The Court pronounced this interlocutor—

"Recal the findings in said interlocutor other than the finding in regard to the declaratory and reductive conclusions of the summons and the finding in regard to expenses: Find that the pursuers have suffered loss and damage, for which the respondents are responsible: *Quoad ultra* adhere to the said interlocutor, and decern."

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

Counsel for the Reclaimers (Defenders)—Moncrieff, K.C. — Graham Robertson. Agents—Gordon, Falconer, & Fairweather, W.S.

Tuesday, June 29.

SECOND DIVISION.

[Lord Dewar, Ordinary.

"STRATHLORNE" STEAMSHIP COMPANY, LIMITED *v.* HUGH BAIRD & SONS, LIMITED.

Ship—Affreightment—Charter-Party—Bill of Lading—Reference to Charter-Party—"Average Accustomed General Average, if any, and All other Conditions and Exceptions as per Charter-Party"—"Delivery with Dispatch according to Custom at Port of Discharge."

A charter-party between the owners of a steamship and the charterers of the vessel bore that the vessel should receive on board at the loading-place a full cargo of wheat, barley, or flour in sacks, and should proceed to discharge at such port and at the rates of freight set out on the endorsement to the charter-party "according to the custom at the port of discharge for steamers except as otherwise provided, cargo to be delivered at ship's tackles." The bills of lading held by the consignees, which formed the contract between them and the shipowners, provided that freight for the goods should be "payable as per endorsement on charter-party, with average accustomed general average, if any, and all other conditions and exceptions as per charter-party." In an action at the instance of the shipowners against the consignees for a balance of freight and demurrage due to failure of the latter to take delivery according to the custom of the port, *held* that the provision of the charter-party was incorporated into the bills of lading, and that the terms of the latter did not limit it to conditions *ejusdem generis* of payment of freight or average.

Ship — Affreightment — Custom of Port — Delivery of Grain Cargo — Custom Limited to Particular Cargoes in Steamers from Particular Ports—Charter-Party—Bill of Lading.

Bills of lading of a cargo of grain acknowledged that the master had received in good order and condition a number of sacks said to contain barley "to be delivered in the like good order and condition . . . weight and contents unknown." The charter-party, to which the consignees were not parties, contained a clause that the vessel should "discharge afloat with dispatch according to the custom at port of discharge for steamers except as otherwise provided, cargo to be delivered at ship's tackles," and this clause was imported into the bill of lading. In an action at the instance of the shipowners against certain consignees, who were buying the grain for their own use, for a balance of freight and demurrage due to failure of the latter to take delivery according to the custom of the port of discharge, the pursuers averred that a custom had existed at the port, for a period of twenty years, in the case of grain cargoes in steamers from North Pacific ports, to bulk the cargo in the hold before delivery. It was proved that this practice, which did not apply to cargoes of grain except those in steamers from North Pacific ports, not many in number, originated at the instance of and in the interest of consignees who were dealers, and who desired delivery in larger sacks than those in which the cargo was shipped, and that it was subsequently claimed as matter of right by them though the shipowners throughout disclaimed responsibility for the number of sacks. Their letters, however, were invariably written after discharge had commenced, and the condition they sought to annex to delivery was repudiated by the consignees. *Held* (*rev.* judgment of Lord Dewar, Ordinary) that the alleged custom had been proved, and that it was not inconsistent with the contract between the parties.

The "Strathlorne" Steamship Company, Limited, *pursuers*, brought an action against Hugh Baird & Sons, Limited, *defenders*, for payment of three sums which the pursuers alleged to be due to them by the defenders (1) for freight on a cargo of barley carried by the "Strathlorne" from Portland, Oregon, to Leith, (2) for demurrage in consequence of the defenders' refusal to take discharge of their barley in accordance with the custom of the port of discharge, in breach of the charter-party and bills of lading, and (3) for extra expense incurred in the discharge owing to such refusal.

The defenders pleaded, *inter alia* — "(4) There being no such custom of discharge as that alleged, *et separatim* any such alleged custom being inconsistent with the terms of the contract, and contrary to the defenders' rights by law, the defenders ought to be assoilzied from the second conclusion of the summons. (5) In any event, the custom alleged being unknown to the defenders, and not being uniform and universal in the discharge at Leith of cargoes from North Pacific ports, ought not to receive effect."

The *charter-party* of the s.s. "Strathlorne" provided that the "Strathlorne"

"shall receive on board at Portland, Oregon, . . . a full and complete cargo of wheat in sacks, and/or barley in sacks, and/or flour in sacks, . . . and being so loaded shall therewith proceed to Teneriffe for orders, same to be waiting her arrival, to discharge at such safe port or ports in the United Kingdom . . . and at the rates of freight as set out on the endorsement on this charter-party, . . . and there deliver the same and be paid freight as hereinafter provided." It provided further—"13. . . . Vessel to discharge afloat with dispatch according to the custom at port of discharge for steamers except as otherwise provided; cargo to be delivered at ship's tackles."

The bills of lading, which were all in similar terms, were as follows—"Shipped in good order and condition . . . in and upon the good ship or vessel called the Br. s.s. 'Strathlorne,' . . . and now lying at Portland, Oregon, and bound for Teneriffe for orders to discharge, according to basis of charter-party, 40,310 sacks, said to contain 4,669,136 lbs. Idaho white barley, being marked and numbered . . . and are to be delivered in the like good order and condition at the aforesaid port of as ordered . . . unto order or to its assigns. Freight for the said goods payable as per endorsement on charter-party, with average accustomed general average, if any, and all other conditions and exceptions as per charter-party. . . . Dated in Portland, Oregon, this 18th day of January 1913. Weight and contents unknown.—L. W., master."

The *facts* of the case and the import of the evidence appear from the opinion (*infra*) of the Lord Ordinary (DEWAR), who, after a proof, on 17th July 1914 decerned against the defenders for payment to the pursuers of the sum of £60, 2s., in full of the sum first concluded for, and assoilzied the defenders from the conclusions for payment of the two remaining sums.

Opinion.—"The pursuers are the registered owners of the s.s. 'Strathlorne,' and the defenders are consignees under bills of lading of a cargo of barley carried on the 'Strathlorne' from Oregon to Leith. The action raises the general question whether it is an established custom at the port of Leith that a cargo of grain shipped in sacks from the North Pacific coast must, before delivery, be emptied from the sacks by the receiver into the hold, and then discharged by the shipowner in bulk. The first question for decision is whether the custom has been proved to exist; and the second—assuming its existence—whether it is not inconsistent with the terms of the contract between parties as contained in the bills of lading.

"By charter-party entered into between the pursuers and the shippers, the 'Strathlorne' was chartered to load a complete cargo of barley at Portland, Oregon, and to proceed to Teneriffe for orders as to the port of delivery. It was stipulated that the vessel was 'to discharge afloat with dispatch according to the custom at port of discharge for steamers.' The cargo was duly shipped and bills of lading incorporating the conditions of the charter-party were granted by the master to the charterers. Four of these bills of lading were endorsed to the defenders. They are all in similar terms, acknowledging that the master has received in good order and condition (in all) 103,013 sacks said to contain barley, which 'are to be delivered in the like good order and condition.' The barley was of three distinct qualities, marked on the sacks with the letters 'D,' 'T,' and 'Z,' and the whole consignment weighed tons.

"When the vessel arrived at Leith the defenders were prepared to take delivery of the grain in the sacks in which it had been shipped, but the pursuers refused to give it in this form. They maintained that it was the invariable custom of the port of Leith for receivers of cargoes coming from the North Pacific Coast to bulk the grain in the hold; that it was then raised in buckets by the shipowner, weighed on deck, and carried off by the consignee either in bulk or put into sacks as he might think fit. The defenders had never heard of the alleged custom, and declined to take delivery in that way. The pursuers accordingly, after some delay, and under reservation of their claims, agreed to deliver as the defenders desired. But this was not an easy matter, because about 27,000 of the sacks had been 'bled'—that is to say, they had been cut with knives, so that the grain might lie loose among the full sacks with a view to 'stiffening' the ship. It appears that it is quite customary to cut the strings of a certain proportion of sacks—from 2½ to 5 per cent. is the usual proportion—for the purpose of 'stiffening'; but it is quite unusual to open anything like the number which was opened in this instance; and while the strings may be cut, the sacks ought never to be cut at all. This 'bleeding' of the sacks necessitated the employment of a staff of men to mend them, and many of them were so badly cut that they could not be repaired, and new sacks had to be obtained. All this involved delay and additional expense to both parties. The pursuers maintain that the defenders' refusal to follow the customary method of discharge detained the 'Strathlorne' for four extra days, and they claim £186, 17s. 4d. as demurrage. Then it costs 2d. per ton more to discharge in sacks than in bulk, and they claim £43, 13s. 6d. under this head. In addition to these two sums they sue for £289, 18s. 7d. being the balance of freight which the defenders have retained pending settlement of their counter claim. The defenders claim to set off against the balance of freight, which they admit they have retained, certain expenses and charges which they have incurred in consequence of the cutting of the sacks and mixing of the different qualities of grain; and they maintain that if there was any delay or extra cost incurred by the pursuers in discharging the vessel it was entirely due to their own fault; and they plead that as there is no custom of discharge, as the pursuers allege, and, in any event, as such custom is inconsistent with the terms of the contract, they are entitled to be assoilzied from the conclusions of the summons.

