In addition to protecting the rights of creditors and of the public the Court must be satisfied that the proposed reduction does not prejudice the rights of the shareholders as a whole or of any individual shareholder. I have already referred to what seems to me to be necessary in order to protect the respondent. I am bound to say, however, that the notice to the shareholders calling the meeting to consider the proposed resolution for reduction of capital is open to criticism. It would, I think, have been better if the directors had reminded the shareholders of the fact that the balance-sheet did not show that any capital had been lost, and if they had informed the shareholders that valuations had been obtained which, if accurate, pointed to the same result. It would then have been apparent on the face of the notice that the shareholders were being asked to proceed purely upon the opinion of the directors —a course which seems to me to be neither unusual nor unreasonable for a shareholder to adopt. Any shareholder who had doubts as to the propriety of reducing the capital could then have attended the meeting and asked the chairman for further information, though probably he would have been told that the matter was one in regard to which it was inexpedient to state details, and that the shareholders must trust to their directors. While I think that the information given to the shareholders as a whole was too scanty, I have come to the conclusion that it would not be a sound exercise of judicial discretion to compel the company to initiate new proceedings. On the contrary, I am satisfied that no injustice will be done to the respondent or anyone if the proposed reduction of capital is confirmed, subject to the conditions above referred to.

I accordingly advise your Lordships to confirm the reduction of capital and to approve of the minute set forth in the petition, but to declare that said confirmation and approval shall not take effect unless and until the petitioners shall by special resolution have altered the articles of association in such manner as will in the opinion of the reporter prevent the said reduction and proposed re-arrangement of capital from unfairly affecting the interests of the respondent.

LORD JOHNSTON—The one point which I felt in the course of the discussion to be clear was that the notice which initiated this proceeding was improperly misleading, because as far as I could see at the time that it was issued the only independent opinion or information which the directors had in their pockets showed something totally different from the facts represented in that notice. I was therefore disposed in the course of the discussion to think that this particular application should not be granted, but that while the petition might be sisted to allow of other proceedings being initiated by the company, short of such proceedings we should not give the sanction craved. But I have only come into this case at the eleventh hour. I did not hear the original discussions, and I feel therefore that I should acquiesce, as I readily do, in the course which your Lordships propose to take, because you have much more thorough knowledge of the situation which has been created before us.

LORD PRESIDENT—I agree in the opinion of Lord Skerrington, which I have had an opportunity of reading. We shall therefore pronounce an interlocutor in the terms suggested by his Lordship.

LORD MACKENZIE was not present at the hearing.

The Court pronounced this interlocutor—

". . . Confirm the reduction of capital resolved on by the special resolution passed on 3rd and confirmed on 18th February 1914, mentioned in the petition: Approve of the minute set forth in the petition . . .: Declaring, however, that said confirmation and approval shall not take effect unless and until the petitioners shall by special resolution have altered the articles of association in such manner as will in the opinion of the reporter prevent the said reduction and proposed re-arrangement of capital from unfairly affecting the interests of the . . . respondent; and remit of new the proceedings to Sir George M. Paul accordingly, with powers, and to report. . . ."

Counsel for the Petitioners—Clyde, K.C.—Wilton. Agents—Davidson & Syme, W.S.

Counsel for the Respondent — Murray, K.C.—Smith Clark. Agents—J. & D. Smith Clark, W.S.

Friday, February 26.

EXTRA DIVISION.

(Before Lord Dundas, Lord Mackenzie, and Lord Cullen.)

DAMPSKIBSSELSKABET SVENDBORG *v.* LOVE & STEWART, LIMITED.

Ship—Charter-Party—Demurrage—Discharge with Customary Steamship Dispatch according to Custom of Port—Strike at Charterers' Yard.

A charter-party provided that a steamer should proceed to one of several ports and there discharge a cargo of pit-props with customary steamship dispatch and according to the custom of the port; time for discharging should not count during the continuance of a strike or lock-out of any class of workmen essential to the discharge of the cargo; a strike or lock-out of shippers and/or receivers' men only should not exonerate the charterers from any demurrage for which they might be liable under the charter if by the use of reasonable diligence they could have obtained other suitable labour.

The customary method of discharge of pit-props at the port was proved to be into railway waggons at the

quay. The vessel's discharge was delayed eleven days beyond the time necessary to discharge, according to the ordinary rate of delivery, owing to refusal of the railway company at the port to supply trucks to convey the pit-props to the charterers' yard. In an action for demurrage it was proved that the railway company's refusal to supply the trucks was owing to the charterers' inability to receive the pit-props at their yard through a strike of their workmen. *Held* that the receiving of the goods in the charterers' yard was no part of the operation of discharge; that the workmen at the charterers' yard were not workmen essential to the discharge; that the charterers had not in any event shown reasonable diligence to obtain other suitable labour for the disposal of the cargo whether in their own yard or elsewhere; and accordingly that they were liable to the shipowners in demurrage.

Ship — Charter-Party — Freight — Contract to Pay Freight for In-taken Piled Fathom — No Reliable Measurement at Port of Loading.

A charter-party stipulated for freight on a cargo of wood-props at so much per in-taken piled fathom of a certain size. The props were brought down in lighters by the charterers from Lake Ladoga to Petrograd, the port of loading. The cargo was measured by the charterers at Lake Ladoga. They refused to make a second tally at the port of loading, and inserted the measurement taken at Lake Ladoga in the bill of lading, which the master signed under protest. The ship took a measurement of the cargo at the port of loading at in-taking which differed from that in the bill of lading. The ship sued the charterers for the difference of freight arising out of the difference in the measurements. *Held* that, inasmuch as the owners of the ship had failed to bring evidence of the accuracy of their measurement at in-taking, the measurement admitted by the charterers must be taken as the basis for freight.

The owners of the steamship "Chassie Maersk," *pursuers*, brought an action against Messrs Love & Stewart, Limited, pit-prop importers, Glasgow, *defenders*, concluding (1) for £260 damage incurred through undue delay at the port of discharge, and (2) for £87 for balance of freight.

The defenders pleaded, *inter alia*—"3. Any delay in regard to the discharge of the cargo having been occasioned by a strike of the defenders' employees, and not by any circumstance for which the defenders are responsible, the pursuers are not entitled to damages for detention. . . . (6) The defenders having paid freight on the quantity of cargo shipped, *et separatim* on the quality set forth in the bill of lading, they are entitled to be assoilzied from the second conclusion of the summons."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (DEWAR), who on 3rd April 1914, after a proof, decerned against the defenders for payment to the pursuers of the sum of £220, with interest as concluded for, in full of the conclusion for demurrage, and the sum of £87 as concluded for in full of the conclusion for freight.

Opinion. — "*Demurrage.* — The 'Chassie Maersk' was chartered by the defenders to bring, and did bring, a cargo of pit-props from St Petersburg to Granton. In ordinary circumstances she would have discharged in about five days, but owing to a strike among the workmen in the defenders' woodyard they had difficulty in disposing of the cargo, and the vessel was delayed for a considerable time.

"The charter-party, which is dated 13th March 1913, provides (I omit all reference to loading as the question only arises on discharge) that the cargo was to be 'discharged with customary steamship dispatch, as fast as the steamer can deliver, during the ordinary working hours of the ports, but, according to the custom of the ports, Sundays, general or local holidays (unless used) excepted. Should the steamer be detained beyond the time stipulated as above for discharging, demurrage shall be paid at twenty pounds per day, and *pro rata* for any part thereof.

"There being no lay-days specified in the contract it was the duty of the defenders to perform their part of the discharging within a reasonable time—that is to say, a reasonable time in the circumstances which then existed, even although the circumstances were unusual. The pursuers say that the defenders have failed to do so and are consequently liable in damages.

"The defenders admit that the vessel was detained, but they deny that they are responsible for such detention, because they say it was caused by a strike which rendered it impossible to discharge the cargo with ordinary dispatch, and they found upon clause 5 of the charter-party, which provided (I again omit reference to loading)—'If the cargo cannot be discharged by reason of a strike or lock-out of any class of workmen essential to the discharge of the cargo, or by reason of epidemic, the time for discharging shall not count during the continuance of such strike or lock-out or epidemic (a strike or lock-out of . . . receivers' men only shall not exonerate them from any demurrage for which they may be liable under this charter if by the use of reasonable diligence they could have obtained other suitable labour).'

