be air locking, which subjects the fireclay pipes to greater pressure. The proper way for the fireclay pipes to have been laid was in cement. All these matters may have made the task of the landlord more difficult, but they do not supply an answer to the complaints of the tenant. The suggestions made by the tenant in his letter of 23rd December 1911 was that metal pipes should be put in, and the estate overseer reported to W. & F. Haldane that "it will never be right until it is all in a lead pipe." It is not suggested that under his common law obligation the landlord was bound to substitute a metal for a fireclay pipe, and I am unable to see that there was any obligation upon him to do so under clause 6. The evidence of Sir William Haldane is that he did not consider the expense consequent on putting in a metal pipe should be incurred unless and until he was satisfied as to the supply of water to the tank. The position taken up by the tenant is that if the water that comes into the tank is all conveyed to the farm the supply will be sufficient unless the weather is exceptionally dry. The weight of the evidence, in my opinion, supports the view of the tenant as regards the supply of water. It is, of course, of importance for a tenant to have as much water as possible by gravitation. The offer by the landlord at a late stage of the correspondence was to put in a pipe and pump at the well. There is a controversy as to the quality of the water from this well, and the sanitary inspector took an unfavourable view of it. It is not necessary to go into that, because the offer of water from this well would only be implement of his obligations under the lease if concurrently therewith he was keeping in a proper state of repair the existing apparatus in connection with the gravitation supply. In my opinion the landlord failed in his latter obligation, and is therefore liable in damages for breach of contract.

Upon the amount of damages I agree with the Lord Ordinary that the defender's evidence is unsatisfactory and exaggerated. The largest head of damage was because they were stopped selling milk and had to make cheese. As regards this, I do not think it is proved that the defender suffered loss in consequence of ceasing to sell milk to the Perth Creamery Company and making cheese instead. On 30th April 1912 he wrote to the Creamery Company that he could make a great deal more by making cheese. It is not proved that he could have retailed his milk in Dollar, and even if he could have done so it is not proved what his profit over a sufficient period would have been as contrasted with the making of cheese. As regards alleged loss on the sale of cows, it is not proved that these cows were sold owing to a deficiency in the water supply. The heads of damage claimed in stat. 7 are not referable to defective water supply. On the other hand, there must have been to a certain extent disorganisation of labour and increased labour in carting water, and this is spoken to by the defender. Taking all the circumstances into account I am disposed to leave the amount of damage at the figure fixed by the Lord Ordinary.

The result is that I think the pursuer should have decree for the sum sued for, less £10. I agree with your Lordship as regards expenses.

LORD CULLEN—I concur.

The Court recalled the interlocutor of the Lord Ordinary, decerned against the defenders for payment of the sum of £160, 1s. to the pursuer, and granted warrant to the Accountant of Court to pay the sum of £160, 1s. with interest accrued thereon to the pursuer's agent, and the sum of £10 with interest accrued thereon to the defenders' agent.

Counsel for the Pursuer—Wilson, K.C.—Smith Clark. Agents—W. & F. Haldane, W.S.

Counsel for the Defenders—MacRobert—Dallas. Agents—Glegg & Orrock, W.S.

Thursday, March 11.

FIRST DIVISION.

[Lord Hunter, Ordinary.

CARLBERG *v.* WEMYSS COAL COMPANY, LIMITED.

Shipping Law — Affreightment — Demurrage—Bill of Lading—Discharge of Cargo —Failure to Produce Bill of Lading Timeously—Consequent Detention of Ship.

Bills of lading provided—"The captain to deliver all cargo on ship's railing, and the same to be taken from there by the consignee notwithstanding any custom of the port to the contrary. The goods to be received as fast as the steamer can deliver day and night, or the same will be landed or put into lighters at the risk and expense of the consignee. . . . Steamer . . . to have a lien on goods for freight, dead freight, demurrage, average, and all other charges incurred, not referring to the transport, loading, and discharging of the cargo, and steamer's readiness to count from the time of her arrival in port and clearing at the custom house, any law and/or custom of port to the contrary notwithstanding."

The steamer sailed from Gothenburg on the evening of Saturday, 16th November, reached Methil on Tuesday, 19th, cleared the custom house, and was ready to discharge her cargo at 11 a.m. on that day. The consignees had not then received the bills of lading, but were ready to take delivery of the cargo, and offered the master a bank guarantee indemnifying him from liability through delivering the cargo in the absence of the bills of lading. The ship's agents then refused to discharge until the bills of lading were produced. On Wednesday, 20th November, by arrangement between the agents of the shipowners and the North British Railway Company, the cargo was delivered to the railway company as wharfingers, dis-

charge beginning at 12·30 p.m. on that date. The bills of lading were received by the shipowner's agents on 21st and 22nd November, and thereafter the cargo was delivered. When goods are shipped from a Swedish port to the Firth of Forth it is an ordinary occurrence for the ship to arrive at the port of discharge before the bills of lading, and the ship's representatives give delivery before the arrival of the bills of lading on receiving, if they require it, a bank guarantee. This was known to all parties, and no case similar to the present had ever occurred.

In an action at the instance of the owner of the vessel for demurrage for the period from 11 a.m. on the 19th to 12·30 p.m. on the 20th November, *held* that the consignees were not liable—*per* the Lord President, on the ground that there was no unqualified obligation to produce the bills of lading either at common law or under the contract, and there was no fault on the part of the consignees; *per* Lord Johnston, on the ground that, while the ship was entitled to refuse delivery until production of the bills of lading, the circumstances of the case were such as would have entitled to nominal damages only; *per* Lord Skerrington, on the ground that as the bills of lading did not specify a time within which discharge was to be effected, the obligation on the consignees was to use the utmost dispatch in the circumstances, which had been done.

On 18th June 1913 Herman Carlberg, shipowner, Gothenburg, *pursuer*, brought an action against the Wemyss Coal Company, Limited, *defenders*, for payment of £51, 19s. 6d. as demurrage.

The defenders pleaded, *inter alia*—"(3) Any delay in discharging the vessel having been caused by the fault of the pursuer or his agents, the defenders should be assoilzied."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (HUNTER), who, on 9th January 1914, assoilzied the defenders.

