121 and 122 of the First Schedule to the 1907 Act, and the construction of these is clearly as the Lord Ordinary has found.

Accordingly on the whole matter I propose that we should refuse the reclaiming note.

LORD KINNEAR—I agree with your Lordship, and only add that I cannot think that there is any sufficient ground for construing a repealing statute by usage which may have followed upon the statute which has been repealed. It has been held that the ambiguous provisions of a statute may be construed with reference to usage which has followed on the statute itself, but even in that case the usage, as is explained in the well-known case of *The Clyde Navigation Trustees* (1883, 10 R. (H.L.) 77), is only an aid to interpretation, more or less valuable according to the circumstances, and cannot absolve the Court from the duty of determining the true construction of the statute for itself when it comes into controversy. But so far as I know it has never yet been held that usage which has followed upon one Act can construe a more recent Act which, for aught we can tell, repeals it just because of the practice that may have followed upon it. Upon the construction of the statute itself I entirely agree with your Lordship.

LORD MACKENZIE—I agree with your Lordships.

LORD JOHNSTON was sitting in the Valuation Appeal Court.

The Court adhered.

Counsel for Complainer (Reclaimer)—Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for Respondent—Horne, K.C.—M. P. Fraser. Agents—Erskine Dods & Rhind, S.S.C.

Wednesday, December 13.

SECOND DIVISION.

[Sheriff Court at Glasgow.

R. B. BALLANTYNE & COMPANY *v.* PATON & HENDRY.

Ship — Charter-Party — Construction — "Cargo to be Discharged Free of Expense to Steamer, with Use of Steamer's Winch if Required"—Liability for Damage to Steamer in Course of Discharge.

A charter-party provided — "12. Cargo to be . . . discharged free of expense to steamer, with use of steamer's winch and winchmen if required."

Held that the shipowner's common law liability for the discharge was not transferred to the charterers by the clause quoted, so as to render the latter responsible for damage caused to the vessel during the discharge.

Reparation — Ship — Damage to Ship in Course of Discharge—Liability of Charterers — Employment and Payment by Charterers of Stevedores—Relevancy.

The owners of a vessel raised an action against the charterers in respect of damage caused to the vessel in the course of discharging under the charter-party, and averred that the stevedores and owners of the crane engaged in the discharge, by whose negligence the damage was caused, were employed and paid by the charterers.

Held that these averments were not relevant to infer liability on the part of the charterers, and action *dismissed.*

R. B. Ballantyne & Company, owners of the s.s. "Bessie Barr," *pursuers*, raised an action in the Sheriff Court at Glasgow against Paton & Hendry, shipowners there, *defenders*, concluding for payment of £270 in respect of damage sustained by the "Bessie Barr."

By charter-party dated 30th March 1909, under which the pursuers chartered the "Bessie Barr" to the defenders to carry a cargo of stones from Portland to Glasgow, it was provided, *inter alia*—"12. Cargo to be loaded, stowed, and discharged free of expense to steamer, with use of steamer's winch and winchmen if required."

A cargo of stones was duly carried from Portland to Glasgow, where in the course of discharge damage was sustained by the vessel, by the falling of a large stone as it was being taken out of the hold.

The pursuers averred—"(Cond. 1) It was provided (by the charter-party) that the cargo was to be loaded, stowed, and discharged by the charterers, and free of expense to the steamer. (Cond. 3) The defenders, in carrying out the terms of the charter-party by themselves or others for whom they are responsible, employed and paid the stevedores and owners of the crane engaged in the discharge of the vessel, and they are liable for the fault of persons employed in doing such work. (Cond. 4) Said accident was due to the fault and / or negligence of those discharging the said vessel, for whom the defenders are responsible under said charter-party, in not taking precautions to see that the said stone when in course of being hoisted was kept clear of the combings, and further, that the hoisting was carried out cautiously, so that, if there was the risk of the stone catching on the combings, same should have been released and hoisting stopped before the chain had been broken."

The defenders averred—" (Ans. 1) . . . By the said charter-party it is provided that the loading, stowing, and discharging is to be done by the pursuers, but free of expense to the steamer."

The pursuers pleaded, *inter alia*—"(1) The defenders having undertaken by the terms of said charter of pursuers' vessel to discharge the cargo carried, and same having been done in such negligent manner as to cause the loss and damage claimed by the pursuers, decree should be granted therefor with interest and expenses, as craved."

The defenders pleaded, *inter alia* — "(1) The action is irrelevant."

On 11th November 1910 the Sheriff-Substitute (FYFE) sustained the defenders' first plea-in-law and dismissed the action.

