somebody else. Therefore, as John William Macfie was alive in 1907 and was alive at the date of the testator's death, the result of resurrecting the bequest to Dr Back recalled in the codicil of 1901 would be quite different from the result of resurrecting it if the codicil of 1901 had been a mere revocation and nothing else, because it would be left in doubt whether the whole of the codicil of 1901 was to be revoked or only that part of it which was itself a revocation.

Looking, then, at the codicil of 1907 itself, I think that one gets a perfectly simple explanation of its intention from the words used. The testator says—"I bequeath the sum of £2000 . . . in addition to any legacies mentioned in my will and codicils." If he had intended to do anything more than merely give the £2000 I think he would not have used the simple word "mentioned." If he had said "bequeathed," it would have been different. I think that the explanation of the word "mentioned" is this, that writing as a layman he wanted to make it quite clear that this new legacy of £2000 was something quite different from and independent of anything that he had already given in his testamentary writings, and that he was not in the least thinking, by these words, of making any alteration in what he had done before. It was unnecessary, as we know; but it was probably not unnecessary from his point of view. He may have desired to make it quite clear that this £2000 was not to fall under any revocation, that it was not mixed up with anything he had done before, but that it was a new legacy.

Under these circumstances I have no difficulty in holding that it is a good legacy by itself, but that the codicil does nothing to alter any other testamentary direction which the testator had given.

LORD MACKENZIE—I am of the same opinion. I do not think that the terms of the codicil of 11th November 1907 are sufficient to revive the legacy of £5000 to Dr Back in the original settlement dated 9th December 1898, which legacy had been revoked by the codicil of 9th September 1901.

LORD SKERRINGTON—I am unable to discover in the codicil of 1907 any words which indicate an intention to bequeath a legacy of £5000 in addition to the legacy of £2000 therein mentioned. I accordingly agree with your Lordships.

The Court answered the question of law in the negative.

Counsel for the First Parties—R. C. Henderson. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for the Second Party—Moncrieff, K.C.—Leadbetter. Agents—Macpherson & Mackay, W.S.

Counsel for the Third Party—Constable, K.C.—Ingram. Agent—Daniel Tudhope, Solicitor.

Thursday, March 28.

FIRST DIVISION.

[Lord Salvesen, for Lord Dewar, Ordinary.

RICKINSON, SONS, & COMPANY (MANAGING OWNERS OF S.S. "ARACHNE") *v.* SCOTTISH CO-OPERATIVE WHOLESALE SOCIETY, LIMITED.

Ship — Affreightment — Bill of Lading — Demurrage — Construction — Delivery as Fast as Vessel can Deliver, any Custom of the Port notwithstanding — Delay from Causes beyond Receiver's Control.

Bills of lading, dated 9th November 1915, provided—"Cargo to be received at destination as fast as vessel can deliver during ordinary working hours, any custom of the port to the contrary notwithstanding." The discharge of the grain cargo carried by the ship was delayed beyond the period in which, so far as the circumstances existing at the time and place affected the ship, discharge should have been completed. The delay was due to shortage of labour, a circumstance over which the receivers, who were the charterers and holders of the bills of lading, had no control. At the time the receivers had other grain cargoes in the port which they were discharging, which discharge absorbed some of the labour then available in the port. In an action by the ship for demurrage, *held* (*rev.* Lord Salvesen, *dis.* Lord Johnston) (1) that the obligation upon the receivers to take delivery was not absolute and measurable solely by the ship's ability to deliver, but that under the clause in question the circumstances existing at the time and place, in so far as they affected the receivers of the cargo, fell to be taken into consideration; (2) that under the circumstances the receivers had done their utmost to take delivery as fast as possible; (3) that the receivers were not liable in demurrage for the delay, as it was caused by circumstances beyond their control both in so far as it was caused by shortage of labour and by the fact that other grain cargoes for the receivers had arrived and were being discharged when the ship in question was in a position to discharge: defenders *assoilzied*.

Rickinson, Sons, & Company, managing owners of the s.s. "Arachne," *pursuers*, brought an action against the Scottish Co-operative Wholesale Society, Limited, *defenders*, concluding for decree for £2625 in name of demurrage.

The pursuers *pleaded, inter alia*—"1. The defenders as charterers of the said vessel, *et separatim* as holders and endorsees of the said bills of lading, having failed to take delivery of the cargo in terms of the said charter-party and bills of lading as fast

as the vessel could deliver, are liable to the pursuers in demurrage at the charter rate, and the pursuers are accordingly entitled to decree against them for the sum sued for. 2. *Separatim*, the custom of the Port of Leith being expressly excluded from the contract of affreightment, the defenders were bound to take delivery of the cargo continuously without regard to weather conditions or the customary modes in operation at Leith of discharging grain cargoes, and they are liable to the pursuers for all loss and damage sustained by them in consequence of the defenders insisting on taking delivery according to the custom of the Port of Leith."

The defenders pleaded—"The defenders having taken delivery of the cargo with reasonable dispatch, and in terms of the charter-party and bills of lading, should be assoilzied from the conclusions of the summons. 2. *Separatim*, any delay in taking delivery having been due to causes outwith the control of the defenders, they should be assoilzied from the conclusions of the summons."

On 9th November 1917 the Lord Ordinary (SALVESEN) for Lord Dewar, after a proof, pronounced this interlocutor—"Finds in fact (1) That the steamship 'Arachne' arrived in Leith on the evening of Friday, the 26th November 1915, and was berthed on the west side of the island in the Edinburgh Dock opposite C Shed; that she was ready to commence delivery of her cargo at 9 a.m. on Saturday, 27th November, and that this was timeously intimated to the defenders: (2) That no work was done at all by the defenders on the 27th, 29th, and 30th November, but a commencement was made by them on 1st December, when 276 quarters were discharged by two tackles: (3) That on the 2nd, 3rd, and 4th December the defenders worked four tackles: (4) That on the 6th, 10th, and 11th December no work was done on account of the wet weather, and that on the other days, with the above exceptions, eight tackles were worked by the defenders till the 24th of December, when the balance of the cargo was discharged from four tackles: (5) That a reasonable rate of discharge was 250 quarters per tackle per day of eight hours: (6) That Saturdays fell to be counted as half-days and wet days fell to be excluded: (7) That the total amount of cargo discharged was 26,588 quarters: (8) That 12 tackles could have been worked by the pursuers, which at the rate of 250 quarters per tackle would have discharged 3000 quarters per day: (9) That at this rate the whole cargo would have been discharged in nine working days: (10) That after allowing for each Saturday a half-day, and counting out one wet day which fell within the period, the discharge would, if the cargo had been received at the rate of 3000 quarters per full working day of eight hours, have been completed by the defenders on 9th December: and (11) That in consequence of the breach of said contract by the defenders the 'Arachne' was thus detained by the defenders for 15 days beyond the period within which the cargo should have been discharged and received: Finds in law that the defenders are liable to the pursuers in demurrage for 15 days at the rate of £125 per day in terms of the bill of lading, amounting to £1875 sterling, for which sum decerns against the defenders, with interest as concluded for," &c.

Opinion, from which the *facts* of the case appear:—"In this action the pursuers sue for payment of £2625 in name of demurrage, the claim being based on an alleged detention of their steamship 'Arachne' at Leith. The action is directed against the defenders as holders of the bill of lading.

"The defenders were both the charterers and the holders of the bill of lading of the cargo of wheat, which they loaded on board the 'Arachne' at Montreal. As, however, there was a provision in the charter-party that it should be superseded on bills of lading being signed in the form and subject to the conditions stated therein, and as these conditions were admittedly complied with, the action is based solely on the contract contained in the bills of lading. The main provision with regard to discharge is in the following terms:—'Cargo to be received at destination as fast as steamer can deliver during ordinary working hours, any custom of the port to the contrary notwithstanding.' There are, however, two further stipulations in the printed conditions, which although they do not appear to be quite consistent, may also have some bearing on the obligation undertaken by the defenders as consignees of the cargo. One of them is embodied in article 3 of the printed conditions, and is to the effect that the steamer may commence discharging immediately on arrival, and discharge continuously at all such hours as the Custom House authorities may give permission to the ship to work, any custom of the port to the contrary notwithstanding, provided that all extra expense incurred in working at night or on holidays shall be borne by the party ordering such work. But this seems to be qualified by a later clause to the effect that receivers of the cargo are in no case obliged to take delivery at night, without their consent. As the defenders were neither asked nor consented to receive delivery at night or on Sundays or holidays, all that remains of these clauses seems to be the provision that the steamer might commence discharging immediately on arrival and discharge continuously during ordinary working hours—the reciprocal obligation of the consignees to take delivery on arrival and continuously thereafter being implied.

"The 'Arachne' arrived in Leith on the evening of Friday 26th November 1915 after office hours. She was berthed on the west side of the island in the Edinburgh Dock and opposite No. C shed, and on the morning of the 27th the defenders were advised that she was in dock and ready to be discharged at 9 o'clock. No work at all was done on the 27th nor on the 29th and 30th, but a commencement was made by the defenders on the 1st of December, when 276 qrs. were discharged at 2 tackles. On the following three days 4 tackles were used in discharging. On the 6th no work was done

owing to wet weather, and the same happened on the 10th and 11th. With these exceptions 8 tackles were worked on ordinary working days until the 24th of December, when the balance of the cargo was discharged from 4 tackles. The total amount of the cargo discharged was 26,588 qrs. Assuming that there had been no impediment to rapid discharge of the cargo it would have been possible by the use of reasonable diligence to have discharged the vessel simultaneously with 20 tackles, the output of which is 250 qrs. per day for an average working day of 8 hours. 5000 qrs. could in such circumstances have been lifted from the ship's hold daily, and the vessel's discharge been completed in a little over 5 days or say 5½ days. It is on this basis that the sum sued for is arrived at. In other words the pursuers' maximum claim is the same as it would have been if it had been expressly stipulated that the cargo should be discharged in 5½ days of 8 hours each or at the average rate of 5000 qrs. per working day.