"There were a great many witnesses examined regarding the alleged custom, but the facts proved may be briefly stated. The grain trade between the North Pacific Coast and Leith is relatively small in dimensions and of comparatively recent date. It began about twenty years ago—the first steamship cargo arrived in 1895—and since that date about half-a-dozen have come every year. So far as can be ascertained the bills of lading were all in much the same terms, and all the cargoes except two appear to have been delivered in bulk. The pursuers state on record, and some of their witnesses supported the statement, that the reason for this practice—which is admittedly peculiar to the North Pacific Coast trade—is because the sacks being thin and fragile and of poor quality, are unable to resist the pressure of the chains when being hoisted. But this theory was not proved. Indeed, it was disproved. The sacks are made of the finest material and are tough and durable. They are thin and light, but that is because of the import duty, which is levied according to weight. They look fragile, but are relatively more reliable than the heavier sacks, double the size and made of inferior material, in which grain comes from India and Australia. They carry the grain from the farms to the port at which they are shipped, and a sack which is fit for that purpose is *prima facie* fit to carry the grain on shore. They are regularly hoisted at all other ports except Leith, and the 75,000 sacks of this cargo, which were not 'bled' were landed in the ship's chains without difficulty. The pursuers failed to establish their averment that the sacks were old and second-hand, and that many of them burst when the pressure of the chains was applied. The true explanation of the practice is really very simple. It frequently suits grain merchants to get delivery in bulk. If, for example, they have sold the cargo in advance—and as this is a long voyage it is frequently sold in advance—it is cheaper to have the grain bulked in the hold, weighed on deck, and discharged into waggons in bulk or taken away in the purchaser's own sacks. It also offers certain advantages to the shipowners. It is a little quicker and 2d. per ton cheaper—the stevedores charge for bulk is 7d., and for hoisting the sacks 9d. per ton. As the practice thus suited both parties the merchants appear to have had very little difficulty in persuading the shipowners to deliver in this way. But the evidence shows that it was always done by special arrangement. The shipowners have never acknowledged that they were under obligation to deliver in bulk, and have in every case intimated to the merchant that if he took delivery in manner other than that in which the goods were shipped they would not be responsible for the out-turn of the bags. The merchants usually protested against this repudiation of liability, and there the matter was permitted to rest. The position therefore is that the merchants now demand as a right what the shipowners maintain is merely a concession to suit the convenience of the merchants, and granted subject to the condition that there would be no responsibility for out-put. There is no evidence of anyone having been refused delivery in sacks who demanded it in that form. Now this practice, although convenient for a certain class of traders, does not suit everybody. It does not suit the defenders at all. They had not sold the grain in advance. They are maltsters, and intended to use the barley for malting purposes, and desired to store it in the original sacks, and when they purchased the cargo they had no idea that there was any custom to prevent them doing so. It was no advantage to them to have it weighed on deck, and it would have cost them 3½d. per ton to bulk, and they did not wish to have it bulked; on the contrary, they had special reasons for not bulking. There were different qualities of grain, and there is always a danger of mixing when it is being bulked, and mixed grain is deteriorated for malting purposes. The question therefore is, whether the practice which I have described can now be held to be an established custom of the port of Leith which binds the defenders and prevents them receiving delivery of goods in the manner in which they were shipped? I am of opinion that it cannot. The bills of lading contain the contract between parties, and the conditions under which such a contract can be amplified by proof of custom are very strictly defined. The custom to be binding must be definite and universally acquiesced in. It must be known to both parties; or, at all events, before it can be binding upon a party who was ignorant of it, it must be shown to be reasonable. It must be consistent with the written contract and not contrary to the general law. 'It must be so notorious that everybody in the trade enters into a contract with that usage as an implied term. It must be uniform as well as reasonable, and it must have quite as much certainty as the written contract itself,' *per* Sir George Jessell, M.R., in *Nelson* v. *Dahl*, 1879, L.R., 12 Ch. D. p. 575. I do not think that these conditions are satisfied in this case.

"It is not said to be a general or universal custom: the pursuers' case is that it is peculiar to Leith; and even at Leith it is restricted to grain coming from the North Pacific Coast. Grain coming from any other part of the world in sacks is admittedly discharged in the sacks at Leith; and if this particular cargo had been ordered to any other port in the United Kingdom—as it might have been—the defenders would, as a matter of course, have got delivery as they demanded. It was not loaded with a view to delivery at Leith: the pursuers did not know to what port it might be ordered before it reached Teneriffe. It is not surprising that a narrow and restricted local practice of this kind, which is contrary to the general custom of other ports, and for which there appears to be no special reason, was unknown to the defenders. There is nothing in the evidence to show that it was known to anyone except to the comparatively few merchants whose convenience it happened to suit. It was certainly not universal and notorious. It is said that as reference was made to custom in the

contract the defenders must be assumed to have known of it. I do not think so. The words—'. . . according to the custom of the port of discharge' apply, I think, to the ordinary facilities for discharge which the port affords. If, for example, there were special regulations at the port of discharge, the defenders would have been assumed to have known of them, but I do not think that it would be reasonable to hold that they must be assumed to have known what private arrangements certain traders were in the habit of making with shipowners. No shipowners had ever refused to deliver in sacks; on the contrary, they all, including the pursuers, appeared to have considered this was the method stipulated for under the contract. Thus the pursuers' agents, writing on their behalf to a receiver on 8th December 1909, state —'. . . In event of your taking delivery of the cargo in other than the manner in which it was shipped, we decline on ship's behalf to be responsible for any shortage in the output of the bags, which please note.' Mr Burrell, on being referred to this letter, states — 'That is a general letter, which is always written. . . . We generally write such letters to keep us right in connection with empty bags and their contents.' No doubt that is the intention, but it appears to be based on the assumption that the contract was to deliver in the manner shipped—that is to say, in sacks. Otherwise I do not see on what ground it could be maintained that they were entitled to escape responsibility for output. I think these letters show that the alleged custom has never been recognised or acquiesced in by the shipowners. It suited them to make the concession, but they always made it clear that it was a concession and not a condition of the contract. Mr M'Intosh, who has the largest experience as a shipowner of this trade, explained how these letters came to be written. He was the first to adopt the system, and all the others have followed his lead. His firm imported the first cargo in 1895, and the receiver desired to have delivery in bulk. Mr M'Intosh agreed on condition that he was relieved of responsibility for output, and he has made that stipulation ever since. In the the proof he says — 'We always make that stipulation, but it is not always agreed to. We usually get a counter-letter, but I regard the whole matter as a merchant's option in the first place . . . I regard it as our right in the first instance to discharge the cargo in bags, unless he stipulates that he will relieve me of all responsibility for bulking. I have never regarded the North Pacific ports as having any specialty of custom at all as compared with other ports.' This is the opinion of one who has known the trade from its commencement, and is most largely engaged in it. His opinion is corroborated by a number of other witnesses, and it is, I think, the sound and reasonable view. The pursuers' contention, on the other hand, appears to be that the alleged custom has so qualified the contract that the defenders are now not only bound to accept delivery in bulk, however inconvenient and costly that may be, but that they must also rest satisfied without check or control with such output of grain and of bags as may be delivered to them. That appears to me to be an attempt to impose a rule of conduct which is so entirely in favour of one party that it is fundamentally unjust to the other; and the Courts have always determined that such a custom, if sought to be enforced against a person who is in fact ignorant of it, is unreasonable and contrary to law. *Robinson* v. *Mollett*, L.R., 7 H.L. 802; *Clydesdale Shipowners' Company* v. *Gallacher*, 2 Ir. R., 578. I do not think that a custom can be said to be reasonable which would prevent, apparently without any cause, a trader from having a cargo carried to and delivered at Leith, as such cargoes are usually carried to and delivered at other ports. It was important to the defenders as maltsters that the grain which they imported should have free ventilation (and bulking prevents ventilation); it was also important that it should be unmixed, and stored in the sacks on delivery. Their contract, apart from the alleged custom, admittedly secured these conditions, and I do not think that they can be deprived of them because certain other traders, carrying on a different kind of business, and to whom these conditions are of no importance, have for a number of years asked and obtained the permission of shipowners to deliver in a different way. The usage of a particular market or class of persons cannot be binding upon a party who had no knowledge of it—*Ropner* v. *Stoate* (1903), 10 Com. Cases, 73. The custom of a port cannot be dictated by one class of traders to the prejudice of others. The conveniences of the port of Leith are open to maltsters as well as to grain merchants. I am accordingly of opinion that the alleged custom has not been proved.