Opinion.—"In this case the time charterers of the s.s. 'St Helens' sue receivers of cargo *ex* that vessel for damages in respect of their failure timeously to produce the bills of lading and take delivery thereunder.

"On the evening of Saturday, 16th November 1912, the s.s. 'St Helens' sailed from Gothenburg with a cargo of pit props shipped partly by a firm of Messrs Hellstrom & Vleugel, and partly by a firm of Emil Nilsson & Co., both of Gothenburg. In terms of the bills of lading the pursuer undertook to deliver the cargo to Messrs Voge & Dacker, Leith, and Messrs Chr. Salvesen & Co., Leith, at Methil. The consignees of the cargo disposed thereof to the Wemyss Coal Company, Limited, who are the defenders.

"By the bills of lading it was provided—'The captain to deliver all cargo on ship's railing, and the same to be taken from there by the consignee notwithstanding any custom of the port to the contrary. The goods to be received as fast as the steamer can deliver day and night, or the same will be landed or put into lighters at the risk and expense of the consignee.' There is also a stipulation to the effect that the steamer is to have a lien on goods 'for freight, dead freight, demurrage, average, and all other charges incurred, not referring to the transport, loading, and discharging of the cargo, and steamer's readiness to count from the time of her arrival in port and clearing at the custom house, any law and/or custom of port to the contrary notwithstanding.'

"On Tuesday, 19th November 1912, the s.s. 'St Helens' arrived at Methil, cleared at the custom house, and was ready to discharge her cargo about 11 a.m. on that day. Before that time the pursuer's representatives at Methil were in telephonic communication with the consignees of the cargo. They explained that the captain of the vessel had been instructed by the pursuer not to deliver the goods except on presentation of the bills of lading. The consignees, who were both well known to the pursuer and his representatives, offered a bank guarantee indemnifying the master from all liability through delivering the cargo in the absence of the bills of lading, but this offer was refused. According to the evidence of Mr Anderson, secretary of the defenders' company, their agents were ready to receive the cargo immediately on the arrival of the boat; trucks and everything were ready. The pursuer practically admitted that if his agents had accepted the offer of a bank guarantee the discharge would have gone on at once and no demurrage would have been incurred. Similarly no such claim would have arisen if the master had discharged the cargo and retained the ship's lien for freight and charges.

"The bills of lading were not received by the pursuer's representatives until the 21st and 22nd November 1912. On 20th November 1912, however, the cargo was by arrangement between the North British Railway Company and the pursuer's representatives delivered to that company as wharfingers, and intimation was made to the defenders that the discharge had commenced. The detention of the vessel for which the pursuer seeks to make the defenders responsible is 37½ hours, viz., from 11 a.m. on 19th November 1912 to 12·30 p.m. on 20th November 1912, and from 6 p.m. on said date to 6 a.m. on 21st November, discharge having ceased during the latter period owing to the vessel having to vacate her discharging berth.

"There is no doubt that the bill of lading is the title to the goods carried on board a vessel, and that the master is not bound to deliver the goods to anyone except on presentation of the bill of lading. At the same time it was proved in this case that where goods are shipped from Swedish ports to the Firth of Forth, and in particular to Methil, very often the boats arrive at the port of discharge before the bills of lading. In such cases the ship's representatives appear to give delivery to the consignees if they are satisfied from the standing of the firms that the bills of lading will be made furthcoming. Where they have any doubt about the validity of the claim of the receivers to get delivery of the goods

they can and do protect themselves by getting a bank guarantee. In the case of 'liner' vessels—and the pursuer in the first article of his condescendence so describes his vessels—the master may at once land the goods, reserving the ship's lien, and deliver them from the quay or shed on presentation of the bills of lading. Cases of delaying a ship owing to the master's refusal to land the goods in circumstances similar to the present appear to be practically unknown. The pursuer has on previous occasions given delivery to the consignees in the present case before presentation of the bills of lading and without asking for an indemnity. But for special instructions given by the pursuer in the case of the s.s. 'St Helens,' for reasons that are not obvious, the same course that had been adopted before would have been followed. Mr Renstrom, the senior partner of Messrs Ohlsen & Company, Methil, who were the pursuer's representatives, says—'Had I been left to myself I would have accepted the offer (*i.e.*, the consignees' offer) and proceeded to discharge the cargo.'

"The pursuer's insistence that the discharge of the vessel should be delayed until the presentation of the bills of lading appears to me in the present case to have been particularly unreasonable. He knew that the receivers had not and could not have the bills of lading in their possession at the time of the arrival of the 'St Helens' at Methil. It appears to be the custom that as the vessel is a 'liner' vessel the bills of lading are not signed by the master but by the owners or agents. They were only presented for signature to the pursuer at Gothenburg on Monday the 18th, and in ordinary course of post would not reach the consignee until Wednesday, 20th November. I was not satisfied from the pursuer's evidence that the shippers ought to have presented the bills of lading on the Saturday night. The ship had not taken the whole quantity of goods that one of the shippers had brought down in lighters, and it is not clear that the pursuer was in possession of a record of the tally of the cargo on Saturday night. Such record was necessary for granting the bills of lading. It appears to me, however, to be sufficient for the decision of the case that the loss owing to the detention of the vessel would not have occurred if the pursuer had adopted what in the circumstances would have been a reasonable course. I shall therefore assoilzie the defenders."