"I have no hesitation in rejecting this construction of the contract between the parties as to the discharge of the vessel. No fixed days were provided in the bill of lading nor was any average rate of discharge mentioned. The obligation of the defenders was to receive the cargo at Leith as fast as the steamer could discharge during ordinary working hours, and it has been long settled that such an obligation must be construed with reference to the circumstances existing at the time when the discharge takes place and not with reference to what could be done under ordinary circumstances. Thus, to take a simple case, if there had been a strike in the docks at the time when the ship arrived and was ready to unload, affecting both the labourers employed by the ship and those employed by the receivers, the lay-days would not have commenced to run as against the defenders here until the strike was ended. In other words, the contract does not impose an absolute obligation on the receivers to have the ship unloaded within a given time irrespective of whether the ship was able to give delivery owing to circumstances beyond the control of the owners. The latest case to which I was referred on the subject is one of high authority as it is a judgment of the House of Lords (*Hulthen* v. *Stewart*, [1903] A.C. 389). The pursuers, however, while recognising the law as laid down in the case above referred to, contend that it has no application to the present case, because the ship was in fact able and willing to discharge from 20 tackles from the morning of Saturday the 27th November. In other words, that under the circumstances that existed from that time onwards there was no obstacle to the ship delivering the cargo at the rate of 5000 qrs. a day, and that there was therefore an absolute obligation on the charterers to receive the cargo as fast as it could be delivered. The parties are however at utter variance on this question of fact, and it is necessary that I should state the conclusions at which I have arrived after a careful perusal of the proof following on the arguments of counsel. I shall embody my conclusions in narrative form.

"On 27th November and during the whole period of the 'Arachne's' discharge the port of Leith was in a very congested state as regards shipping. This was in part due to the fact that Bo'ness and Grangemouth had been closed by orders of the Admiralty and the traffic of these two ports had been in great part diverted to Leith. In part it was due to the fact that more grain cargoes arrive at one time towards the end of the year after the harvests of North America have been reaped and made ready for shipment than in the spring or summer months. The congestion was also largely due to shortage of labour. Conscription had not yet been introduced but a considerable number of the best men who earned their livelihood in the docks of Leith had joined the army, and as there was a great demand for labour generally the amount of casual labour obtainable was greatly diminished. The shortage, however, was more severely felt amongst the men normally employed by the receivers of grain cargoes than amongst those employed by stevedores acting for the owners of ships. The customary method in Leith of discharging a grain cargo in bulk is for the men employed by the ship to fill the grain into buckets in the hold, which buckets are emptied into a standard vessel of which the weigher has charge, and by whom the weight is accurately taken. When weighed the grain is filled into sacks which are carried on the backs of porters either to a cart or railway waggon or emptied into a bulk waggon or put temporarily into a shed. As the bags sometimes weigh over two cwts. only a strong man can carry such a weight ashore. The merchant employs lifters (that is, men who lift the bag) and porters on whose backs the bags are carried, and these latter men belong to a special class and generally work in companies. Casual labourers being generally of inferior physique are not fitted to do this heavy work of carrying the bags ashore, but the work of filling the buckets in the hold of the ship and of trimming the cargo towards the hatchways underneath which the buckets are filled is work that requires no great physical strength and is ordinarily performed by casual labourers. These men go in crowds to the dock gates in the morning and are engaged there by the stevedores according to their requirements. In the case of the 'Arachne' the stevedores employed were Saddler & Company, of which firm the witness Mr Saddler is the leading if not the only partner. His evidence is to the effect that if the merchant had been able to take delivery at 20 tackles he would have been able to secure sufficient labour to perform the ship's part of the obligation of unloading at these 20 tackles. Mr Cairns, who is a very candid and apparently fair witness for the pursuers, puts the case rather lower, and thinks there would have been no difficulty in manning 16 tackles, and other witnesses give evidence to the same effect. On the other hand, the defenders' witnesses said that they did not believe the ship could man anything like as many tackles as 16

or indeed more than 8 tackles, but they agree with the pursuers' witnesses that the shortage of labour was more acute amongst the class of men who are customarily employed in Leith to take delivery of grain cargoes. Moreover, it is the fact that the supply of ship's men by the stevedores was regulated throughout by the number of tackles at which the defenders were willing to receive, and that in no case did the stevedores find any difficulty in securing the necessary labour to man as many tackles as the defenders were willing to receive at, and this notwithstanding that in the later stages of the discharge more men are required to perform the ship's part of the joint operation of unloading than are required at the commencement. When the discharge commences only three men employed by the ship are required per tackle; whereas when the cargo has been in great part removed and needs to be trimmed towards the hatchways at least two and possibly three additional men are necessary to keep the buckets at each tackle going. Having in view the nature of the evidence it is a jury question how many tackles the ship's stevedores could have manned, and I think that in reaching the conclusion that they could have manned 12 tackles throughout the discharge — if the receivers had been able to take delivery at so many—I am not doing the defenders any injustice. Messrs Saddler were at the time unloading a number of other ships, some of which are said to have had much longer lay-days than were required for their discharge even in the congested condition of the port at the time, and the evidence of Mr Saddler is that he could have diverted men from these ships to the 'Arachne,' and would have done so had the receivers been willing to take delivery as fast as he was able to give it. He says, in addition, that other casual labour was available, but that of course he engaged no more men than he could actually employ, and that the number engaged depended therefore on the number of tackles at which the receivers were willing to take delivery.

"Assuming then that 12 tackles could have been manned by the ship's stevedores, Are the lay-days in the present case to be ascertained by reference to the amount of grain that could reasonably have been raised from the holds and delivered on to the deck by means of 12 fully manned tackles? If so the steamer fell to be discharged at the rate of 3000 qrs. per working day of 8 hours, and the discharge ought to have been completed in 9 days from the 29th November counting the Saturday as a half-day, for the discharge was only to go on during ordinary working hours, and on Saturdays these are exactly one-half of a full working day. The question, however, would still have to be solved as to whether days in which no work was done because of wet weather were to be counted as working days. This I think again is a question purely on the evidence. The reason why according to the ordinary custom of the port of Leith the discharging of a grain ship ceases during wet weather is to avoid injury to the cargo. In the present contract, however, the custom of the port was excluded, and had I therefore been satisfied on the evidence that the stevedores' men were willing to work in rain I should not have regarded the occurrence of wet days as modifying the defenders' obligation under the contract. According to the fair import of the evidence, however, I have come to the conclusion that at the time in question when work was abundant, and was paid for at a rate which enabled the dock labourers to make as much in three or four days as they would in normal times have made in a week, stevedores' men would also have declined to work. At that time they could afford to consider their own comfort more than the requirements of the traffic, and even at the high rate of wages that was then paid I think they would have declined to work. I hold therefore in fact that the ship was not in a position to deliver cargo on wet days even if the receivers had been willing to take it.

"The defenders' construction of their obligation is that they were only bound to take delivery with such dispatch as was consistent with their engagements to other ships and proportionate to the number of carts and bulk waggons which they in fact had at their disposal. During the last days of November the defenders were in point of fact receiving grain from other two vessels — the s.s. 'Tafna' and the s.s. 'Hurona.' Sometime later they had also to receive a large parcel which had arrived by the s.s. 'Cairndhu.' All the men that they were in the habit of employing as porters were engaged on the two former vessels, which had arrived earlier than the 'Arachne,' and were therefore in their view entitled to a preference over her. So also were their carts and their bulk waggons in which in the ordinary course of business they were in the habit of taking away cargoes from the ship's side. This is the explanation of the fact that no work of any kind was done on the 'Arachne' on Saturday 27th, Monday 29th, and Tuesday 30th November. Fortunately the 'Tafna' was unloaded entirely by the elevator from and after the 1st December, but she had had 4 tackles employed on her on each of the three preceding working days. Similarly the 'Hurona' was working with 4 tackles on the 27th, with six men on the 29th, and with eight on the 30th of November. On the 1st of December the 'Hurona' was working with 12 tackles, and on the 2nd with 6 and on the 4th with 4. It is a significant fact that it was not until the 'Tafna' went to the elevator that any tackles were worked on the 'Arachne'; and it was not until the 'Hurona' had been completely discharged that delivery was taken at 8 tackes of the cargo of the 'Arachne.' Up to that time the porters whom the defenders could have obtained for the discharge of the 'Arachne' were being employed by them at this other work, and the same is true of the carts and bulk waggons in which they usually receive grain cargoes as they come from the ship's side. The alternative of receiving the cargo and putting it into the shed opposite the berth where the 'Arachne' was lying was only available to a limited extent because of the shed being partly filled

with other goods which had been discharged from ships with which the defenders had no concern and which had not been removed by the owners owing to the congested condition of the port.

"Except on one day when large steel pans supplied by the stevedores were used in discharging the cargo the defenders conducted the discharge in the manner which is customary at Leith and which I have already described. If the cargo had not been weighed before it passed from the ship's side one obstacle to rapid delivery would have been removed, and as the contract expressly provides that all customs of the port are to be excluded, it follows that the defenders are not entitled to maintain that the customary mode of discharge was the only one which they were bound to adopt. Discharge by means of pans is common at the neighbouring port of Granton, and when properly conducted is almost as expeditious as discharge by filling into sacks and having the sacks carried ashore. Where bulk waggons are available I see no reason why it should not be as fast as the ordinary method, but any mode which has not been commonly employed in a port is bound to be slower at first than what the men are used to. The advantage of employing the steel pans is that the porters can be dispensed with and their place taken by ordinary labourers.