"The facts upon which the question of the defenders' liability turns are briefly these—There are two methods of discharging pit-props customary in Granton docks. At the middle wharf, where small vessels can be accommodated, the props are taken from the vessel and piled upon the quay; and at the west wharf, where the 'Chassie Maersk' was berthed, there being no space on the quay for piling, the props are placed upon railway waggons and taken to any destination the receiver may direct. The defenders usually direct them to be taken to their woodyard, about a quarter of a mile from

the dock; but on the occasion in question there was a strike among the men in their yard, and although there was no difficulty in removing the props from the ship to the railway waggons, the defenders could not send the waggons to their yard because their men would not unload them. The defenders disposed of part of the cargo by dispatching it direct from the ship to a colliery, but they did not succeed in disposing of it all in this or any other way, and the vessel was detained until the strike terminated.

"In these circumstances the first question is whether the strike in the defenders' woodyard may fairly be regarded as a strike of workmen 'essential to the discharge of the cargo' within the meaning of the contract? I do not think it can. The men on strike were probably essential to the *disposal* of the cargo in the yard, but they were not essential to the *discharge* of it from the ship. That was done by dock labourers, and there was no strike among them. To 'discharge' a cargo means to deliver it over the side of the ship. It is a joint operation in which both the shipowner and the consignee are concerned. The one delivers and the other receives the cargo, and when it is received the ship is 'discharged.' It is no concern of the shipowner how the consignee may dispose of it—he may or may not take it to his yard—that is his own affair, and is no part of the operation of discharging. I do not think that the pursuers in this case took the risk of any strike except a strike among the dock labourers who actually received the cargo from the ship. The case of *Langholm Steamship Company* v. *Gallacher*, 2 Irish Reports (1911), p. 248, appears to me to be in point. In that case a strike among carters rendered it impossible to accept delivery of the cargo, there being no space for it in the docks or means of taking it away when tendered over the side of the ship. It was held (under a strike clause similar to this) that carters were not a class of workmen essential to the discharge of the cargo within the meaning of the clause, and that the shipowners did not take the risk of a strike except among dock labourers, who alone were essential, and that the taking away of the cargo in carts was no part of the operation of discharging.

"But the defenders argued that the customary method of discharging pit-props at Granton was to convey them from the docks to their woodyard, and as the obligation to discharge was indefinite as to time and qualified by reference to the custom of the port, every impediment arising out of the custom which they could not overcome by reasonable diligence ought to be taken into account. But I do not think that it is the custom of the port to convey props to the consignee's yard. It is true that the defenders usually directed the railway company to take the waggons to their yard. It apparently suited them to do so, as it probably suited other consignees to transmit goods to their premises. But that was only one way of disposing of the cargo, and cannot, I think, be regarded as a custom of the port. The custom of the port was, as I have said, to pile the props on the quay or load them on waggons. There it ended. In *Coverdale* v. *Grant*, 9 App. Cases, 470, a ship was chartered to load iron ore 'in the customary manner . . . cargo to be supplied as fast as steamer can receive . . . except in case of hands striking work, or frost or flood, or any other unavoidable accidents preventing the loading.' The charterer had iron ore in a canal outside the dock. Frost prevented the transit of this ore by water. It was possible, though expensive, to bring it by land. It was held that the charterers were liable for delay as the frost did not prevent the loading but only the transit of the cargo to the place of loading by one of the ways usual at the port. I think that principle is applicable here. The strike in the defenders' yard prevented the disposal of the cargo in one of the usual ways. But there were other ways of disposing of it. Part of it was in point of fact sent to a colliery direct from the ship, and if the defenders had used reasonable diligence I am of opinion that they could have disposed of it all in the same way. There was a brisk demand from the collieries at the time owing to the strike. Mr Reid admits that they were getting good prices, but it apparently did not occur to him to offer special terms in the circumstances. There is no evidence that any special efforts were made at all. The defenders appear to have been willing to sell if they got good prices, but not otherwise. I do not think that they were entitled to adopt that attitude at the expense of the pursuers. Then it appears that they were dispatching pit-props from two of their own vessels—the 'Faerder' and the 'Sheaffield,' while they kept the 'Chassie Maersk' waiting. It was said that the props from these vessels were of more suitable lengths, but I am not satisfied that that is the correct explanation. Mr Reid stated—'I admit that there were sent away from Granton to various collieries consignments of props from other vessels than the "Chassie Maersk" at a time when the "Chassie Maersk" was standing and not being discharged. My explanation is that the props were of more suitable lengths for the orders we had on hand.' But he does not appear to have made very careful inquiry on this matter, because he is asked —'(Q) Are there not various orders prior to this period for props of the lengths which the "Chassie Maersk" was carrying?—(A) I am not prepared to say. . . . (Q) Taking an example, have you any explanation why on 31st May you confirmed having an order for props of 6½ feet, and props of that size were on the "Chassie Maersk," and were not being discharged?—(A) I cannot give any explanation.' And finally he admitted that 'the collieries were taking any size we sent them, but they had a preference for what was nearest their dimensions.' If good prices were being obtained and collieries were taking any size sent them, I do not think it would have been difficult to dispose of this cargo if the defenders had made any real effort to do so. But even if they had not succeeded in selling it all I can see no reason why they should not have

stored it. Mr Wood says—'We made no attempt to find any place where we could discharge the props because we knew that it could not be done.' But one never knows what can be done until one tries. Most things can be obtained if one is willing to pay the price, and I see no reason why space to accommodate pit-props should not be found by anyone who looked for it and was willing to pay for it. They are light and easily handled and do not require to be under cover. Any field would do, and it is out of the question to say that there was no field available. Sooner or later the whole cargo found its way to the collieries, and I see no reason why, by arrangement, it should not have been stored temporarily at or near some of them. It is admitted that the workmen made no objection to the wood being handled except in the yard. I think the admission that no attempt was made to find any place to discharge the cargo shows that the defenders did not use reasonable diligence.

"Mr Sandeman referred me to the case of the '*Alne Holm*,' 1893, Probate, p. 173, where the charter-party provided that the cargo was to be discharged with 'the customary steamer dispatch of the port . . . strikes, lock-outs, or combination of workmen . . . not to count as part of the discharging time . . . the usual custom of the wood trade to be observed. . . . ' There was a strike among men in the timber trade who discharged the lighters, so that the lighters were not available, and it was held that the defenders were relieved from liability, the ground of judgment being that 'the only customary mode of discharging of such a cargo as that of the "Alne Holm" was by lighters in which the timber is lightered to Gloucester, and it is clear to us that the parties contemplated that discharge should take place in that manner, and in fact it was the only practicable way in which it could be done.' But in the present case I do not think that the parties had in contemplation that the defenders were to dispose of the cargo in their yard, nor was that by any means the only way in which it could have been disposed of.

"The defenders further founded on the fact that the railway company had refused to supply waggons to convey the props to their yard, and they argued that this was a matter for which they were not responsible under their contract. As the contract is silent as to the time within which they were to discharge the cargo their obligation was only to discharge in a reasonable time under the circumstances, and if the difficulty in obtaining waggons had not been caused or contributed to by the defenders themselves I do not think that they could have been held liable — *Lyle Shipping Company* v. *Corporation of Cardiff* [1900], 2 Q.B. 638. But I think the failure to get waggons was really their own fault. The railway company refused to send waggons to the yard, where they admittedly could not be unloaded, but they were quite willing to send them to any other place the defenders might name, and did in point of fact send them to the collieries when asked. There was no scarcity of waggons and no refusal on the part of the railway company to supply them. They offered them for transit but declined to supply them for the purpose of storing pit props. In these circumstances it is for the defenders to prove that they 'had done the best in the actual circumstances to make the appliances of the port available' —'*Arne*' [1904], P. 184. In my opinion they have not done so. If they had used reasonable diligence they would have discovered means of disposing of the cargo, and would have had no difficulty about waggons. I am therefore of opinion that the defence on the question of demurrage has failed and that the defenders are liable in damages.

"If I am right in thinking that the defenders are liable, the next question is the amount of damages.