The pursuer reclaimed, and argued—The defenders were liable in demurrage. The bill of lading was the title to the cargo. The shipmaster was not bound to, nor entitled to, deliver the cargo until the bill of lading was produced—"*The Stettin*," 1889, 14 P.D. 142, *per* Butt, J., at p. 147; *Glyn, Mills, Currie, & Company* v. *The East and West India Dock Company*, 1882, 7 A.C. 591, *per* Lord Cairns at p. 598; *Sanders Brothers* v. *Maclean & Company*, 1883, 11 Q.B.D. 327. The clause in the bill of lading providing that if the cargo were not received as fast as the ship could deliver it should be delivered into lighters was conceived in favour of the ship, and gave the ship an option but imposed no duty on it—*Hick* v. *Rodocanachi*, [1891] 2 Q.B. 626, *per* Lindley, L.J., at p. 632, Fry, L.J., at p. 640; "*The Arne*," [1904] P. 154. The bill of lading was a negotiable instrument, and the shipmaster had to be careful in giving delivery. The master did not know through how many hands the bill might have passed, and the contract was to deliver on presentation of the bill. The consignee must take delivery when the ship cleared the custom house—*The Horsley Line, Limited* v. *Roechling Brothers*, 1908 S.C. 866, 45 S.L.R. 691. It was matter of contract in the present case that delivery be taken when the ship cleared the custom house. If the consignee was not able to receive the cargo he was liable in demurrage unless he could show that his inability was due to the circumstances of the port or the fault of the ship—*Budgett & Company* v. *Binnington & Company*, [1891] 1 Q.B. 35. The custom of taking an indemnity had not been proved. To prove such a custom it was necessary to show that it was reasonable, certain, consistent with law and with the contract, and universally followed—*Hogarth & Sons* v. *Leith Cotton Seed Oil Company*, 1909 S.C. 955, 46 S.L.R. 593; Scrutton on Charter-Parties and Bills of Lading, 7th ed. p. 19—and the defenders had not done this. The taking of an indemnity was not a satisfactory method to adopt. Abbott, Law of Merchant Ships, 14th ed., p. 384, dealt with indemnity as a method which might, not must, be adopted.

The respondents argued—The Lord Ordinary was right in holding that the pursuer was the cause of the detention of the ship, and that his actings were not reasonable. There was no fault on the part of the defenders in not having the bills of lading ready when the ship was ready to discharge. That was the normal condition in this traffic. The custom of the port had been proved to be that the master should take a bank guarantee, and begin to discharge before the bills of lading arrived. It was his duty to effect the discharge in the circumstances, *i.e.*, to follow this custom, or to land the cargo under reservation of his lien—Abbott, *op. cit.*, p. 384; *Jesson* v. *Solly*, 1811, 4 Taunton, 52; *Erichson* v. *Barkworth*, 1858, 27 L.J. (n.s.), Exch. 472, *per* Watson, B., *diss.* at p. 478, *rev.* 1858, 28 L.J. (n.s.), Exch. 95, *per* Crompton and Crowder, JJ., at p. 96. The cargo was landed under reservation of lien on the 20th. Failure to do this on the 19th was unreasonable, and for the delay caused thereby the consignees were not liable—*Wilson* v. *Hicks*, 1857, 26 L.J. (n.s.), Exch. 242; *Möller* v. *Jecks*, 1865, 19 C.B. (n.s.) 332; *Dunford & Elliot* v. *Macleod & Company*, June 19, 1902, 4 F. 912, *per* Lord M'Laren at p. 920, 39 S.L.R. 719, at p. 723; Carver, Carriage by Sea, 5th ed., sec. 718. As no time had been fixed by contract within which discharge was to take place, a reasonable time must be allowed—*Hulthen* v. *C. A. Stewart & Company*, [1903] A.C. 389; *Hick* v. *Rodocanachi* (*cit.*), *per* Lindley, L.J., at p. 639. The time taken here was

not unreasonable in the circumstances. The case of "*The Arne*" (*cit.*) was distinguishable on the facts.

At advising—

LORD PRESIDENT — This is an action of damages for detention of a steamship at the port of discharge, on the ground that she was detained "through the fault of the defenders in failing timeously to produce the bills of lading."

I am of opinion that there is in this record no relevant averment of fault on the part of the defenders, and at all events that none is established by the evidence. My reason for saying that there is here, in my opinion, no relevant case against the defenders is that the action appears to me to be raised upon the assumption that there is an absolute and unqualified obligation on the part of the consignee to present his bill of lading immediately the ship is ready to discharge, under pain of being found liable in damages for the detention of the ship. Now I do not think that assumption can be supported either at common law or upon the particular terms of the contract of affreightment now before us.

The steamship "St Helens," with a cargo of pit props, arrived at Methil, the port of discharge, on the 19th November 1912, and was ready to unload at 11 a.m. on that day. The representative of the consignee says—"Our agents were ready to receive the cargo immediately on the arrival of the boat; trucks and everything were ready." And that is uncontradicted. The master, however, acting on the special instructions of the pursuer, refused to discharge the cargo until the bills of lading were presented, and the pursuer now sues an action of damages for the detention of his vessel on the ground that the defenders were guilty of fault.

Now the defenders were guilty of no fault, for they had not the bill of lading to present. It had not arrived in this country, as was well known to the pursuer and his agents, for the pursuer, through no fault of anybody, signed the bill of lading on the 18th November 1912. The ship left Gothenburg on the evening of 16th November, and accordingly under ordinary circumstances it would reach the port of discharge before the bill of lading arrived there. This was no uncommon occurrence in this trade at this port. It was the rule and not the exception for the ship to arrive before the bill of lading. This was an emergency which confronted shipowner and freighter every day at this port in this trade; and in the ordinary case where, as here, the consignees were well known to the shipowner and his agent, discharge of the vessel took place at once, and the bills of lading were handed over afterwards, usually within a few hours, when they reached the consignee. But no shipowner may be compelled to discharge his vessel on such easy conditions, and accordingly the consignees here were ready with a sufficient indemnity—for the sufficiency of the indemnity is not challenged—with a sufficient indemnity to the shipowner against all loss which he might incur by discharging the ship. His agent was prepared at once to discharge upon receiving this indemnity, but by the special instructions of the pursuer he refused, on the ground, as the pursuer himself says, that he was "entitled to retain the cargo until the bill of lading was produced." And I observe that the representative of the consignees says distinctly that "as the result of the offer"—the offer of an indemnity—"we were told that they would only discharge on production of the bill of lading. We were told that by telephone." In other words, the shipowner maintained that he was entitled to refuse to discharge this cargo, and was entitled to claim damages from the consignees for detention of the vessel until the bill of lading was presented, at however distant a date that might be.