"Now, these being the facts, I pass to consider the construction of the clause on which the pursuers rely. There is only one reported case where the clause was so far identical with the one that I have now to consider—*Crown Steamship Company, Limited* v. *Leitch*, 1908 S.C. 506, 45 S.L.R. 402. I agree with the opinion of Lord Low delivered in that case that there is no ambiguity in the clause, 'the consignee,' he says, 'is taken bound to receive the goods as fast as they can be delivered by the use of the ship's tackles, and that obligation is not to be limited or minimised by any custom of the port. The measure of the consignees' obligation is the rate at which the ship is able to deliver the cargo under the circumstances that actually existed.' (*sic.*) I do not see how language could have been expressed more plainly. No doubt it is assumed in such cases that the shipowner will not employ a larger staff of men than is ordinarily used in discharging a cargo so as to throw a heavier responsibility on the consignees, but there is no suggestion of that kind here. So far as the ship was concerned the tackles were manned in the ordinary way by no more men than the stevedore found necessary consistently with economic working. But for the authorities to which I was referred I should have had no doubt that this was the meaning of the contract. I cannot see how, according to its terms, difficulties which the consignee may have in securing shed accommodation, or an adequate number of carts or waggons to remove the cargo, or a sufficient number of porters to carry it ashore, qualify the obligation there undertaken. It does not seem to me that a provision that the cargo is to be received as fast as the steamer can deliver is to be construed as if it meant as fast as the consignee using reasonable dispatch in the existing circumstances is able to receive, especially when all customs of the port to the contrary are expressly excluded. If I thought that the House of Lords in the case of *Hulthen* v. *Stewart* had so decided of course I should be bound to follow it, but having read carefully the opinions both in the Court of Appeal and in the House of Lords I am unable to reach this conclusion.

"All that was actually decided was that a provision in a charter-party that 'the cargo is to be discharged with customary steamship dispatch as fast as the steamer can deliver during the ordinary working hours of the port of discharge, but according to the custom of the port, is not tantamount to fixing a definite number of days or hours during which the discharge is to be completed. To create such a liability the days or hours must be specified in plain terms.' Now I have no difficulty in accepting that judgment on the facts which were before the Court. The learned judge of first instance (Phillimore, J.) held that the true meaning of the charter-party was not that the ship was to discharge in the number of hours in which she could ordinarily discharge, and on the facts he held 'that with the appliances that were available at the time the ship could not have discharged her cargo more quickly than she in fact did.' It is also noteworthy that the clause there expressly embodied the custom of the port. The shipowners in appealing did not challenge the findings in fact, but simply raised the question of law which is thus stated by Collins, M.R.—'The point therefore comes to this, whether the clause that the ship is to be discharged as fast as the steamer can deliver is to be taken as importing an obligation to discharge in five days, which is the time the vessel would take in being discharged if nothing came in the way of the discharge.' There was no alternative case presented by the shipowner, such as there is here—that taking into account the actual conditions of the port the shipowner was able and willing to deliver at a given rate—and it is not clear that such a case could have been presented. I rather gather that it could not, because the custom of the port being to discharge into lighters or on to the quay, it appears that the first method was not available at the berth which the vessel might otherwise have got, because no lighters could be obtained, and the second method was impeded because the quay was blocked with other cargo, both causes of delay being entirely beyond the control of the consignee. The amount of delay when the vessel actually got to her berth was very slight; she got into her berth on October 22nd and did not complete her discharge till October 29th so that she used at most seven days, two of which were half days, for a discharge which in normal circumstances would take at least five days. The only argument which was dealt with in the House of Lords was that 'unconditional liability to take delivery within a fixed limit of time was imposed on the

consignee by the clause there considered.' Their decision which negatived this contention I have given effect to in construing the clause on which the pursuers found.

"I admit, however, that there are certain expressions of opinion which taken apart from the context at first sight seem to favour the defenders' contention — thus Phillimore, J., said 'that the obligation on the defendants was to exercise all reasonable means to procure for the vessel an opportunity to discharge as quickly as she could.' That of course was not the whole obligation on the defendants, but it was the only one that needed to be considered in that case, for the main complaint was that the ship had not been unloaded by means of lighters in the West India Dock, where she could have got a berth earlier than the quay berth at which she actually discharged if lighters had been available. Lord Macnaghten, after stating that the words used in *Hulthen's* case did not point to a definite period of time, said, 'What they do point to is the discharge of the cargo with the utmost dispatch practicable having regard to the custom of the port, the facilities for delivery possessed by the particular vessel under contract of affreightment, and all other circumstances in existence at the time not being circumstances brought about by the person whose duty it is to take delivery or circumstances within his control.' The assumption of the case was that the consignees had done all that they reasonably could to give discharge of the vessel, and the fact seems to have been that the delay was caused by circumstances which were entirely beyond their control. When carefully considered and analysed it appears to me that the decision in *Hulthen's* case is not a decision to the effect that a clause providing that cargo is to be received as fast as steamer can deliver is to be universally construed as meaning as fast as the receivers can reasonably take delivery. I am accordingly of opinion that demurrage falls to be paid on the footing that the ship was able and willing to work 12 tackles, and that the obligation of the receiver was to take delivery at 12 tackles even if he was unable to find a sufficient number of men for the purpose.

"In the event of it being held that I have wrongly construed the clause with regard to the discharge of the cargo, and that it imposes no higher obligation on the defenders than to discharge the ship with such reasonable dispatch as was practicable in existing circumstances, I should still hold that the pursuers were entitled to demurrage, for the circumstances which largely caused or contributed to the delay were, to use Lord Macnaghten's language, 'brought about by the person whose duty it was to take delivery or were circumstances within his control.' I have already adverted to the fact that during part of the time that the 'Arachne' was waiting to be discharged the defenders were unloading or partly unloading other three grain ships. Mr Drummond, their cargo superintendent, was asked 'Did you sacrifice the "Arachne" until the "Tafna" and the "Hurona" were completed'? answered 'There was nothing else to be done. I was taking the sensible course. I was taking them in the order of their being ready for me as cargo superintendent.' A little later he says 'The defenders must have known that they (these cargoes) would probably come to Leith Docks about that time.' And Mr Stewart, their commercial manager, gives the following evidence—'(Q) In point of fact weren't you in December 1915 discharging in Leith exceptionally large quantities of wheat?—(A) We were. (Q) More than your ordinary appliances of bulk waggons and lorries were really designed for handling?—(A) You can put it that way. Much more than we ever did before.' Now I think that this was a matter which was within the control of the defenders, and that they are not entitled to say, having entered into engagements which fell to be discharged at the same time and which they could not have met even in normal times with fairness to the vessels chartered, that they were prevented from performing their duties as consignees by circumstances over which they had no control. Just as the charterer is bound to make arrangements for having a cargo loaded when a vessel arrives (*Ardan s.s. Company, Limited*, 1905, 7 F. (H.L.) 126, 42 S.L.R. 851), so it appears to me that the consignee must make arrangements which will enable him to give such dispatch as he contracts to give. If notwithstanding that he has made such arrangements delay is caused by unforeseen circumstances he will not be liable, but he cannot plead his own want of foresight in justification of delay that might have been avoided had proper arrangements been made. Now applying this view of the defenders' obligations to the circumstances of the present case I think it is plain that the defenders could have had at least 8 tackles working during the whole period from Saturday the 27th of November in the discharging of the 'Arachne' if it had not been that they had to turn their men, carts, and bulk waggons in the first instance to the discharge of the 'Tafna' and 'Hurona,' and later to the 'Cairndhu.' That statement shows that on the 27th of November the defenders had men and appliances sufficient for 8 tackles—4 on the 'Tafna' and 4 on the 'Hurona'; on the 29th they had men available for 10 tackles, and on the 30th for 12 between these two vessels. On the 1st of December they had 2 tackles working on the 'Arachne' and they had 12 on the 'Hurona'; on the 2nd they had 10, and on the 3rd 8 tackles between the two ships. At a later period of the discharge they were engaged with the 'Cairndhu,' but I do not think there is evidence as to the actual number of tackles worked by the defenders, who were only consignees of part of the cargo. I think, however, it is fair to conclude, and is in accordance with the bulk of the evidence, that they could throughout have worked 8 tackles on the 'Arachne' but for their other engagements. The average rate of discharge at one tackle is 250 qrs., and indeed on some days that quantity was considerably exceeded. The discharge ought therefore on this view to

have proceeded at a rate of not less than 2000 qrs. per day of eight hours, counting the Saturday as a half day, and excluding wet days for the reasons I have already given."