"The 'Chassie Maersk' left St Petersburg on 17th May. Parties had arranged that she should proceed to Granton Roads and there wait instructions, as the defenders had not decided whether she would be discharged at Bo'ness or Granton. She reached Granton Roads at 4·10 p.m. on Saturday, the 24th. The captain came ashore and telegraphed to the defenders at their Glasgow office, but it was after office hours and the message was not received until Monday morning. Instructions were sent on Monday afternoon and the vessel was berthed in Granton Docks the same evening, and ready to discharge on Tuesday morning, the 27th. The pursuers argued that Monday, the 26th, was lost through the fault of the defenders in respect that they ought to have anticipated the arrival of the ship and left instructions at the docks or with the pilot. If they had done so the pursuers say that she could have been berthed on Saturday and ready to unload on Monday morning. The defenders deny that there was any obligation upon them to make arrangements before they received notice of the actual arrival of the vessel, and they explain that it would have been inexpedient for them to decide until the last moment whether to send the vessel to Bo'ness or Granton—everything depended on the progress of the strike. I think this is a narrow point. The defenders must have known that there was a probability of the vessel arriving after office hours on Saturday, and it would have been easy, and I think reasonable, for them to have left a message at Granton which the captain could have received, and if they had done so discharging could have commenced on the Monday. And I doubt whether it was legitimate to take a strike which did not concern the pursuers into consideration. But, on the other hand, they were not, I think, legally bound to make arrangements or take action before they received notice that the ship had arrived. Something unforeseen might have occurred to detain her, and arrangements which may have involved cost would be rendered useless. And as they did not, in fact, receive notice in the ordinary course of business until Monday, I cannot hold them responsible for the loss of that day. The first day, therefore, which I take into account is Tuesday, the 27th May. Discharging ought

to have commenced then. Parties are I think agreed—in any case it is proved in evidence — that discharging should have been completed in five days—that is to say, on Saturday, the 31st. It was not, in fact, completed until Wednesday, the 11th of June, at 5·45 p.m. The 'Chassie Maersk' was therefore unduly detained for eleven days, which, at the rate of £20 per day, represents a loss of £220 to the pursuers, and I accordingly grant decree for that amount.

"*Freight.* — I now come to the other branch of the case—the question regarding the balance of freight. The pursuers say that the cargo consisted of 653 fathoms, while the defenders maintain that it was 595 fathoms, and they have only paid freight on that amount. The claim is for the difference between these two amounts, viz., 58 fathoms at £1, 10s. per fathom—£87.

"The dispute on this question of fact arose in this way. The pit-props in question are taken from a forest which is situated near Lake Ladoga, about 100 miles from St Petersburg. When the wood is cut it is customary to bring it down to the shore of the lake, where it is measured. After the quantity is ascertained it is then put upon lighters. The lightermen give certificates or bills of lading for the amounts, and the cargo is taken down to St Petersburg, where it is transferred to the steamer from the lighters. The defenders say that the cargo in question was carefully measured in this way, and that they received bills of lading from the lightermen who conveyed it certifying the amount to be 595 fathoms. But the shipowner does not usually accept the up-country measurement, at which he is not represented, and takes a tally of his own at the ship's side as the wood is being put on board. The pursuers measured this cargo in that way conform to the terms of the charter-party, which provides 'per in-taken piled fathom of 216 cubic feet.' The tally was taken by the ship's officers, assisted by two independent professional checkers engaged and paid by the pursuers. The wood is measured in a double frame made of wood, 7 feet long by 3 feet high. The props are placed in this frame until it is full, and then they are slung into the ship. The cubic contents of the frame are ascertained by multiplying the length of the frame by its depth and the length of the props. That is what is known as a 'pile of in-taken fathoms.' The captain asked the defenders' representative at St Petersburg to send men to check the measurements as the wood was taken on board, but he said that he already knew the accurate measurements, viz., 595 fathoms, which had been taken up country, and had bills of lading for it and did not require to do it again. When the pursuers' tally was completed it showed a cargo of 653 fathoms. The defenders' representative challenged the accuracy of this and insisted on his own figures being put in the bill of lading, and this was done. But the pursuers protested, and the captain signed 'under dispute for quantity.'

"In these circumstances the question is, Whose measurement is correct?

"The first and second mates gave evidence for the pursuers (the evidence of the first mate was taken on commission). They both describe the manner in which the measurement was taken and speak to the accuracy of their figures. They both kept tally books in which they jotted down the number of fathoms as they were put on board [see also Lord Dundas' opinion on this evidence], and every night the chief mate added up the figures and noted the sum total in another note book which is produced, No. 132 of process. The tally books have gone amissing and are not produced, but they were examined by Mr Wark, Messrs Boyd, Jameson, & Young's assistant, and he found that the figures noted in them correspond with the figures in No. 132 of process. This, together with the fact that the 'Chassie Maersk' was fully loaded, and is capable when fully loaded of carrying a cargo of 653 fathoms, is practically the whole evidence for the pursuers. They put in process certificates by the independent checkers, but these checkers were not examined as witnesses and the documents were not proved, and I do not therefore take them into consideration.

"It is possible that the pursuers' figures may not be accurate, because the method of measurement, although customary, is necessarily rough and ready, especially with props of different lengths; but I see no reason to doubt that the tally was quite *bona fide* and the evidence honestly given.

"The defenders do not dispute that the pursuers adopted the customary method of measuring at the ship's side, but they led a good deal of evidence to show that it could not be accurate. That is probably true. If the props had been all of the same size each frame load would have been of the same weight. But they are of different lengths, and although the men loading endeavoured to keep those of similar lengths together that was not easy in the limited space, and it was not disputed that estimates and allowances had to be made which are not consistent with complete accuracy. The defenders also led evidence to show that the up-country system of measurement was much more likely to be accurate. I think that that is also probably true. The system is to pile the props on the shore of the lake, sort them out into similar lengths, and measure them in the presence of the men who cut them and who are paid by measurement. That is the usual system, and the probability is that it is accurate, and the lightermen appear to accept it as accurate and grant bills of lading without question; and if the defenders had proved by competent evidence that the props in question were measured in that way I should have been disposed to accept their measurements. But I do not think they have. They produced certificates dated February 1914 which are said to be from the men who measured, but the men did not appear as witnesses. They also produced bills of lading said to be granted by the lightermen, but the lightermen are not examined. These documents were not proved, and cannot therefore be received in evidence—*New Line Steamship Company* v. *Bryson & Company*, 1910 S.C.

409. Mr Saxbeck, the defenders' superintendent at Lake Ladoga, gave evidence and described the system, but he did not make the measurements and obviously did not know anything about them, for he thought it necessary to obtain a certificate from the actual measurer. I think the defenders have failed to prove the quantity of props they aver were put upon the lighters at Lake Ladoga, and even if they had proved that, they have not proved that the same quantity was put upon the 'Chassie Maersk.' The lighters came down to St Petersburg in October and lay all winter in dock, and it appears to be customary to permit the lighters to use the props for firewood, and it is at least possible that some of it might go amissing in other ways. Perhaps that is not very probable, but the possibility of it has not been excluded. It is possible, as I have said, that the pursuers' figures may not be quite accurate, still they are at least substantially accurate, and they were ascertained by the method provided for in the charter-party and in accordance with the usual custom. The defenders were invited to check them and declined to do so. They relied upon their own figures, and have not proved that they were correct. I am therefore of opinion that they have failed in this branch of the case also.

"The defenders argued that they are only liable for freight on the quantity of cargo shipped as set forth in the bill of lading. No doubt this would have been so if the pursuers had agreed that the figures in the bill of lading were correct, but they protested against the figures at the time, and the captain signed as I have said 'under dispute for quantity;' and further, the bill of lading states that 'weight, measure, quality, and condition' are unknown. It was settled in the case of *Jessel* v. *Bath*, 1867, 2 Exch. 267, that a person signing a bill of lading under such circumstances does not bind himself to the quantity mentioned therein.

"On the whole matter I am of opinion that the pursuers are entitled to decree for (1) £220, and (2) £87, with interest, and expenses."