"But assuming that I am wrong in this, and that the custom does in fact exist, I am further of opinion that it is contrary to the contract between parties, and cannot be given effect to in this case. As I read the contract of affreightment, the pursuers undertook to deliver the cargo in the condition in which they received it. It was received in sacks, and they were accordingly under obligation to deliver it in sacks, subject to whatever machinery and means might exist at the port for the delivery of sacks. They had no right to alter its condition, and to bulk is to alter the condition, and is inconsistent with delivery in sacks; and if there be a custom of the port to that effect it is, in my opinion, contrary to the express terms of this contract. (See the unreported case of *Pickford* v. *Johnston*, and *Hogarth* v. *Leith Cotton Seed Oil Company*, 1909 S.C. p. 955.)

"If I am right so far, it follows that the pursuers' claims for demurrage and extra cost of discharge fail, because they are both

based on the assumption that the method of discharge was controlled by the alleged custom.

"The only remaining question is the claim for balance of freight. The defenders retained £289, 18s. 7d. on the ground that they had incurred certain costs and charges which they claim to set off against this sum. The first charge is £138, 13s. 6d., being the sum paid to the stevedores for repairing the 'bled' sacks and refilling the grain. This amount has been paid to Messrs Young & Leslie and is vouched by the receipt. The pursuers deny that the sacks were 'bled.' They say that the condition they were in when they arrived was due to bursting, owing to the inferior quality of the material of which they were made. But that has not been established by the evidence. It is in my opinion proved that 27,000 were cut, and 19,000 of them very badly cut. Some of course did burst—that is inevitable. The precise number is difficult to ascertain, but Mr Levy, who examined them, and gave much the best evidence on this part of the case, estimated the number at a little over 1000. The pursuers are not of course responsible for these, but they are responsible for those which were cut. If there had been no cutting there would have been no necessity for repairing and refilling. I accordingly think that the defenders have established their claim under this head to the extent of £130.

"The second charge is for £50 for the hire of new sacks, but the defenders admit that this falls to be reduced to £34, 10s. New sacks were required to replace those which were damaged and the defenders hired them. But they have not yet paid for them, and I am not satisfied that 1d. per sack which is charged is the correct price. There is evidence to the effect that sacks can be hired for ½d. each, and I therefore propose to allow half the amount claimed, viz., £17, 5s.

"The third charge is £18, 13s. 6d. for surveyor's fees. This appears to have been incurred with a view to establishing the defenders' case, and I do not think that it can be allowed.

"The fourth charge is £56, 5s. for depreciation in the value of the cut sacks. The whole cargo was sold in advance to Messrs Levy at 2d. and 1-16th per sack. When the consignment was examined and the injured sacks were discovered the purchasers claimed ½d. per sack on the 27,000 which were cut. This is only an estimate, but I think it is a fair estimate for the actual depreciation, and there is no evidence to a contrary effect. I am accordingly of opinion that this charge has been proved; and I am also of opinion that the fifth and last charge of £26, 6s. 7d. for damaged barley through mixing has been proved.

"These sums when added amount in all to £229, 16s. 7d., and this deducted from £289, 18s. 7d., the balance of freight claimed, leaves a balance of £60, 2s. still due to the pursuers, for which I grant decree."

The pursuers reclaimed, and argued—The clause in the charter-party as to delivery at the port of discharge according to the custom of the port had been validly incorporated in the contract evidenced by the bill of lading by the reference in the latter document to the charter-party for all other conditions. The two documents were mutually consistent, and the contract based on them must be read as a whole and with a view to its main purpose—*Glynn* v. *Margetson & Company*, [1893] A.C. 351, *per* Lord Halsbury, at p. 357. If the custom was consistent with the terms of the charter-party it must be taken as incorporated into the contract, which must be construed accordingly—*Aktieselskab Helios* v. *Ekman & Company*, [1897] 2 Q.B. 83, *per* Lord Esher, M.R., at p. 86; *Kearon* v. *Radford & Company*, 1895, 11 T.L.R. 226. A custom regulating the method of delivery was just the kind of custom which the Court would willingly import into a contract—*Budgett & Company* v. *Binnington & Company*, 1890, 25 Q.B.D. 320, *affd.* [1891] 1 Q.B. 35. Delivery being a joint act of the shipowners and the consignee, it was open to both parties to adjust the manner of delivery by the custom of the port—*ibid.*, *per* Lord Esher, M.R., p. 38; *Petrocochino* v. *Bott*, 1874, 9 C.P. 355, *per* Brett, J., at p. 360; *Gatcliffe* v. *Bourne*, 1838, 4 Bing. N.C. 314, *per* Tindal, C.J., at pp. 329, 330. The provision in the charter-party was clearly relevant to delivery, and therefore must be held as incorporated in the bill of lading—*East Yorkshire Steamship Company* v. *Hancock*, 1900, 5 Comm. Cas. 266, *per* Mathew, J., at p. 268. Further, the custom in this case had been clearly established. Custom was established by a multiplicity of instances, and it was a question of fact in each particular case whether the instances were sufficient to found a legally enforceable custom—*Mackenzie* v. *Dunlop*, 1856, 3 Macq. 22, *per* Lord Cranworth, L.C., at p. 40; *Postlethwaite* v. *Freeland*, 1880, 5 A.C. 599, *per* Lord Blackburn at pp. 613, 616; *Nielsen & Company* v. *Wait, James, & Company*, 1885, 14 Q.B.D. 516, *per* Pollock, B., at p. 520, *affd.* 16 Q.B.D. 67; *Tucker* v. *Linger*, 1882, 21 Ch. D. 18, *per* Jessel, M.R., at p. 34; *Birrel* v. *Dryer*, 1884, 9 A.C. 345, *per* Lord Selborne, L.C., at p. 346; *Roe* v. *Charnock*, 1790, 1 Peake 6, 3 R.R. 643; *Knight* v. *Cotesworth*, 1883, 1 C. & E. 48, *per* Mathew, J., at p. 51; *Haynes* v. *Holliday*, 1831, 7 Bing. 587; *Cuthbert* v. *Cumming*, 1855, 24 L.J., Ex. 198, 310. The fact that this custom was peculiar to a particular trade would not prevent its being given effect to—*Gould* v. *Oliver*, 1837, 4 Bing. (N.S.) 134; *Taylor* v. *Briggs*, 1827, 2 C. & P. 525; *Norden Steam Company*, v. *Dempsey*, 1876, 1 C.P.D. 654, *per* Lord Coleridge, C.-J., at p. 659; *Benson* v. *Schneider*, 1817, 7 Taunt. 272, 1 Moore 21, 76. The letters of protest founded on by the defenders were written after discharge had begun, and constituted therefore no evidence to rebut the evidence of the custom. Further, it was immaterial whether there was mutual knowledge of the custom or not, because it was a term of the contract between the parties that they should submit to the custom prevailing at the port of discharge—*Ardan Steamship Company, Limi-*

ted v. *Weir & Company*, January 19, 1904, 6 F. 294, 41 S.L.R, 230; *Somes* v. *Jenkins*, 1866, 2 Mar. L.C. (O.S.) 330. In *Kirchner* v. *Venus*, 1859, 12 Moore's P.C. 361, founded on by the defenders, the custom was superimposed on the contract, and therefore it had to be shown that it was in the comtemplation of both of the parties to it. For a similar reason the case of *Holman* v. *Peruvian Nitrate Company*, February 8, 1878, 5 R. 657, 15 S.L.R. 349, founded on by the defenders, was not in point. If the custom was clearly imported into the contract it was not necessary that it should be reasonable — *Stewart* v. *West India and Pacific Steamship Company*, 1873, L.R. 8 Q.B. 88, *per* Quain, J., at pp. 94, 95, *affd. ib.* 362. The custom, however, in the present case was reasonable, and with two exceptions it had been uniform over a considerable period of time so as to entitle it to receive effect—*Nelson* v. *Dahl*, 1879, 12 Ch. D. 568, *per* Jessel, M.R., at p. 575; *Park Steamship Company, Limited* v. *W. Knox & Company, Limited*, not reported. In *Clydesdale Shipowners Company* v. *Gallacher*, [1907] 2 Ir. R. 578, cited by the Lord Ordinary, the custom was not made an express term of the contract. The present case satisfied all the criteria laid down in *Hogarth & Sons* v. *Leith Cotton Seed Oil Company*, 1909, S.C. 955, *per* Lord Ardwall, pp. 964 and 968, 46 S.L.R. 593, and which were also given effect to in *Marzetti* v. *Smith & Son*, 1883, 5 Asp. Mar. L.C. 166, 49 L.T. 580; 1 Cab. & Ellis, 6; Carver's Carriage by Sea (5th ed.), sec. 182, p. 251; Scrutton's Charter-Parties and Bills of Lading (7th ed), p. 19. The pursuers were therefore entitled to recover the balance of freight and the extra cost of discharging the cargo.

