which then subsisted. All that was decided in that case was that the subsequent Act of Parliament had not the effect of innovating upon the agreement come to between the parties.

LORD SKERRINGTON, who had not heard the case, delivered no opinion.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—W. T. Watson—D. Jamieson. Agents—Sharpe & Young, W.S.

Counsel for the Defenders (Respondents)—Wilson, K.C.—M. P. Fraser. Agents—Steedman, Ramage, & Company, W.S.

Thursday, July 20.

FIRST DIVISION.

[Sheriff Court at Glasgow.

CAZALET AND OTHERS (OWNERS OF THE S.S. "CRONSTADT") *v.* MORRIS & COMPANY (CHARTERERS).

Ship — Charter-Party — Demurrage — Exceptions — Restraints of Princes — Application to Charterers as well as to Owners.

After a mutual clause of exceptions a charter-party provided—"The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, arrests and restraints of princes, rulers, and people, collisions, stranding, and other accidents of navigation excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner"—which clause was followed by two clauses in favour of the ship. In an action by the owners of a ship for demurrage, *held* that the charterers were not protected by the clause of exceptions, as it was conceived in favour of the owners only.

Question, whether a shortage of railway trucks due to the Government having taken them for the defence of the realm was "a restraint of princes."

Ship—Affreightment—Custom of the Port—Delivery of Cargo — Evidence — Usage of One Trader.

Charterers alleged that the custom of a port was to discharge esparto grass, which was the cargo of the ship in question, into railway trucks on the quay. Four or five cargoes a year, which were the only cargoes, were consigned to one receiver. He for twenty-five years invariably received the grass into trucks on the quay. That suited his convenience. Small quantities were occasionally received by other receivers, who received them into lorries, that suiting their convenience. *Opinion* (*per* Lord President Strathclyde) that the charterers had failed to prove the alleged custom.

Contract — Charter-Party — Damages — Right of Shipowners to Recover from Charterers Cost of Discharging Cargo into Lighters when Ship was on Demurrage through Fault of Charterers.

Owners of a ship, the lay-days having run off, discharged the cargo into lighters, being unable to discharge into trucks on the quay owing to a shortage of trucks. The charterers refused to consent to discharge into lighters. *Held* that the owners were entitled to take steps to minimise the loss occasioned by the delay, and could recover from the charterers the cost of the lighterage so far as the claim for demurrage was thereby diminished.

William Marshall Cazalet and others, owners of the s.s. "Cronstadt," *pursuers*, brought an action in the Sheriff Court at Glasgow against Morris & Company, merchants, 204 St Vincent Street, Glasgow, charterers of that vessel, *defenders*, for a sum of £285 with interest in name of demurrage, and a further sum of £240, 13s. 9d. for lighterage and other expenses.

The *charter-party* provided — "*Esparto Charter-Party.*—. . . . The cargo to be brought alongside the ship at loading and taken from off the quay at port of discharge at the merchant's risk and expense, and in accordance with custom of respective ports.

"The ship to be loaded at the rate of 150 tons per working day, weather permitting, Sundays and holidays excepted, and to be discharged—after obtaining the usual quay discharging berth—at the rate of 150 tons per like working day, Sundays and holidays excepted. . . . . .

"Demurrage over and above the said lying days at forty pounds sterling per day. . . . . .

"Charterers and owners not to be responsible for any loss, damage, or delay directly or indirectly caused by or arising from strikes, lock-outs, labour disturbances, trade disputes, or anything done in contemplation or furtherance thereof, whether the owners or charterers be parties thereto or not.

"The act of God, perils of the sea, barratry of the master and crew, enemies, pirates, arrests and restraints of princes, rulers, and people, collisions, stranding, and other accidents of navigation excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner.

"Ship not answerable for losses through explosion, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull, not resulting from want of due diligence by the owners of the ship or any of them or by the ship's husband or manager.

"Ship has liberty to call at any port in any order, to sail without pilots, and to tow and assist vessels in distress, and to deviate for the purpose of saving life and property.

"Charterers have liberty to ship a full reasonable deckload at their risk from all causes, but quantity at captain's decision, and captain to take all reasonable care of same, and to supply any available covers."

The defenders *pleaded*—"2. The defenders having been prevented from completing the discharge of said cargo by causes which fall within the scope of the exceptions in the charter-party, are entitled to decree of absolvitor in respect of the sum first concluded for with expenses. 3. The delay at the port of discharge being wholly due to restrictions imposed by the military and/or Admiralty authorities acting under the Order in Council, dated 4th August 1914, under section 16 of the Regulation of the Forces Act 1871, and relative warrant of the Secretary of State of same date and/or the Defence of the Realm Act 1914, and relative Defence of the Realm Regulations, sections 2 (*a*) (*f*), 8, and 28, the defenders are not liable for same in virtue of section 1 (2) of the Defence of the Realm (Amendment) No. 2 Act 1915, and they are entitled to decree of absolvitor with expenses. 4. The pursuers having incurred the expense represented by the sum second concluded for without the authority of the defenders, the defenders are not liable therefor and are entitled to decree of absolvitor in respect thereof with expenses. 5. The completion of the discharge of the s.s. 'Cronstadt' at the rate provided for in the said charter-party or earlier than the date on which the steamer was finally discharged having been rendered impossible by the Government requisitions and requirements of railway trucks for military and/or naval purposes for the safety of the realm, the defenders are entitled to absolvitor with expenses."