The defenders reclaimed and argued—(1) *On the Question of Demurrage.*—The defenders were bound to discharge with customary dispatch. Customary dispatch at Granton meant by means of waggons. The supply of waggons was, however, conditional on the capacity of the charterers to take discharge at their yard. Here there was no provision for lay-days, and therefore no absolute and unconditional duty on the charterer to take discharge within a fixed period. The charterers' part of the duty of discharge was merely to take reasonable means to provide waggons in the circumstances then existing, and the means by which and the conditions upon which waggons might be provided were among the "circumstances then existing," and subject to the same standard of reasonableness—*Postlethwaite* v. *Freeland*, 5 A.C. 599, *per* Lord Selborne at 608, Lord Hatherley at 611, and Lord Blackburn at 613; *Ford* v. *Cotesworth*, 1868, 4 Q.B. 127; *Hulthen* v. *Stewart & Co.*, 1902, 2 K.B. 199, *per* Collins, M.R., at 204, and 1903 A.C. 389, *per* Lord Halsbury at 391. The *onus* was on the pursuers to show that the defenders had not exercised reasonable diligence—*Hick* v. *Raymond & Reid*, 1893 A.C. 22, *per* Lord Herschell at 28 and 32. The immediate reason for the failure to discharge was not the strike at the defenders' yard, but the declinature of the railway company to give the means of discharge in the customary manner, *i.e.*, by waggons. In *Wyllie* v. *Harrison*, October 29, 1885, 13 R. 92, 23 S.L.R. 62, the charterers were relieved because of a failure in the supply of waggons as here. So also in the "*Alne Holme*," 1893 Prob. 173, *per* Gorell Barnes, J., at 178, where there was a failure in the supply of lighters. Regard must be had to the actual circumstances at the time of discharge, and also to what was customary—*The Lyle Shipping Company, Limited* v. *The Corporation of Cardiff*, [1900] 2 Q.B. 638, *per* Romer, L.J., at 648. The proximate cause of the delay must be looked to, *i.e.*, the refusal of the railway to give waggons—*Letricheux & David* v. *Dunlop & Company*, December 1, 1891, 19 R. 209, *per* Lord President at 213, 29 S.L.R. 182, at 185; *Mein* v. *Ottman*, December 11, 1903, 6 F. 276, 41 S.L.R. 144. The case of *Grant & Company* v. *Coverdale, Todd, & Company*, 9 A.C. 470, relied on by the respondents, had no application, for there there were lay-days. Neither had *Hudson* v. *Ede*, L.R., 1868, 3 Q.B. 412; *Good & Co.* v. *Isaacs*, [1892] 2 Q.B. 555; *Budgett & Company* v. *Binnington & Company*, [1891] 1 Q.B. 35; *The Sailing Ship "Allerton" Company* v. *Falk*, 1888, 6 Asp. M.C. 287; *Langham Steamship Company* v. *Gallacher*, [1911] 2 I.R. 348. The loading cases cited by the respondents were no guide. It was clear from them that the obligation to provide a cargo was absolute unless specially qualified, and this independently of the charter-party, and separate from any question of mutual duties in loading and discharging. The obligation to load was an absolute obligation on the charterer. Loading cases had nothing to do with the question what was the obligation at the other end, and had no application to the question of reasonable diligence—"*Ardan*" *Steamship Company, Limited* v. *Andrew Weir & Company*, 1905 A.C. 501, *per* Lord Halsbury, 509; *Gardiner* v. *Macfarlane, M'Crindell, & Company*, February 24, 1893, 20 R. 414, 30 S.L.R. 541; *Kay* v. *Field & Company*, 1882, 10 Q.B.D. 241; "*Arden*" *Steamship Company, Limited* v. *Mathwin & Son*, 1912 S.C. 211, 49 S.L.R. 143. The case of "*The Arne*," 1904 Probate 154, turned on its own particular circumstances, the main question being whether the shipper should not have exercised the option of taking alternative modes of discharge. The case of *Dampskibsselskabet Danmark* v. *Paulsen & Company*, 1913 S.C. 1043, 50 S.L.R. 843, also was special. The agreement here was to provide and make proper use of sufficient means of discharge within reasonable time under the circumstances then existing. Where, as here, there was in the charter-party a reference to the custom of the port, every impediment arising out of it which the charterer could not overcome by reasonable

diligence had to be taken into consideration. On the evidence the appellants gave no preference to other vessels over the "Chassie Maersk" and tried all the substitute means. In any event, clause 5 of the charter-party exempted the respondents from liability to pay demurrage, for here there had been a strike of workmen essential to the discharge within the meaning of that clause. The Lord Ordinary had gone wrong, and his interlocutor should accordingly be recalled. (2) *On the Question of Freight.*—The figure in the bill of lading was 595 fathoms, and it was for the respondents to upset that figure—Carver, Carriage by Sea (5th ed.), section 69; *M'Lean* v. *Hope & Fleming*, March 27, 1871, 9 Macph. (H.L.) 38, 8 S.L.R. 475; *Harrowing* v. *Katz & Company*, 1894, 10 T.L.R. 115 and 400; *Smith* v. *Bedouin Steam Navigation Company*, [1896] A.C. 70, *per* Lord Halsbury at 75. The bill of lading was signed under protest it was true, but it was for the master and his employers to make good the protest. They had failed to do so. The only complete tally at the first mate's end of the ship was by the independent tallyman. He was not brought as a witness. The mate's method of checking was bad. Neither party had by any evidence proved any other figure than 595—*The New Line Steamship Company, Limited* v. *Bryson & Company*, 1910 S.C. 409, 47 S.L.R. 346. The case of *Spaight* v. *Farnworth*, 1880, 5 Q.B.D. 115, per Bowen, J., at 119, had no application to the present case. The defenders should accordingly be assoilzied from the second conclusion of the summons.

The respondents argued—(1) *On the Question of Demurrage.*—If a shipowner proved that the ship took longer than usual his *onus* was discharged, and it is for the charterer to show some special circumstance which prevented him taking delivery sooner. The ordinary custom of discharge at Granton was to put the cargo over the ship's side into railway trucks. As soon as the sling went into the truck the operation of discharging was complete. There was no evidence of a custom to take the cargo to the consignees' yard. The operation of discharge was alone in question, and anything beyond that was of no moment. The strike was in the defenders' yard, and in no way prevented the discharge proper. Discharging was a joint operation, but the disposing of the cargo after discharge was a matter with which the shipowner had nothing to do, just as the providing of a cargo by bringing it to the ship's side was an operation with which the shipowner had nothing to do. This was so whether there was a time fixed for discharging or not. In the joint operation of discharging proper, the charterer was only bound, where there were no lay-days, to do what was reasonable in the circumstances, and outside that the shipowner took the risk. Further, exceptions in the charter-party applied only to the operations of loading and discharging proper, and were presumed not to apply to anything further. This was clear as regarded loading. If not so clear as regarded discharging, at all events the charterer was not excused unless he could show that circumstances quite beyond his control prevented him taking discharge—Carver on Carriage by Sea (5th ed.), sections 617 and 257. In the "*Ardan*" *Steamship Company* v. *Andrew Weir & Company* (*cit.*), and in *Gardiner* v. *Macfarlane, M'Crindell, & Company* (*cit.*), which were loading cases, it was held that the duty on the charterer to bring the cargo forward was an absolute one, and this reasoning applied directly to the present case. In all the cases cited in favour of the defenders the impediment was owing to the lack of something necessary to the actual discharging—*Grant & Company* v. *Coverdale, Todd, & Company* (*cit.*); *Langham Steamship Company* v. *Gallacher* (*cit.*); *Granite City Steamship Company, Limited* v. *Ireland & Son*, November 20, 1891, R. 124, 29 S.L.R. 115 *per* Lord Trayner; *Kay* v. *Field* (*cit.*); *Ford* v. *Cotesworth* (*cit.*); *Wyllie* v. *Harrison* (*cit.*) The preventing cause must be beyond the control of the charterer—*Holman* v. *Harrison*, March 16, 1887, 29 S.L.R. 47; *Postlethwaite* v. *Freeland* (*cit.*); *Good* v. *Isaacs* (*cit.*); *Hick* v. *Raymond & Reid* (*cit.*). Delay must not be due to the charterer's failure to do anything he could possibly have done to avoid delay—*Hulthen v. Stewart* (*cit.*). The shipowner did not take the risk of a strike which was not interfering directly with the discharge. The appellants confused the necessity for trucks with the sending of waggons to his yard. The latter operation was something after the actual operation of discharge was complete. The charterers must consider the shipowner's interests. There was no evidence to show they discharged that *onus*. On the evidence it was plain the charterers made no effort to relieve the ship. They discharged other ships that came in later. The shipowner could not know when he loaded at St Petersburg that the yard was full or that there was a strike at Granton. In *The Lyle Steam Shipping Company, Limited* v. *The Corporation of Cardiff* (*cit.*), Romer, L.J., at p. 648, said there was no absolute obligation on the charterer to have appliances ready, but that case was not against the respondents, for here waggons might have been available. The same might be said of the cases of *Postlethwaite* v. *Freeland* (*cit.*); "*Alne Holme*" (*cit.*); *The Sailing Ship* "*Allerton*" *Company* v. *Falk* (*cit.*); *Hudson* v. *Ede* (*cit.*); and "*The Arne*" (*cit.*) Even though there was a strike clause there was a duty on the charterer to do everything to avoid delay—*Dampskibsselskabet Danmark* v. *Paulsen & Company* (*cit.*) In *Letricheux & David* v. *Dunlop & Company* (*cit.*); and *Mein* v. *Ottman* (*cit.*) the only question was whether an exception clause applied, and nothing was decided affecting the present case. In *Holman* v. *Harrison* (*cit.*) as in the present case there was no real shortage of waggons at all. Accordingly apart from the exception clause no defence was open to the charterers. The strike clause, however, had no application to the present case at all. This was a printed form of charter-party and meant to be applicable to all cases of this class of charter-party. The meaning of the clause was "workmen essential to the actual