Argued for the defenders—The bill of lading superseded the charter-party, and although it referred to other conditions as per charter-party, these conditions were imported only so far as they were consistent with the bill of lading, and where the consignee was different from the charterer it would require a clear expression of intention to incorporate conditions that were in any way inconsistent with the bill of lading —*Gardner* v. *Trechmann*, 1884, 15 Q.B.D. 154; *Serraino & Sons* v. *Campbell*, [1891] 1 Q.B. 283; *Diederichsen* v. *Farquharson Brothers*, [1898] 1 Q.B. 150; *Delaurier* v. *Wyllie*, November 30, 1889, 17 R. 167, 27 S.L.R. 148; Scrutton's Charter-Parties and Bills of Lading (7th ed.), Art. 19, p. 52. If the bill of lading stood alone there could be no doubt of defender's right to get the goods as shipped. As a matter of fact, however, the charter-party completely supported the bill of lading to the effect that the cargo was one which was to be carried in sacks. The discharge under the charter-party was to be a discharge according to the cargo, but without altering the character of the cargo. The appellants read into the contract not custom of the port but custom of the port in a very small branch of a particular trade. This was really not a custom of the port, but a custom of trade—*Ropner* v. *Stoate, Hosegood, & Company*, 1905, 10 Com. Cas. 73. It was not delivery of a commodity enclosed in a case, or with contents declared unknown, to deliver the commodity separate from the case or with the contents mixed. The duty of the shipowner was to stow, carry, and deliver the cargo as it was received—*Pickford and Others* v. *Johnstone*, 1891, Guthrie's Select Cases (Second Series), 563; *Clacevith* v. *Hutcheson & Company*, October 28, 1887, 15 R. 11, 25 S.L.R. 11; *Tyzack & Branfoot Steamship Company, Limited* v. *Sandeman & Sons*, 1913 S.C. (H.L.) 84, *per* Lord Haldane, L.C., at p. 88, Lord Moulton at p. 92, 50 S.L.R. 869. The holder of a bill of lading was not affected by any arrangement which the shipper might have made with the shipowner. The clause in the charter-party, that the vessel was to discharge afloat with dispatch according to the custom of the port, meant according to the circumstances of the particular port in question and by means of the customary appliances, and had nothing to do with the method of discharge—*Metcalfe, Simpson, & Company* v. *Thompson, Pattrick & Woodwark*, 1902, 18 T.L.R. 706; *Kearon* v. *Radford & Company*, 11 T.L.R. 226, *per* Kennedy, J., p. 227; *Fawcett & Company* v. *Baird & Company*, 1900, 16 T.L.R. 198; *Castlegate Steamship Company, Limited* v. *Dempsey and Others*, [1892] 1 Q.B. 854; *J. & A. Wylie* v. *Harrison & Company*, October 29, 1885, 13 R. 92, 23 S.L.R. 62. In any event the custom had not been proved. The evidence only showed that in certain cases delivery in bulk had been made in the interest of certain consignees, but these instances could not establish a custom legally enforceable against a consignee whose interest it was not to receive in bulk—*Marwood* v. *Taylor*, 1901, 6 Com. Cas. 178. The present practice was unreasonable, and what was unreasonable could not be established as a custom by a few years' usage, or an outside party be forced to adopt it—*Ropner* v. *Stoate, Hosegood, & Company* (*cit. sup.*), *per* Channell, J., at p. 79; *Sea Steamship Company, Limited* v. *Price, Walker & Company, Limited*, 1903, 8 Com. Cas. 292; *Glasgow Navigation Company* v. *Howard*, 1910, 15 Com. Cas. 88. The criteria for a custom such as the pursuers sought to set up here were laid down in the case of *Hogarth & Sons* v. *Leith Cotton Seed Oil Company* (*cit. sup.*), and the present case failed when these criteria were applied to it. Such a custom must be definite and certain, universal, uniform and notorious, and not inconsistent with the written contract between the parties. In the present case the custom was not sufficiently definite, and it was purely local. It was, further, not known to the defenders—*Kirchner* v. *Venus* (*cit. sup.*); *Holman* v. *Peruvian Nitrate Company* (*cit. sup.*). It was further really an attempt to alter the written contract. In the case of *Budgett & Company* v. *Binnington & Company* (*cit. sup.*), cited by the appellants, there was no delivery prescribed at the ship's tackles. Delivery must be one and individual, and could not be both in the hold and at the ship's tackles.

At advising—

LORD SALVESEN—The facts in this case have been narrated with substantial accu-

racy by the Lord Ordinary in the note which he has appended to the interlocutor under review. The contract between the parties is contained in bills of lading which were all in similar terms. A typical bill of lading is printed in the appendix. The shipowner thereby acknowledges the shipment in good order and condition on the vessel "Strathlorne," then lying at Portland, Oregon, and bound for Teneriffe for orders to discharge according to basis of charter-party 40,310 sacks white barley, and undertakes that these sacks shall be delivered in the like good order and condition at the port to which the vessel may be ordered to proceed, "freight for the said goods payable as per endorsement on charter-party, with average accustomed general average, if any, and all other conditions and exceptions as per charter-party." The only material clause in the charter-party which is said to have been incorporated into the bill of lading by the above clause is expressed as follows:—"Vessel to discharge afloat with dispatch, according to the custom at port of discharge for steamers, except as otherwise provided; cargo to be delivered at ship's tackles."

Apart from the question of custom both at Portland and at Leith, the respective ports of shipment and delivery, there is no doubt as to the obligation that this contract imposed upon the pursuers. Having received the barley in sacks they were not entitled to alter its condition, and they were bound to deliver it at Leith in the identical sacks in which the barley had been originally contained. It appears, however, to be the custom at Portland, with a view to stiffen the ship and enable it to carry its full dead weight of cargo, to open a certain percentage of the sacks and to allow the barley in bulk to fill up the interstices between them. This custom in the case of a charter-party such as the present is mainly in the interest of the shipper, and indirectly therefore of the consignee of the cargo. If the cargo had all remained in bags a certain amount of ballast would have been required in order to stiffen the ship and enable her to navigate safely the long voyage which she had before her. Correspondingly less cargo would have been carried and dead freight would have been payable to the owners, with the result that the freight on each parcel of barley carried would have been sensibly increased. It has not been necessary in this case to inquire into the extent or universal applicability at Portland of the custom in question, for if the pursuers are right in their contention the partial bulking of the cargo at Portland was an advantage to the consignee; but all the witnesses examined speak to its being usual that a certain percentage of barley in cargoes from North Pacific ports is invariably found in bulk filling up the spaces between the sacks. The common percentage appears to be from 2½ per cent. to 5 per cent., although in the case of the "Strathlorne" the percentage was very much higher. Apart from proof of custom of so shipping a cargo of barley, it was decided by this Division in the case of *Pickford* v. *Johnstone* (unreported) that the bulking of a portion of a cargo of barley in sacks which falls to be delivered in sacks constitutes a breach of contract as in a question between the shipowner and the holder of a bill of lading expressed in terms similar to the present, and that if damage results to the cargo therefrom the shipowner is answerable to the consignee. That judgment is binding upon us, but apart from that I see no reason to doubt its soundness.

If the pursuers are right, however, in their main contention, the mere fact that they permitted a part of the cargo to be bulked at the port of shipment is of no moment, because they say that in accordance with the settled and established practice of the trade at Leith the whole cargo fell to be bulked in the hold there, and to be removed from the hold in bags supplied by the receiver. They say that the clause in the charter-party which I have already quoted having been expressly incorporated by the bill of lading, it became part of the contract between the parties that the vessel should discharge in the manner customary at Leith, and their claim in this action is based on the fact that the defenders refused to receive the cargo otherwise than in the original sacks discharged over the ship's side. This method of discharge resulted in the shipowners being put to extra expense to the extent of 2d. per ton, and it has also given rise to a claim of demurrage consequent on the attitude which the defenders took up with regard to the method of discharge.

