acter in his profession, and medical men were called to prove that he had in no way ceased to enjoy their confidence owing to the admitted error which led to these proceedings.

COMRIE THOMSON, for panel, addressed the jury —There was no such gross, corrupt, and evil intention as is essential to the idea of crime—Hume i. 21; nor any regardlessness of order and social duty (22). There was at the worst an unfortunate and excuseable error. In *Reg.* v. *Noakes*, 4 F. & F. 920 (1866), the pursuer was a chemist and the deceased dealt with him, and had for years been used to send to him for aconite as a liniment. The prisoner was in the habit of using bottles of a particular make and colour to contain poison, but on this occasion the deceased had sent his own bottles. He had been ordered to take 30 drops of henbane, and to use aconite for a liniment, and he sent two bottles, one for aconite and one for henbane. The bottle for henbane (both being ordinary bottles) had on it a label bearing "henbane," and in small letters "30 drops at a time," which for aconite would be fatal if taken internally. The prisoner through some accident put the aconite in the henbane bottle, and the deceased took it and died. Erle, C.-J., would not call on prisoner for his defence, "because they could not convict unless there was such a decree of complete negligence as the law meant by the word felonious." Verdict not guilty. So also in *Reg.* v. *Spencer*, 10 Cox C. C. 525, where the prisoner was the doctor of the deceased, and gave him a bottle marked to the effect that 3 spoonfuls should be taken at night. He denied of poisoning by strychnine. The prisoner believed it to be bismuth, which is like strychnine. There was no suggestion of bad motive. Willes, J., told the jury that a blunder alone would not render the prisoner criminally responsible. There must be such gross and culpable negligence as would amount to a culpable wrong and show an evil mind. Verdict not guilty. See also *Henderson*, June 13, 1842, 1 Brown 360.

LORD ADAM in charging the jury stated that the conduct of the Advocate-Depute in bringing the case before a jury was most proper, that the law was correctly stated in the indictment to be that it was the "duty" of the accused "in your capacity of chemist and druggist aforesaid to exercise due care and caution in the dispensing of drugs and medicines," and the question for the jury related to the applying that law to the undisputed facts of the case. Had that duty been discharged? If there was an excuseable mistake there was no crime, but the jury would consider whether the fact that in the hands of even a careful person like the prisoner the fact that this event had occurred did not show that it was a reprehensible and dangerous practice to keep a deadly poison among the innocuous drugs like liquorice, and with no separate place for it on the shelf, and whether the whole circumstances did not constitute a breach of the duty of the prisoner.

The jury returned a verdict of not guilty, coupled with a recommendation that some distinct colour or mark be put on bottles containing poison.

In respect of which verdict of assize the Court assoilized the panel *simpliciter* and dismissed him from the bar.

Counsel for Crown—Wallace, A.-D.—Sym. Agent—Procurator-Fiscal of Renfrewshire.

Counsel for Panel—Comrie Thomson—Patten. Agent—J. Patten, W.S.

Wednesday, October 28.

GLASGOW CIRCUIT COURT.

(Before Lord Adam.)

H. M. ADVOCATE *v.* PITCHFORD AND ANOTHER.

Justiciary Cases—Assault with Intent to Ravish—Age of Accused—Sentence.

Sentence on boys aged 15 and 13 who pleaded guilty of assault with intent to ravish.

At Glasgow October Circuit, 1885, Joseph Pitchford, aged 15, and Patrick Connelly, aged 13, were charged with rape, and alternatively with assault, aggravated by its being committed with intent to ravish, and by its being committed on a girl under puberty.

The girl assaulted was a girl of 10 years of age.

The pursuers pleaded guilty to the minor alternative charge.

LORD ADAM in respect of their youth sentenced them each to one month's imprisonment, and thereafter to be detained in a reformatory for 3 years.

Counsel for Crown—Wallace, A.-D.

Counsel for Pitchford—M'Nair.

Counsel for Connelly—Wilson.

COURT OF SESSION.