I am of opinion that this is an untenable position, and that the shipowner is bound, if it be reasonably practicable under such circumstances, at once to land the cargo into waggons or on to the quay, as the case might be, reserving his lien. In other words, he was bound in the circumstances to adopt at once the expedient which he adopted twenty-four hours later—an expedient admitted on all hands to be quite reasonable and proper. If that be not reasonably practicable, then I hold that the shipowner is bound to discharge into the waggons of the consignee upon receiving a suitable indemnity from him against any loss which may emerge.

We are not here concerned with the delivery of the cargo. No question was raised relative to delivery. The bills of lading arrived and were presented in due time for delivery to take place. The question in this case is confined exclusively to the discharge of the vessel and to the claim of damages for detention, although the shipowner refused to discharge or to take any reasonable means of unloading his cargo.

Now it appears to me that the business of a crowded port could not go on if shipowners were to be entitled to refuse to land the cargo and were to wait until the bill of lading arrived, however long that might be, and that the representatives of the consignees here were well founded when they said that so far as this particular trade was concerned, and on these short distance runs, "it would be utterly impossible for business to be conducted — if it is to be conducted on the footing on which it is — unless on the footing of indemnity and landing the cargo."

No one in this case disputes the general rule of law which is admirably stated by the Lord Ordinary where he says that "there is no doubt that the bill of lading is the title to the goods carried on board a vessel, and that the master is not bound to deliver the goods to anyone except on presentation of the bill of lading." If the consignee has the bill of lading he is bound to present it; he is not entitled to keep it in his pocket. But if the bill of lading has not reached him, then the shipowner is not entitled to refuse to discharge the cargo and charge the consignee with damages for detention. He is bound, in my opinion, to one or other of the expedients I have mentioned.

In this case the detention of the ship was due, in my opinion, solely and directly to the fault of the shipowner himself. I hold it to be proved that he, from long past experience, well knew that in this trade at this port a ship usually arrived before the bills of lading; that the cargo was in the ordinary course of business discharged—I do not say delivered—from the vessel without production of the bills of lading. He knew in this particular instance that in the ordinary course the ship would arrive before the bills of lading reached the consignees, and under these circumstances, if he resolved that the ship was not to be discharged until the bills of lading were presented, it was his duty to intimate that to his agents at the port of discharge, who would then be in a position at once on the arrival of the ship and her readiness to unload to adopt the expedient which he adopted at 12 noon on the 20th November, for I observe the agent says that that course—the course taken at 12 noon on the 20th—was equally open to him at 11 o'clock on the 19th, but it did not occur to him at that time. It would have occurred to him—it ought to have occurred to him—if the pursuer had given him due notice. And at all events the consignees were entitled to have notice that the ordinary course of business was to be departed from in order that they, if it were not reasonably practical for the shipowner to adopt the course he did, might be ready with their indemnity and to receive the cargo into their own waggons. The shipowner in this case appears to me to have taken the one and only course which it was illegitimate for him to take, for I think the law cannot be better laid down than in Mr Carver's work on Carriage by Sea (5th ed.), 1909, sec. 609, p. 785—"The master ought not to keep goods on board, and so detain the ship, if he might land and warehouse them with safety to the shipowner's interests." That law appears to me to be directly applicable in the present case. The conclusion I come to is that there was here no fault on the part of the consignees, and that the detention of the vessel was due to the fault of the pursuer.

I am therefore for adhering to the interlocutor of the Lord Ordinary.

LORD JOHNSTON—The pursuer, Mr Carlberg, was the time-charterer of the "St Helens" and other steamers which he ran as a line of goods boats from Gothenburg in Sweden to Forth ports, including Methil in Fife. The "St Helens" was thus a general ship, and she made periodical voyages on advertised dates. Carlberg had running contracts with two shippers of timber from Gothenburg, Messrs Emil Nilsson & Company and Messrs Hellstrom & Vleugel, to carry their consignments. The "St Helens" was advertised to sail from Gothenburg to Methil on Saturday, 16th November 1912, at 6 p.m., and both Nilsson & Company and Hellstroms secured accommodation for consignments of pit props. In point of fact these consignments made the whole cargo. Nilsson & Company had loaded 180 standards, being all that they intended to forward, in due time, but Hellstroms only got 120 standards on board, leaving about 30 in the lighters, at the time when it was necessary to stop loading if the ship was to get away from the river by that tide. Loading was stopped a little before six, and the vessel cleared the Customs and sailed between seven and eight on Saturday evening the 16th. The bills of lading were not tendered for signature before the ship sailed. In the case of Nilsson & Company's parcel, there was not the slightest reason why this should not have been done. In the case of Hellstroms, while, owing to their parcel being broken by their delay in bringing it forward, a little more trouble in calculating the amount was involved, they also could, if they had used the necessary expedition, have had their consignment checked and entered in the bill of lading, as the amount on board was quite well known both to the ship and to the shippers' lighter-man, for without it the ship could not have made her declaration and have cleared the Customs. But, in point of fact, no bills of lading were presented to Mr Carlberg, who, and not his master, was in use to sign the bills of lading for his liners, on the evening of Saturday 16th, and that night's post was accordingly lost. The bills of lading, though bearing date 16th, were presented for signature on Monday morning the 18th, and posted overland on that day, *via* Berlin and London, to the consignees in Leith. Thus the ship had some thirty-six hours start of the bills of lading.

Nilsson's parcel was consigned to Messrs Salvesen of Leith. Hellstrom's parcel was consigned to Messrs Voge & Dacker, also of Leith. These firms were apparently merely agents. The receivers of both parcels of the cargo were intended to be the Wemyss Colliery Company.