The *facts* appear from the interlocutor of the Sheriff-Substitute (A. S. D. THOMSON) dated 2nd December 1915, which was as follows—"*Finds in fact* that (1) by charter-party, dated 21st January 1915, the pursuers, through their managers William Thomson & Company, Leith, agreed that their s.s. 'Cronstadt' should load and carry for defenders from Arzew or Oran a full cargo of esparto fibre to Bristol for a lump sum of £1500 net as therein provided. (2) By said charter-party it was further provided that the vessel was to be discharged at the rate of 150 tons per working day, Sundays and holidays excepted, and that if she were longer detained demurrage at the rate of £40 per day was to be paid. (3) The 'Cronstadt' accordingly, in terms of said charter-party, duly loaded and carried a cargo of 1295 tons of esparto fibre to Bristol, where she arrived and was docked on Sunday, 21st February 1915, and her discharging time began to run on 22nd February at 10 a.m. (4) Five and a half days had been consumed in loading her, and her discharge was not completed till 16th March at 1 p.m. She was accordingly seven days and three hours on demurrage, and the charge for such demurrage, on the assumption that it is due in terms of the charter-party, amounts to £285, being the sum first concluded for. (5) On the arrival of the vessel it was found that the Great Western Railway Company (or the Government which had taken over the railway), at whose railway quay she was berthed for discharge, were unable to give a sufficient supply of railway trucks to receive her cargo. Every possible effort was made by the charterers, as well as by the owners and their representatives, to induce the railway company to increase the supply, but their efforts met with no success, the average number of trucks being only thirteen instead of the usual number of forty per day, which was quite insufficient to receive 150 tons per day of fibre in terms of the charter-party. (6) As in consequence of the inadequate supply of trucks the discharge of the vessel was proceeding very slowly, and the lay-days had expired on 8th March at 10 a.m., the pursuers, the owners of the vessel, through their brokers Hartley, Hodder, & Company, Bristol, hired from Messrs T. R. Brown & Sons several lighters to take delivery of so much of the undischarged cargo as could not at once be taken on rail. The defenders, the charterers, refused to be a party to this arrangement or to bear any of the expense of it, and the pursuers accordingly entered into it on their own responsibility and at their own risk. (7) In all 385 tons were discharged into lighters, the discharge beginning on 9th March and ending as above stated on 16th March, on which date the vessel was entirely unloaded and demurrage ceased to run. (8) The loading into lighters was intended merely as a temporary expedient to release the vessel, and it was the understanding of all concerned that the cargo was to be discharged from the lighters as soon as possible into railway trucks. This discharge, however, was not completed (owing to the continued insufficiency of trucks) until 17th April. The expense occasioned by having recourse to lighters was £240, 13s. 9d., being the sum second concluded for. (9) When the 'Cronstadt' left her berth on 16th March the pursuers as owners of another steamer, the 'Reval,' applied to the railway company for the vacant quay discharging berth and obtained it. The 'Reval,' which had arrived on 8th March with a cargo of Spanish esparto fibre imported for the same firm for whom the Algerian esparto fibre had come by the 'Cronstadt,' took up her place accordingly on 17th March under the loading crane, and the pursuers, her owners, refused to allow any of the trucks to take cargo from the 'Cronstadt's' lighters (save as regards the lighter 'Swindon' on one or two days), and insisted upon using all the trucks for the 'Reval' until she was discharged on 27th March partly into trucks and partly into lighters. Thereafter the trucks were shared equally between the lighters of the two cargoes. By this action of the pursuers the 'Cronstadt' lighters were kept very much longer than they would otherwise have been, with correspondingly increased expenses. (10) The said charter-party, which is headed 'Esparto Charter-Party,' contains amongst other provisions the following—(*a*) 'The cargo to be brought alongside the ship at loading, and taken from the quay at port of discharge at the merchant's risk and expense, and in accordance with custom of respective ports.' (*b*) 'The ship to be loaded at the rate of 150 tons per working day,

weather permitting, Sundays and holidays excepted, and to be discharged—after obtaining the usual quay discharging berth—at the rate of 150 tons per like working day, Sunday and holidays excepted.' (*c*) 'The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, arrests and restraints of princes, rulers, and people, collisions, stranding, and other accidents of navigation excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner.' (11) The import of esparto into Bristol began when the Severn Tunnel Railway was opened for traffic some twenty years ago. From four to six cargoes arrive per annum. They are consigned to different importers, but the receivers have been and are the firm of Pirie, Wyatt, & Company, papermakers, Wells, Somersetshire. Delivery has invariably been taken on railway trucks, although one other firm or perhaps two, being Bristol firms, have occasionally taken a small portion (from 5 to 10 tons per annum) on lorries from the vessel. (12) Owing to its inflammable nature esparto is not allowed to be left or stored on the quay or in the dock sheds. A special application for an exception in the case of the 'Cronstadt's' cargo was made but was refused. (13) The Secretary of State issued a warrant dated 4th August 1914 empowering the President of the Board of Trade to take possession on behalf of His Majesty of all the railroads, excluding tramways, in Great Britain, and of the plant belonging thereto or any part thereof, and to use the same at all times during which this warrant or any renewal thereof remains in force for the conveyance of any of the naval or military forces of His Majesty, or of any goods, stores, or merchandise required for the use of any of His Majesty's said forces, or to use the same for any other purpose or in any other manner for or in which it is expedient to use it for His Majesty's service.' (14) The President of the Board of Trade from the date of said warrant exercised the powers thereby conferred upon him, and said powers have ever since been in force and are still being exercised. (15) It was the scarcity of trucks which prevented the complete discharge of the 'Cronstadt's' cargo within the lay-days. (16) This scarcity of trucks was due to the exercise by the Government of the powers conferred by said warrant, and the consequent great and constant demand for trucks for Army and Admiralty purposes. After these purposes had been served there was a further preference in the matter of the supply of trucks given to perishable commodities and foodstuffs over ordinary cargoes such as esparto fibre. (17) The customary method at the port of Bristol in regard to the discharge of cargoes of esparto fibre is for discharge of the esparto into railway trucks on the quay, it being the duty of defenders to put the cargo into trucks on the quay. (18) That there was no custom nor any precedent for discharging esparto fibre first into lighters at Bristol and then from the lighters into railway trucks for the purpose of releasing the ship. *Finds in law* (1) that the defenders are not liable for demurrage in respect they are protected by the exception clause in the charter-party above quoted, 'restraint' of the British Government exercised over the truck supply having prevented them from taking delivery of the cargo according to the custom of the port, and (2) that the defenders are not liable for the expense involved in putting cargo from the ship into lighters, the same having been done by the pursuers for their own interests and on their sole responsibility, and without the consent, express or implied, of the defenders: Therefore assoilzies the defenders and finds them entitled to expenses."