Argued for the defenders (reclaimers)—Bills of lading as far as the clauses relating to discharge were concerned were of two kinds—(1) where expressly the receiver was bound to discharge absolutely, *e.g.*, where so many lay-days were contracted for, or where discharge was to be continuous. In such a case the obligation upon the receiver was absolute, and he was liable in demurrage though he had done all he could; (2) where there was no such express obligation. In such a case the whole facts would be inquired into to see if the receiver had done his best. Questions had arisen as to which category various expressions found in bills of lading fell into, and until comparatively recently all the usual expressions had been dealt with except the words in the present case, viz., as fast as steamer could deliver. Such words fell into the second category and did not import an absolute obligation to take delivery, and the receiver would be liable in demurrage only if upon an inquiry into the whole facts it was shown that he had failed to avail himself of available means for discharge—Carver, Carriage by Sea (5th ed), section 614; *Hulthen* v. *Stewart*, [1902] 2 K.B. 199; [1903] A.C. 389, *per* Lord Halsbury, L.C., at p. 390; Lord Macnaghten, at p. 392; Lord Davey, at p. 394. The decision in that case would have been applied in *Crown Shipping Company* v. *Leitch*, 1908 S.C. 506, *per* Lord Low, at p. 514, 45 S.L.R. 402, had it been a demurrage case; *Temple, Thomson, & Clarke* v. *Runnalls*, 1902, 18 T.L.R. 18 and 822, *per* Collins, M.R., at p. 822. *Hulthen's* case (*cit.*) followed upon and laid down the same principles as were laid down in *Good & Company* v. *Isaacs*, [1892] 2 Q.B. 555; *Lyle Shipping Company* v. *Corporation of Cardiff*, [1900] 2 Q.B. 638; *Hick* v. *Rodocanachi*, [1891] 2 Q.B. 626, *per* Lindley, L.J., at p. 638, [1893] A.C. 22; *Wyllie* v. *Harrison & Company*, 1885, 13 R. 92, 23 S.L.R. 62, where the clause was identical with the clause here. *Hulthen's* case (*cit.*) had been regarded as a reiteration of the already existing law—The "*Arne*," [1904] P. 154, and the "*Kingsland*," [1911] P. 17, *per* Sir Samuel Evans at p. 22; *Rowtor s.s. Company* v. *Love & Stewart*, 1916 S.C. (H.L.), 199, *per* Lord Sumner at p. 201, 53 S.L.R. 706; *Postlethwaite* v. *Freeland*, [1880] 5 A.C. 599, *per* Lord Selborne at p. 608. The obligation on a shipper to have a cargo ready to load was absolute, but that was all the length it went—Carver (*cit.*), sections 618 and 619; *Postlethwaite's* case (*cit.*), *per* Lord Blackburn at p. 619 (foot). On the evidence it was proved that the defenders had done all they could and the delay was caused by circumstances beyond their control. Further, it was not proved that the defenders could have taken labour from other ships which arrived before the "Arachne" and used it to discharge her. But in any event they were not bound to do so, and were not liable in demurrage for having failed to do so. To hold the contrary would be unreasonable and impracticable. The consignee could not tell when the ship would arrive, for there was a latitude of time for loading, consequently it was impossible for him to time arrivals to suit the labour available. *Ashcroft* v. *Crow Orchard Colliery Company*, 1874, 9 Q.B. 540, was distinguished. Charterers' engagements could not be made a ground of fault—*The Barque Quilpué, Limited* v. *Brown*, [1904] 2 K.B. 264. *Harrowing* v. *Dupré*, 1902, 7 Com. Cas. 157, *per* Bigham, J., at p. 163; *Postlethwaite's* case (*cit.*), *per* Lord Blackburn at p. 622; *Tapscott* v. *Balfour*, 1872, L.P. 8, C.P. 46; *Coulthurst* v. *Sweet*, 1866, L.R. 1, C.P. 649, were referred to.

Argued for the pursuers (respondents)—The clause in question admitted of consideration of the circumstances affecting the ship only. That was the plain meaning of the words. The circumstances as they affected the receiver could not be taken into consideration. In all such cases the circumstances as they affected the receiver had only been taken into consideration when there was a provision that discharge was to be as customary or with customary dispatch. The effect of such reference to custom was equivalent to an obligation on the receiver to take delivery with reasonable diligence—Carver (*cit.*), sections 180 and 181. If custom was not excluded then reasonable diligence was enough—*Postlethwaite's* case (*cit.*), *per* Lord Selborne, L.C., at p. 608 and 610, Lord Hatherly at p. 612, and Lord Blackburn, at pp. 613 and 616, (1879) 4 Ex. Div. 155, at p. 157, and *per* Brett, J., at p. 164. The moment custom was introduced into the contract the circumstances affecting the ship and the receiver fell to be taken into consideration—*Wyllie's* case (*cit.*), *per* Lord Justice-Clerk Moncreiff at p. 96; *Good's* case (*cit.*), *per* Lord Herschell at p. 561. Custom might be implied into the contract, in which case the same principles applied—The "*Jaederen*," 1892, P. 351; *Hicks* case (*cit.*), *per* Lord Herschell, p. 31, and Lord Watson, p. 33. In *Temple's* case custom was regarded as equivalent to reasonable diligence—*per* Bigham, J., at p. 19, and Collins, M.R., at p. 822. In *Hulthen's* case (*cit.*) custom was not excluded and reasonable diligence was held sufficient—[1902] 2 K.B. 199, at 204, *per* Collins, M.R., and *per* Lord Macnaghten, [1903] A.C. at p. 392, and 6 Com. Cas., *per* Phillimore, J., at p. 70. The same rule was applied in *Rodenacker* v. *May & Hassell, Limited*, 1901, 6 Com. Cas. 37, *per* Matthew, J., at p. 38. In the *Lyle Shipping Company's* case (*cit.*) custom was expressly imported into the contract. The "*Arne*" (*cit.*) was decided upon specialties. But where, as here, custom was excluded, the obligation on the receiver was absolute. The exclusion of custom meant the delivery was complete by passing the goods over the ship's rail—*Brenda s.s. Company* v. *Green*, [1900] 1 Q.B. 518. The absolute nature of the receiver's obligation had been sustained in a case undistinguishable from the present—*Maclay* v. *Spillers & Baker*, 1901, 6 Com. Cas. 217, *per* Sir A. L. Smith, M.R., at p. 218, reversing Matthew, J., 16 T.L.R. 401; Carver (*cit.*), section 614; *Crown s.s. Com-*

pany's case (*cit.*), *per* the Lord Justice-Clerk (Kingsburgh) at p. 511, *per* Lord Low at p. 512 *et seq.*, Lord Ardwall at p. 516, and Lord Stormonth-Darling at p. 518; the "*Kingsland*" (*cit.*); *Rowtor s.s. Company* (*cit.*), *per* Lord Sumner, at p. 200; *Dampskibselskabet Svendborg* v. *Love & Stewart, Limited*, 1915 S.C. 543, *per* Lord Dundas at p. 551, 52 S.L.R. 456. In any event the defenders had not used all reasonable diligence. Further, they were in fault in not having taken men from the other ships; the difficulty which had arisen was self-imposed. *Ashcroft's* case (*cit.*) applied. *Harrowing's* case (*cit.*) and *Tapscott's* case (*cit.*) were distinguished.

At advising—

LORD PRESIDENT—In this action the owners of the s.s. "Arachne" make a claim for demurrage against the Scottish Co-operative Wholesale Society, who are large importers of wheat at the port of Leith. The sum claimed is £2625. The Lord Ordinary has given decree for £1875. I am of opinion that the claim fails, because the defenders did all that was reasonably within their power to secure a rapid delivery of the cargo at the port of discharge, and consequently by virtue of the contract of affreightment expressed in the bill of lading are released from liability for demurrage.

The circumstances in which the claim arises are so fully set out in the opinion of the Lord Ordinary that I think it unnecessary to resume them. His findings in fact were accepted by the pursuers and on only one material point were challenged by the defenders. The Lord Ordinary considers that the ship could have been discharged by twelve tackles under the conditions which prevailed at Leith at the time. The defenders disputed this, and I think with good reason. Repeated consideration of the evidence satisfied me that in this case both shipowners and freighters did their very best, and that neither could have done better than they did to secure a rapid delivery of the cargo. Both, I am satisfied on the evidence, were eager to expedite the discharge to the utmost of their ability. But my opinion on this question of fact is immaterial in the view I take of the case. Assuming the facts to be as the Lord Ordinary has found them and as the pursuers accept them, the conclusion in law is, in my opinion, that the claim is unfounded.

The whole controversy turns on the just construction of the following clause in the bill of lading—"Cargo to be received at destination as fast as vessel can deliver during ordinary working hours, any custom of the port to the contrary notwithstanding." It is certain that "such a clause does not impose an absolute obligation on the receivers to have the ship unloaded within a given time irrespective of whether the ship was able to give delivery owing to circumstances beyond the control of the owners." So says the Lord Ordinary, and I agree. It is equally certain "that such a clause must be construed with reference to the circumstances existing at the time when the discharge takes place, and not with reference to what could be done under ordinary circumstances." So says the Lord Ordinary, and I once more agree. But when the Lord Ordinary goes on to say that the circumstances existing at the time when the discharge takes place mean and include only the circumstances affecting the shipowner and not the circumstances affecting the receivers of cargo, I differ. In my opinion, under such a clause as we have here, "the measure of the consignees' obligation is the rate at which the ship is able to deliver the cargo under the circumstances that actually existed," as these circumstances affected both the shipowner and the receivers of cargo. This was authoritatively decided in the House of Lords in the case of *Hulthen* v. *Stewart*, [1903] A.C. 389, on the construction of a clause substantially identical with the clause we have here to construe. The Lord Ordinary appears to me to have failed to appreciate the meaning and effect of that decision and of the series of authorities on which it rested. In all of them a sharp distinction was drawn between cases in which a specific number of days are given within which the discharge must take place and cases like the present where no days are mentioned. In the former class of cases the consignee's obligation to take delivery is absolute and the circumstances prevailing at the port of discharge are disregarded. In the latter class of cases there is imported into the contract the circumstances under which the discharge is to take place. And it is certainly not merely the circumstances affecting the shipowners which are to be taken into account, but also the circumstances affecting the consignee. In good sense it could not be otherwise. Indeed it has been expressly so decided. For as it so happens in most, if not all, of the cases it was the circumstances affecting the consignee and him alone which were pleaded as, and held to be, a complete defence to a demurrage claim. Nothing could be clearer on this head than Lord Davey's precise statement of the issue raised in *Hulthen* v. *Stewart* (*cit.*), at p. 394. I refer also to the opinions of Lord Stormonth-Darling and Lord Low in the *Crown Steamship Company* v. *Leitch*, 1908 S.C. 506, 45 S.L.R. 402. Their words be it observed are spoken with reference to a clause expressed in terms identical with the clause before us. Indeed it was frankly conceded by the pursuers that *Hulthen* v. *Stewart* would undoubtedly rule the present case were it not for the following words in the clause we have to interpret, "any custom of the port to the contrary notwithstanding."