The ship, sailing on Saturday 16th, arrived at Methil and was berthed on Tuesday the 19th at 11 a.m. The bills of lading were not forward. In point of fact a further delay was occasioned by sending them to Leith instead of to Methil. They were received in Leith on Wednesday the 20th, and at Methil only on Thursday, 21st. The position is somewhat complicated by Messrs Ohlsen of Methil being agents at that port for all concerned, Carlberg the charterer of the ship, Salvesens and Voge & Dacker the consignees, and the Wemyss Colliery Company the receivers. At once on arrival, namely at 11 a.m. on the 19th, the master intimated to the two Leith firms that he was ready to discharge, and as soon as he knew that they were the receivers he intimated the same to the Wemyss Coal Company. But no bills of lading were forward, for the reasons I have stated, and the master had instructions from Carlberg not to deliver without production of the bills of lading, in consequence of some trouble which he had had on a previous occasion in which Messrs Salvesen & Company were concerned, and also of advice taken from solicitors on this side as to his rights and duties. In the course of the day the master intimated by telegram to all concerned that "consequent upon bills of

lading not being presented for this vessel's cargo the steamer is lying on demurrage." This draws no distinction between discharge and delivery. This was met on the part of Messrs Salvesen by a letter of the 19th, in which they said—"As advised you by telephone, the bill of lading per this steamer has not come forward and will probably not arrive here for a day or two, but, as mentioned, we are prepared, acting as agents for both the shippers and receivers of the props, to give you a bank guarantee. Failing your agreement to this, we must ask you to discharge the props in accordance with the conditions of the bill of lading." What Messrs Salvesen meant by this latter expression they did not explain, and I cannot assume that they intended the goods to be landed, warehoused, or placed in lighters at their expense, which under certain though not apposite circumstances the bill of lading allowed. This letter was addressed to Messrs Ohlsen, and could not reach them till the morning of the 20th.

The master's notification to Messrs Voge & Dacker was met by them by a telegram late on 19th November to the effect—"Having offered" (presumably by telephone) "guarantee produce bill of lading immediately when received from abroad which you decline accept, we repudiate all responsibility detention on Vleugel's behalf." Both these answers imported a demand for delivery, as I read them, not merely for discharge on a guarantee.

Here I think it desirable to consider the law of the situation, which I think is as follows—a shipowner is not bound to deliver goods except in exchange for the bill of lading. He is not bound to take on trust that he knows the consignee and that no intermediate rights have been created. Of course the master is only the shipowner's agent in the matter, and if he acts beyond what is required of the shipowner he undertakes personal responsibility.

Neither the owner, his agent, nor the master can, I think, be called upon to accept a banker's or any other guarantee of indemnity, though such a thing is not unknown, and in the event of total loss of the bill of lading might have to be resorted to, if necessary at the sight of the Court. There is no such custom of delivering on a guarantee as is alleged. It is neither part of the general law merchant nor is it a local custom of which both parties must be held to have been cognisant.

But Messrs Salvesen had a different idea of their own position and of the law, as they wrote Messrs Ohlsen on 21st November:—"We observe that the goods are consigned on bill of lading to us, and there was therefore no necessity for the captain's demanding the bill of lading for this portion, nor had he any right to refuse to accept a bank guarantee in the absence of the bill of lading."

In support of this claim there has been reference made to the case of *Erickson* v. *Barkworth*, 27 L.J. Exch. 472, and to the opinion of Watson, B. In that case Barkworth had chartered a vessel from Erickson to go to New Brunswick and load a cargo of timber for this country which had been secured there by his agents. It was loaded at a port in New Brunswick, but when the vessel reached this country, Barkworth, the charterer, found that it was disconform to contract and refused to accept the bills of exchange which had come, with bill of lading attached, into the hands of a bank in this country. As Barkworth repudiated the cargo, he intimated to the master that he was not going to take delivery. At the same time the bank warned the master not to deliver without the bills of lading. So Barkworth then offered to turn himself into a warehouseman and take delivery for behoof of whom it might concern to obviate demurrage. This was declined by the master, who sued Barkworth, the charterer, for demurrage under the charter-party. Watson, B., in dissenting said, referring to the charterer's offer to receive the cargo for whom it might concern—"I am of opinion the master was not bound by the contract to do so, for by his contract he would be bound to deliver the cargo at the ship's side. The master could not be required to deliver without production of the bill of lading. Lord Tenterden has laid this down in the very neatest terms in Abbott on Shipping (9th ed.) p. 258—'It is no answer,' he says, 'to this claim for the consignee to allege that he did not receive notice of the arrival of the ship within the time stipulated by the bill of lading for the discharge of the cargo, for it is his duty to inquire for and watch the ship's arrival, or that he did not receive the bill of lading in time, and that the master insisted on its being produced or on an indemnity, for the master had a right so to insist for his own protection'"; and then having quoted Abbott, Watson, B., added, "and this in my experience has been invariably acted on." This has been represented to be a recognition of what the defenders here maintain is not merely the right but the legal obligation of the master. It is not perfectly clear either what Lord Tenterden or Watson, B.'s, words really amount to, but I cannot carry them any further than this, that if the master, though not bound, chooses to deliver without presentation of the bill of lading, he is entitled to insist on an indemnity for his own protection.

But when the passage in Abbott (14th ed. p. 384) is examined, Lord Tenterden is found to give as authority for his statement the case of *Jesson* v. *Solly*, (1811) 4 Taunt. 52. It is found to be an important authority on another point, but to give no further countenance to the proposition in question than this, viz., that in the narrative of the case it is said that there being no bill of lading forward when the vessel arrived, and two competing claimants of the cargo, the master "refused to deliver, unless either upon sight of the bill of lading, when it should arrive, or on receiving an indemnity." But the judgment had no bearing on the point of the question of indemnity. It was solely concerned with the question whether the consignee, by adopting the bill of lading, makes himself liable in demurrage as well as freight—in other words, whether

the ship's lien extends to demurrage as well as to freight.

Turning back to *Erickson's* case, it will be found that Bramwell, B., delivering the judgment of the Lord Chief Baron, Martin, B., and himself, said—"The captain, as a general rule, would be entitled to say—'I am not bound to unload unless I am secure from claim at the suit of the holder of the bill of lading.' When I say secure from claim, I do not mean secure by means of an indemnity, because the captain was not bound to take the indemnity, however unreasonable it might be to refuse it; he could stand upon his rights and say—'I shall not take an equivalent or a substitution for those goods than I am entitled to.'"