The first argument maintained for the defenders was that the clause in the charter-party founded on was not validly incorporated in the contract evidenced by the bill of lading. Various authorities were cited in support of this view, of which the case of *Diederichsen* v. *Farquharson Brothers*, [1898] 1 Q.B. 150, may be taken as typical. In that case the vessel was to load a full cargo of timber, including a deck cargo, at merchants' risk. The bill of lading contained no reference to any part of the cargo being on deck. There was, however, a clause in these terms—"Freight and all other conditions as per charter-party." It was held that the exemption of the shipowner from liability in respect of the deck cargo was not incorporated into the bill of lading by this clause. Rigby, L.J., dissented from the judgment, which proceeded on the view that the clause was to be read as if the word "paying" had introduced it, in which case the question was ruled by two prior decisions. I prefer the dissenting judgment, but in any event it is noteworthy that in this case, as well as in the two on which it proceeded, the conditions imported by the clause were held to include all those to be performed by the receiver of the goods.

The decision is plainly not applicable here, where the clause is expressed so as to incorporate "all other conditions and exceptions as per charter-party." It would be impossible to construe this clause so as to limit it to conditions *ejusdem generis* of payment of freight or average, and I cannot doubt that both the learned Judges who constituted the majority of the Court of Appeal

in the *Diederichsen* case would have reached the same conclusion as Rigby, L.J., arrived at had the clause been similarly expressed to that now under construction. But whether that be so or not, the decision is a clear authority for the proposition that the conditions which are embodied are those which fall to be performed by the holder of the bill of lading. Now there is nothing that more directly affects him than stipulations with regard to the discharge of the cargo, and I therefore see no room for doubt that he contracted with the pursuers that their vessel was to be discharged afloat with dispatch according to the custom of the port of discharge for steamers.

It was next contended for the defenders that, assuming the custom to exist as averred by the pursuers, it could not be enforced unless it were known to the defenders. On this matter I think it necessary, in order to avoid confusion, to distinguish between custom which requires to be known to both parties in order to be binding, and custom or, more correctly, usage of trade, such as the one averred, in which knowledge is of no moment. The case of *Kirchner* v. *Venus*, 12 Moo. P.C. 361, at p. 399, is an excellent illustration of the former class. There it was held "that when evidence of the usage of a particular place is admitted, to add to or in any manner to affect the construction of a written contract, it is admitted only on the ground that the parties who made the contract are both cognisant of the usage, and must be presumed to have made their agreement with reference to it." Such cases as *Kirchner* and *Holman* v. *Peruvian Nitrate Company*, 5 R. 657, have no application, however, to a case where it is part of the contract between the parties that they shall submit to the custom prevailing at the port of discharge. The consignee under a bill of lading either knows before he purchases the cargo what the port of discharge is, or he himself determines what it shall be. He at all events may be presumed to know what that custom is, although the shipowner who signs the charter-party, under which his vessel might have been ordered to one of a dozen ports, might reasonably be ignorant of it; but both parties contract that whatever the place of discharge may come to be, so long as it is within the ambit of the charter-party they shall be bound by the custom there prevailing. The matter is nowhere more lucidly expressed than in Lord Kinnear's opinion in the case of the *Ardan Steamship Company, Limited* v. *Weir & Company*, 6 F. 294, at p. 311, where he says—"It appears to me that whatever be their actual knowledge, if people make conditions with reference to loading or discharging a ship at a particular port their contract must be construed with reference to the custom of that port. If the defenders did not know what the special custom in loading coals at Newcastle might be, they at all events knew there must be some custom, and they either contracted intelligently to be bound by the particular custom they knew, or else they contracted to take the risk of what the custom might be. I think with your Lordship again that *Hudson* v. *Ede*, L.R., 3 Q.B. 412, is directly in point, for in that case a shipowner was shown to be absolutely ignorant of the custom of the ports on the Danube, but it was held by the Court that that made no difference in the construction of the contract betwixt him and the trader." The same result was reached by the Judges of the Court of Common Pleas in the "*Norden*" *Steam Company* v. *Dempsey*, L.R., 1 C.P.D. 654, where a custom of the port of Liverpool to the effect that in the case of timber ships the lay-days commenced from the mooring of the vessel at the quay, where by the regulations of the dock she was alone allowed to discharge, was held to be binding on the foreign shipowner under a charter-party made at Riga. There are other cases to the same effect, but it is not necessary to go more fully into the subject, as it appears to me to be plain that a custom which is part of the contract, or is by law implied in the contract, is in a totally different position from a custom which is extraneous to the contract, and by which it is sought to add a term which is not expressed in the contract itself. I do not think the Lord Ordinary has sufficiently adverted to this distinction in some of his observations, and in other cases it has also been lost sight of, as, for instance, in certain *obiter dicta* of Lord Ardwall in *Hogarth & Sons* v. *Leith Cotton Seed Oil Company*, 1909 S.C. 955, at pp. 966, 967.

I proceed to consider whether the custom alleged has been proved. The facts are really not in dispute. The first steamer laden with barley from a North Pacific port arrived in Leith about twenty years ago. The captain proposed to deliver his cargo in the sacks in which it had been shipped, but the consignees, who were corn dealers in Leith, approached the shippers' agent, Mr M'Intosh, and requested him to allow the receiver's men to empty the sacks in the hold, to fill the bulk grain into tubs, then when these tubs had been raised to the deck to empty their contents into larger bags, holding 2 cwts., on deck, where they were weighed and carried ashore at the expense of the consignee. Mr Bruce, the receiver in question, represented that by this method of discharge he would be saved an expense of about £300 or £400, for if the sacks were lifted from the hold and weighed on deck before being slung ashore, they would have to be emptied into larger bags and be reweighed to suit the convenience of the trade in which the receivers were engaged. Mr M'Intosh agreed on the footing that if the sacks were bulked in the hold as proposed the ship should not be held responsible for the number of sacks, as it was feared that empty sacks might go amissing, or be abstracted by some of the workmen engaged in the discharge. To this condition the receivers consented, and the cargo was accordingly discharged in the manner proposed by them. There was thus here a special arrangement which, as it turned out, suited both parties, for the shipowner saved about 2d. per ton, and the

receivers saved the expense of a double weighing, which represented a much larger sum. It may be mentioned incidentally that while this was the first case in which a steamer had arrived from a North Pacific port, the trade was by no means new to Leith, although it had previously been entirely carried in sailing ships. The explanation no doubt is that the voyage from a North Pacific port to Europe is one of the longest which a ship is ever called upon to take, and it was from this long-voyage traffic that the sailing ships were last ousted by steamers. There is no evidence, I think (differing from the Lord Ordinary), which shows that subsequent steamers were discharged under an express special arrangement of this kind. The consignees appear to have claimed as matter of right to bulk the cargo in the steamer's hold, and to send men to do so, and at the same time to fill the bulked barley into their own bags. The steamer's agent, acting on the precedent set up by Mr M'Intosh, on such occasions invariably intimated that as the cargo was taken by the receivers otherwise than in the original sacks, the ship would not hold itself responsible in the event of any bags turning out short. For the first few years apparently the receivers did not repudiate these letters, which came to assume a stereotyped form, and their silence might well be interpreted as acquiescence in the condition imposed by the ship, so that in such circumstances it would be fair to infer in law that here also the departure from the legal obligation to deliver in the original sacks was under special arrangement. But as the custom hardened and crystallised this ceased to be the case. The consignees claimed the right to discharge according to what they styled "the custom of the port," and while the shipowner's agent continued to write the stereotyped letter disclaiming responsibility for the number of bags, the receiver as regularly wrote repudiating the condition which the shipowner sought to impose. In every instance the ship acquiesced in the method of discharge, which the consignees claimed that they were entitled to adopt in accordance with the recognised practice of the port. Now this method of discharge has gone on for twenty years without variation in the case of steamers, and, in my opinion, it had at the time when this action was brought become the settled and established practice in the case of barley cargoes in sacks from North Pacific ports. The consignees of such cargoes at Leith might well place reliance on this practice being followed, and shipowners who had carried previous cargoes of the same kind to Leith, as was the case with the pursuers, had also come to know of it, and to rely upon it. The fact that it was an advantage to both parties to have cargoes so discharged was an excellent basis on which to found such a practice. There were other reasons which made it desirable. Amongst these may be enumerated (1) the custom of partial bulking at the port of shipment which, whether it was binding or not on consignees, was known to them, and accepted without challenge; and (2) the circumstance that the grain from North Pacific ports is shipped in smaller sacks, made of a thin material (in order to reduce the expense of import to America), which material is not always of adequate strength to enable the sacks to be slung from the ship's hold ashore without a certain percentage of them bursting. Any loss of grain so caused would fall upon the receivers, for it was a universal feature of such bills of lading that the ship did not sign for weight, but only for the number of sacks.