It was argued to us that these words made all the difference and effected a radical alteration in the meaning of the clause; that they converted the consignees' obligation from being an obligation modified by circumstances into an absolute obligation; that the circumstances of the port as affecting the shipowner still remained to be taken into account, but not the circumstances as affecting the consignee. In short, the measure of the consignees' liability to take delivery of the cargo is under this clause

the shipowners' ability to give delivery of the cargo under the existing circumstances at the port. Consequently all evidence relative to the circumstances of the port in so far as they are calculated to impede the action of the consignee is irrelevant. I am quite unable to accept this argument. It could not of course be supported on principle, and certainly was not supported on authority. It is directly contrary to the opinions expressed by the Judges of the Second Division in the *Crown Steamship Company's* case, where the clause was identical with the clause before us here. I refer particularly to the opinion of Lord Stormonth Darling. And it is quite contrary as I think to the plain meaning of the words "any custom of the port to the contrary notwithstanding." These words surely mean that the consignees here cannot shelter themselves from a claim for detention of the ship at the port of discharge by pleading a custom of the port as excusing them from doing everything within their power to facilitate the delivery of the cargo. If there be available some method of delivery of which they have refused to avail themselves, then they cannot under this clause excuse themselves on the ground that it was not in accordance with the custom of the port. Custom or no custom, the consignees here were bound to employ any reasonably feasible mode of delivery. The sole question for consideration is—Was the alternative method feasible, and if adopted would the result have been a more rapid discharge of the cargo? It is nothing to the purpose to say that it is contrary to the custom of the port. The present case furnishes a capital illustration of all this. It was suggested in the course of the proof, never before, that simultaneously with the usual method of delivery of grain cargoes there might have been employed an alternative method, which for shortness was referred to at the debate as delivery by means of pans. This is a mode of delivery which, as one of the witnesses says, is sometimes resorted to when parties are "in a tight corner." But he adds, "The pans are our last hope.... The use of pans for discharging wheat is the last resort." Nevertheless in the present case the shipowners and freighters both being anxious for rapid discharge did resort to "pans" on the 1st of December 1915, it being then quite impossible to obtain labour to pursue the customary method of discharge. The experiment was not a success, delivery was very slow, for the labourers were doing unaccustomed work. And on the following day labour adequate to enable the customary method to be followed being procurable the pan method was, by consent, I hold on the evidence, abandoned and never afterwards resumed. Nor was it ever suggested by the shipowners that it should be resumed either at that time or later. As Mr Cairns, the leading witness for the pursuers, observed—"We never worried them any more about these pan methods. They had got started with their four tackles, which they promised to increase, and they did increase, and we were always in the hope, as Mr Stewart was himself, that they would be able to increase and still further. (Q) Wasn't it that you saw they were getting on as quickly as they possibly could in the circumstances?—(A) Yes, I agree to that." After that evidence given by the pursuers' representative, whose candour and fairness impressed the Lord Ordinary, it appears to me to be idle to suggest, as we find at a subsequent stage of the proof, that the "pans" method should have been continued along with the customary method throughout the remaining stages of the discharge. It is significant that although on record the pursuers allege that the defenders ought to have delivered into sheds at the quay (now admitted to have been quite impracticable) no allusion is made to the "pans" method of delivery. Nor does the Lord Ordinary do more than notice it, probably for a reason which I shall immediately explain.

But the evidence of Mr Cairns, and also the assumption on which the pursuers presented their case in the argument addressed to us, alike demonstrate that the "pans" method was not in the circumstances practicable. For lack of sufficient labour and waggons it is apparent that it could not have been carried on simultaneously with the customary method. To demonstrate this I turn, first, to the evidence of Mr Cairns the shipowner's representative. For although the Lord Ordinary has not found that the "pans" method could have been followed with advantage simultaneously with the customary method—and indeed his findings in fact, as I shall presently show, necessarily lead to the opposite conclusion—yet this method of discharge was strongly urged as one which should never have been abandoned. Mr Cairns says—"I must admit that all along they (the consignees) were quite prepared to try any reasonable methods but they did not adopt them; they had not quite the pluck. In addition, of course, the men were not available.... He (Mr Stewart) always gave me the excuse that he could not get men. There is no doubt about that. He chiefly said weighers and porters, all that concerned him. (Q) Do you suggest that the defenders were not doing their very best during the whole time to get as many men as they possibly could?—(A) They were probably doing their best to get as many men as they possibly could. I agree to that. I agree that the pans were only adopted because there were too few men. (Q) And as soon as they had enough men properly to work more than one tackle was the pan method given up?—(A) No, I think the pan method was given up because they preferred to work in another method, and they did manage the next day to man tackles in the ordinary way. (Q) And that would be quicker?—(A) Yes, because any old method that is a good method is better than anything new. Our object was to help Mr Saddler to get the cargo away from the ship as quickly as possible, and I agree that that was Mr Stewart's object too." And he added that no alternative method of discharge which could have been usefully employed was ever rejected by the consignees. In truth they were as anxious to get

this wheat as the shipowners were to get their ship, and both seem to have done their very best to attain their common end. The pan method was, he says, abandoned because they were able to start with the tackles in the ordinary way. "(Q) Which was better? —(A) Yes, I agree. I think I am quite prepared to say that they (the consignees) did the best they could." The conclusion reached by Mr Cairns is well summed up at the close of his evidence thus—"(Q) You admit that they did give a surprisingly good despatch? —(A) I agree that they were rather better than other ships; I don't say it was a surprisingly good despatch. (Q) But I say considering the circumstances?—(A) I suppose I should say yes." Indeed it is common ground that the discharge of the "Arachne" was more rapid than that of any other grain ship in the port about that time. The reason was not far to seek. As one of the witnesses, a stevedore in large business at Leith, said, the defenders "are as receivers one of the best in the docks, because they have got their own horses, carts, and men for working those horses. They have also got bulk waggons or bulk vans of their own which receive the grain. They have greater facilities for unloading than perhaps any other receivers in the docks."

In the face of such evidence as this, and in the entire absence of any complaint or remonstrance at the time or subsequently, it is difficult to convict the defenders of failure to do their best by reason of their non-continuance of the "pans" method of discharge. The truth of course was that they could neither get men nor waggons to do it. All that were available were required in order to pursue the customary mode of discharge. The whole evidence in favour of the feasibility of continuing the "pans" method comes not from the pursuers but from the stevedore Saddler, and it amounts to very little. Here is what he says—[*His Lordship then narrated the evidence of this witness*]. Now it is plain from this evidence that inability to get labourers was the real difficulty, and this was asserted by the defenders at the time. And it is not said by Saddler or by any other witness that extra men could have been got. All the evidence in the case points the other way. And this is doubtless the true reason why the "pans" method was abandoned without remonstrance on the part of the shipowners. —[*After further narrative of the evidence his Lordship proceeded*] — It is common ground that men skilled in handling grain were not to be had in addition to those actually employed at the tackles, but it was suggested that an inferior quality of men, such as those employed by the stevedores in discharging the cargo, might have been obtained. Nobody actually says they could. The evidence appears to me to be all the other way. But the Lord Ordinary's finding in fact, accepted by the pursuers, that the shipowners themselves could not find labour sufficient to work the full sixteen tackles but only to work twelve, completely negatives the contention that labour to work the "pans" method simultaneously with the customary method could possibly have been obtained. If then it be certain that the shipowners could not obtain labour adequate to work all their tackles, then it is equally certain that the consignees could not have obtained the labour requisite to discharge by pans simultaneously with the customary method. The necessary and inevitable conclusion then from the assumption that the ship could not obtain the labour adequate to man sixteen tackles is that the consignees could not have obtained the labour requisite for the continuance of the "pans" mode of discharge. Its abandonment by mutual consent is therefore completely justified.

I turn finally to an argument advanced, certainly not with much confidence, by the pursuers' counsel, which seems to have found some favour with the Lord Ordinary. Grain importers, including the defenders, had an exceptional quantity of wheat coming into port during the months of November and December 1915. The exigencies of the nation demanded this; and at the time when the "Arachne" reached Leith certain ships had arrived before her and were discharging wheat consigned to the defenders. They of course knew generally about the time that these cargoes would be likely to arrive, although certainty and exactitude were impossible; and in no case were they able to secure anything like the full complement of men to discharge these other cargoes. In this state of matters the pursuers aver on record that "in consequence of these other cargoes of the defenders the disposal of the 'Arachne's' cargo was impeded and the 'Arachne' suffered in consequence." I cannot say that I understand this averment, and there is no plea-in-law founded on it which might afford a clue to its meaning. Counsel for the pursuers, however, disclaimed altogether the suggestion that the men engaged in discharging these other vessels should have been withdrawn and turned on to work at the delivery of the "Arachne's" cargo. The real contention of the pursuers was not formulated to us, nor can I discover any hint of it in the Lord Ordinary's opinion. It must, however, be something like this—"You the consignees ought to have anticipated the number of ships that you would have discharging at Leith at a particular time and the amount of labour and the number of waggons available to unload them, and by your intelligent appreciation of the future you ought so to have regulated your purchases and shipments of wheat that you would never have in port at any given time more vessels than there was labour and waggons available to unload." I must say that when the pursuers' true contention is expressed in words its unreasonableness at once becomes manifest; and it is not surprising that it was found impossible to embody it in a plea-in-law or a legal proposition.