The case went to the Court of Exchequer Chamber, where the judgment of Bramwell, B., and the majority in the Court below, which had in the circumstances exonered the charterer from the claim of demurrage, was reversed, and in accordance with the opinion of Watson, B., he was held liable. Two of the four Judges who sat in the Exchequer Chamber, viz., Crompton, J., and Crowder, J., repeat indeed the expression of Watson, B., but in the same indeterminate language. When I regard the source of the passage in Abbott on Shipping, and its dubious meaning, and find the positive expression in contradiction by Bramwell, B., and the majority in the Court of Exchequer of the inference sought to be drawn from it by the defenders, I think it is impossible to hold that the defenders here have established their contention on authority. I have further examined Abbott on Shipping (14th edition), under the head "Demurrage," at p. 384, and under the head "Delivery of Cargo," at p. 562, where I should have expected this matter to be dealt with, but I find no further reference to it than the one quoted by Watson, B., in *Erickson's* case, *supra*.

I am not the least alarmed for the inconvenience to the trade with the Forth ports, of shippers finding out that if they want their cargoes promptly delivered they have got to be ready with their bills of lading. The only result need be less slackness at the port of loading, and avoidance of circumlocution in posting bills of lading to Leith instead of to the port of discharge. To suggest, as some of the witnesses do, that the trade of the Forth could not proceed, is sheer nonsense.

But delivery and discharge are two different things. While a master is not bound to deliver except in exchange for the bills of lading or one of the set, he is not entitled to refuse discharge and run the ship on demurrage indefinitely for want of the bills of lading. Affreightment, like all mercantile contracts, is one to be reasonably interpreted and reasonably implemented. Accordingly the master is at some point entitled and bound to take steps to discharge the cargo and to avoid or reduce the demurrage, saving all the rights of all concerned. These rights are, on the one hand, the rights of the owner or charterer to freight and disbursements, and for these he has his lien over the cargo, and, on the other hand, of the true owner, who need not be the original consignee, of the cargo to delivery of the cargo. The master must therefore, prior to presentation of the bills of lading, do nothing with the cargo which will place it beyond his owners' and his own control, that is, which will amount to delivery, and whatever he does he must do under effectual preservation of the ship's lien for freight. He can generally meet the occasion by warehousing or its equivalent. But a cargo of pit props does not bear to be warehoused or even put into quay or harbour shed, for it is too bulky, and the cost of the double handling is so great that questions might well arise in the end of the day regarding the expense so incurred, on the holder of the bill coming forward. Still the master is entitled, for it may be his interest even more than that of the consignee, to get the ship discharged somehow, and so to find some other mode of ridding his ship of its cargo, while, at the same time, conserving all rights. Only two ways were suggested in the evidence—first, the deposit of the cargo on a piece of ground of which the owner or his agent at the port had or could obtain control—this course was one not to be resorted to if it could be avoided in the case of such a bulky cargo—or the discharge into railway waggons in the event of its being known that the cargo was going to be sent by rail to its destination, and provided that the railway company were prepared to act as wharfingers or warehousemen.

To return now to the facts of the present case, I think it is a mistake to assume that the parties on the 19th were drawing any distinction between discharge and delivery. They had, I think, discharge and delivery as one act in view, having regard to the nature of the cargo. I take it that this was unquestionably so in the case of the consignees. It was delivery they demanded. If the guarantee which they offered, but which the master was, I think, entitled to reject, had been accepted, this could only have been a guarantee against responsibility for delivery without production of the bills of lading. It could have no meaning if confined to mere discharge. There could be no discharge of the cargo by the master as distinguished from delivery, whereby, in the absence of the bills of lading, he did not, by the arrangement for discharge, protect himself and his owners. An indemnity was not required, and would have been quite inapposite.

The bills of lading not having been received, and Messrs Salvesen's letter of 19th having reached Messrs Ohlsen in their capacity of ship's agents on the morning of the 20th November, in which they say—"Failing your agreement to this" (that is, to accept a guarantee) "we must ask you to discharge the props in accordance with the conditions of the bill of lading"—what were Messrs Ohlsen called upon to do? When the bill of lading is looked at it is found to contain this clause—"The captain to deliver all cargo on ship's railing, and the same to be taken from there by the consignee, notwithstanding any custom of the

port to the contrary. The goods to be received as fast as the steamer can deliver, day and night, or the same will be landed or put into lighters at the risk and expense of the consignee. . . . The consignee at all times to keep a clear quay space so that the steamer's discharging be not impeded, or, failing, to pay an equivalent demurrage of £30 per day." This clause is the only one which has the least bearing on the expression in Messrs Salvesen's letter, and it is I think conceived entirely in the ship's favour, and indicates merely what the ship is to be entitled to do in the normal case where discharge is proceeding but is delayed or impeded by the act of the consignee. It could not be used, as Messrs Salvesen attempted to use it, as defining the master's duty to them as consignees. At the same time it indicates what the master may do in the event of it being necessary to discharge before the bills of lading arrive. To land on the quay such a bulky cargo was out of the question, and to put it into lighters was impossible at Methil. But it occurred to Messrs Ohlsen, after the receipt of Messrs Salvesen's letter, that a way might be found out of the difficulty by discharging into railway waggons, and asking the railway company to act as warehousemen. Accordingly, Messrs Ohlsen at once applied to the railway company by letter in these terms—"The master of this steamer asks us to request you to take charge, as wharfingers, of the wood which he is about to discharge, until you hear further from us." And this having been agreed to, thereafter discharge was commenced at 12 noon on the 20th and finished at 7 p.m. on the 22nd November. As the bills of lading arrived before it was concluded, and freight having been arranged for, not merely was discharge effected but delivery given.