During the last ten years or more that the practice has been established I have come to the conclusion that it has been uniformly claimed as matter of right by the receivers; and that while the shipowner has as uniformly endeavoured to impose as a condition that he should not be answerable for the number of sacks if the discharge took place according to the alleged custom, that condition has been regularly repudiated. The position of matters has therefore been that the shipowner has submitted to the receivers' demand without securing any advantage except such as was incidental to the method of discharge to which he was asked to submit. This is plain from the decision in the *Park Steamship Company, Limited* (unreported), where the very question was tried and where the shipowner was held responsible for the full number of sacks for which the master had signed, notwithstanding that the receivers had taken delivery of the cargo by emptying the barley into the hold and re-bagging it in their own bags. The only differences between the facts of that case and the present are that there the master submitted to this method of discharge without protest; but that appears to me to be precisely the same as if he had submitted after his protest had been expressly repudiated. It may be noted by the way that these stereotyped protests, which were as regularly repudiated, were never made until after the discharge according to the customary method had been commenced. If the shipowner had considered that he could make his protest effectual by stopping the discharge and claiming to deliver in sacks he would presumably have done so, for the saving to him by this method of discharge was very much less than that to the consignees. He would therefore have had it in his power to dictate terms on which the discharge should proceed. In the present case the saving to the ship only represents some £43, which is the sum third concluded for; whereas Mr Bruce in the earliest case of a steamer coming to Leith from a North Pacific port claimed that he would be put to an expense of £300 on a cargo half the size of that carried by the "Strathlorne" if the ship insisted on delivery in the original sacks. This explains the strong position taken up from first to last by receivers of such cargoes in Leith, extending over some twenty years and embracing over sixty steamer cargoes. After a practice has become so established I think it would have been impossible for the shipowner to have resisted with any prospect of success the demand of the receiver that

he should permit the discharge of the ship according to the method that had become universal in this particular trade. The difficulty would have been still greater, at all events in equity if not in law, where, as here, the shipowners had had previous experience of the customary method of discharge in Leith of a cargo of this kind.

The peculiarity of this case is that the claim is made by the shipowner and not by the consignee, and that for the first time in the history of the trade, so far as we know, the consignee had an interest in obtaining delivery in the original sacks, instead of following the usual practice which, as appears from the report in the *Park Steamship Company* case, prevails equally in Aberdeen. The reason of the consignee's attitude is that it did not suit him as a maltster who intended to store the barley for his own use, to take delivery in the ordinary method. For purposes of sale it is essential that the bags should be of the standard 2 cwt. size; but for a man's own purpose as a consumer it is of no moment in what kind of sacks the barley remains stored so long as he knows the correct weight. Hitherto the traders with whom the custom originated and was persisted in have all been corn-dealers or brokers, and it is said to be unreasonable that a company like the defenders, who import for their own consumption and not for sale, should be bound by a practice which has been established against their interest. I cannot see any force in this argument. Assuming that a definite usage of trade has been established at a particular port, both parties to the contract must be bound by it or neither. The mere fact that it may not suit one of the parties is no ground for holding that the practice cannot be enforced at the instance of the other. Usages of trade of this description are no doubt the outcome in many cases of mutual convenience, but once they have been established as fixed and definite usages and are imported into a contract, they are as much part of the contract and as much binding on the contracting parties as if they had been written at length into it. The defenders were well aware of the settled practice in Leith, although they did not believe that it would be binding on them in law, but they took the risk of that. They might, if they had chosen, have ordered the ship to a different port where the customary method of discharge was in sacks, or failing that they might have made a special arrangement with the pursuers. As it happened they got delivery in sacks as they desired, and if they had promptly conceded the shipowners' demand the only penalty would have been the obligation to indemnify him for the more costly form of discharge which they desired, an indemnity which would have been measured by the sum of £43 or thereby. A custom of the port or a usage of trade—as I think is the preferable term—could never become binding if it were possible to disregard it on any occasion when either party found that it did not suit his convenience. The reasonableness of a custom, if that matter enters into the discussion at all—as I think it does not where a contractual obligation is expressly qualified by custom—does not depend upon particular and exceptional cases, but upon the generality of cases to which it owes its origin. It would be unfortunate if the general interest of consignees was to be sacrificed because one particular consignee found that his interest did not coincide with theirs.

The strongest point against the proof of custom in the present case is that throughout shipowners through their agents have invariably protested against its existence, and have sought to adject conditions to their consent being given to a discharge in the customary mode. The argument would, I think, have been unanswerable so long as consignees acquiesced either expressly or by implication in these conditions, but from the time that, fortified by a long course of dealing, they boldly repudiated the conditions, the whole complexion appears to me to be changed. The material fact is that the shipowner submitted to the custom in every case notwithstanding his being alive to the advantage which he would have had if he thought he could have disregarded it.

The only two cases in which a different method of discharge has been adopted in Leith in this particular trade do not affect the universality of the custom. In the first place, these were cases of sailing ships and parties expressly contracted with regard to steamers; in the second place, one of them at least was a quite exceptional case, for the cargo had been damaged, and it would have been out of the question to bulk the undamaged sacks and allow their contents to mix with the damaged grain. We know less about the case of the "Siam," but there is no reason to suppose that this ship had any interest to oppose the consignees' request that her cargo should be discharged in the original sacks, and, for all that appears, a special arrangement may have been come to.

Assuming the question of fact to be decided against them, the defenders still maintain that this usage of trade is not binding upon them on various grounds. In the first place, they say that it was not a usage of the port of Leith generally, but applied only to a particular trade, and not to a particular trade only, to wit, the grain trade, but to the grain trade from North Pacific ports only. They say that a very large part of the grain that comes to Leith in bags or sacks from other places, notably from India and Australia, is always discharged in the original bags, and that therefore there is no universality in the alleged custom. I am unable to assent to this view. Where a custom of discharging is referred to in the bills of lading as prevailing at a certain port it must necessarily have reference to the kind of goods described in the bills of lading, and I see no reason why, if there be a settled usage in one branch of trade, it should not be given effect to because in other branches of the same general trade a different usage prevails. A similar argument was urged in the "*Norden*" *Steam Company* already referred to. In the case of the *Aktieselkab* "*Helios*" v. *Ekman & Company*, [1897] 2

Q.B. 83, a custom of the port of London that a ship discharging timber in long lengths must put the timber into lighters brought alongside by the consignees was sustained, although extra expense was thereby imposed upon the shipowner. This custom only applied to long lengths of timber and not to timber generally, which fell to be discharged in other customary ways. The truth is that the trade from different ports in the same article may be carried on in such various ways that different customs grow up with regard to the discharge. In the case of India and Australia the grain is shipped in large strong bags, which it suits the receivers best to have slung ashore just as they are. Hence in that case the obligation of the shipowner, which the law implies from his having received the goods in bags to deliver in the same bags, would naturally be enforced.

Another and more formidable argument was that the practice could not receive effect because it was inconsistent with the terms of the contract. It was said that the contract implied that delivery should be in the original sacks, and that it expressed that delivery should take place from the ship's tackles, and that the practice founded on was inconsistent with both these terms of the contract. In considering this matter, assuming that the practice is well proved, it appears to me that our duty is to construe the contract as if the practice had been described at length in it. If so the supposed difficulty of interpretation disappears. The implication would be overridden by the express terms, and the phrase "at the ship's tackles" would not in any way be contradicted by the practice followed in Leith. In point of fact the grain is slung from the hold in tubs of uniform size attached to the ship's tackles, and delivery takes place when the grain is emptied into the bags of the receiver on the ship's deck. The receiver thus gets his grain from the ship's tackles, just as much as if the grain was poured into a cart brought along the ship's side or emptied into bags on the quay. There was far more ground for holding, in my opinion, that the contract was inconsistent with the custom in the case of the "*Helios*." According to the implication of law, the duty of the receiver was to take delivery of the timber over the vessel's rail, but this implication was held to be not inconsistent with a custom that the ship did not discharge its obligation until at its own expense, and without the intervention of the receiver's men, it had loaded the timber into the receiver's barges. In *Budgett & Company* v. *Binnington & Company*, 25 Q.B.D. 320, the custom of the port of Bristol in the matter of discharging a cargo of barley in bulk is incidentally mentioned. It consists in the consignees employing bushellers to go into the hold and put the grain into sacks. These sacks are then attached to a running noose and hoisted by winchmen employed by the shipowner on deck, and thence into scales by men employed by the shipowners. The sacks are there weighed by weighers employed by the consignees, and carried into trucks or warehouse by men also employed by them. Now the custom there described is the exact converse of the custom with which we are here concerned. The cargo having been shipped in bulk the shipowner at common law would be entitled to discharge it in bulk over the ship's side, but would be under no obligation to permit the receiver's men to perform an operation on the cargo in the hold of the vessel. The custom, however, prescribed a more convenient course, and regulated the contribution that each should make to the joint act of delivery. It is common knowledge that such customs, varying with different kinds of goods and with the circumstances of each port, exist everywhere. The primitive method, which is still reflected in the language of charter-parties and bills of lading, of the members of the crew carrying goods from the hold to the side of the vessel and there delivering into the hands of the receiver or his servants has long since been superseded in modern commerce, but the contribution that each makes to the joint act of delivery has been regulated roughly by reference to the original and primitive method. It would be the merest pedantry to hold that such phrases as "over the ship's rail" or "alongside" or "at the ship's tackles" could not be qualified by a custom such as that which prevails at Bristol, by which the discharge is effected by modern and convenient as opposed to primitive and inconvenient methods.