The shipowners' contention on this head is although expressed in a different form just the main contention in the case, viz., that the consignees are under this bill of lading bound to take delivery within a certain definite time regardless of circumstances, or, to put it otherwise, that the

consignees have not done all that was reasonably within their power to secure rapid delivery of the cargo because they did not and could not peer successfully into the uncertainties of the future and regulate their business accordingly. When the exigencies of the grain market and the needs of the nation at the time are kept in view it is startling to reflect what would have been the consequences to our food supplies if attempts had been made by importers to preserve an absolutely even balance between cargoes of wheat on the one hand and the available means of unloading them on the other hand. I am of opinion that on this part of the case also the pursuers' claim fails. I propose to your Lordships that we should recal the Lord Ordinary's interlocutor and assoilzie the defenders.

LORD JOHNSTON—The defenders on 2nd September 1915 chartered the steamship "Arachne" to load about 26,000 quarters of wheat at Montreal and carry the same to Leith. The defenders were freighters as well as charterers, and so the bill of lading may be taken to supersede the charter-party.

The bill of lading granted by the master in Montreal on 9th November 1915 acknowledged receipt of the grain to be delivered at the port of Leith to the defenders' order, "he or they paying freight for the said goods on or before delivery, without any allowance for credit or discount, at the rate of 10s. per quarter of 480 pounds delivered." The point at issue is a claim for demurrage, depending upon the construction of the clause in the bill of lading regarding the discharge of the vessel, which is exceptional.

I think it is not inappropriate to say a few words in preface as to the relative position of the parties to a bill of lading in regard to this question of demurrage. In all such contracts there is a risk of delay occurring in the discharge, and if there is delay there is loss involved to one party or to both. But there is no question that the party chiefly interested in speedy discharge is the shipowner, because it is on him that the loss from delay falls most heavily if not entirely. His ship is held up, and he is prevented promptly utilising her services for fresh employment. His capital sunk in his ship is lying idle, and he is incurring all the oncost. Delay in discharge may also affect the freighter, as if it results in loss of market, &c. But it does so more rarely and in less degree. As a rule the freighter loses nothing by delay, and is sometimes even saving money. The shipowner therefore seeks to protect himself by terms. But the degree to which he can effectually do so depends upon the market for shipping. When the demand is in excess of the supply the shipowner has his opportunity of making better terms, and *vice versa*. Now in the present instance the supply of shipping was abnormally low and the demand for it abnormally high, and we have accordingly advantage taken by the shipowner of these facts, and an unusual discharge clause is the consequence. It has been the result of special bargaining, and is not part of the stock printed form of bill of lading used, but is added as a special marginal addition in typewriting, though this is not shown in the print of documents. I think that it is especially necessary to keep these considerations in view when coming to interpret this clause.

This special added clause on which the present question turns is as follows:—"Cargo to be received at destination as fast as vessel can deliver during ordinary working hours, any custom of the port to the contrary notwithstanding. If longer detained at discharging port demurrage is to be paid at the rate of £125 British sterling per day, or *pro rata* payable day by day."

The facts may be very briefly stated. The "Arachne" sailed from Montreal on 12th November; entered the Edinburgh dock at Leith on the 26th November, being a Friday; the stevedores had their tackles rigged and were ready to start discharging at nine o'clock on Saturday 27th; but the defenders were not in a position to commence taking delivery on that day; they were equally unable to commence on Monday 29th and Tuesday 30th; but they got a commencement made on Wednesday, 1st December. The discharge was not completed until the afternoon of 24th December, but during this period there were three days and a portion of another when discharge was stopped by heavy rain. When they did get started the defenders commenced working with only two of the ship's tackles on the first day, four on the second, third, and fourth days, and eight for the rest of the discharge. The maximum number of tackles which could possibly have been used was twenty-two. The pursuers maintain that they have proved their preparedness to do their part in working sixteen tackles. The Lord Ordinary has held that they had a force of men available to work twelve tackles, and at the hearing on the reclaiming note counsel for the pursuers intimated that they did not seek to disturb the Lord Ordinary's finding in fact upon this point. If, therefore, the defenders' plea that they ought to be assoilzied in respect (1) that they took delivery of the cargo with reasonable dispatch in terms of the . . . bill of lading, and (2) that any delay in taking delivery was due to causes outwith their control, are not well founded, and consequently demurrage is due, it will fall to be measured by the difference in time of discharge between what could have been done by working all through with twelve tackles and the actual performance; but this difference is substantial.

In Leith the custom of the port is to discharge grain by ship's tackles, lifting it from the hold, pouring it into the meter's barrel on his steelyard placed on the deck. The meter then, when the steelyard shows two hundredweight, tips his barrel into the receiver's two-hundredweight sack; the sack is carried ashore by grain porters and loaded on to ordinary railway waggons or on to lorries, or is emptied into bulk waggons, and the waggons and lorries and the bulk waggons are taken to the receiver's stores.

Here it is as well to dispose of a point maintained by the pursuers, viz., that unnecessary delay was interposed by employing meters to weigh on deck, as the pursuers were quite ready to accept the weights given in the bill of lading, or the weights ascertained after delivery on the quay. I hardly understand the pursuers' attitude here, but seeing the terms of the bill of lading and that freight had to be settled on the basis of the quantity delivered, and also that the shipowners' responsibility for full delivery had to be discharged, I cannot see how any other check on delivery of *a bulk cargo of grain* could be imposed except by the employment of meters in the final act of delivery. In point of fact, however, the pursuers never suggested that the ordinary check should be abandoned, or that anything else should be put in its place.

For delivery of grain in customary fashion at Leith the essential man is the grain porter. It is only exceptionally strong men who are able to carry the heavy two-hundredweight sacks and load them into waggons or into carts. They are a special class of dock labourer working generally in gangs, never over numerous, and at the time with which we are concerned very scarce indeed. The cause of the protracted discharge was, first, the defenders' inability to obtain the services of a sufficient number of these grain porters; and second, their inability to maintain a sufficient service of railway waggons; and third, their unpreparedness with any other alternative means of taking delivery. Of bulk waggons they had a considerable number of their own, more than any other trader in Leith, and they hired a few more, all they could get. The scarcity of labour, and also to a large extent of waggons, was entirely attributable to war conditions. I think I may say that *once they got fairly begun*, but only then, if the rate of discharge is to be judged of on the footing of reasonable despatch in the circumstances, the defenders did everything they reasonably could, with the possible exception of putting sufficient pressure on the railway company to increase the supply of waggons, but the question is whether that satisfies their obligation. In my opinion it does not.

Regarding the demurrage clause, apart from authority I should not have much difficulty in construing it, particularly keeping in view the circumstances to which I adverted at the outset, which dictated its terms. I think that it was intended to create a situation different from that produced by bills of lading in ordinary use, the demurrage clauses in which have undergone a great deal of judicial interpretation, and I think that it means what it says. Had the clause been confined to its first limb, "cargo to be received at destination as fast as vessel can deliver during ordinary working hours," I fully accept that its meaning and effect must now be taken to be that the cargo is to be received with all reasonable despatch according to the custom of the port and with regard to the circumstances in which delivery is made, provided these circumstances, so far as causing delay, are not occasioned by the act or the default of the freighter. This has been repeatedly held where the words "as customary" or "according to the custom of port" are expressed, or may be implied, as they always are implied if the charter or bill of lading is silent on the point. But the clause in question is not silent on the point, for custom of port is expressly excluded. The words "any custom of the port to the contrary notwithstanding" give, I think, a meaning to the expression "as fast as vessel can deliver" which it has not received in prior cases, with the possible exception of those of *Crown Steamship Company*, 1908 S.C. 506, 45 S.L.R. 402, and *Spiller & Baker*, 1901, 6 Com. Cas. 217. I think it is necessary that the clause should be read as a whole, and that the words used should receive their ordinary and natural meaning and effect. So reading them, the result of the clause is, in my opinion, to make the vessel's capacity to deliver the measure of the freighter's obligation to receive. But when I say "capacity to deliver" I do not mean maximum theoretical capacity but only actual capacity in the circumstances, the ship working as ordinarily with the usual appliances and with the labour at the time available, but taking no exceptional measures to speed up delivery and so unduly enhance the freighter's obligation to receive. I think that the fair meaning of the clause is that no excuse having any relation to custom of port, whether that be adopted by reason of local circumstances or the ways of local labour, is to be accepted to qualify the obligation to receive "as fast as vessel can deliver." That is what I mean by saying that the vessel's capacity to discharge is the measure of the freighter's obligation to receive.

I am not called on to determine what under such a charter-party or bill of lading would be the result of a paralysing strike or anything analogous stopping delivery. We are concerned merely with difficulties, not so much in taking delivery as in taking it sufficiently expeditiously to meet the call of the ship.