Thursday, October 29.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

J. & A. WYLLIE *v.* HARRISON & COMPANY.

Ship—Charter-Party—Demurrage—Cargo to be Discharged "as fast as Steamer can deliver after being berthed as customary"—Local Custom.

A charter-party provided that the cargo was to be discharged "as fast as steamer can deliver after being berthed as customary." The cargo was iron ore. It was the custom at the port of discharge that on notification by the consignees or charterers of the arrival of the vessel to a railway company, whose line ran down the quay, the latter should provide trucks, into which the cargo was to be discharged by means of steam-cranes provided by the harbour authorities, and the discharge could not be made in any other way. Owing to inability to obtain from the railway company the use of a sufficient number of trucks the cargo was not discharged as fast as it might have been had these been

provided. In an action for demurrage by the owners against the consignees of the cargo, *held* that the consignees having taken delivery according to the custom of the port, were not responsible for delay caused by the absence of sufficient trucks.

Postlethwaite v. *Freeland*, L.R., 4 Ex. Div. 155, and H. of L., 5 App. Cas. 599 followed.

Opinion (*per* Lord Young) that delivery according to the custom of the port was to be implied in the contract of affreightment.

The pursuers in this action were shipowners at Troon, and the defenders were merchants in Glasgow engaged in the Spanish ore trade. The action was for £59, 5s. as demurrage (at 15s. an hour) for 79 hours, during which they alleged that their ship "Mandarin" had been delayed at Glasgow beyond the customary time for discharging. The material facts of the case, as ascertained at the proof, are given in the interlocutor of the Sheriff-Substitute (ERSKINE MURRAY), as follows—"Finds (1) that the defenders Harrison & Company are consignees of 800 tons of iron ore conveyed from Bilbao to Glasgow in the ss. 'Mandarin,' under a charter-party between pursuers J. & A. Wyllie, shipowners, and Harrison & Company: Finds (2) that under the charter-party the charterers were bound to proceed 'to Glasgow General Terminus or Queen's Dock, in charterers' option,' and 'deliver as customary,' freight being charged at a certain rate per ton, 'delivered free into trucks,' 'cargo to be discharged as fast as steamer can deliver after being berthed as customary'—'demurrage, if any, at the rate of 15s. per hour, except in the case of any hands striking work, frosts, or floods, break down of machinery, revolution, or war, which may hinder the loading or unloading of said ship:' Finds (3) that in the end of October last it was customary to discharge vessels laden with iron ore into trucks at the General Terminus by working continuously day and night, deducting about four hours for meals, thus giving 20 hours' work per day, no work, however, being done on Sundays, and as the only trucks permissible at the General Terminus were those belonging to the Caledonian and North British Railway Companies, it was also customary, after the shipowner had notified to the consignees or charterers the arrival or forthcoming arrival of a vessel, for the said consignees or charterers to notify to one or other of the railway companies that trucks were required for the carriage of the specified quantity of ore, and then for the railway companies to provide according to their ability the necessary trucks, and, on the other hand, for the shipowners or their stevedore to arrange with the river authorities for the use of the cranes for the purpose of unloading: Finds (4) that in the latter part of October there was rather a want of trucks felt at Terminus quay, which appears to have arisen partly from trucks being filled by the day and night system more rapidly at the quays than they could be unloaded at the works they went to, where they were only unloaded by day, and partly because, even though there might be sufficient trucks in the station, works of alteration were going on in it which sometimes only rendered one line available, thus choking the traffic, and delaying loaded trucks from getting away from the quay, or empty trucks getting alongside: Finds (5) that the 'Mandarin' arriving in Glasgow on 27th October, notice was sent to the consignees, who elected that the delivery should take place at the terminus, and although the pursuers seem to have pointed out that there might be delay at the Terminus, yet when it was mentioned that the iron was for Dixon & Company, and that therefore the Terminus was more convenient, they made no objection, as indeed they were not entitled to object: Finds (6) that as a good many vessels had preceded the 'Mandarin,' she did not get berthed till Thursday the 30th, about 11·30: Finds (7) that the defenders gave due notice to the Caledonian Railway Company to have trucks provided, and a similar notice was also given to them by Dixon & Company, who were to receive about 480 tons of the 800, and who had also received notice from defenders: Finds (8) that except for a short period the pursuers were unable to get the use of more than one crane, which to a certain extent delayed the delivery: Finds (9) that during the Friday night the discharge of the 'Mandarin' was altogether stopped by joint arrangement between pursuers' stevedore and the railway authorities, in the hope that by using two cranes at a neighbouring vessel which had the precedence they would be able to get two cranes for the 'Mandarin' next day, which hope, however, proved fallacious: Finds (10) that on Monday morning two hours were lost in canting the vessel, which had to be done in order to permit of her discharging further: Finds (11) that the discharging lasted off and on from the berthing of the vessel till 5 p.m. on the Monday, no work being done on the Sunday: Finds (12) that apart from the delays above mentioned great delays took place in discharging caused by the want of trucks being forthcoming, which accounted for the extent of delay above the nominal time for unloading when added to the other delays: Finds (13) that while the nominal time for unloading a vessel of 800 tons like the 'Mandarin,' working night and day with two cranes, would have been twenty hours, or one complete working day, provided trucks had been always ready, she ought with only one crane to have been unloaded in about thirty to thirty-five hours, or say one complete working day and ten to fifteen hours of another day, which, allowing for the night during which by arrangement with pursuers' stevedore no unloading took place, would still have completed the unloading sometime on the Saturday evening, say 9 p.m., had it not been for the delay in forwarding trucks: Finds (14) that in the period from 9 p.m. on Saturday till 5 p.m. on Monday, being forty-four hours, two hours delay on Monday were attributable as above mentioned to pursuers, leaving a period of forty-two hours, including the twenty-four hours of the Sunday."