Note.—"There was unusual delay in discharging the 'Cronstadt's' cargo, and the delay was entirely due to the scarcity of railway trucks. Esparto being inflammable is not allowed at the port of Bristol to remain in the dock sheds. It must be removed at once. This rule is strictly enforced, and an application to have it relaxed in the case of the cargo in question was refused. The charter-party provided that the cargo was to be taken from off the quay at the merchant's risk and expense and in accordance with the custom of the port.

"What, then, was the custom at Bristol in regard to the discharge of esparto? The answer is supplied by defenders, where they aver that 'at Bristol the customary method of discharge of esparto is into railway trucks on the quay, it being the duty of the defenders to put the cargo into trucks on the quay.' At the hearing on the evidence the pursuers, relying on some passages in the evidence, sought to get behind the tacit admission of this averment which they had given, by not expressly denying it, under rule 44. They have since been allowed to amend by adding a denial, and they are now entitled to contest the point. They rely on the case of *Clacevitch* v. *Hutcheson & Company*, 15 R. 11, 25 S.L.R. 11. That case seems a very special one, depending upon its own rather peculiar facts. In the present case the facts are quite different. Esparto was regularly loaded into trucks. Such certainly was the practice, but it must be kept in view that the receivers—Messrs Pirie, Wyatt, & Company, of Wells—have in course of time superseded other firms, and are now receivers of all the cargoes of esparto which come into Bristol. But these cargoes are brought in by different merchants. The occasional receipt of 5 or 10 tons per year out of large cargoes by one firm, or perhaps two firms, in the city, who take their supply away in lorries is so insignificant that I think it may be disregarded. Esparto cargoes have been and are in practice invariably put into and removed from the quay in trucks. It was argued, however, on the authority of *Clacevich's* case, that the actings of one firm cannot create a custom. But I do not think that principle even if sound applies to the present case. The parties here entered into—according to the printed heading of the document—an 'esparto charter-party,' and the port of the discharge is Bristol. In contracting for the discharge it was provided that the cargo

was to be taken from the quay in accordance with the custom of Bristol. The invariable practice of the firms which had received all the esparto cargoes which had been brought by many different merchants into the port for many years, at least twenty, seems to me to create a custom which the contracting parties would take cognisance of. There was, in fact, no diversity of practice, and it was fairly large, affecting several different firms of owners, shippers, and receivers, and it was reasonable, because esparto being inflammable was different from ordinary cargoes, and was subject to special restrictions by the dock authorities of the port, which restrictions owners and shippers must have known, and therefore I think there was a custom. A custom is nothing more than a general practice so fixed and constant that it is reasonable to hold that the parties have taken cognisance of it in their contract,

"If, then, the obligation on the defenders was to put the esparto into railway trucks according to the custom of the port, and there was an insufficient supply of trucks and consequent detention of the ship beyond the lay-days, the question arises whether demurrage is due.

"In considering this question one must observe that the obligation incumbent on the charterers is definite, viz., that the cargo is to be discharged at the rate of 150 tons per day, and that 'demurrage over and above the said lying-days is to be at £40 sterling per day.' This definite obligation is more stringent than one providing for discharge 'with all reasonable speed,' and its effect is stated as follows by Lord Selborne in *Postlethwaite* v. *Freeland*, 5 A.C. at p. 608—'There is no doubt that the duty of providing and making proper use of sufficient means for the discharge of cargo, when a ship which has been chartered arrives at its destination and is ready to discharge, lies generally upon the charterers. If by the terms of the charter-party he has agreed to discharge it within a fixed period of time, that is an absolute and unconditional engagement for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it and which cause the ship to be detained in his service beyond the time stipulated. If, on the other hand, there is no fixed time, the law implies an agreement on his part to discharge within a reasonable time, that is—as was said by Lord Blackburn in *Ford* v. *Cotesworth*, L.R., 4 Q.B. 127, 5 Q.B. 544—a reasonable time under the circumstances. . . . If an obligation, indefinite as to time, is qualified or partially defined by express or implied reference to the custom or practice of a particular port, every impediment arising from or out of that custom or practice which the charterers could not have overcome by the use of any reasonable diligence ought, I think, to be taken into consideration.' An illustration of what is referred to in the concluding portion of Lord Selborne's judgment which I have quoted is found in the case of *Wyllie* v. *Harrison & Company*, 13 R. 92, 23 S.L.R. 62, where, as in the present case, the detention of the vessel was due to insufficiency of railway trucks, but no definite rate of unloading had been specified. The charterers were held not liable in demurrage, the obligation in the charter-party being expressed thus—'Cargo to be discharged as fast as steamer can deliver after being berthed as customary'—*cf.* also *Whites* v. *Steamship Winchester Company*, 13 R. 524, Lord Shand, at foot of p. 537, 23 S.L.R. 342.

"There being thus an obligation in the general case upon charterers to pay demurrage if they fail to take delivery within the lay-days, the *onus* is upon them to show that they are not bound to do so in the circumstances which have arisen in regard to the cargo in question. They accept the *onus*, and contend, as I understand, first, that the deficiency of trucks was due to the action of the Government in taking over all the British railways and railway plant, and that as the Government by legislation can render fulfilment of a contract impossible, and release the obligants, so it may by actual seizure of the railways render fulfilment in the present case impossible, and similarly discharge the obligants. This argument is open to criticism, but even if it were sound I do not think it can avail the defenders, because the seizure of the railways was effected on 4th August 1914, while the date of the charter-party is 21st January 1915. It was entered into therefore after the railways had been taken over, and parties must be held to have contracted in knowledge of the fact and its possible consequences. If the defenders having this knowledge bound themselves, without qualification, to pay demurrage, they must just accept the consequences and fulfil their contract or pay demurrage.

"But the defenders contend, second, that they are protected by the exception clause in the charter-party, because the shortage of trucks is due to 'arrests and restraints of princes, rulers, and peoples.' The State was using so many trucks that a sufficient number was not left to enable defenders to carry out their contract, and they contend that they were thus restrained from carrying out the contract as truly as if the State had prohibited them from carrying it out.