I hold that under such a bill of lading as the Court have before them, the duty of the freighter or his consignee is to be prepared for the ship's arrival and not to wait on her arrival before he makes his preparations—if there is congestion at the port or shortage of labour, to consider that betimes and make his dispositions accordingly. It is not enough for him to wait the ship's arrival, and then, finding congestion and shortage of labour, to begin to try methods of delivery to which the local dock labour is unaccustomed, as alternatives to the custom of the port, and then discard them because no prior provision for their proper working had been made or because they interfered with working the custom of the port to best advantage. What the defenders ask us to do is to consider what they did do *as soon as they got started*, and the shortage of labour and waggons, and the reason for this, which they contend was not under their control, and then to hold that they had done all that was reasonably incumbent on them, and that the ship must therefore bear the con-

sequence of any delay occasioned. That we should so hold would be, I think, in effect to reduce the demurrage clause here to the ordinary clause "as customary" or "according to the custom of the port," and that I am not prepared to do.

But there is another element in the case which I think in itself would be a reply to the defence. The defenders were themselves the cause of much of the congestion and short supply of labour. When the "Arachne" arrived the defenders had already two vessels in the harbour unloading large grain cargoes and another just on the point of arriving, and so were monopolising a large amount of the labour and means of conveyance actually available, both waggon and lorry. It was only as they got their other ships discharged that the defenders found it possible to transfer some of this scanty labour and insufficient waggon service to the "Arachne." For that state of matters I think the defenders and not the ship are responsible. The defenders were bound to know their own commitments, to arrange for the more convenient arrival of their cargoes, or provide for their reception should they come in one on the top of the other.

Accordingly I would affirm the Lord Ordinary's interlocutor, with which I am perfectly satisfied. I have before completing my judgment again read over his opinion, and had I appreciated that my grounds of judgment were so identical with his own I should probably have contented myself with saying so. But as your Lordships are of a different opinion I have thought it proper to state my conclusions in my own words.

LORD MACKENZIE—The pursuers' claim for demurrage is founded on the clause of the bill of lading which is expressed thus—"Cargo to be received at destination as fast as vessel can deliver during ordinary working hours, any custom of the port to the contrary notwithstanding."

The pursuers argue that the obligation on the consignee is absolute to take delivery as fast as the ship, looking only to the circumstances which affected her, could deliver, and that the consignees could not excuse themselves by showing that their inability to receive was due to causes for which they were not responsible. The stress of the pursuers' argument is upon the words "any custom of the port to the contrary notwithstanding," which, they say, have the effect of excluding the idea of delivery being a joint operation, excluding the consideration of whether the defenders' conduct has been reasonable or not, and that their effect is to impose upon the defenders an obligation of the nature of a guarantee. The pursuers in short seek to construe the clause as identical with one in which it is stipulated that the delivery shall be within a specified number of days and hours. The only qualification, according to this argument, which is to be read into the clause is the state of facts so far as these affect the shipowner. It is conceded that the measure of the consignees' obligations is not the theoretical capacity of the ship to deliver under ideal conditions, but her actual ability under the conditions as they exist at the time. But once these have been ascertained, say the pursuers, then the standard up to which the consignees are to work has been rigidly fixed, and they cannot excuse themselves by pointing to any circumstances which rendered it impossible for them, with the exercise of due skill and diligence, to take the goods.

The question is one of construction of the language of this contract, and the authorities aid only by way of analogy. I am unable to assent to the contention of the pursuers. The initial words of the clause, "Cargo to be received at destination as fast as vessel can deliver," do not, in my opinion, mean that the consignee is bound to take delivery in the shortest time the ship could, in the circumstances affecting her, put the goods out. Consideration must also be paid to the circumstances so far as they affect the receivers of the goods. If they take the cargo as fast as was possible in the circumstances with the exercise of reasonable skill and diligence, then they fulfil their part of the contract. The effect of the words "any custom of the port to the contrary notwithstanding" is not what the pursuers contend for. The true meaning of these words is that the consignees cannot excuse themselves if all they can do is to show they could not by the exercise of due diligence receive the cargo in the manner prescribed by custom. They must also show that there was no method practicable in the circumstances, whether customary or not, by which they could have taken delivery from the ship. The effect of the exclusion of custom is to transfer the controversy between the parties to the field of fact, not to settle it in the domain of law.

The result of the foregoing observations is that in my opinion the pursuers fail to show that the views expressed in the series of cases from *Postlethwaite* v. *Freeland*, [1880] 5 A.C. 599, to *Hulthen* v. *Stewart*, [1903] A.C. 389, do not bear directly on the construction of the clause in hand here. Mr Watson's argument was that in all these cases custom was imported into the contract, either expressly or by implication, and that but for this the obligation on a consignee to receive as fast as vessel can deliver would be construed as if the charter-party or bill of lading stipulated for a given number of lay-days. The only modification made by Mr Watson upon the argument, which was unsuccessfully presented in *Hulthen* v. *Stewart*, was that the receiver's duty was to be measured by the ship's actual ability to deliver in the circumstances, not her theoretical capacity. The pursuers' argument at this point seems to me in direct conflict with what is said by Lord Macnaghten in *Hulthen* v. *Stewart*—"It is, I think, established that in order to make a charterer unconditionally liable it is not enough to stipulate that the cargo is to be discharged 'with all dispatch,' or as 'fast as steamer can deliver,' or to use expressions of that sort. In order to impose such a liability the language used must in plain and unambiguous terms define and specify

the period of time within which delivery of the cargo is to be accomplished." Nothing is said by Lord Macnaghten to suggest that his view depended upon the words "according to the custom of the port" which were in the charter-party in *Hulthen's* case. The view so expressed is consistent with the trend of opinion in the cases, that there are two classes of charter-party, the one where lay-days are specified, the other where they are not. In the former class it is of no moment what amount of skill and diligence the consignees have exercised, they are unconditionally bound. In the latter class the observations of Lord Davey in *Hulthen's* case (at p. 394) are directly applicable—"It then becomes a question of law, aye or no, are the respondents liable by virtue of the terms of the charter-party, although they have done all that, humanly speaking, was reasonably possible for them to do in order to secure the vessel reasonable despatch?' The decision in the case of *Hulthen* applies the principle laid down by Lord Selborne in *Postlethwaite* v. *Freeland*—"There is no doubt that the duty of providing and making proper use of sufficient means for the discharge of cargo when a ship which has been chartered arrives at its destination and is ready to discharge lies (generally) upon the charterer. If by the terms of the charter-party he has agreed to discharge it within a fixed period of time, that is an absolute and unconditional engagement for the non-performance of which he is answerable whatever be the nature of the impediments which prevent him from performing it, and which cause the ship to be detained in his service beyond the time stipulated. If, on the other hand, there is no fixed time, the law implies an agreement on his part to discharge the cargo within a reasonable time; that is, as was said by Blackburn, J., in *Ford* v. *Cotesworth*, L.R. 4 Q.B. 127, L.R. 5 Q.B. 544, 'a reasonable time under the circumstances.' The same principle is stated by Lindley, L.J., in *Hick* v. *Rodocanachi*, [1891] 2 Q.B. 626, at p. 638—'There are two well-known forms of contract, one with and the other without a specified number of days for unloading. If the first form is used, the risk of a strike falls on the merchant; if the second form is used it does not, and the risk falls on the shipowner, not because he has agreed to bear it, but because he is unable to throw it on the merchant.'"

The case of the *Crown Steamship Company*, 1908 S.C. 506, 45 S.L.R. 402, is founded upon by the Lord Ordinary, and was relied on by the pursuers in argument. It is to be observed that the sentence in the Lord Ordinary's opinion—"The measure of the consignee's obligation is the rate at which the ship is able to deliver the cargo under the circumstances that actually existed"—is printed as if it were a quotation from Lord Low's opinion, where, however, it is not to be found. The Lord Ordinary puts the shipowner's case in a more tenable position than it occupied in the argument of counsel in *Hulthen's* case. The peculiarity of the *Crown Steamship Company* case is that the opinion was expressed that if the claim there had been one for demurrage the judgment would have been in favour of the consignee. As Lord Low says—"I cannot read the bill of lading as fixing a specific time for discharge." Now the clause with reference to which this opinion was expressed was in these terms—"The goods to be received by the consignee from the ship's tackles as fast as the steamer can deliver, any custom of the port to the contrary notwithstanding, and all charges incurred after being discharged necessary for the steamer's quick dispatch to be paid by the owner or consignee of the goods." Lord Ardwall says the same. In view of this it is not necessary to examine the reasoning by which Lord Low and Lord Ardwall arrived at the conclusion that the claim differed in principle from one of demurrage. The judgment of Lord Stormonth Darling, who dissented, is of importance, because the train of reasoning shows why his Lordship reaches the conclusion that if it had been a claim of demurrage *Hulthen* v. *Stewart* would have been in point. With reference to the words in the *Crown Steamship Company*, "any custom of the port to the contrary notwithstanding," Lord Stormonth Darling observes that these words "obviously make no difference, seeing that no peculiar or exceptional custom of the port of Greenock which could affect the matter one way or other was proved." The construction put upon the clause in the *Crown Steamship Company* case is thus stated by Lord Stormonth Darling—"The case therefore presents itself to my mind as one in which the consignee was under no absolute and unconditional obligation to take delivery within a specified time, but in which his obligation was limited to taking delivery within a reasonable time, so as to allow of the steamer's 'quick dispatch,' having regard to all the existing circumstances." This expresses my view as to the construction which ought to be put upon the clause in the bill of lading here. As to *Maclay* v. *Spillers*, 1901, 6 Com. Cas. 617, which was founded on in the *Crown Steamship Company* and in the argument here, the clause there contained the word "continuously," which makes the case distinguishable from the present.