I am accordingly constrained to differ from the Lord Ordinary in the result at which he has arrived. I hold that the custom is definite and has been universally acquiesced in, that it is in itself a reasonable custom from the point of view of the general body of traders, that it was known to the defenders, and that it is not inconsistent with the terms of the contract between the parties. The result is that the pursuers are entitled, in my opinion, to decree for £43, 13s. 6d., and to such demurrage as they have established to be due because of the defenders' refusal to recognise the custom. As regards the amount of the demurrage, I think it proved that if the vessel had been discharged with dispatch according to the custom of the port she would have been completely cleared of cargo in six full working days, counting the two Saturdays that occurred as one day. In this view the pursuers are entitled to three days' demurrage instead of the four which they claim. The counter-claim for the depreciation in the value of sacks which were cut at the port of loading instead of being properly opened was not disputed, nor, I think, the sum allowed for repairing sacks which had been improperly bled. Parties will, however, I have no doubt, be able to adjust the figures, as I have dealt with all the points in controversy.

LORD GUTHRIE—This case turns on the existence and applicability of an alleged legally enforceable custom at the Port of Leith to discharge in bulk, and not in voyage sacks, grain cargoes arriving at that port in steamers from North Pacific ports.

The first question is, Can a practice of that kind, however many instances of it there

may have been, however unvarying the practice may have been, and however long it may have continued, be a legally enforceable custom, seeing that it is restricted in its operation (*a*) to grain cargoes, (*b*) to such cargoes arriving in steamers, and (*c*) to such steamers from North Pacific ports only?

The second question is, whether, if the first question be answered in the affirmative, the proof of usage is so definite, unvarying, long continued, and covers so many instances, as to rear up the usage into a legally enforceable custom?

And the third question is, whether, if the custom is proved, it applies to the cargo in question in this case?

To get at the real questions between the parties it is necessary to put aside some matters about which there was much evidence and argument.

It appears that it is the practice at North Pacific ports in the case of grain cargoes (for the purpose of stiffening and to avoid payment of dead freight) to open some of the sacks in which the grain has been loaded, and to empty a proportion of the contents (varying from 5 to 30 per cent. of the whole cargo) into the interstices between the sacks. This practice is inconsistent with the terms of the bill of lading, and therefore cannot be read into the contract as an implied term—*Pickford* v. *Johnson*, Guthrie's Select Sheriff Court Cases, Second Series, 571; *Tyzack and Branfoot Steamship Company, Limited* v. *Sandeman & Sons*, 1913 S.C. (H.L.) 84, *per* Lord Haldane, L.C., at p. 88. Even if it could, there is neither averment nor proof that the practice, inaccurately called "bleeding" in the evidence, is in law an enforceable custom. The practice may partly help to explain how the alleged custom of discharge at Leith in question in this case arose, and to show its reasonableness. But as I am of opinion that no question of reasonableness arises, if the pursuers' argument is right on the construction of the contract, as I think it is, I shall not further refer to this practice of "bleeding" at the ports of loading.

The reason why I do not think that the question of reasonableness arises in this case is because the pursuers are not attempting to introduce an implied term to modify the express stipulations of a contract; they are founding on a custom, which they say is expressly made part of the contract. All the cases relied on by the defenders, in which the reasonableness or unreasonableness of a custom was discussed, were cases of a local custom about which the contract was silent. Indeed, in the case of *Stewart*, (1873) L.R., 8 Q.B. 88, *aff.* 8 Q.B. 362, it was decided that a local custom must be given effect to because it was expressly stipulated for in the bill of lading, even though it might be held to be "according to the best opinion vicious and unreasonable." But if reasonableness does require to be considered, I cannot see why a custom should be held unreasonable because while it is convenient to all shipowners on the one hand and to all ordinary receivers on the other, it happens to be inconvenient to an exceptional class represented by the defenders, namely, those who order the grain for their own use at Leith, and who do not require to re-weigh and to re-bag it. Probably most, if not all, customs are inconvenient in exceptional instances. On the question, however, of whether the custom has been proved, the inconvenience to persons in the position of the defenders is of much significance, because it does not appear that such persons have ever during the last twenty years, despite the inconvenience, disputed the custom.

Nor do I require to determine whether the alleged custom was known to the defenders. I do not think the evidence bears out the Lord Ordinary's view that "the defenders had never heard of the alleged custom." At all events, whether they considered it a custom or not, they knew the whole facts as to the unbroken practice, extending over twenty years, for steamers with grain cargoes for Leith from North Pacific ports to discharge at Leith in the manner alleged by the pursuers. But here again the cases founded on by the defenders, such as *Kirchner* v. *Venus*, 1859, 12 Moore's P. C. Cases, 361; *Nelson* v. *Dahl*, 1879, 12 Ch. D. 568 (relied on by the Lord Ordinary); *Holman* v. *Peruvian Nitrate Company*, 5 R. 657; *Norden Steam Company* v. *Dempsey*, 1 C.P.D. 654; and *Hogarth & Sons* v. *Leith Cotton Seed Oil Company*, 1909 S.C. 955, applied to questions of implied terms, and have no application to a case where a custom if not expressly specified is at least covered by a clause in a contract. If a custom covered by a clause in a contract is sufficiently proved, it does not matter whether one of the parties to the contract was or was not aware either of the existence of the custom or that the clause as framed would on a sound construction include it — see Lord Kinnear's opinion in *Ardan Steamship Company, Limited* v. *Weir & Company*, 6 F. 294, at p. 311.

Coming now to the real questions in the case, the defenders say, in the first place, that the admittedly uniform practice of discharging grain cargoes in bulk from North Pacific ports at Leith, although extending over twenty years, and including from 50 to 100 instances, cannot amount to a binding custom, because it applies only (*a*) to grain cargoes, (*b*) to such coming in steamers, and (*c*) to such steamers from North Pacific ports. I see no reason in principle why a custom, in order to be a custom of a port, should, as the defenders appear to contend, apply necessarily to all cargo in all kinds of vessels from all ports. The case of *Gould* v. *Oliver*, 1837, 4 Bingham's New Cases, 134, although the question of custom was not raised for decision, affords an illustration of what the report calls "a certain ancient and laudable custom" limited to the loading of timber coming to London from a single port (Quebec), and in *Aktieselkab* "*Helios*" v. *Ekman & Company*, 1897, 2 Q.B. 83, the custom which was held proved in the lower court and on appeal was not merely confined to timber but covered only timber in long lengths.

The second question relates to the proof of the custom as that appears from the oral evidence and in the correspondence. Are the instances numerous enough? Is the custom invariable? Is the proof sufficiently definite? Has the custom lasted for an adequate period?

There is singular unanimity among the witnesses on both sides as to the facts alleged by the pursuers. As to duration and number of instances, I have already said that an invariable custom has been established in the case of steamers for over twenty years, and has applied to between 50 and 100 steamers. In *Taylor* v. *Briggs*, 1827, 2 C. & P. 525, Chief-Justice Abbott affirmed a custom of packing bags of cotton in connection with a trade "only of three or four years' standing."