Note.—"The case, as laid by the pursuers, is that, under the charter-party founded on, the defenders had relieved the ship and themselves accepted liability for all occurrences in any way arising out of the discharge of the s.s. 'Bessie Barr,' or in other words, that the charterers had insured the ship against structural damage which might occur in the course of the discharge. I do not think this proposition is sound.

"There is, I think, no doubt about the general maritime law, that the work of loading and discharging falls within the ship's duty unless there is some special contract to the contrary. All the operations connected with the loading and discharging are ship's operations, whether these are actually conducted (as in theory, perhaps, these operations always are) by the ship's crew, and with the ship's appliances, or (as in practice they generally are) conducted by stevedores with the aid of appliances outside the ship.

"The mere fact that some other person is to relieve the ship of the expense connected with the discharge of some duty of the ship does not affect the legal situation at all (*Maciver* v. *Tate*, 1903, 1 K.B. 362).

"The charter-party founded on in this case is an ordinary voyage charter, and there is nothing in it which saddles the charterers with liability for occurrences which might happen in the course of the discharge. The pursuers' paraphrase of the charter-party (condescendence 1) is 'that the cargo was to be loaded, stowed, and discharged by the charterers.' But the charter-party itself does not say so. What it does say (clause 12) is 'cargo to be loaded, stowed, and discharged free of expense to steamer, with use of steamer's winch and winchmen if required.' This clause deals only with expense, and it means no more than that the charterers are to bear, *inter alia*, the expense attending the discharge. It does not affect the legal position at all. The shipowner may have a claim against somebody, but in my opinion he has stated no relevant claim against the charterers."

The pursuers appealed to the Sheriff (MILLAR), who on 15th February 1911 adhered.

Note.—"The ordinary rule of law is that the shipowner is bound to deliver the goods from the side of his ship. In the charter-party which has been produced the parties have embodied this rule into the written contract. In article 4 it is said that the 'cargo to be brought to and taken from alongside free of expense.' Article 12 seems rather to be a method of settling the charges which were to be paid by the charterers to the shipowners, and does not affect this condition. Accordingly I agree with the learned Sheriff-Substitute in his interpretation of the contract. But the agent for the appellants referred to article 3 of the condescendence. That article seems to me to be too vague to support the pursuers' position. It is not said how the defenders came to accept the responsibility of discharging the goods from the vessel itself, contrary to the terms of the written contract in the charter-party. The appellants' agent referred to the terms of the answer 1, but it seems to me that in considering the question of the relevancy of the action regard should only be taken of the averments in the condescendence itself. However, even if notice is taken of the averment in that answer, it does not seem to me to carry the pursuers very far, as there is no explanation of the circumstances under which the receivers undertook the responsibility of discharging the goods from the ship. I think, therefore, the pursuers' case is irrelevant, and that the learned Sheriff-Substitute's judgment should be affirmed."

The pursuers appealed and at the hearing moved for leave to amend the record by deleting from condescendence 4 the words "under said charter-party," and by substituting in their first plea, for the words "by the terms of said charter of pursuers' vessel" the words "as condescended on."

Argued for the pursuers (appellants)—(1) The natural meaning of clause 12 of the charter-party was that the liability for the discharge of the vessel was transferred from the pursuers, on whom it admittedly lay at common law, to the respondents. The last words of the clause providing for the use of the steamer's winch and winchmen if required, could not otherwise have any meaning, for the pursuers did not require to contract for the use of their own winch. (2) But whatever was the meaning of the charter-party, the record as amended relevantly averred that the defenders had in fact undertaken the discharge and carried it out by stevedores employed and paid by them. They had thus the control of the parties whose negligence caused the damage, and that was enough to subject them in liability—*Rourke* v. *White Moss Colliery Company*, 1877, 2 C.P.D. 205; *Donovan* v. *Laing, Wharton, and Down Construction Syndicate, Limited*, 1893, 1 Q.B. 629; *Cairns* v *Clyde Trustees*, June 17, 1898, 25 R. 1021, 35 S.L.R. 808; *Harris* v. *Best, Riley, & Company*, 1892, 7 Asp. Mar. Cas. 272.

Argued for the defenders (respondents)—(1) The liability for the discharge lay at common law on the pursuers, and no contract involving a transfer of that liability to the defenders could be extracted from clause 12 of the charter-party. The meaning of that clause was simply that while the pursuers remained responsible for the discharge they were to be repaid the expense thereof by the defenders, who were not, however, to be charged anything for the use of the steamer's winch or winch-men. The clause therefore dealt only with the expense and did not affect the common law liability for the discharge—*M'Iver & Company Limited* v. *Tate Steamers, Limited*, 1903, 1 K.B. 362. If the clause was susceptible of two constructions, that would be preferred which was consistent with the com-

mon law. There was therefore no relevant case founded on the charter-party. (2) Nor was the case attempted to be made independently of the charter-party relevant even with the amendment proposed. It was merely averred that the defenders employed and paid the stevedores, &c., but that did not give them control of the discharge—Carver, Carriage at Sea (5th ed.), secs. 273-4—which alone could involve them in liability—*Quarman* v. *Burnett*, 1848, 6 M. & W. 499; *Blakie* v. *Stembridge*, 1859, 6 C.B. (N.S.) 894.