operation of discharge"—*Langham Steamship Company* v. *Gallacher* (*cit.*). That was the commercial meaning of "discharge." The case of *Steven* v. *Harris* (1887, 57 L.J., Q.B. 203) was a loading case, but showed that the strike covered by the exception clause must be one interfering with the actual operation of loading. The strike clause accordingly did not apply, and the Lord Ordinary was right in holding the respondents entitled to demurrage. (2) *On the Question of Freight.*—On this question regard must be had to the provisions of the charter-party. It showed that it was contemplated by the parties that measurement was to be taken when the cargo was taken into the ship by intaken piled fathoms. It was the duty of both parties to see that such measurement was taken. The pursuers measured according to the usual practice. The charterers on the other hand took up the attitude that no measurement should be taken by them, but that the Lake Ladoga measurement embodied in the bill of lading should stand. In the case of *The New Line Steamship Company, Limited* v. *Bryson & Company* (*cit.*), the intaken measurement was unreliable and a measurement taken at unloading was preferred. If the intaken measurement had been reliable it would have displaced the later measurement. The charterer here ought to have checked the cargo at intaking, and having failed the *onus* shifted on to him to prove the ship's measurement wrong—*Bain and Others* v. *The Assets Company, Limited*, June 4, 1905, 7 F. (H.L.) 104, 42 S.L.R. 835; *Spaight* v. *Farnworth* (*cit.*); *Merryweather* v. *Pearson & Company*, 1914, 19 Com. Cas. 402. The real question here was not how much cargo was taken on board, but how much freight was due on a proper measurement made at the port of loading. It was contrary to the terms of the charter-party to say the pursuers should have made a measurement at the port of discharge. There was in any case in the documents before the Court formal proof of measurement. The pursuers had proved an actual measurement taken. On the evidence the vessel was fully laden and capable of taking the larger number of props. As to the bill of lading it was only *prima facie* evidence against the shipowner. Where, as here, intimation was given by the ship that it would not be bound by the bill of lading, statements in it were of no value at all for or against the ship —*Merryweather* v. *Pearson & Company* (*cit.*); *Lebeau* v. *The General Steam Navigation Company*, 1872, L.R. 8 C.P. 88; *Jessel* v. *Bath*, 1867, L.R. 2 Ex. 267; Carver on Carriage by Sea (5th ed.), section 581.

At advising—

LORD DUNDAS—In this case the pursuers are the foreign owners of the steamship "Chassie Maersk" and the defenders are Love & Stewart, Limited, pitwood importers and coal exporters, Glasgow, who were charterers of the vessel. The charter-party is printed in the appendix. By its terms the parties agreed that the ship "shall proceed to St Petersburg . . . and there load . . . a full and complete cargo of short pit props, not exceeding 9 feet long," for the "Tyne (below bridges), West Hartlepool, Grangemouth, Granton, or Bo'ness, as ordered on signing bills of lading." The "Chassie Maersk" was loaded, and made the voyage to Granton. The summons seeks payment of two sums of money upon quite separate and distinct grounds. The sum first sued for is for demurrage, the second in respect of freight. The Lord Ordinary decided in favour of the pursuers upon both conclusions. The defenders reclaimed, and the case was fully argued at our bar with much citation of authority.

1. In regard to the first conclusion, it is admitted that the discharge of the vessel at Granton was delayed beyond the normal period of dispatch, and parties are agreed that if demurrage is due, which the defenders deny, the amount payable is £220, viz., £20 per day for eleven days. In my opinion the Lord Ordinary rightly gave decree for this sum.

The charter-party provides in regard to discharge, *inter alia*—"(3) The cargo to be . . . discharged with customary steamship dispatch as fast as the steamer can deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports, Sundays, general or local holidays (unless used) . . . excepted. . . . The cargo to be . . . taken from alongside the steamer at charterer's risk and expense as customary . . . (5) If the cargo cannot be . . . discharged by reason of a strike or lockout of any class of workmen essential to the . . . discharge of the cargo, or by reason of epidemics, the time for . . . discharging shall not count during the continuance of such strike, or lockout, or epidemic (a strike or lockout of the shippers' and/or receivers' men only shall not exonerate them from any demurrage for which they may be liable under this charter if by the use of reasonable diligence they could have obtained suitable labour) . . . . "

At the west pier of Granton where the "Chassie Maersk" was berthed, and with which alone we are concerned, there is no space on the quay for piling pit-props, and the customary method of discharging such a cargo is direct from the ship's side into railway waggons which convey it to its appointed destination. The defenders usually desired pit-props arriving for them to be so conveyed to their own yard, which is close to Granton Harbour, but upon the occasion in question a strike was afoot among their yardmen, and if the cargo had been brought there on the waggons the men would have refused to unload it, and probably to permit others to do so. The defenders in point of fact caused part of the cargo to be sent by rail from the quay to a colliery, but they did not succeed in disposing thus or otherwise of the remainder, and the ship was detained until the strike ended. There was no absence or scarcity of railway waggons. or of dock labourers on the quay, but the railway company declined, as they were entitled to do, to supply waggons to be used, not for the transit, but for the storage of the defenders' pit-props. It is in these circumstances that the defenders repudiated liability for demurrage.

I notice, in the first place, only to repel it, the defenders' suggestion to the effect that, looking to previous usage between them and the railway company, "discharge with customary steamship dispatch, but according to the custom of the port," must be held to infer conveyance of pit-props from the ship's side to their yard. The clause quoted from the charter-party is a printed clause contained in a commonly used form. The parties cannot be supposed to have contemplated the special circumstances or usual practice at the defenders' yard, especially as the charter-party named a variety of ports other than Granton as the possible destination of the cargo. The real gist of the defenders' argument, as I understood it, was to the effect that, there being no lay-days the charterers were not (as they would in that case have been) under an absolute obligation or engagement as to the period of discharge, and are not liable for demurrage if delay in discharging arose through absence or failure of the customary appliances owing to some cause outside their control, viz., the strike, and which they could not remedy or overcome by the use of any reasonable diligence. I think the argument is fallacious. One must distinguish between the operation of discharge and the disposal of the cargo when discharged by the consignee. Discharge begins and ends as from the ship on to the quay, or on to such appliances—waggons, lighters, or sheds—as are customary at the port of discharge. The actual discharge is an operation in which both shipowner and charterer are concerned and have their respective duties. The subsequent destination or disposal of the cargo concerns the charterer alone. In the present case it is not disputed that the ship was prepared to do its part in the discharge. Nor was there any absence or shortage of the customary appliances, viz., waggons, or of dock labourers in order to complete the discharge. There was no strike on the railway or at the quay. The impediment was only at the defenders' yard. it was not truly an impediment to discharge proper, but to the disposal of the cargo in the manner usually and naturally resorted to by the defenders. The difficulty was not one about discharge but about storage. The fallacy, as I consider it to be, of the defenders' argument would be more apparent, but no less real, if one supposes that the defenders' yard was not adjacent to, but at a distance of many miles from, the port of Granton, or that the difficulty of using that yard arose, not from the presence of strikers there, but from some physical condition, *e.g.*, a flooding of the land. The case seems to me to be quite different from any of those to which the defenders' counsel sought to assimilate it. In all the reported cases, so far as I am aware, the impediment which was held to absolve the charterer from liability consisted in the *de facto* absence or insufficiency of lighters, waggons, or the like. I think the occurrence of a strike at the defenders' yard is really irrelevant. It was not an impediment arising from or out of the custom of the port affecting or preventing the discharge of the cargo. If this be the correct view the question whether or not the defenders used all reasonable diligence to have the cargo disposed of otherwise than by storing it in their yard does not seem strictly and properly to arise for consideration. But upon the evidence I agree with the Lord Ordinary's conclusion on that matter, and substantially upon the same grounds. Nor do I think that the defenders can take any benefit from the strike clause in the charter-party. It is a printed clause of ordinary style which cannot be supposed to have been inserted in contemplation of possible conditions which might arise at the charterers' yard. And the strike of the yardmen seems to me to be plainly not a strike of a "class of workmen essential to the discharge of the cargo." There was no strike of any such class; there were stevedores and dock labourers available as usual to carry out the work of discharge. The same observations apply to the words "receivers' men," occurring in the clause, which seem to me to have no application to the strikers in the yard.