In these circumstances I am of opinion, in the first place, that Carlberg, his agent and master, were not in any way bound to accept the offer of a guarantee, whatever that might mean or include, in lieu of the bills of lading, and to give delivery accordingly. In the second place, even if it was a recognised equivalent for production of bills of lading in a question of delivery, I do not think that a guarantee could have any place in a question of discharge to which it would be quite inapposite. And in the third place, where bills of lading are not forthcoming when the ship is ready to discharge I do not think that there is any obligation upon the master to take instant measures for such discharge as will preserve all rights intact, unless he is asked to do so. He might well incur expense to which, if the bills of lading arrived shortly after the ship, objection might be taken. I think that any such arrangement is one rather for the consignee to propose, if he is in touch with the master, and only for the master to take at his own hand if after reasonable lapse of time he has no request from the consignee, or if it is essential to get his ship away in order to avoid loss elsewhere.

But though he may be bound as well as entitled to take this course at some stage, he is neither entitled nor bound, in my opinion, to do so instantly the vessel is ready to discharge merely because no bills of lading are at once presented. He must act reasonably in the circumstances and not hastily or rashly, and, moreover, I do not think he would be justified to act at all without communication and, if possible, concert with the consignee where the consignee is known. If the provisions on the subject of delivery of goods and lien for freight in the Merchant Shipping Act 1894, sections 492 *et seq.*, which replace these of the Act of 1862, are examined, I think it will be seen that the master is intended to act with reasonable deliberation, and I may refer to what is said by Willes, J., in *Meyerstein* v. *Barber*, (1866) L.R. 2 C.P. 38, at p. 53—"Now, I will consider the question as if it had arisen before the passing of the Act of 1862 or of any of the earlier statutes of which that is the modern representative. I will assume that there was no Act of Parliament empowering the shipowner to land and warehouse goods at the expense and risk of the consignee or the holder of the bill of lading. What would then have been the state of things if the 'Acastus' had arrived in the Port of London and had found no person ready to take delivery of the goods or to pay the freight? What would have been the master's duty? His duty undoubtedly would have been to deal with the goods in a reasonable manner, regard being had, of course, to his lien for freight. According to our law he might have kept the goods on board the vessel on demurrage, at all events for a reasonable time, thus using the ship as a warehouse. That was found to be exceedingly inconvenient, and led to frequent disputes between the shipowner and the consignee. But another course was open to the master. Having obtained a new employment for his vessel he would be unwilling that she should be used as a mere warehouse, especially as the demurrage he might recover would often be no sufficient compensation for the detention in an inconvenient, and perhaps an expensive, port; and the law gave him the alternative of landing and warehousing the goods, giving notice to the consignee that they were at his disposal on payment of the freight, and having an action for the charges. That also was very inconvenient, for although the shipowner's liability as a carrier would be thus got rid of, he would incur a new liability as a warehouseman. It was inconvenient and unjust that the master should be forced to abandon his lien, or incur a charge of litigation in his new capacity of warehouseman, with all its dangers and risks. Accordingly we find that a series of Acts of Parliament has been passed for the purpose of relieving the master from that difficulty." And his Lordship then examines the provisions of the statutes which led up to that of 1862.

I do not think that the master in the present case or Messrs Ohlsen, as charterer's agents, were guilty of any delay in waiting twenty-four hours before they commenced to discharge into the hands of the railway

company as wharfingers, and in doing the latter I think they did the best for all concerned.

The conclusion, therefore, to which I have come is that Mr Carlberg was technically right, and that for any delay occasioned by the want of the bills of lading the consignees are liable. But while I think that is the law of the situation, there are circumstances in the present case to which your Lordship has adverted, and to which I shall not refer in detail, which, although I might not myself have come unaided to that conclusion, may well justify the fixing of damages for delay at a merely nominal amount, and in this I would readily acquiesce. The practical result of your Lordship's opinion and mine is therefore in the present case the same, except possibly as regards expenses.

Lord Skerrington—It is proved to be an ordinary though not an invariable incident of the shipping trade between Scandinavian and Scottish ports that the bills of lading (which require to travel by post) do not reach the port of discharge in Scotland until one or two days after the arrival of the ship. Hitherto this circumstance has caused no difficulty, and has never given rise to a claim for demurrage or damages for detention of the ship. The persons named as consignees in the bills of lading, or the purchasers from them, come forward on the arrival of the ship and ask for delivery and receive it, though it is conceded that the shipmaster could if he chose demand a substantial indemnity against claims of damages consequent on the cargo having been delivered without production of the bill of lading. In the present case, however, the pursuer, who is a shipowner in Gothenburg, instructed his shipmaster not to deliver the cargo except on presentation of the bills of lading. He now sues for £51, 19s. 6d. as damages for the detention of his ship at Methil, the port of unloading, for 37½ hours. The defenders purchased two portions of the cargo from the consignees named in two of the bills of lading, and by accepting delivery they are admittedly liable for the obligations undertaken by the shippers in the contracts of carriage as regards the terms of which the bills of lading are the primary and best evidence. The specific breach of contract of which the pursuer complains is that the defenders failed to present the bills of lading at Methil at 11 a.m. on 19th November 1912, when the ship had passed the Customs and was ready to be discharged. He alleges that it was "their duty so to present the same." No such obligation is expressed in the bills of lading, and I should be slow to imply an obligation which both parties to the contract of carriage must have known to be difficult if not impossible of accomplishment. The contracts in question were concluded on the afternoon of Saturday, 16th November, when the goods were put on board the pursuer's ship at Gothenburg, but the bills of lading were not signed and delivered to the shippers until the following Monday. It is, however, in my opinion sufficient for the disposal of the present case to refer to the well-known distinction between charter-parties and bills of lading which impose upon the charterer or receiver of the cargo an absolute and unconditional obligation to discharge the ship within a specified period and those which merely require that the cargo shall be received as fast as the steamer can deliver, or contain some similar stipulation. The bills of lading in the present case do not specify any period within which the cargo must be discharged, and accordingly the obligation of the receivers of the cargo was to use the utmost dispatch practicable, having regard to the whole circumstances at the time when delivery fell to take place. I hold it proved that the shippers were in no way to blame for the delay in the arrival of the bills of lading, and it therefore follows that no claim of damages in respect of that delay can be enforced against the receivers of the cargo. An attempt was made both in the evidence and in the argument to show that the shippers were in fault in not having obtained the completed bills of lading in time to be dispatched by the post which left Gothenburg on the evening of 16th November; but the pursuer's counsel did not in the end maintain that he had made good this point.