"To this contention the pursuers reply that an exception clause like this is conceived entirely for the benefit of owners and not at all for charterers. I doubt whether this reply is sound. The clause is a condition in a bipartite agreement, and as it is not in express terms conceived in favour of one party only it would rather seem that it should be available for both unless by clear implication the contrary appears. No doubt most of the eventualities mentioned in the clause apply to the ship and its owners, but some can apply quite as well to the charterers.

"The pursuers further reply that the arrest or restraint applies only to actual arrest or restraint of the ship or cargo. I doubt this also. The State may restrain in various ways, *e.g.*, by actual seizure of the ship or cargo, by prohibiting the ship from

entering port, by forbidding the landing of the cargo, by blockade or embargo, by forbidding the use of trucks even if they were on the quay and ready to receive the cargo. In short, the State may put a restraint upon the parties not only when it prohibits, but when by its acts it disables them from carrying out their contract.

"I think the weight of authority at present is in favour of the view I have taken. I would point out (1st) that the 'restraint' may be by the home Government as well as by a foreign government. (2nd) That this exception is for the benefit of the charterers as well as the shipowners. The law is so stated by Mr Justice Scrutton in the sixth edition of his work on Charter-Parties and Bills of Lading, at the foot of page 199. It is based on the judgment of Lord Mersey, then Mr Justice Bigham, in *Newman & Dale S.S. Company* v. *British and South American S.S. Company*, [1903] 1 K.B. 262. The note to the passage in Scrutton is, I think, hardly correct. Bigham, J., did not 'doubt' the previous judgment of Mathew, J., in *Barrie* v. *Peruvian Corporation*, 2 Com. Cases 50. He had apparently some difficulty in coming to the same conclusion, but he seems to have overcome his difficulty and reached the same result. Bray, J., in *Braemont S.S. Company* v. *Weir*, 1910, 15 Com. Cases 101, seemed to be of a different opinion, but in the most recent case I can find, Scrutton, J., in a considered judgment expressly agreed with Bigham, J., and Mathew, J., in the above cases—*Embiricos* v. *Sydney Reid & Company*, [1914] 3 K.B. 45, at p. 52. The matter has not come before the Court of Appeal, but three eminent Judges specially versed in this branch of the law are thus agreed on the point. (3rd) In some charter-parties all doubt is removed by inserting the words 'to be mutually applicable,' as in *Bruce* v. *Nicolopoulo*, 24 L.J. Ex. 321; *Aktieselskabet Lina* v. *Turnbull*, 1907 S.C. 507, 44 S.L.R. 367, but Bigham, J., had this point in view, and refers to it in his judgment above referred to. (4th) 'Restraint of princes' does not involve the idea that the ship or cargo must be actually seized—*Smith* v. *Rosario Nitrate Company*, [1894] 1 Q.B. 174; *Nobels Explosives Company* v. *Jenkins*, [1896] 2 Q.B. 326; *Rodocanachi* v. *Elliot*, L.R., 9 C.P. 518; *Geipel* v. *Smith*, L.R., 7 Q.B. 404, where Blackburn, J., at p. 412, referred to 'restraint' as an *obstacle to the fulfilment by the defendants of their obligations under the charter-party.*

"These authorities seem to justify the conclusion I have reached, and to establish that if either a home or foreign government exercises the powers of the State by some act such as a blockade, embargo, or interference with the means whereby alone a contract can be fulfilled, so as to prevent its fulfilment, its action is a 'restraint' within the exception clause, and that the exception clause may be pleaded in defence by the charterer as well as by the owner, in the absence of course of any specialty in the particular charter-party.

"Accordingly I must hold that the defenders have established that the detention of the vessel was due entirely to an insufficient supply of trucks; that they did all they could to have the supply increased but without success; that the want of trucks was due to the appropriation of trucks by Government for its own purposes; that as a direct consequence the defenders were deprived of the only means whereby they could perform their part of the contract, and that they were accordingly restrained by the State from fulfilling it; that the exception clause applies to such a case and exempts the defenders from paying demurrage for the ship's detention; and that in accordance with this view the first claim in the petition falls to be dismissed.

"The second claim is for the expense connected with the lighterage of 385 tons of the cargo put into lighters and kept there till trucks were available. If the view I have taken of the first claim be sound the claim for lighterage is also bad.

"But even if the claim for demurrage be good the claim for lighterage would still, I think, be bad. Pursuers engaged the lighters on their own responsibility entirely. The defenders refused to have anything to do with it. The pursuers had of course an interest to have the 'Cronstadt' released as soon as possible, for freights were high, and they had a further interest, viz., to allow another vessel of theirs, the 'Reval,' to take the 'Cronstadt's' berth, and be discharged all the sooner. But in employing lighters they deviated from the contract, and in doing so without the defenders' consent they did so at their own risk. I fail to see how they can in such circumstances found any action against defenders. The claim against defenders lay solely upon the contract in the charter-party, and if they chose to deviate from that contract I see no other that they can found upon. It seems no answer to say that the claim for demurrage would have been much larger if they had not employed lighters. So it would, but they could have enforced that claim, however large, in virtue of the charter-party. They cannot, however, in face of defenders' refusal, found upon any new express contract, and equally I think they cannot point to any circumstances raising an implied contract. On this ground their second claim—for the expenses incurred in connection with the lighters—likewise falls to be dismissed.

"If, however, I am wrong in this view, and the claim for lighterage falls to be sustained, it is right to point out (1) that the lightermen, Messrs T. R. Brown & Son, agreed to deduct £10 from their account and defenders should receive the benefit of this deduction. (2) The 'Reval' was unduly favoured in getting, through the active efforts of pursuers, all the trucks between the 17th and 27th March in preference to the lighters (other than the lighter 'Swindon') which contained 'Cronstadt' cargo. A considerable deduction ought to be allowed on this head. (3) Perhaps also a deduction should be allowed for the day the 'Cronstadt' went into dry dock and could not in consequence use the trucks

which were on hand for that day and were not available the following day.

