was averred here, but the whole proof was before the Court, and the question arose incidentally to the question of when delivery took place. The answer to that question depended upon the custom of the particular port and the particular trade—Maclachlan on Shipping, 459. Delivery at Dundee meant delivery there according to the custom of the port and the trade, and the bill of lading was subject to the custom of the port and the trade—*Marzetti* v. *Smith & Son*, 49 L.T. 580, where the bill of lading was in the same terms as here; Abbott on Shipping (13th ed.), 456, foot; *Budgett & Company* v. *Binnington & Company* [1891], 1 Q.B. 35, *per* Lord Esher, M.R., at page 38. The custom founded upon here was an eminently reasonable one, because if each consignee were entitled to insist upon taking the particular bales belonging to him from the ship's tackles, the ship would be detained for an inordinate length of time. An arrangement was therefore made that the ship should retain control until the different lots had been sorted out, and given by the ship's clerk to the different consignees. (2) Even supposing that the damage was sustained after delivery took place, still the shipowners were liable, because the ship's representatives had no right to direct the cargo to be put in an improper place, and they were responsible if this was done by the harbour porters, who according to the evidence took no orders at that stage from anyone except the ship—*Avon Steamship Company, Limited* v. *Leask & Company, cit.* In *British Shipowners Company, Limited* v. *Grimond, cit.*, it was apparently conceded that the shipowners had no right to put the cargo down on a wet quay. In *Petrocochino* v. *Bott, cit.*, it was not said that there was anything improper in the place where the cargo was placed. The ship was not entitled simply to dump down the cargo wherever they could find room without regard to the interests of the consignees. This was what was done here. The vacant ground and roadway were improper places to put jute upon from the first. What happened was that, to obtain a quick discharge, the cargo was put out so rapidly that it could not be taken away, because the ship's clerk had not time to apportion it as required, with the result that it was put in an improper place, and so piled up that it could not be got away for some time, and suffered damage in consequence. For this the shipowners were liable.

At advising—

LORD JUSTICE-CLERK—The pursuers sue for a balance of freight for the carriage of certain bales of jute, and the defenders maintain that they are not liable, as the jute was damaged after it was delivered over the ship's side, and while the pursuers were responsible for its safe keeping. Under the bill of lading the pursuers were bound to deliver the goods in good order and condition as they were shipped, the delivery to be "from the ship's tackles, where the ship's responsibility shall cease"—a phrase which expresses in terse language what is the common law in regard to discharge of ships. This stipulation is very distinct and clear, and it is difficult to see how any question could arise in regard to it in the case of goods which had been put over the ship's side, unless it were the case that in doing that act they had done something plainly careless, such as lowering them down into a pool of water or mud, or in such a way that they rolled into the dock.

The defenders, however, maintain that they have established a custom of the port, under which, notwithstanding this clause in the bill of lading, they are entitled to have it held that the goods, although separated from the ship's tackles, were still undelivered in the hands of the shipowners.

I am unable to give effect to that contention. In the first place, there is no such case made upon the record as certainly should have been done, seeing it is a defence by which the defenders seek to exclude the case from the operation of the distinct terms of the bill of lading which they accepted. But even if the defenders could be permitted to maintain such a case without any averments or plea-in-law by which notice is given of it, it is not one which, as I hold, can be founded on where it is not included in the terms of the bill of lading. We were referred to no case in which effect was allowed to special custom of port, where the contract did not provide for such a custom being effectual to modify its general stipulations.

But further, if it were the case that custom of the port could be competently founded on without averment, and without being made part of the contract, I am of opinion that the defenders have failed to prove the existence of such a custom. There are only suggestions of such a custom. The one is that it is the practice that the ship's clerk is present at the removal of goods so as to check the bales taken away by each consignee. This is a most proper and business-like proceeding to prevent blunders being made by carters or other employees of consignees in removing the goods, and prevent after questions as to whether certain goods were truly delivered on to the quay from the ship's tackles. But I cannot hold that it constitutes a custom of the port, which sets aside or modifies the express stipulation that the ship's responsibility ceases at the ship's tackles.

The second point is that the defenders maintain that the dock porters, in moving the bales and placing them at any place on or near the quay, are the servants of the shipowners. This is not proved—indeed, I think the evidence is to the opposite effect. The dock porters are not engaged by the ship; they are engaged and paid by the consignees of cargo. It appears to be true that when consignees do not promptly move goods delivered over the side of the

ship, and thus hinder the discharge by having the quay cumbered, the shipowners get the porters to clear the goods away from the edge of the quay, and give them a gratuity for doing so. But they are in no sense in the employment of the shipowner.