LORD GUTHRIE—The case was presented by the appellants under two heads. The first view was founded on the terms of clause 12 of the charter-party, and they argued alternatively that, whatever the charter-party provided, the charterers did in fact undertake the discharge of the vessel, and employed and paid the stevedores, thus becoming responsible for the damage which is alleged to have been caused to the ship by the falling of a stone as it was being taken out of the hold.

It was conceded by Mr Murray that under the record as originally framed the alternative case was neither averred nor pled so as to entitle the pursuers to inquiry, and he accordingly proposed to amend by deleting from condescendence 4 the words "under said charter-party" and by substituting in the first plea-in-law for the pursuers the words "as condescended on" for the words "by the terms of said charter of pursuer's vessel." I do not think that this part of the case is relevantly averred even on the record as so amended. There is no averment that the charterers undertook the control of the discharge of the cargo. Even if they employed and paid the stevedores, this will not by itself infer liability for damage in carrying out the discharge—*Blakie* v. *Stembridge*, 1859, 6 Scott's Reps. C.B., 894; *Harris* v. *Best*, 1892, 7 Asp. 272, 274.

The remaining question arises on clause 12 of the charter-party, with which alone the Sheriffs have dealt. That clause is in the following terms—"Cargo to be loaded, stowed, and discharged free of expense to steamer, with use of steamer's winch and winchmen if required." The pursuers allege that by that clause "it was provided that the cargo was to be loaded, stowed, and discharged by the charterers." On the other hand the defenders aver that "by the said charter-party it is provided that the loading, stowing, and discharging is to be done by the pursuers" (the owners). The Sheriffs have not sustained either view, but, agreeing in result with the defenders' contention, have held that the clause in question did not vary what they have held to be the common law rule placing the duty on the owners. Now it was admitted by the appellants that the Sheriffs were right in their view of the common law rule. It is therefore for the appellants to show that in this charter-party the duty of discharging cargo was transferred to the charterers.

It is common ground that if the clause had stopped at the words "free of expense to steamer" the duty of discharge would have rested as at common law, but it was said that the concluding words "with use of steamer's winch and winchmen if required" can only mean that the charterers were to discharge the vessel, because if that duty rested on the ship there could be no case in which a requisition could be intelligibly made for the use of the steamer's own winch and winchmen. It seems to me that the respondents only need to suggest a reasonable interpretation of this clause which would be consistent with the common law duty, because if the common law is to be altered by the terms of the charter-party, that must be done by a clause which admits of no other reasonable interpretation. The defenders suggest that the clause was inserted to prevent the owners, if their winch and winchmen were used, claiming payment for them, in addition to being relieved of all other expense of discharging. This is an intelligible explanation of the clause, consistently with the maintenance of the owner's common law duty. I therefore think that the view which the Sheriffs have taken is sound. The result will be that the interlocutors of the Sheriffs will be affirmed and the appeal dismissed.

LORD DUNDAS—I agree, and I think the point is a very short one. It is plain, and indeed was not really disputed, that on the record, as originally framed, the case turned entirely on clause 12 of the charter-party. I concur in thinking that on the case thus intended to be presented, the Sheriff is right, and that the clause in question makes no alteration on the common law rule that the duty of discharging rests on the ship and not on the charterer. As regards the amendment proposed and allowed at the bar, I cannot see that it makes the matter any better. I do not think that a record framed to meet one case can be so easily adapted to the requirements of another as by the simple deletion of four words in the condescendence and of a few more in one of the pleas-in-law, with the effect of making the pleadings more vague than they were. This case which the appellants endeavour to make independently of the charter-party would have needed very careful and specific averments, and as these have not been made that case must fail. I cannot avoid the impression that if the facts had truly admitted of such averments being made they would have been tendered.

The LORD JUSTICE-CLERK concurred.

LORD SALVESEN was sitting in the Valuation Appeal Court.

The Court adhered.

Counsel for Pursuers and Appellants—Murray, K.C.—C. H. Brown. Agents—J. & J. Ross, W.S.

Counsel for Defenders and Respondents—Sandeman, K.C.—Russell. Agents—Webster, Will, & Co., W.S.