In respect of these findings of fact the Sheriff-Substitute found on the whole case and in law —(1) That if defenders were responsible at all for demurrage in the circumstances, the time on which it would fall to be calculated would be forty-two hours as above mentioned, bringing out a sum of £31, 10s.; (2) but that in the circumstances they cannot be held liable in demurrage: Therefore assoilzies defenders from the craving of the petition, and decerns, &c.

"*Note.*—There is really little discrepancy between the parties as to the facts in this case, and

the question is simply one of law. But the point of law is a difficult one.

"In the first place, this case is not among those which fall to be decided against the charterer or bill of lading holder in consequence of his having engaged to load or to discharge in a fixed time, or at a fixed rate per day, by which a time can be fixed. The charterer is therefore only bound to discharge in a reasonable time. But then it has been held, as in the case of *Wright*, L.R., 4 Ex. Div. 165, that in a case where there was no provision whatever about discharging, and delay arose by the charterers being unable to get lighters in consequence of stormy weather, the charterers were responsible. As Lord Bramwell lays down, the charterers were bound to have the lighters ready; it was not, properly speaking, the discharging, but the preparation for discharging; they ought to have had all preparations made beforehand, so as to be ready to start at once, and could not excuse the omission by saying that others required and had got the lighters. The same principle is referred to in the recent case of *Grant* v. *Coverdale*, 1884, L. J. Rep., 53 Q.B.D. (N.S.) 462, where the circumstances were different, this being a case where the time on demurrage was specified, which always tells against the charterer. It was held that frost which delayed cargo on its way to be loaded did not fall under the description of frost preventing loading, which would have been a very different thing. On this the case turned. But Lord Selborne certainly lays down that each side is responsible for what he undertakes to do, and for all practical impediments that arise in the course of his doing it. Under this rule, as the defenders in the present case certainly had to arrange for the trucks being ready for the pursuers to discharge the ore into, the defenders would have been held responsible had no other considerations entered into account. But then it must be remembered that the delivery is in the present case provided to be 'as customary,' and cargo is 'to be discharged as fast as steamer can deliver after being berthed as customary.' The custom of the port is thus woven into the contract. The pursuers themselves need to appeal to it, and what is more, need to appeal to it with regard to the last clause above quoted, for unless they did so they could not maintain that the delivery should go on day and night. All they could have insisted on was working days. Such being the facts, the present comes within the category of cases of which *Postlethwaite* v. *Freeland*, L.R., 4 Ex. Div. 155, and on appeal in the House of Lords, 5 Ap. Cas. 599, is a type. There it was decided that when the charter-party provided that the charterer was to 'discharge with all despatch according to the custom of the port,'—words very similar to those in the present case—a delay of thirty-one days before commencing to unload for want of lighters, which in consequence of the custom of the port could not be got till then, was not held to infer liability for demurrage. The same was held in *Ford* v. *Cotesworth*, L.R., 4 Q.B. 127, and v. 544, where it was provided that the vessel was to deliver the cargo 'in the usual and customary manner,' and where delays arising under the custom were held to be matters over which neither party had control, and neither were responsible.