It appears to me that this case is exactly like that of *Grimond*, decided in this Court, except in this, that in that case the special stipulation found in the bill of lading in this case was not present, the bill of lading only speaking of delivery "as customary."

The position of the defenders under the bill of lading was that when the goods were on the quay and off the ship's tackles, they had either to remove them or store them in their own way. In ordinary course they would be removed at once. If not removed, it lies with them in their own interest to protect the goods from injury. The facts as disclosed in the evidence satisfy me that the defenders' goods could have suffered no damage if on being deposited at the place where they were laid after being taken out of the ship, the defenders had proceeded to remove them or to protect them from the weather. They were put down when there was a hard frost, and any danger they suffered was caused by their having been left lying there until thaw set in. My opinion is that the shipowner was not responsible for the goods or what happened to them. It appears that circumstances made it difficult for consignees to find cartage for the goods, and that they were not therefore able to remove them from the harbour, and so they lay there for a whole week. Had the defenders provided conveyance for the goods as they were put over the ship's side, I can see no ground in law on which the shipowner could have interfered to prevent the defenders from removing them. And if they had the right to remove them, that must be because they had delivery of them. They did not do so, and accordingly all that was done with the goods was to put them aside out of the way that the ship's discharge might not be hindered. They were put down where the defenders could have taken them away undamaged had they proceeded to do so at once. They left them there for several days. I cannot therefore agree with the conclusion at which the Sheriff-Substitute has arrived. I would propose that the interlocutor should be recalled, and that your Lordships should find that the pursuers delivered the goods under the bill of lading to the defenders by placing them on shore off the ship's tackles, and that accordingly they are entitled to decree for payment of the balance of the freight claimed by them.

LORD TRAYNER—This is an action brought to recover from the defenders the balance of freight payable on a parcel of jute of which they were the consignees, and which formed part of the cargo brought to Dundee on board the "Knight Bachelor." The amount claimed is not disputed, but the defenders plead that they are not liable in payment in respect the jute suffered damage to a larger extent through the fault of the pursuers in the delivery. The fault alleged consists in the pursuers (1) having delivered the jute at a berth which was unsuitable for delivery of such a cargo, (2) having delivered the jute during wet or snowy weather, whereby the jute got wet and damaged, and (3) by its having been placed after discharge on a piece of vacant ground which was unsuitable, and where also the jute got damaged from wet and mud. The first ground seems to me to be one which cannot be sustained. The "Knight Bachelor" took the berth assigned to her by the harbourmaster, and could take or get no other. The harbourmaster explains that the berth is one which has been used since 1893 "for landing cargoes of jute," and, in his opinion, "quite suitable for the discharge of the cargo of the 'Knight Bachelor.'" That being so, I think it cannot be said that the captain of the vessel was in fault in discharging his cargo there. Even if the berth had been unsuitable, the discharge of the cargo there would not have been a fault on the part of the captain. He had no choice—he had to go to the berth assigned to him by the harbourmaster.

The second ground of fault alleged appears to me to fail on the proof. It is established and was not controverted before us that the discharge of the cargo was stopped when snow or rain came on, and only recommenced when the weather cleared.

The third ground relied on by the defenders requires more attention, particularly in view of what the Sheriff-Substitute has said in regard to the duties incumbent on the shipowner in reference to the delivery of cargo. The Sheriff-Substitute seems to think that it is the duty of the shipowner to look after the cargo and see to its proper storage after it has passed over the ship's side, and in this case, as enforcing this view, he refers to the clause in the bill of lading which authorises the ship, where "consignee delays to take delivery of the cargo whenever the ship is ready to unload, to land and warehouse the same . . . at the risk and expense of the owner of the goods." The Sheriff-Substitute fails here to distinguish between duty and privilege. If the consignee does not come forward at all when the ship is ready to deliver, or coming forward delays duly to take delivery of his goods, the ship may land and store them at the consignee's risk and expense. It is in the interest of the ship alone that this provision is made, to prevent undue detention and to enable the ship to take on board another cargo. But it imposes no duty on the ship to land and store the cargo. The ship's duty in regard to delivery is expressed in the bill of lading, and that is, to deliver the cargo in good order and condition "from the ship's tackles." In my opinion the ship's duty of delivery is performed when the cargo is put over the ship's side into the hands of the consignee or his servants, or on to a place from which the consignee or his servants can take it. After that the cargo is at the risk of the consignee, and the ship has no concern with it. Now, if

this be a correct view of the ship's duty, it was here fulfilled. The cargo was put over the ship's side on to the wharf or jetty at which the ship was discharging, and into the hands of the harbour porters, who were *quoad hoc* the servants of the consignee. The ship had no duty and no right to direct where the cargo should be piled or stored. The ship was not bound to find accommodation for the discharged cargo.