For these reasons I am for adhering to the interlocutor in so far as it decerns against the defenders for payment of the sum of £220, with interest, in full of the first conclusion of the summons.

2. The second conclusion relates to a quite different and separable matter. The charter-party stipulates for freight on "Short props at £1, 10s., intaken piled fathom of 216 cubic feet." The pit-props were brought down in lighters from Lake Ladoga to Petrograd, and there put on board the "Chassie Maersk." The pursuers say that the cargo actually loaded consisted of 653 intaken piled fathoms. The defenders have paid freight upon 595 fathoms only, and they decline to make any further payment. The sum of £87 sued for by the second conclusion is for freight at the stipulated rate of 30s. per fathom upon 58 fathoms, being the difference between these two figures, 595 and 653. The bill of lading bears to be for a cargo of 595 fathoms, but it was signed by the master "under dispute for quantity" and therefore seems to me to afford neither evidence nor presumption in favour of either of the two figures respectively put forward by the parties as being the true measurement of the cargo actually loaded. The Lord Ordinary has given decree for the sum sued for. I am unable to agree with this conclusion. If the Court had merely to arrive at an award of damages to be assessed at a reasonable, but necessarily to some extent random sum, we should not lightly interfere with the Lord Ordinary's award. But that is not the nature of the dispute; we have to decide as between the two figures propounded by the parties respectively as representing the measurement of the cargo; there is no *via media;* we have no materials for arriving at any intermediate figure. One cannot help thinking that where so small a sum was at stake the parties would have done well to settle this matter out of Court, but they have not done so, and we are therefore confronted with the task—a

difficult one, as I find it to be—of deciding which of the two figures is to be preferred. It appears that the defenders declined to take an active part in the measurement at Petrograd. The reason they alleged for this course was that they were satisfied of the accuracy of their own measurements, taken at Lake Ladoga, which brought out a total of 595 fathoms. But as regards the pursuers' measurement a serious difficulty is presented which is not referred to in the Lord Ordinary's opinion—I do not know whether or not it was brought to his notice. It seems that the loading of the pit-props at Petrograd was tallied on lighters at each end of the vessel—by the first officer at the fore end and the second officer at the aft end, each of whom had a local tallyman beside him. A tally was kept by each of the four men. Not one of the four tally books is produced; and though the two officers gave evidence neither of the local tallymen was adduced as a witness. An abstract or abstracts are produced bearing to be made up from the tally books. All this must pass muster, though the proof is in parts vague and scanty. But the difficulty I have referred to arises from the fact that as appears from the first officer's evidence he was admittedly absent from the fore-end tally, while engaged in superintending the stowage of the cargo on board ship, for an undefined portion of each of the six loading days. In cross-examination he says—"When I was on deck the independent tallyman tallied each frame. . . . . When I came off the ship back to the lighter the independent measurer told me what had gone on board, and then I was only a very short time away from it. (Q) How many hours were you on board the ship each day during the loading?—(A) That I cannot say; that is quite impossible. I wrote down in my tally book the information supplied to me by the independent measurer. . . . . *Re-examined*—. . . I cannot give you an estimate of the number of slings I did not measure myself. The independent checker was there the whole time. We kept separate tallies. I took his figure for the slings I was not there to measure myself; that is the reason we had him to assist us. (Q) Did you measure most of the slings yourself?—(A) Yes. Sometimes I had to be superintending the stowage on the ship. (Q) Did that very rarely occur or did it often occur?—(A) It rarely occurred; we had a foreman there to look after the stowage; once in the forenoon and once in the afternoon is about all that I did go there to give instructions to the foreman. . . ." It seems therefore that twice during each of the six days—for periods undefined, but the total of which cannot have been inconsiderable—the first officer's information as to the number of slings put on board depends solely upon the alleged statement of the local tallyman, who is not a witness, and of whose tally there is no evidence whatever. As regards a not inconsiderable portion of the cargo, accordingly, no measurement of any kind is proved. One would not expect or demand in a mercantile case like this precise proof of the contents of every sling taken on board during the loading of a large cargo; but we are here dealing with a dispute about something like one-eleventh part only of the total alleged to have been measured and loaded, or one-sixth part of the alleged measurement applicable to the fore-end loading of the vessel; and I am afraid we cannot simply disregard a serious blot, such as we find in the pursuers' proof, which might go far to account for the discrepancy between the views of the two parties. I do not see that the defenders' abstention from taking an active part in the measurement can be set off against a deficiency in the pursuers' proof; or how it can be positively affirmed that the latter would have been in a stronger position if the defenders had attended and made an independent tally. Mr Horne urged that we ought under the circumstances to be content with something less than the irreducible minimum of legal evidence upon which the Court is accustomed to proceed. I know of no authority which should warrant us in such a course, and none was cited. The evidence in this case is not, as I think was admitted, such as to give room for the well-known rule that where primary evidence has been lost or is otherwise unobtainable secondary evidence may be regarded. I think, therefore, that the pursuers have failed to prove that 653 fathoms were in fact loaded upon the "Chassie Maersk." We have no materials in the proof for arriving at any independent figure of our own, and it seems to me that we must hold that it is not proved that more than 595 fathoms were loaded upon which measurement freight has been already paid. I think we must accept that figure, not because it appears in the bill of lading or because the defenders assert it to be the true measurement, but simply because upon the evidence before us we have no materials for arriving at any other figure if, as I think, the proof does not establish that in point of fact 653 fathoms were put upon the "Chassie Maersk" at Petrograd. There are two circumstances which lead me to think that this result, though necessarily somewhat arbitrary, is probably not unfair to the pursuers. In the first place, I agree with the Lord Ordinary in thinking that the defenders' tally of the cargo at Lake Ladoga was in all probability a pretty accurate one, though its accuracy is not established by legal proof, and could not in any event have prevailed against a tally taken in the stipulated method at Petrograd if that tally had been supported by proper legal evidence. It formed the basis of the defenders' payment to the owners of the timber and satisfied the Russian Custom-house officials—witnesses Reid and Saxbeck. In the second place, the method of measurement adopted at Petrograd is at best a somewhat rough and ready one—"a commercially practical way of doing it," as the master calls it. And there were elements tending to its inaccuracy on this occasion, *e.g.*, the presence of "more ice in this cargo than usual," and the fact that "closed," not "open," lighters were employed, which "adds to the difficulty of accurate measurement—witness

Easton; see also Möller, the master, and his letter "closed lighters . . . ought really to be completely boycotted if possible." Further, it appears plainly enough that the master himself was by no means sure of even the approximate accuracy of measurement of 653 fathoms. I refer to two of his letters, in the latter of which he says—"I am still of opinion that the quantity is tolerably fair," while in the earlier letter he states that he "offered to settle for 635 fathoms, but this was refused."

Upon the whole matter we ought, in my opinion, to adhere to the interlocutor reclaimed against in so far as it decerns against the defenders for payment to the pursuers of the sum of £220 with interest in full of the first conclusion of the summons, and *quoad ultra* to recal it and assoilzie the defenders from the second conclusion.

LORD MACKENZIE—The first question is as to the charterers' liability for demurrage. It is admitted that the normal period for discharge of the cargo of the "Chassie Maersk" would have been five days, and that sixteen were taken. If therefore the charterers are liable, there is no dispute that the amount for which the Lord Ordinary has given decree, £220, is due, viz., eleven days at £20 a-day.