But the defenders maintain that whatever the facts may have been, it was not supposed by them and certain of their witnesses that the invariable practice founded on by the pursuers constituted an enforceable custom. In view of the facts shown by the correspondence that the existence of a custom was expressly asserted by the receivers during all these years as their ground, and their only ground, for legally demanding delivery in bulk and not in voyage sacks, and that this claim was never disputed by the steamship owners, I cannot accept the statements of the defenders' witnesses that their written assertions and demands were only in the nature of "bluff." But even if I could, I should follow the view expressed in the series of English cases quoted to us, namely, that what is to be considered is facts not opinions. I refer to Lord Kenyon's judgment in *Roe* v. *Charnock*, 1790, 1 Peake, 4; Lord Cranworth's in *Mackenzie* v *Dunlop*, 1856, 3 Macq. 22, at p. 40; Sir George Jessel's in *Tucker* v. *Linger*, 1882, 21 Ch. D. 18, at p. 34; Mr Justice Mathew's in *Knight* v. *Cotesworth*, 1883, 1 C. & E. 48, at p. 51; and Baron Pollock's in *Neilsen & Company* v. *Wait*, 1885, 14 Q. B. D. 516, at p. 520.

The defenders also maintained that the facts relied on by the pursuers do not prove a binding custom, because if there was any custom to deliver in the manner alleged by the pursuers, it was coupled with a condition, namely, that the shipowners should not be responsible for the full number of voyage sacks. The correspondence and the evidence seem to me to negative this contention. The shipowners' protest to the effect mentioned was indeed usually made in answer to the receivers' claim founded on the custom in question, but that protest was repudiated, and the repudiation was acquiesced in. In short, the shipowners admitted the custom, but attempted unsuccessfully to tack a legal consequence on to it. See *Park Steamship Company* (unreported—a print of the judgment is in process). It is noteworthy that these protests were only made after the discharge in bulk had actually begun.

Finally, the defenders maintain that whatever may be the proof of this so-called custom it cannot affect the present case, because it is inconsistent with the terms of the bill of lading. If the custom was not itself an express term of the contract between the parties embodied in the bill of lading and in the charter-party, but must be treated as an implied term, then it may be that the defenders' contention would be sound, because the primary meaning of the bill of lading, taken by itself, is that the grain shall be delivered as it was received on board—that is to say, in voyage sacks—and there is no warrant either in the contract or by binding custom for the so-called "bleeding" of the sacks. But the pursuer's contention is that the law about inconsistency has no application, because they are relying not on an implied custom but on a custom which is made by the charter-party an express term of the contract. The defenders admit that the words "to discharge afloat with dispatch according to the custom at port of discharge for steamers" would, as a matter of possible construction, cover any custom affecting delivery, but they argued alternatively that the clause must in the circumstances, as the Lord Ordinary holds, be confined to customs affecting the mechanical appliances used in discharging or otherwise that it only applied to customs dealing with matters for which the consignee was responsible.

I am unable to see any ground for distinguishing between mechanical appliances and manual labour used along with them, or replacing them, or necessary for working them; nor can I see any ground for supporting the defenders' alternative contention (even if it were well founded in fact, which I do not think it is) in view of the joint or composite method of delivery (involving, in any view of it, "delivery at ship's tackles"), in which both the ship and the receivers took part.

I may add that I do not see any inconsistency, as was also maintained by the defenders, between the bill of lading and the charter-party. They are to be read together, and if possible consistently with each other. The pursuers' reading seems to me to reconcile them. According to the pursuers the stipulation in the bill of lading is reasonably modified by the clause in the charter-party as to custom, which readjusts the incidents of what is necessarily a joint act of delivery, always, of course, provided that in a reasonable sense the sacks and their contents are delivered, as I think by this mode of delivery when properly conducted they are, "in like good order and condition." The observations of Tindal, C.-J., in *Gatliffe* v. *Bourne*, (1838) 4 Bingham's New Cases, 314, at p. 329, are, I think, in point—"We know of no general rule of law which governs the delivery of goods under a bill of lading, where such delivery is not expressly in accordance with the terms of the bill of lading, except that it must be a delivery according to the practice and custom usually observed in the port or place of delivery. An issue raised upon an allegation of such a mode of delivery would accommodate itself to the facts of each particular case, and would let in every species of excuse from the strict and literal

compliance with the precise terms of the bill of lading, which must necessarily be allowed to prevail with reference to the means and accommodation for landing goods at different places, the time of the arrival and departure of the vessel, the state of the tide and wind, interruptions from accidental causes, and all the other circumstances which belong to each particular port or place of delivery."

On the other parts of the case I agree in the opinion of Lord Salvesen, and I have nothing to add.

LORD DUNDAS, who was present at the advising and who gave no opinion, not having heard the case, intimated that the LORD JUSTICE-CLERK concurred.

The Court pronounced this interlocutor—

"Recal the said interlocutor: Find that the pursuers have established their claims against the defenders under the summons as follows—(1) to the sum of £289, 18s. 7d. in respect of balance of freight unpaid; (2) to the sum of £140 3s. in respect of demurrage; and (3) to the sum of £40 in respect of extra expenses of discharge, said three sums amounting together to £470, 1s. 7d.: Find that defenders have established their counter claims put forward in the defences as follows, viz., to the sum of £56, 5s. in respect of depreciation of the value of cut sacks, and (2) to the sum of £26, 6s. 7d. in respect of barley damaged through mixing, said two sums amounting together to £82, 11s, 7d.: Therefore decern against the defenders for payment to the pursuers of the sum of £387, 10s. in full of the conclusions of the summons, with interest as concluded for: Find the pursuers entitled to expenses against the defenders, but subject to a disallowance of one-fifth of the expenses of and in connection with the proof, and remit the account," &c.

Counsel for the Pursuers and Reclaimers —Macmillan, K.C.—Watson, K.C.—Gilchrist. Agents—Beveridge, Sutherland, & Smith, W.S.

Counsel for Defenders and Respondents —Horne, K.C.—Lippe. Agents—Boyd, Jameson, & Young, W.S.

Wednesday, June 30.

FIRST DIVISION.

[Sheriff Court at Glasgow.

MACPHEE *v.* GLASGOW CORPORATION.

Process—Proof—Diligence for Recovery of Documents—Facilities for Precognition of Witnesses—Confidentiality—Report of Employee of Tramway Company Made de recenti of Accident, and Containing List of Witnesses of Accident.

In an action of damages against a tramway company arising out of an accident, a diligence for the recovery of reports made at the time of the accident to the defenders by employees present at the time of the accident and relating thereto, was granted. The defenders produced a report by the conductor of the car involved in the accident, containing a list of witnesses who were present, but on the defenders pleading that this list was confidential, the commissioner sealed up that part of the report which contained the list, to await the orders of the Court. The Court *granted* a motion by the pursuer for access to the report.

Christina Macphee, domestic servant, 3 Kinnoull Place, Dowanhill, Glasgow, *pursuer*, brought an action in the Sheriff Court at Glasgow against the Corporation of the City of Glasgow, *defenders*, for damages in respect of injuries sustained through being thrown, by a sudden jerk of the car, from a tramway car belonging to the defenders. The action was remitted to the Court of Session for jury trial, and after sundry procedure was sent for trial to the Vacation Sittings.

A diligence for the recovery of documents was obtained by the pursuer in the terms granted in *Finlay* v. *Glasgow Corporation*, 52 S.L.R., 446, and under it a report by the conductor of the car was recovered. The report contained a list of witnesses of the accident, including a number of passengers on the car. The defenders pleaded to the Commissioner that this part of the report was confidential, and it was sealed up by him. In Single Bills the pursuer moved for access to the report.

Argued for pursuer — The Court had allowed the report to be recovered, and the list of witnesses was part of the report. The list was a mere statement of fact, giving names and addresses of persons who were present when the accident occurred. It was not of the nature of precognition, and could not be confidential. Pursuer was entitled to the list—*Admiralty* v. *Aberdeen Steam Trawling and Fishing Company, Limited*, 1908 S.C. 335, *per* Lord President at p. 339, 46 S.L.R. 254, at p. 256; *Finlay* v. *Glasgow Corporation* (*cit.*). The Lord President in *Henderson* v. *Patrick Thomson, Limited*, 1911 S.C. 246, at p. 249, 48 S.L.R. 200, at p. 203, did not lay down a general rule. That case, however, was distinguishable from the present.

Argued for the defenders—The motion was equivalent to a demand for a list of defenders' witnesses, and ought to be refused. The pursuer had recovered the report and was entitled to that part of it which gave a statement of what took place at the time of the accident, and to the names of the driver and conductor of the car, but the list of other persons present was confidential—*Henderson* v. *Patrick Thomson, Limited* (*cit.*), *per* Lord President (*cit.*).

LORD PRESIDENT—It was laid down by Lord President Dunedin in the case of *Henderson* v. *Patrick Thomson, Limited*, 1911 S.C. 246, at p. 250, 49 S.L.R. 200, at p. 203, that a demand to get the names of those