But it was argued for the defenders that the cargo could not be held to be delivered by being landed, because the cargo could not be removed by the consignee without the permission of the ship's clerk. This, however, I think is a mistake. The ship's cargo was for several consignees, and it was necessary that some-one on behalf of the ship should be present to check each parcel as it went away, and to see that each consignee got his own parcel, and no more. This was a convenient and proper arrangement for all concerned. But the ship's clerk did not give or withhold delivery.

I have dealt with the case hitherto as governed by the common law. But it is right to notice that by the bill of lading the ship's responsibility was declared to cease on delivery of the cargo "from the ship's tackles." I do not regard this as introducing any right or exemption from liability which the common law would not have given or recognised. But it makes the right at common law matter of express contract, by which the defenders are bound.

On the whole matter, I think the Sheriff-Substitute's judgment should be recalled, and decree pronounced as concluded for.

Lord Moncreiff—I am also of opinion that the defenders have not established their counter claim. Even taking the least favourable view for the pursuers of their rights and obligations under the bill of lading, the defenders are, in my opinion, barred from claiming damages on this simple ground, that they delayed for an unreasonable time to remove the jute. They knew of the arrival of the cargo—indeed, they presented their bill of lading before any of it was discharged—and they knew where the bales in question were placed, and did not complain. They were repeatedly called upon to remove the jute, but to suit their own convenience, or because of the difficulty of getting carters and warehouse accommodation, they did not remove the jute until the thaw set in. The discharge began on the 13th of January, and the last of the defenders' bales was not removed from the jetty till 13th February. [*His Lordship then referred to certain passages in the evidence as establishing this fact.*]

It is said for the defenders that the reason why they could not remove the jute was because other bales were lying on the top of it. That excuse might possibly have aided them had the time available for removal been shorter, but taking the evidence as a whole I cannot doubt that if the defenders had provided carters and accommodation they could have removed the jute before the frost gave.

But the defenders' counter claim must also be rejected on other and higher grounds. The pursuers' obligation under the bill of lading was to deliver the goods "subject to the exceptions and conditions hereinafter mentioned in like good order and condition from the ship's tackles (where the ship's responsibility shall cease) at the aforesaid port of Dundee."

One of the conditions was—"The goods to be taken delivery of from the steamer immediately she is ready to unload, and if the goods are not thereupon removed by the consignee, the master or agent is to be at liberty to land or warehouse the same, or if necessary to discharge them into hulk, lazaretto, or hired lighters, at the risk and expense of the owners of the goods."

Under these conditions, unless they were effectually modified by local custom or agreement, delivery was complete when the goods were taken from the ship's tackles by the harbour porters. The pursuers do not contend that these conditions entitled the ship to discharge the cargo into the water or during rain or snow. But it is not proved that the pursuers did anything of the kind; the jute was delivered safely and dry on to the quay. It was thereafter removed by the harbour porters, there being a dearth of shed accommodation, to the reclaimed ground mentioned in the evidence, which at the time was frozen and dry. This was apparently done with the knowledge and consent of all parties, including the defenders' representative, but the defenders' representative being present, I do not think that any obligation lay upon the pursuers to select a place on which to deposit the jute. Therefore in terms of the bill of lading the ship's responsibility ceased when the goods were in the hands of the porters, who were paid by the merchants.

The defenders, however, maintain that according to the custom of the port of Dundee, delivery was not complete until the bales were identified and weighed and checked by the ship's clerk. No such custom is averred, and it may be doubted whether it would be competent to contradict by proof of local custom the express stipulation in the bill of lading. But in my opinion the defence on that point is absolutely precluded by the authority of *The British Shipowners Company* v. *Grimond*, 3 R. 968, which relates to the discharge of a cargo of jute at the same port, and in which the same alleged custom was pleaded unsuccessfully. That decision is conclusive to the effect that the alleged custom does not affect or vary the general rule, according to which delivery of each bale was complete as soon as it passed over the ship's side into the hands of the porters employed by the consignee. The bills of lading in that case did not contain a stipulation that the ship's responsibility should cease on delivery being given from the ship's tackles—"delivery as customary" was the condition. The present case is therefore much the clearer. The Sheriff-Substitute, however, ignores the application of that decision to the present case upon the points which I have noted—in