Upon the construction of the contract I am therefore unable to reach the same conclusion as the Lord Ordinary, which is expressed in the findings and brought to a point in one sentence, viz.—"I am accordingly of opinion that demurrage falls to be paid on the footing that the ship was able and willing to work twelve tackles, and that the obligation of the receiver was to take delivery at twelve tackles even if he was unable to find a sufficient number of men for the purpose." With the Lord Ordinary's opinion on the question of fact down to this point I am in agreement. In his Lordship's view of the law it was of course unnecessary to consider whether the receiver was able to find a sufficient number of men for the purpose or not. It is necessary in the view I take to consider the question whether the defenders used all due diligence to get porters to carry the grain. My view

upon that question of fact may be shortly expressed, because I read the pursuers' evidence as conceding the fact that the defenders did all they could to get this class of labour and failed. The evidence of the pursuers' leading witness Mr Cairns establishes this. So far therefore the pursuers in my opinion fail.

There is the further question, which is dealt with by the Lord Ordinary, whether part of the delay was brought about by the conduct of the consignees. The pursuers argue that when the "Arachne" came into port there were other vessels there before her with cargoes for the defenders, which were being discharged by them. Their contention was not that the labour so engaged should have been transferred from the "Tafna," "Hurona," and "Cairndhu" to the "Arachne," but that the defenders had made contracts in the knowledge that at a time when the port was in a congested state they would have cargoes to receive at one and the same time in excess of the quantity they and their waggons could cope with. The test that must be applied here is that already indicated, viz., what was reasonable conduct, and at this stage the general question arises in a different shape. There is, no doubt, evidence that the defenders were at this time getting exceptionally large consignments of wheat. This, however, does not appear to me unreasonable, nor could the defenders exactly forecast when the different ships would arrive. In *Hick* v. *Raymond*, [1893] A.C. 22, Lord Watson at p. 32 says this—"When the language of a contract does not expressly or by necessary implication fix any time for the performance of a contractual obligation, the law implies that it shall be performed within a reasonable time. The rule is of general application, and is not confined to contracts for the carriage of goods by sea. In the case of other contracts the condition of reasonable time has been frequently interpreted, and has invariably been held to mean that the party upon whom it is incumbent duly fulfils his obligation, notwithstanding protracted delays, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably." It is to be noted that in the charter-party of the "Arachne" the limits of deviation in the time for loading extend to twenty-five days. Looking to the condition of matters at the time, it may be held that delay from such a cause was within the contemplation of both parties. I am not therefore disposed to make the defenders liable for delay attributable to this cause.

There remains the question whether there was not a duty on the defenders as ancillary to, not in substitution for, the discharge by sacks and porters to have recourse to the method of discharge by pans. This branch of the case depends upon the theory that more flat waggons ought to have been got by the defenders for the discharge by sacks and carriers so as to relieve the bulk waggons for discharge by pans. This point was developed more in argument than in the evidence, and is not made matter of express averment. Condescendence 27, which deals with the matter, refers in this connection to delivery into the sheds. It was conceded, however, by the pursuers' counsel in the course of the argument that the sheds were so full at the time that there was no room for the "Arachne's" cargo in them. The point about the sheds was therefore given up. The reason why the pursuers' witnesses did not insist on the defenders' bulk waggons being used for discharging by pans is that all these waggons were required for the discharge by carriers, which was the quickest way of taking delivery. This explains why Mr Cairns, after the discharge by pans was tried on the one day, 1st December, did not urge the defenders to continue it. The following question and answer puts Mr Cairns' view concisely—"(Q) Wasn't it that you saw they were getting on as quickly as they possibly could in the circumstances?—(A) Yes, I agree to that—not as quickly as the ship could deliver though." This brings the matter back to the general question of law, and clears the defenders' feet on the question of fact. Later on Mr Cairns says the pan method was abandoned "because they were able to start with the tackles in the ordinary way." "(Q) Which was better?—(A) Yes, I agree." And again—"(Q) Isn't it the fact that the receivers of the 'Arachne's' cargo took it with surprisingly good dispatch, considering all the circumstances?—(A) Considering the other vessels they were discharging they did quite well. (Q) Considering all the circumstances of the discharge?—(A) Yes. They recognised they had to do it. (Q) You admit they did give a surprisingly good dispatch?—(A) I agree that they were rather better than other ships; I don't say it was a surprisingly good dispatch. (Q) But I say considering the circumstances?—(A) I suppose I should say yes." Mr Drummond says the defenders used the whole of their fifteen bulk waggons in the discharge of the "Arachne," and that had they robbed the other holds of some of the bulk waggons for discharge by pans they would have increased the difficulty of discharge. Further, before the pursuers could make anything of this point it would have to be clear that the labour could have been got for discharge by pans. They put their case thus—granting that strong grain carriers capable of lifting sacks weighing 2 cwt. could not be got, yet a poorer class of labourer would suffice to manage the pans, upon which the power of the tackle was exerted. But this is just the class of labourer that would have suited the stevedores, and agreeing with the Lord Ordinary I am of opinion that no more labour could be got than was sufficient to man twelve, not sixteen, tackles. This is strong against the pursuers' contention that labour was available for discharging by pans. Upon this part of the case I accept the answer of Mr Drummond as sufficient to discharge the defenders from liability under this head. "(Q) Why didn't you combine with the new and quicker method, the method of pans, and let them both go on simultane-

ously?—(A) Shortage of men and shortage of bulk waggons."

Upon the whole matter therefore I am of opinion that the interlocutor of the Lord Ordinary should be recalled and the defenders assoilzied.

LORD SKERRINGTON—As the pursuers' case was presented to us the claim for demurrage was rested exclusively upon the final clause in the bill of lading, which is as follows:—"Cargo to be received at destination as fast as vessel can deliver during ordinary working hours, any custom of the port to the contrary notwithstanding. If longer detained at discharging port demurrage is to be paid at the rate of One hundred and twenty-five pounds (£125) British sterling per day, or *pro rata* payable day by day."

The words "as fast as vessel can deliver" are capable of two constructions. The reference may be to delivery in the abstract with no special circumstances tending to impede the delivery, or the words may refer to delivery in the concrete attended by all the difficulties which may actually occur. The pursuers' primary claim was made up on the basis that the former was the true meaning and that in substance the bargain was that the consignee should release the ship in 5½ days. The Lord Ordinary rejected this contention and the pursuers' counsel accepted his ruling on this point. It follows that the ship's duty under this clause was to use all reasonable diligence and all available means in order to deliver the cargo as fast as it was able to do so in the actual circumstances. One would suppose that the receivers' ability or inability to receive the cargo was one of those circumstances. It was argued, however, by the pursuers' counsel (and here they held the judgment of the Lord Ordinary in their favour) that the reciprocal obligations of the parties under this clause fell into two entirely different categories, those of the ship being qualified while those of the receivers were absolute. In interpreting and applying the clause in question counsel insisted that we must confine our attention exclusively to the circumstances which affected the pursuers' ability to deliver the cargo, and that we must shut our eyes to all circumstances which affected the defenders' ability to receive it. This seems a somewhat difficult mental feat. The delivery of a cargo and its receipt are two aspects of one single operation, and any circumstance which prevents or delays the receipt prevents or delays the delivery. It was argued, however, that the clause which excluded the custom of the port of delivery justified and indeed necessitated the course which the pursuers' counsel urged us to adopt. I cannot agree. The words in question qualify the whole sentence of which they are a part. Accordingly if they compel us to shut our eyes to all circumstances affecting the receiver they equally require us to disregard all circumstances affecting the ship. In that view the duty of the ship to deliver and that of the consignee to receive were each of them absolute, viz., to deliver and to receive in a definite number of days, which for all practical purposes might as well have been written into the bill of lading. That, however, is the view of the bargain which the Lord Ordinary negatived and which the pursuers' counsel did not maintain in the argument which they addressed to us. Though none of the authorities cited is precisely in point their fair import is that if mercantile men wish to contract that the discharge of a ship shall be completed in a certain time they fix a definite number of lay-days, and that if they omit this familiar precaution it is of set purpose, and that the Court ought to be slow to supply the omission from implication, unless of course such implication is absolutely certain and necessary. In the present case the clause excluding the custom of the port fulfils what seems to be its natural purpose if it is construed so as to disentitle either party from pleading that the cargo must be delivered and received in one way only, viz., by the usual or customary method, notwithstanding that some other method might be available. I cannot interpret the words as imposing upon either party or upon both parties an absolute and unqualified duty to proceed with the unloading in the absence of any available means of doing so, whether customary or not.

If the true meaning of the bill of lading is as I have stated, the main ground of the Lord Ordinary's judgment is displaced. The pursuers, however, tabled an alternative case in articles 26 and 27 of their condescendence. In the first place they complained that when their ship arrived at Leith the defenders were engaged in discharging the cargoes of two other ships, and that delay was caused in this way. If the defenders' duty as regards their future conduct was not an absolute duty (as the Lord Ordinary considered it to be), but only a qualified duty, the same qualification must be imported into any warranty which ought to be implied in regard to their conduct prior to the date of their contract with the pursuers. I do not think that the pursuers have proved that the defenders acted unreasonably towards them either because they had two other cargoes at Leith at the time when the pursuers' ship arrived or because they took delivery of these cargoes in their natural order. In condescendence 27 the pursuers complained that the defenders caused delay by refusing to receive the cargo into sheds and by means of buckets instead of in bags, but in my opinion they have failed to establish any separate case under this head. I agree with the observations which your Lordship in the chair has made upon the evidence both as regards this and also as regards other matters.

In the result I am of opinion that the defenders are entitled to absolvitor.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defenders.

Counsel for the Pursuers (Respondents)—Watson, K.C.—Gentles. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Defenders (Reclaimers)—Blackburn, K.C.—W. T. Watson. Agents—Beveridge, Sutherland, & Smith, W.S.