The charter-party is one in which there are no lay-days. Therefore there is no absolute obligation on the charterer to discharge within a certain time. The obligation on him is to perform his part of the joint operation of discharge within a reasonable time. A controversy arises as to how far the charterer is entitled to qualify this obligation by adding that regard must be had to circumstances as they then existed. The strike which existed at the defenders' yard is used by them on this branch of their argument, not *qua* strike (as it is in the exception clause in the charter-party) but merely as an existing impediment of the same character as any physical obstruction, *e.g.*, flooding of the defenders' yard. The argument for the charterers on the terms of clause 3 of the charter-party is that "customary dispatch" in discharge of the cargo means discharge by means of railway waggons into their timber yard, which is a little way from the quay. In consequence of the strike they say the railway company refused to give them waggons, and it was because of this that they were unable to perform their part in having the cargo discharged. I agree with the Lord Ordinary that it is not the custom of the port of Granton to discharge into the defenders' yard. Upon this the defenders' own record may be referred to. In Ans. 4 they say, "By the custom of the port at Granton pit-prop cargoes must be discharged into trucks, and it is forbidden to discharge the props on the quay." There is no doubt the practice on the part of the defenders is to take a cargo of pit-props to their yard. This practice has prevailed for many years, but the defenders' object in doing so is that the different lengths of props may be sorted before they are disposed of. This practice does not constitute a custom of the port. The customary method of discharge is into railway waggons. The "Chassie Maersk" because of her size could not discharge on the quay at the middle wharf. The question then arises, did the railway company refuse to give waggons? The answer to this must be in the negative if what is intended to be conveyed is that the company met the defenders with an absolute refusal. The railway company did not refuse waggons for the only legitimate purpose for which they can be called on to supply them, viz., conveyance. They did decline to give the defenders waggons for the purposes of being used as storehouses. The fact is that the defenders, in consequence of the strike, were unable to unload the waggons which had already been supplied to them, and the railway company knowing this refused waggons which were to be used by the defenders for the purpose only of going the short distance to the defenders' yard and then being detained there. They might have had the waggons at once if they had asked for them in order to take the pit-props to collieries; they had no difficulty in obtaining them when, later on, they had succeeded in selling the cargo. Nor would they have had any difficulty about the conveyance in waggons of the props to storage ground either in a field or yard. The defenders accept the *onus* of showing why it was that they had not waggons forward for the discharge of the vessel. They maintained, however, as I understand the argument on this branch of it, that regard must be had solely to the *causa proxima*, the refusal by the railway company, and that the reason why they had refused is not to be inquired into. A great many authorities were cited, beginning with *Postlethwaite*, 5 A.C. 599, but there is not any case in which the charterers were held free from demurrage unless there had been a failure in the means of discharge, *e.g.*, lighters, in consequence of a vessel having to wait her turn according to the usage of the port, railway waggons, in consequence of a railway strike, delay in getting a particular berth, &c. In none of them is there warrant for saying that the ship has to take the risk of something which disables the consignee personally from getting the means of discharge. The argument for the defenders was that the abnormality of the existing circumstances on account of the strike must be taken into account, but this is true only if and so far as the strike had anything to do with the discharge. It appears to me that it had no more to do with the discharge than the bankruptcy of the charterers would have had, in which case the railway company might have refused waggons because the charges might not have been paid, or the flooding of the defenders' yard, in which case waggons might equally have been refused for the reason that there was no place to unload them. Stress was laid on certain dicta to the effect that a charterer is excused for delay if it has been brought about by causes which are not within the control of the person whose duty it is to take delivery. In none of the cases, however,

has this been applied to causes which are directly connected with the charterer's own business. Causes of that character cannot excuse the charterer. The ship cannot be held to have taken the risk of them. The case of *Letricheux*, 19 R. 209, was a special one, the clause being "detention of railways," and does not affect the general question. The general rule is that in a charter-party such as this where there are no lay-days the shipowner takes the risk of ordinary delay, but does not take the risk when the effective cause does not prevent the discharge, but only has to do with the disposal of the cargo after discharge. The analogy of bringing the cargo alongside in order that it may be loaded was urged by the pursuers' counsel, but it is not necessary to consider how far this should be carried.

The defenders therefore fail on this branch of their argument. The delay was not connected with the discharge. They concede, however, that even if successful on this point that would not absolve them from the duty of showing they had taken all reasonable means to provide a substitute method of getting discharge by means of railway waggons. This is a question upon the evidence in the case. The defenders contend that they were unable to obtain orders sooner than they did for this cargo, that they could not have obtained storage in any field or at any yard, and that they had not given a preference to other vessels in discharging their cargoes before the "Chassie Maersk." A study of the evidence has convinced me that on all these points, more especially upon the first two, the defenders have failed to discharge the *onus* there is upon them to show that they could not fulfil any of the reasonable conditions upon which the railway company would have given them waggons. Upon this branch of the case I agree with the Lord Ordinary.

The defenders' next point arises upon clause 5 of the charter-party, and depends upon their being able to make out that the strike was of a class of workmen essential to the discharge of the cargo. If they could do this, then there is the further proviso that a strike of receivers' men only shall not exonerate them if by the use of reasonable diligence they could have obtained other suitable labour. But unless the defenders establish the first proposition the necessity for considering the proviso never arises. In my opinion clause 5 of the charter-party has no application to the present case. The strike here was of men in the defenders' own yard—a class not essential to the actual operation of discharge. The operation of discharge consists in putting the cargo over the side of the ship in the manner prescribed by the custom of the port. There was a full complement of stevedores and dock labourers to do this. If it were to be held that the services of the defenders' men were essential to the discharge this strange consequence would follow — the cargo might be completely out of the ship and into the railway waggon, the ship herself might have sailed, and yet the operation of discharge be held not complete because the cargo was not into the defenders' yard. To hold this to be the case would merely be to endorse the view which has been already rejected in connection with the first point in the case. The expression "receivers' men" cannot be construed as meaning men employed by the consignees in their yard. The reasoning in the first case cited by the Lord Ordinary, the case of the *Langham Steamship Company*, [1911] 2 I.R. 348, is exactly applicable to the present. The comment by the defenders' counsel upon the decision is not effective, because the judgment did not turn on the point that lay-days were mentioned in the charter-party but on the proper construction of the exemption clause.

Upon the question of demurrage I therefore agree with the Lord Ordinary, and think he has rightly decerned against the defenders for the sum of £220.

The next point is in regard to the amount of freight due. The pursuers say they shipped 653 fathoms; the defenders say the amount was only 595. This raises what appears to me to be a difficult question upon the evidence. I do not think any question of law is involved, and no case was cited which is of assistance. The case of *Spaight* which was cited by the defenders turned on whether one or other of two rival methods of ascertaining the amount of the cargo shipped was to be adopted, when some had been lost on the voyage. The judgment there does not induce one to suppose that the legal rules of evidence are to be disregarded in such a case as the present. No doubt a certain amount of sympathy is due to the shipowners here. They seem to have taken the ordinary steps to ascertain at the port of lading the number of "intaken piled fathoms of 216 cubic feet" in terms of the charter-party, and they are, no doubt, well founded in their contention that it was upon this measurement and this alone that freight is to be calculated. The charterers' representative did not assist in checking the measurement so made, but I am afraid this does not advance the pursuers' case very far. The charterers do not profess to put forward a measurement that they can stand by. Apparently the reason why their representative did not attend to the measurement at the ship was because he thought he could rely on the measurement taken up country. Obviously he could not because that was not a measurement in terms of the charter-party. Nor has the measurement up country been proved. The master signed bills of lading in which the defenders' figure of 595 fathoms was entered, but he did so under protest. It cannot be held in the circumstances that the *onus* upon the shipowner is greater because of the quantity entered in the bills of lading. The *onus* upon them is just that of any litigant who has to prove his case. They are *in petitorio*. It was said on their behalf that this is an accident and that the *onus* would have been on the charterers if the shipowners had been seeking to enforce their lien on the cargo for freight. I do not think so. Even then the ship-

owners would have had to prove the correct amount of freight to which they were entitled.