"I fail to understand how defenders can found upon section 1 (2) of the Defence of the Realm (Amendment) No. 2 Act 1915. The section as framed does not seem to apply to the present case at all, although one may well surmise that the Legislature intended that it should."

The pursuers appealed to the Court of Session, and argued—1. The exception clause of the charter-party was not in favour of the charterers and the owners but solely in favour of the owners. As a matter of history this clause was originally annexed to the clause imposing the obligation to make the voyage. It contained the words "during the voyage," and was invariably in favour of the owners—*Touteng and Another* v. *Hubbard*, 1802, 3 B. & P. 291, *per* Lord Alvanley, C.J., at p. 298; *Blight and Others* v. *Page*, 1801, quoted in 3 B. & P. 295, note (*a*). Accordingly it was for the defenders to show that the terms of the charter-party had rendered that clause mutual. That was often done by inserting expressly the word "mutually." In modern times that exception clause was still an exception to the obligation to make the voyage, *i.e.* an owner's clause, as appeared from the skeleton form of charter-party—Maclachlan on Merchant Shipping (5th ed.) p. 398. In the present case the ship was to be discharged at the rate of 150 tons a-day, and the method of discharge, provided for in a separate clause, was to be in accordance with the custom of the port. The result of such a clause was to impose on the charterers an absolute obligation to discharge at that rate, and the reference to the custom of the port did not qualify that obligation—*Postlethwaite* v. *Freeland*, 1880, 5 A.C. 599, *per* Lord Selborne, L.C., at p. 608; *Rowtor S.S. Company* v. *Love & Stewart, Limited*, 1916 S.C. 223, 53 S.L.R. 280. The contrasted case was where discharge was to be at all convenient speed according to the custom of the port. There the rate of discharge was made expressly dependent on the custom of the port—*Hulthen* v. *C. A. Stewart & Company*, [1903] A.C. 389, *per* Lord Halsbury, L.C., at p. 391; Scrutton on Charter Parties and Bills of Lading (7th ed.), art. 131. The obligation was absolute, and the exception clause was solely in favour of the owners, for the clause was separated from the immediately preceding clause, which was a mutual exception clause, and the immediately succeeding clauses were in favour of the owners. Further, the enumerated exceptions were in the main characteristically sea risks. That they were all regarded as sea risks was clear from the general summation implied in the words "other accidents of navigation excepted." The position of the word excepted showed that everything preceding it was qualified by it and treated as all of the same category. Further, the charterers were already protected by other exception clauses. In *Braemount S.S. Company* v. *Weir*, 1910, 15 Com. Ca., 101, a clause identical (except for the inclusion of strikes) in terms with the present was construed as applying to owners only. *Embericos* v. *Reid & Company*, [1914] 3 K.B. 45, did not decide that an exception of restraint of princes must be construed as mutual. *Barrie* v. *The Peruvian Corporation*, 1896, 2 Com. Ca. 59, was not in point, for the terms of the charter-party were different, and the exception clause was construed as mutual because it came between two mutual clauses. *In re Newman and Dale Steamship Company* v. *British and South American Steamship Company*, [1903], 1 K.B. 262, was really in favour of the pursuers, for Bingham, J., at p. 267, merely followed *Barrie's* case, though his own opinion was to the contrary, and further he indicated that the defenders' contention was usually secured by inserting the word "mutually" into clauses like the present. *Schele* v. *Lumsden & Company*, 1916, 53 S.L.R. 581, was in favour of the pursuers. 2. Whether the exception clause applied to charterers and owners or not, it was not proved that the custom of the port was to discharge into railway waggons. The custom must be uniform and notorious—"*Strathlorne*" *S.S. Company* v. *Baird & Sons, Limited*, 1916, 53 S.L.R. 293; *Hogarth & Sons* v. *Leith Cotton Seed Oil Company*, 1909 S.C. 955, 46 S.L.R. 593. There was no evidence showing uniformity or notoriety here, for all the cargoes went practically to one person on railway trucks, but another consignee took delivery on lorries. The practice of one person could not set up a custom—*Clacevich* v. *Hutcheson & Company*, 1887, 15 R. 11, *per* L.J.-C. Moncreiff at p. 16, and Lord Young at p. 17, 25 S.L.R. 11. 3. If the pursuers were otherwise wrong, what occurred at Bristol was not a "restraint of princes." The trucks were merely detained for others who had a preferable right to them; that to a less degree was always an incident of railway transit. There was no absolute embargo on the trucks, but a regulation of the right to the first use of them, which led as an indirect result to a lack of available waggons to unload this ship. There was no special restraint laid on the ship, but a general railway regulation. Those circumstances could not be held to be within the words "restraint of princes"—Carver's Carriage by Sea (5th ed.), section 82. *Rodoconachie* v. *Elliot*, 1874, 9 C.P. 518, was distinguished, for the circumstances were totally different, for the railway line which was to be used for the transit was in the enemy's hands. *Nobel's Explosives Company* v. *Jenkins & Company*, [1896] 2 Q.B. 326, was distinguished, for it was a case of seizure of contraband. *Geipel* v. *Smith*, 1872, 7 Q.B. 404, was a case of blockade. *Miller* v. *The Law Accident Insurance Company*, [1903] 1 K.B. 712, showed a prohibition against intercourse with the land might be a restraint. The idea of prohibition or forcible interference was inherent in "restraint." The nearest case to the present was the *Associated Portland Cement Manufacturers, Limited* v. *Cory & Son, Limited*, 1915, 31 T.L.R. 442, and it was in favour of the pursuers. *Sanday & Company* v. *British and Foreign Marine Insurance Company*, [1915] 2 K.B.

781, was not in point, for it merely decided that a "restraint" did not necessarily involve the use of force, but that a direct prohibition of the act in question was enough. In any event the contract was entered into when both parties were aware of the regulations as to railway waggons, and it must be held that "restraint of princes" applied to something else supervening after the contract was made. 4. The pursuers were entitled to be relieved of the lighterage. In the circumstances they had become custodiers of the cargo and were bound to minimise the defenders' loss, and were entitled to be relieved for expenditure made for the benefit of the defenders—*Great Northern Railway Company* v. *Swaffield*, 1874, L.R., 9 Ex. 132, *per* Kelly, C.B., on p. 135, and Pollock, B., p. 138.