The Lord Ordinary has assoilzied the defenders on the ground that the pursuer acted unreasonably in refusing the offer of the consignees to give him an indemnity against the consequences of delivering the goods without production of the bills of lading. It seems to me that no question arises as to the conduct of the pursuer until it has been first established that a breach of contract was committed. Assuming, however, that the defenders by taking delivery of the cargo had subjected themselves to, and had failed to fulfil, an absolute obligation to discharge the ship within (say) forty-eight hours after she had passed the Customs, I should have thought that only nominal damages could be recovered by the pursuer in respect of the defenders' failure to perform this term of the contract of carriage, seeing that the consignees timeously offered the pursuer a substantial indemnity if he would deliver the cargo to their vendees pending the arrival of the bills of lading. If the pursuer chose as he did to refuse this reasonable offer and to allow his ship to stand idle, he has in my opinion no one but himself to blame for the loss which he suffered. In this view of the case I should have awarded the pursuer ¼d. in name of damages instead of assoilzieing the defenders as was done by the Lord Ordinary.

The defenders' counsel did not argue that the pursuer had committed a breach of contract in refusing to deliver the cargo before the arrival of the bills of lading, and I think that he was right in not attempting to plead his case too high. Obviously where a bill of lading has been lost or has failed to arrive in ordinary course of post some solution must be found for the difficulty, and some light upon the subject may perhaps be obtained from the common and statute law in regard to lost bills of exchange. The position is, however, different where a con-

signee is unable to produce the bill of lading for no other reason except that it has not yet arrived in the ordinary course of post. Much argument was also expended upon the question whether in the absence of the bills of lading it was not the pursuer's duty to land the goods subject to his lien, as was permitted by the terms both of the bills of lading and of the Merchant Shipping Act 1894. The power to land goods subject to the shipowner's lien is primarily a right which is created in the interests of the ship, but I do not doubt that in special circumstances a shipowner might find himself precluded from claiming demurrage or damages for detention if he unreasonably refused to exercise this right. Having regard, however, to the very short periods of time with which we are concerned in the present case, it would, I think, be unsafe to hold that the pursuer prejudiced his position by not adopting somewhat earlier the course which his agent ultimately adopted, viz., to deliver the goods to the North British Railway Company as wharfingers.

For the foregoing reasons I am of opinion that the Lord Ordinary's interlocutor ought to be affirmed.

LORD MACKENZIE was sitting in the Extra Division.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Horne, K.C.—Lippe. Agents—Martin, Milligan, & Macdonald, W.S.

Counsel for the Defenders and Respondents—Dean of Faculty (Dickson, K.C.)—Carmont. Agents—Beveridge, Sutherland, & Smith, W.S.

Friday, March 12.

EXTRA DIVISION.

TRAILL'S TRUSTEES *v.* TRAILL'S CREDITORS.

Bankruptcy—Voluntary Trust Deed for Creditors—Right in Security—Poinding—Ancestors' Creditors—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 102.

J. C. T. died after executing a trust-deed for his creditors. On a construction of the terms of the deed, *held* that the provision in the Bankruptcy Act 1856, sec. 102, that the Act and warrant of a trustee should operate in favour of ancestors' creditors as a complete diligence, was not imported into the trust-deed, and consequently that ancestor's creditors holding heritable bonds over property conveyed by the trust deed, not having poinded, had in a competition with the truster's creditors no preferential claim over the moveables which had been on it.

Opinion per Lord Cullen that the term "complete diligence" in the Act 1856 did not include poinding of the ground.

Prescription—Bankruptcy—Succession—Preference of Ancestors' Creditors over Heir and his Creditors after Forty Years.

The rights, in a sequestration, of ancestors' creditors to a preference over the heir and his creditors, which arises from the common law rule that the heir takes the property subject to his ancestors' debts, may be cut off by the negative prescription, unless the ancestors' creditors follow up their claims within forty years. *Circumstances* in which ancestors' creditors' rights to a preference *held* to have been so cut off.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79), sec. 102, enacts, *inter alia*—"The act and warrant of confirmation in favour of the trustee shall *ipso jure* transfer to and vest in him . . . the whole property of the debtor to the effect following:—. . . (2nd) . . . Provided always that such transfer and vesting of the heritable estate shall have no effect upon . . . the rights of the creditors of the ancestor (except that the act and warrant of confirmation shall operate in their favour as complete diligence). . . ."

John Little Mounsey, W.S., sole surviving trustee under the trust-disposition granted by the late James Christie Traill of Rattar, *first party*, the creditors of the said James Christie Traill, and the creditors of his ancestors James Traill and George Traill, presented a Special Case to have determined the rights of the respective creditors to the proceeds of two of the family portraits taken from Castlehill House and sold. The portraits belonged originally to James Traill, who owned Castlehill and other properties, and subsequently in succession, along with James Traill's properties, to George Traill and James Christie Traill. The *second parties* to the case consisted of the heritable creditors of James Traill, who held bonds over properties other than Castlehill; the *fourth parties* were the holders of bonds over Castlehill granted by George Traill; the *fifth parties* were holders of bonds over Castlehill and other properties granted by George Traill, and also creditors of James Christie Traill, holding bonds over the whole estates; the *sixth parties* were the holders of bonds granted by George Traill over estates other than Castlehill; and the *seventh parties* were the unsecured creditors of James Christie Traill.

The Special Case set forth, *inter alia*—"1. By *inter vivos* trust-disposition, dated 5th January 1887, the deceased James Christie Traill, Esq. of Rattar, on the narrative that he was indebted and owing to various persons certain sums of money, partly upon heritable securities over his estates therein disponed, and partly on bonds, bills, accounts, and otherwise, and that for further security and more ready payment to his whole lawful creditors at the date of the said trust-disposition, and being desirous that the said debts should be paid off as speedily as practicable, he had resolved to grant the said trust-disposition, gave, granted, alienated, disponed, and assigned to John Clerk Brodie, Thomas