"Here there can be no doubt that at the end of October last it was the known custom that the trucks to be used for discharge were only those of two railway companies; and that all that the charterers could do was to give notice what trucks were wanted, and then, if necessary, hurry and stir up the railway companies to provide them. This they did. They seem, therefore, in the circumstances, not to be responsible for the delay that occurred through the custom of the port, which rendered them dependent on the provision of trucks by the railway companies, which custom was fully known to the pursuers."

The pursuers appealed to the Court of Session, and argued—The obligation in the charter-party to discharge "as fast as steamer can deliver" meant that it was to be done as fast as it could be done by means of the appliances which the contract provided, and had no reference to the trucks, the forwarding of which was in the charterer's department. The duty of the ship stopped when it tendered the cargo. It was the charterer's business to provide trucks. If he did not, then he (pursuer) was prevented fulfilling his contract by something beyond his control. The case of *Postlethwaite* v. *Freeland*, on which the Sheriff-Substitute relied, was distinguishable from this one both in the words of the charter-party and in the introduction of the element of lighters. The case of *Lapsecott* v. *Balfour*, L.R., 8 C.P. 46, where the charterers were held liable for delay under a similar clause in the charter-party, applied.

The defenders replied—The case was ruled by *Postlethwaite*, for, substituting lighters for trucks, the circumstances were precisely parallel.

Additional authority—M'Lachlan on Shipping, p. 526.

At advising—

LORD JUSTICE-CLERK—I think it is clear on the terms of this charter-party that the goods were to be delivered subject to the custom of the port, and it is likewise clear from the nature of the harbour that they could not be delivered except into trucks belonging to and furnished by the railway company. They could not by the custom of the port be delivered on the quay.

Now, I think it is a general rule in contracts of affreightment that for the loading the charterer is responsible, after loading the shipowner is responsible, and again for unloading that the duty of taking delivery is incumbent on the charterer. But the place of delivery may be a port which is subject to regulations which are not within the power of the charterer, and which must be complied with before delivery can be given at all. Where these regulations which are incorporated into the charter-party provide that goods shall not be laid down on the quay, but be put into trucks, I think the whole obligation of delivery is subject to the possible contingency of trucks being available. It is not shown that there was any default on the part of the defenders in availing themselves of the means of unloading when these were at hand. An obligation to take delivery as fast as the ship could put it out can only mean to do so by the means which are available at the place of delivery. The case is therefore, I think, in the same position as that of *Postlethwaite*, which is cited by the Sheriff-Substitute, and I am satisfied that his judgment is a sound one, and should be affirmed.

Lord Young—I agree with your Lordship. I think the judgment of the Sheriff-Substitute is manifestly a well-considered judgment, and I also think a sound one. The case appears to me to be, I shall not say, a very easy one—for we have listened to two days' argument upon it—but I should say that the question is a short and simple one, and depends on facts almost undisputed.