Argued for the defenders (respondents)—1. The exception clause applied both to the charterers and the owners. *The Rowtor S.S. Company* v. *Love & Stewart* (*cit.*) had no bearing, for the question was not whether the obligation to discharge at 150 tons a day was modified by the custom of the port, but whether the defenders were protected by the exception clause. In a charter-party the construction of the exception clause as mutual or not depended in each case on the terms of the contract. This was a bilateral contract, and naturally its clauses ought to be interpreted as mutually beneficial. The exception clause followed a mutual clause, and there was nothing to indicate that mutuality was not carried on into it. On the other hand, the immediately succeeding clause was in favour of the ship alone, so that if the clause in question had been intended to be in favour of the ship alone, that should have been indicated by express words. The risks excepted were not characteristically sea risks, though no doubt some of them were. The words "other accidents of navigation" referred back to "collisions" and "strandings," and did not qualify the whole clause. Similar clauses were construed as being mutual in *Barrie's* case (*cit.*), followed *in re Newman & Dale S.S. Company* (*cit.*); *Touteng's* case (*cit.*) and *Blight's* case (*cit.*) were distinguished, for the exception clause was qualified by the words "during the voyage." *Braemount S.S. Company* v. *Weir* (*cit.*) was distinguished, for the exception clause contained the word "strikes," and the decision was based upon the particular terms of the charter-party. *Embiricos* v. *Read & Company* (*cit.*) decided that an exception of restraint of princes applied mutually. *Schele* v. *Lumsden & Company* (*cit.*) was distinguished, for the collocation of the exception clause was different. 2. The custom of the port was to discharge into trucks. Every cargo of esparto grass was discharged in that way. The cases of loading into lorries were so rare and minute that they could not establish any material deviation. The custom was uniform and notorious, for no other method of unloading was known. All the requisites desiderated in the "*Strathlorne*" *S.S. Company* v. *Baird & Sons, Limited* (*cit.*), and *Hogarth* v. *Leith Cotton Seed Oil Company* (*cit.*) were satisfied. In any event in the "*Strathlorne*" case (*cit.*) the usage had always been protested against, and there was a conflict of evidence. *Clacevich's* case (*cit.*) was not in point, for the *ratio decidendi* was that the ship was entitled to discharge the cargo as she received it, not that the custom of the port could not be established by the practice of the only trader in the commodities in question. The usage of one trader who was the only trader in a commodity was held to establish the custom of a port in *Temple, Thomson, & Clarke* v. *Runnalls*, 1902, 18 T.L.R. 822. But in any event the practice of the one trader here must be held to be the custom of the port to which the parties referred in contracting, for there was no other custom. Consequently the obligation of the charterers was to unload 150 tons a-day into trucks, more particularly as unloading was to be on to the quay, and esparto grass could not be allowed to lie on the quay. 3. The contract being to unload into trucks and the exception clause being mutual, the defenders were excused from performance because the Government regulations as to supply of waggons was a restraint of princes. The Government regulations were compulsory in nature, though compensation was provided for. They were carried out by statutory warrant, and were for the defence of the realm and were undoubtedly a forceful act of the executive, and these regulations undoubtedly restrained an essential part of this contract making it impossible of performance. Restraint of princes covered any executive act of the home Government — *Sanday & Company* v. *British and Foreign Marine Insurance Company* (*cit.*), *per* Bailhache, J., at p. 785, *per* Lord Reading, C.J., at p. 800, and Bray, J., at p. 825. Actual physical seizure was not necessary. An obstacle preventing fulfilment, and created by the executive Government, was enough — *Smith & Service* v. *Rosario Nitrate Company, Limited*, [1893] 2 Q.B. 323, [1894] 1 Q.B. 174. The restraint need not operate directly—Government action indirectly resulting in detention was enough —Scrutton's Charter-Parties and Bills of Lading, section 82. That was consistent with *Nobel's* case (*cit.*), *Rodoconachie's* case (*cit.*), *Geipel's* case (*cit.*), *The Associated Portland Cement Company's* case (*cit.*), and *Ebbw Vale Steel, Iron, and Coal Company* v. *M'Leod & Company*, 1915, 31 T.L.R. 604, 1916, 32 T.L.R. 485. 4. The claim for lighterage could not be sustained. The defenders were not in breach of contract, and consequently there was no occasion to minimise damages. Further, the pursuers were in breach of contract, in respect that they did not unload on the quay and they unloaded into lighters, contrary to the defenders' express protest and at their own risk. In any event the whole claim for lighterage could not be given effect to, as the pursuers did not use waggons available for the "Cronstadt," but took them for the "Reval." The Sheriff-Substitute was right.

At advising—

LORD MACKENZIE—The obligations of the defenders, the charterers, is contained in the

following clauses of the charter-party:—

"The cargo to be brought alongside the ship at loading, and taken from off the quay at port of discharge at the merchant's risk and expense, and in accordance with custom of respective ports.

"The ship to be loaded at the rate of 150 tons per working day, weather permitting, Sundays and holidays excepted, and to be discharged—after obtaining the usual quay discharging berth—at the rate of 150 tons per like working days, Sundays and holidays excepted."

It was not disputed by Mr Macmillan that the effect of these clauses was to import an absolute obligation on the charterers to unload within the stipulated period, qualified by the condition that this was to be in accordance with the custom of the port. It was maintained that this means in the present case to unload into railway trucks. It is unnecessary to examine the evidence upon this point, the import of which is fairly stated in the 11th and 12th findings in fact in the interlocutor of the Sheriff-Substitute. There may be difference of opinion as to whether the evidence led is sufficient to amount to proof of custom of the port in the sense of the judgment in the "*Strathlorne*" case, 53 S.L.R. 293, from which it appears that the custom must be certain, reasonable, uniform, and so notorious that those in the trade must be presumed to know it is an implied term of the contract. It is sufficient for the purpose of the present judgment to assume this point in the defenders' favour. The defenders did not fulfil their contract, and they accept the *onus* of showing that they were not bound to do so under the circumstances. They say they could not get sufficient railway waggons within the stipulated time owing to the Government having taken over the railways, and that this is restraint of princes and falls within the exception clause, in virtue of which they are excused performance.