This is just what in the present case I feel bound to hold they have failed to do. I do not attach importance to the charterers' criticism upon the method of measuring which was adopted. I hold it to have been the ordinary method, conducted in the ordinary way. Even if the method had been more rough and ready than I think it was, it would only be fair, dealing with such a matter, to allow a certain latitude. Where the pursuers' proof fails is upon the admissions in the evidence of their first officer Einar Moller. He is quite frank about it. He was tallying at the fore-end of the ship, and admits that he was absent during part of the measurement. Neither of the two independent tallymen are called as witnesses, and therefore in order to get a complete measurement it is essential that the first officer should be able to speak to the figures at the fore-end. This is what he is not able to do. During part of the time he was not on the lighters, but on the vessel attending to the storage of the cargo. While so engaged he could not be checking the measurement. What he says on the point is this—"When I came off the ship back to the lighter, the independent measurer told me what had gone on board, and then I was only a very short time away from it. (Q) How many hours were you on board the ship each day during the loading?—(A) That I cannot say—that is quite impossible. I wrote down in my tally book the information supplied to me by the independent measurer." Now the measurement so vouched enters into the totals of the statements upon which the pursuers rely, and unless it can be proved then these statements are not supported by legal evidence. The matter was one susceptible of exact proof. It cannot be said that the log helps the case. The first officer's re-examination is as follows—"(Q) Did you measure every sling of cargo yourself?—(A) Yes, as far as I could be there; I cannot say every one—that is the reason of course why we have a tallyman to assist us. I cannot give you an estimate of the number of slings I did not measure myself. The independent checker was there the whole time. We kept separate tallies. I took his figure for the slings I was not there to measure myself; that is the reason we had him to assist us. (Q) Did you measure most of the slings yourself?—(A) Yes. Sometimes I had to be superintending the stowage on the ship. (Q) Did that very rarely occur, or did it often occur?—(A) It rarely occurred." No doubt the witness says that "it rarely occurred," but it is necessary to bear in mind that the loading and consequent tallying went on for six days at the rate of approximately 100 fathoms a day. Comparatively short absences on each day might lead to a difference of as much as the 58 fathoms here in dispute. In saying this I quite keep in view that it is only the tallying at one end of the vessel, the fore end, that is at fault. The tallying at the aft end is, I think, proved. Nor if I could read the first officer's evidence as meaning that he was occasionally absent on rare occasions for purposes unconnected with other duties would I attach weight to it. What I do attach weight to is the admitted fact that he was away for purposes which were evidently connected with his duty of seeing that the cargo was properly stowed not only on deck but also in the hold. During this time he was simply away doing something else while the measuring was going on. He could not see what was being done and had to trust to the tallyman's figure. It was contended that the pursuers' figure of 653 fathoms was supported by a consideration of the ship's carrying capacity, and by the fact that she is said to have been fully loaded and "down to her marks" on this voyage. I do not think much can be taken from these facts. The quantity of cargo on board, within the limits which are in dispute here, depends upon how the cargo has been stowed; and how far down the vessel is in the water depends to a considerable extent upon whether the cargo is heavy or not, the amount of wet in the props being a material consideration. There is evidence here that the props were wet when put on board. The first officer says so, though the master does not admit that they were wetter than usual. The height of the deck cargo on the different voyages depends on the stowage to a certain extent, and cannot supply the gap in the evidence.

We were invited to deal with this matter as a jury question, and to take into consideration that the discrepancy arises upon props of one length only, which diminishes the chance of error having arisen through general carelessness. But we were given only two alternatives in the case and cannot strike any mean figure. If the pursuers have not proved their figure of 653 fathoms there only remains the figure of 595, which the defenders admit.

For the reasons stated I think the pursuers have failed to prove that they took on board 653 fathoms. The Lord Ordinary's interlocutor ought therefore, in my opinion, to be recalled as regards the sum of £87, and the defenders assoilzied from that conclusion of the summons.

LORD CULLEN—I concur, and as regards the freight question I have nothing to add to what your Lordships have said. As regards the claim for demurrage, the operation of discharging the cargo from the ship is one thing, and the disposal of the cargo after discharge by the consignees in the course of their business is a different thing. In the present case there was no failure in the means of prompt discharge viewed by themselves. The hitch which occurred was connected with the disposal of the cargo by the consignees after its discharge. It was an unfortunate vicissitude in the course of the consignees' business as timber merchants. But a difficulty of that kind is, I think, the consignees' own affair. In the absence of a special and exceptional contract I do not think that the shipowners are concerned with such vicissitudes in the consignees' business affecting the disposal of

the cargo after its discharge; and there is no such exceptional contract here.

The defenders' argument on the strike clause in the charter-party clearly fails. The strike of the union pit-prop workers was not a strike of workers essential to the discharge of the ship, but of workers connected with the disposal of the cargo by the consignees in course of their business after discharge, which is a different matter.

The Court adhered to the interlocutor reclaimed against in so far as it decerned against the defenders for payment of demurrage, and *quoad ultra* recalled it and assoilzied the defenders from the conclusion for freight.

Counsel for Pursuers (Respondents)—Sandeman, K.C.—Hon. W. Watson, K.C.—M. J. King. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for Defenders (Appellants)—Horne, K.C.—D. P. Fleming. Agents—Boyd, Jameson, & Young, W.S.

HIGH COURT OF JUSTICIARY.

Monday, March 15.

(Before the Lord Justice-General, Lord Dundas, and Lord Mackenzie.)

M'CULLOCH *v.* RAE.

Justiciary Cases—Conviction—Betting and Gaming Offences — Alternative Charge Followed by General Conviction — Keeping, or Having Care or Management of, or Conducting Gaming in, a Betting House —Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 407.

A husband and wife were charged with a contravention of the Burgh Police (Scotland) Act 1892, sec. 407, on a complaint which stated that at a time and place specified "you did keep a dwelling-house there as a gaming or betting house, or had the care or management thereof, or did act in conducting gaming or betting therein."

Held, on appeal, that the charges were not necessarily alternative, in respect that they might all have been committed by the same person and were not mutually exclusive; and a general conviction following thereon *sustained* as against the wife but *quashed* as against the husband, with regard to whom it was only proved that he was tenant or occupier of the house.

Justiciary Cases—Procedure—Stated Case —Conviction—General Conviction Following on Alternative Charges.

Held that it was competent to challenge a general conviction on the ground that it followed on alternative charges, in an appeal by stated case in which the only question for the opinion of the Court was, whether the facts proved inferred a contravention of the statute libelled in the complaint.

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), enacts—Section 407—"It shall be lawful for the chief-constable or any constable of police, having good grounds for believing that any house, room, or place is kept or used as a gaming or betting house, to enter such house, room, or place . . . and the owner or keeper of such gaming or betting house, or other person having the care or management thereof, and also any person who shall act in any manner in conducting such gaming or betting, shall be liable to a penalty not exceeding £50. . . ."

Robert M'Culloch, Annie Gray or M'Culloch, his wife, *appellants*, and David M'Culloch, were charged in the Police Court at Wishaw at the instance of Thomas Rae, Burgh Prosecutor, *respondent*, on a summary complaint, stated thus—"You are charged at the instance of the complainer that during the period between the 19th and 29th days of November 1914, at 276 Craigneuk Street, in the burgh of Wishaw, you did keep the dwelling-house there as a gaming or betting house, or had the care or management thereof, or did act in conducting gaming or betting therein, contrary to the Burgh Police (Scotland) Act 1892, section 407, whereby you are each liable to a penalty not exceeding £50, and failing payment each to imprisonment in terms of section 46 of the Summary Jurisdiction (Scotland) Act 1908."

On 19th December 1914 the Court, on the motion of the Prosecutor, deserted the diet *pro loco et tempore* against the accused David M'Culloch, and on 28th December 1914 "the Court found the accused Robert M'Culloch and Annie Gray or M'Culloch each guilty as libelled, and fined each of said accused in the sum of £50 sterling, and in default of payment within four weeks from this date, 60 days' imprisonment each."

Robert and Annie M'Culloch appealed by Stated Case, and the Case was stated by the Magistrate thus—"I held the following *facts* to have been proved:—That the appellant Robert M'Culloch was the tenant or occupier of the house 276 Craigneuk Street (hereinafter called 'the house') during the period libelled; that the appellant Annie Gray or M'Culloch is the wife of the said Robert M'Culloch, and lived in family with him in the house during the period libelled; that the said David M'Culloch was bedridden and unable by himself to leave his bed, to which he had been confined for a period of about two years, and also lived in family with the said Robert M'Culloch during the period libelled; that the house consists of one apartment. That for some time prior to 19th November 1914, and between noon and 2 p.m. on various dates, considerable numbers of men entered the house, each remaining in it from two to three minutes at a time, the said men being workmen coming from the works of the Lanarkshire Steel Company, which adjoins the dwelling-house occupied by accused, the dinner hour at said works being between the hours stated; that William Devine, residing at 296 Craigneuk Street, Wishaw, had on various dates prior to 19th November 1914