The action is for demurrage, that is, conventional damages for delay alleged to have been caused to the steamship "Mandarin" by the failure of the consignee to take due delivery of the cargo, We had a good deal said about it being no answer to an action for breach of contract that the party alleged to be in breach could not help himself—that without any fault on his part he was unable to fulfil the contract. It is a well-established principle of contract law—not confined to contract on charter-party, or indeed to any department of it—that the party should fulfil his contract, and is not to be excused for breach of his contract by showing an inability on his part to fulfil it. A builder would not be excused for non-fulfilment of his contract—unless there was a special clause to that effect—by showing that he could not get the requisite materials, or could not find workmen, or the like. That a man shall fulfil his contract, even though he find it impossible to do so, is a general principle of contract law applicable but by no means confined to this department of the law of contract. The question here then is, Was the defender in breach of his contract? If he was, it is nothing to the purpose to say that he could not keep it. I think he was not. The contract between the pursuer and the charterer was that the pursuer was to carry 800 tons of iron ore from Bilbao to the General Terminus at Glasgow, and to deliver them there with all due despatch, the expression here used being, "as fast as steamer can deliver," which is just equivalent to "with all due despatch." It happens that the expression "as customary" is added here, but I think its occurrence is superfluous and does not affect the meaning of the contract. Unless something to the contrary were shown, it would be implied that delivery was to be by the custom of the port, especially when it could not be taken otherwise, as was the case here. The ship came to Glasgow on the 27th of October, and got a berth on the 30th, which was Thursday, and the delivery was completed on Monday following. It is said by the pursuers that it ought to have been completed on the Friday, if the defender had not broken his contract to take delivery as fast as the ship could give it, and he claims demurrage from Friday morning.

I think the contract was to deliver and receive as alone delivery could be given and received at the place where it was contracted to be given and received. Here then were rails coming down to the ship's side, and delivery was given and received in trucks on the rails provided by the railway company. Any other mode would have been contrary to the custom of the port. "Here there can be no doubt," the Sheriff-Substitute says—[*reads concluding paragraph of Sheriff-Substitute's note*].

I should have arrived at this conclusion independently of any decision, but the point has been already determined as a general proposition by the Court of Exchequer in England, the Appeal Court, and the House of Lords, that a contract to give and receive delivery from a ship was to give and receive it according to the custom of the port. In the case of *Postlethwaite*, where that proposition was affirmed, the customary mode of giving and receiving delivery was by means of lighters. Here if you substitute trucks for lighters I cannot distinguish the case from *Postlethwaite*. There the contract was to give and receive delivery in lighters—here it is to give and receive in trucks.

As I have said, I should have arrived at the same conclusion without that case, but I regard it as entirely confirmatory of my own view.

Lord Craighill—I am of the same opinion, and I confess without any difficulty. It appears to me that the custom of the port was, to use the expression of the Sheriff-Substitute, "woven into the contract," and required to be taken into account with reference to all things pertaining to the discharge of the cargo. It was, therefore, though it is not expressed, part of the contract that delivery was to be taken in trucks, for that was the custom of the port. Now, the way in which the trucks could be got was regulated by the custom of the port. It was not in the power, and could not be matter of obligation on the part of the charterer to provide the trucks for himself; they were provided by the railway company. There was a way to be followed in the discharge of the cargo—the way of the port—and if that way was followed the consequences were to affect both parties, the ship and the charterer alike, and were not to fall unequally on either the one or the other. But if either party failed to observe the custom of the port, the consequence was to be borne by that party. The defenders are charged with causing delay; but it is shown that they did all that was incumbent on them to do by the custom, and that there was no breach and no failure on their part. I therefore concur with your Lordship that the appeal should be dismissed, and the interlocutor of the Sheriff-Substitute affirmed.

Lord Rutherfurd Clark—I have arrived at the same conclusion.

The Court dismissed the appeal and affirmed the interlocutor of the Sheriff-Substitute.

Counsel for Pursuers (Appellants)—Asher, Q.C.—Dickson. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for Defenders (Respondents)—Mackintosh—Low. Agents—Ronald & Ritchie, S.S.C.