The exception clause is in these terms—"The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, arrests and restraints of princes, rulers, and people, collisions, stranding, and other accidents of navigation excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner." It was maintained by the defenders that this clause applied both to the shipowners and the charterers. I am unable to agree in the view of the learned Sheriff-Substitute, and am of opinion on a just construction of the charter-party that this is not a mutual clause, but was one intended solely for the protection of the shipowners. I come to this conclusion both from a consideration of what the clause itself contains and from its position in the charter-party. It immediately follows a clause in these terms—"Charterers and owners not to be responsible for any loss, damage, or delay directly or indirectly caused by or arising from strikes, lock-outs, labour disturbances, trade disputes, or anything done in contemplation or furtherance thereof, whether the owners or charterers be parties thereto or not." One would have expected, if the clause under consideration had been intended to apply to charterers, that the expression "charterers and owners" would have been carried down. The charterer is not mentioned in the clause; the shipowner alone is. Where there is, as here, an express obligation on the charterers they must show from clear and unambiguous expressions that it was intended this exception clause should enure to their benefit. The bulk of the clause refers to the risks of the owner, not of the charterer, and when ambiguous words occur in such a clause they must be construed in conformity with the general tenor of the clause. The position of the word "excepted" in the middle of the clause shows that the concluding words "even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner" qualify not merely "collisions, strandings, and other accidents of navigation," but also "the act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, arrests and restraints of princes, rulers, and people." If a limited qualification had been intended, then the word "excepted" would have been at the end of the clause. There is no provision for negligence, default, or error in judgment of servants of the charterer. It is stated in Carver on Carriage, section 150, that it is a frequent practice to express that the ordinary risks are "mutually excepted." The absence of "mutually" in this case is against the defenders. The position of the clause in the charter-party appears to me to indicate that it is the first of a fasciculus of three clauses in favour of the ship. No doubt the position of the clause in the present case does not give the same assistance towards its construction as there was in the case of *Schele* v. *Lumsden*, 53 S.L.R. 581. There the exceptions were adjected to and only qualified the obligation of the shipowners to deliver. Nor in a case which depends upon the precise terms of the charter-party can much light be obtained from authority. The Sheriff-Substitute refers to certain English cases, and some of these were considered in *Schele* v. *Lumsden* (*cit.*). I need only say that in *Barrie* v. *The Peruvian Corporation*, (1896) 2 Com. Ca. 50, the clause which Mathew, J., had to construe was materially different from the present, and that Bigham, J., only decided *in re Newman & Dale S.S. Company*, [1903] 1 K.B. 262, in consequence of the decision in *Barrie's* case (*cit.*). Scrutton, J., in *Embiricos* v. *Sydney, Reid, & Company*, [1914] 3 K.B. 45, said he would have been bound as a judge of first instance by these decisions, but the point in that case was not whether the exceptions applied to the charterers. The charter-party in *Embiricos'* case (*cit.*) contained in the exception clause "fire from any cause on land," which, as Scrutton, J., says, points to charterers' obligations rather than shipowners' duties. In *Braemonnt S.S. Company* v. *Weir*, 1910, 15 Com. Ca. 101, Bray, J., distinguished the clause there from those in *Barrie* (*cit.*) and *in re Newman & Dale S.S. Company* (*cit.*), and came to the

conclusion that a clause in terms similar to the present but with the addition of "strikes" was not mutual and applied only to the shipowner. Upon a just construction of the charter-party I am of opinion that the exception clause here does not apply to the obligation of the charterers.

In these circumstances it is unnecessary to express an opinion upon the question whether the shortage of trucks was caused by "restraint of princes" as that expression is used in the clause. It was the duty of the consignee to have the trucks forward to receive the cargo. He was prevented doing so in consequence of the action of the Government under 34 and 35 Vict. cap. 86, sec. 16, by which the regulation of traffic on the railways was undertaken by the State, as a result of which his particular goods came low down in the scale of preference. If this comes within the "restraint of princes" it would be an extension of the "exception" beyond that given effect to in any of the cases cited to us.

The second conclusion of the summons raises the question of the pursuers' right to claim the lighterage dues which they paid. There can be no question of the equity of a considerable portion of this claim. During the examination for the pursuers of Mr Hodder it was agreed that, had the pursuers not used lighters to facilitate the discharge of the "Cronstadt," instead of being seven and-a-half days on demurrage—the exact amount allowed under the first conclusion of the summons is £285, being demurrage for seven days and three hours—she would probably have been at least twelve or thirteen on demurrage. As Mr Tutton—examined for the defenders—says, there was only one way of getting the ship discharged, and that was by lighters. It may therefore be taken that the pursuers by employing lighters saved the defenders at least five days' demurrage. This is not affected by any question about the "Reval." Under the charter-party the rate of demurrage is £40 a-day. The defenders were thus saved £200, and the pursuers are out of pocket to the amount of £240, 13s. 9d., which they disbursed for the lighters. The Sheriff-Substitute has taken the view that in employing lighters the pursuers deviated from the contract, and that in doing so without the defenders' consent they did so at their own risk. This involves that the defenders were entitled to detain the ship as long as they pleased at the rate of £40 a-day, and that the demurrage in this case cannot be considered as of the nature of liquidated damages. If, however, the defenders were in breach of their contract when they failed to take delivery within the period stipulated, then the pursuers were entitled to take steps to minimise the damage. I think the latter view should be taken, and that upon this ground the pursuers' claim for lighterage should be sustained to the extent of £200.

LORD SKERRINGTON—I have seen Lord Mackenzie's opinion, and I agree with it, and have nothing to add.

LORD PRESIDENT—I also have had an opportunity of reading Lord Mackenzie's opinion, with which I entirely agree. But as I hold a clear view that the defenders have here failed to prove the alleged custom of the port of Bristol to discharge esparto fibre into railway trucks I think it right to express that view.