particular, on the point that delivery ended on the goods passing into the hands of the harbour porters. *Grimond's* case in no way conflicts with the later case of *The Avon Steamship Company, Limited* v. *Leask & Company*, 18 R. 280, which simply decided that notwithstanding a similar provision in the charter-party, the ship was responsible, because when the cargo was being swung ashore, it was spilt between the ship and the quay—that is to say, the Court held that the rule that responsibility ends when the goods cross the rail is subject to the qualification that those acting for the ship are not entitled to land the cargo in a careless manner or with defective plant.

Such a condition as occurs in this bill of lading may sometimes cause inconvenience to a consignee when taking delivery from a general ship if his bales are mixed up with those consigned to other merchants and require to be identified and separated. But all this was considered in *Grimond's* case and disregarded, for this amongst other reasons, that if delivery from the ship's tackles or over the rail of the ship were not taken as complete delivery, it would be difficult to find any other *punctum temporis* for delivery. Besides, in the present case the contract between the parties contains a special provision on the subject, and the case is not left to depend on any general rule or to be regulated by local custom.

The only other observation that occurs to me is this—There is a condition in the bill of lading that if the goods are not removed by the consignee, the master or agent of the ship is to be at liberty to land and warehouse the same at the consignee's expense. This, it is said, indicates that he is not entitled in any case simply to deposit the goods on the quay—that he is bound to warehouse them. But that condition, which is in favour of the ship, applies to the case of the consignee not being present or represented at the discharge. In the present case the defenders were represented by their clerk and the harbour porters from the first.

I am therefore of opinion that the defenders' case fails throughout, and that the pursuers are entitled to decree.

LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

"Sustain the appeal, and recal the interlocutor appealed against: Find in fact (1) that the 'Knight Bachelor' arrived in Dundee on 13th January 1897 with a cargo of jute, part of which was consigned to the defenders; (2) that the said ship on her arrival was assigned a berth for discharging her cargo by the harbourmaster, which was a suitable berth for such discharge; (3) that at said berth the 'Knight Bachelor' discharged the whole jute consigned to the defenders with the exception of one bale, for which the pursuers have made payment to the defenders; (4) that the jute consigned to the defenders was discharged by the ship's tackles on to the quay or jetty along which she was lying in the foresaid berth; (5) that the said jute was all delivered by the pursuer from the vessel in good order and condition as shipped, and was taken delivery of by the harbour porters, who were, in taking delivery, acting as the servants of the defenders; (6) that after delivery had been given and taken as aforesaid, said jute received damage at the place where it was piled or stored to the extent of £61, 7s. 6d. sterling; (7) that pursuers did not give any directions or instructions as to the disposal of said jute after the delivery thereof as aforesaid, and in particular did not direct or instruct that said jute should be deposited or stored at the place where the same was damaged; (8) that said damage was not occasioned by any fault or neglect on the part of the pursuers; and (9) that of the freight due in respect of said jute there remains (after payment of certain sums to account made by the defenders) a balance of £61, 7s. 6d. sterling due by the defenders to the pursuers: Find in law (1) that the pursuers are not responsible to the defenders for the damage sustained by said jute after the delivery thereof as aforesaid, and (2) that the defenders are liable to the pursuers for the foresaid balance of freight: Therefore repel the defences, and decern against the defenders for payment to the pursuers of the said sum of £61, 7s. 6d. with interest as concluded for: Find the defenders liable in the expenses in the Sheriff Court, and also in this Court, and remit," &c.

Counsel for Pursuers—Jameson, Q.C.—Salvesen. Agents—Lindsay & Wallace, W.S.

Counsel for Defenders—Sol.-Gen. Dickson, Q.C. — Aitken. Agents — Skene, Edwards, & Garson, W.S.

Friday, July 1.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

PARKER *v.* NORTH BRITISH RAILWAY COMPANY.

Shipping Law—Harbour—Defective Condition of Harbour—Liability of Proprietors of Harbour for Fault of Harbourmaster or of Licensed Pilot Employed for Wages by Proprietors of Harbour.

A sailing ship was approaching the entrance to a harbour under the charge of a compulsory pilot. When she got within hailing distance the harbourmaster gave the orders "hard-a-port" and then "hard-a-starboard," but before