The material facts of the case are set out very fully and clearly in the interlocutor of the Sheriff-Substitute. They are unchallenged. It is unnecessary therefore to repeat them. It appears to me that the charterers' obligation to pay demurrage depends, in the first place, on the soundness of the 17th finding in the Sheriff-Substitute's interlocutor to the effect that "the customary method at the port of Bristol in regard to the discharge of cargoes of esparto fibre is for the discharge of the esparto into railway trucks on the quay, it being the duty of the defenders to put the cargo into trucks on the quay." I am of opinion that on the evidence this finding cannot be sustained. The defenders' obligation under their charter-party was expressed in the following terms:—"The cargo to be taken off the quay at the port of discharge at the merchant's risk and expense, and in accordance with the custom of the respective ports." According to all the authorities that must be read as meaning "according to the settled and established practice of the port."

The evidence here discloses no settled and established practice of the port in the sense in which that expression was used in this charter-party. It simply shows that in the case of esparto fibre a method of discharge is adopted which has been found to suit the convenience of one of the receivers, and it is impossible in my view to rear up a settled and established practice of the port upon that solitary fact. The trade in esparto fibre so far as the port of Bristol is concerned sprang up twenty-five years ago, but it was a very small trade at the best. In each year four or, it may be, five cargoes of esparto came into the port of Bristol, and they were all consigned to one receiver—the firm of Pirie, Wyatt, & Company, paper-makers at Wells. They, it appears, had made what was for themselves a very favourable arrangement with the Great Western Railway Company. They had secured through rates for the esparto from Bristol to Wells, and accordingly it suited their convenience admirably when the esparto was unloaded at Bristol to place it immediately in railway trucks to be conveyed thence to Wells. Occasionally there were other buyers of esparto in small quantities in Bristol, and they equally naturally took delivery of their esparto in waggons or lorries. The result of the practice which had sprung up at the port of Bristol is admirably summarised in the evidence of the managing director of a large stevedore company—the witness Machin. To the question "There is no general trade to this port except half-a-dozen customers, and this particular firm, for their own requirements, say they will take it straight into truck and to their works?" he answers "That is so."

An effort has been made to establish as a custom of the port of Bristol what is no more than a method of taking delivery which suits the special convenience of one particular buyer. That appears to me to lack all the essentials of an established and settled custom at a port either of loading or of discharge. It is not certain except in the case of one receiver. It can by no possibility be notorious, since only four or five cargoes a-year are consigned to one receiver. It is not uniform except in the case of one of the receivers. And it is certainly not reasonable except in the case of Pirie, Wyatt, & Company or others who chance to be placed exactly as they are. In the case of other receivers it would be a most unreasonable custom, and one hesitates to lay down that there is an established and settled custom of the port of Bristol, which would be most anomalous and inconvenient, and which would probably operate unjustly in the case of subsequent buyers and receivers of esparto cargoes consigned to this port. Lord Justice-Clerk Moncreiff observed in the case of *Clacevich* v. *Hutcheson & Company*, 1887, 15 R. 11, 25 S.L.R. 11, with regard to an alleged custom in the discharge of bones at Aberdeen (p. 16)—"I do not think that any such custom has been proved. In the first place, the trade in bones has grown up lately, within the last thirty years." Here it is twenty-five years. "Then there is only one merchant in Aberdeen who deals largely in bones, and that is the defender"—there is only one receiver who deals largely in esparto, and that is Pirie, Wyatt, & Company—"and his practice cannot raise up such a custom of the port as would be sufficient to bind traders." "It appears," says Lord Young in the same case (p. 17), "that" the defender "is in the habit of insisting on having the cargoes consigned to him separated on board the ships which brought them, but I cannot regard that as a custom of the port within the meaning of this charter-party. The practice of a single merchant to use ships in this way for his own convenience is not a custom of the sort to which the charter-party refers."

These opinions seem to me to be exactly in point in the present case. The evidence clearly establishes that it is for the convenience of Pirie, Wyatt, & Company, papermakers at Wells, to receive esparto on railway trucks, but it establishes nothing more. I accordingly reach the conclusion that inasmuch as the alleged custom of the port of Bristol has not been proved the defenders are bound to pay demurrage. On the other questions which Lord Mackenzie has dealt with in his opinion I entirely agree with his Lordship.

LORD JOHNSTON did not hear the case, and was not present at advising.

The Court recalled the interlocutor of the Sheriff-Substitute, and repeated the findings in fact therein, Nos. 1 to 16 inclusive, and in place of No. 18 found "that had the pursuers not used lighters to facilitate the dispatch of the 'Cronstadt,' she would have been on demurrage for five days longer"; and in place of the findings in law found "(1) that the exception clause in the charter-party above quoted did not apply to the charterers but only to the shipowners, (2) that the defenders were liable in the sum of £285, with interest, as concluded for, in name of demurrage, and (3) that the pursuers by employing lighters diminished the damages resulting from the defenders' breach of contract in failing to take delivery within the period stipulated in the charter-party, to the extent of £200, being five days' demurrage at £40 a-day, and that to this extent they were entitled to decree under the second conclusion of the summons: Therefore decerns," &c.

Counsel for the Pursuers—A. O. M. Mackenzie, K.C.—C. H. Brown. Agents—J. & J. Ross, W.S.

Counsel for the Defenders—Macmillan, K.C. — D. Jamieson. Agents—Webster, Will, & Co., W.S.

Tuesday, July 11.

SECOND DIVISION.

[Scottish Land Court.

HUNTER *v.* STRACHAN.

Landlord and Tenant—Small Holding—Process—Appeal—Competency—Special Case Bringing under Review Decision by a Single Member of the Land Court—Small Landholders (Scotland) Act 1911 (1 *and* 2 *Geo. V, cap.* 49), sec. 25 (5).

An application to have a first equitable rent fixed was presented by the tenant of a croft. He maintained that he had given valid notice of his intention to take, and had taken, advantage of a break in his lease. The application was dealt with by a single member, not the chairman, of the Land Court.

Held, after consultation with the judges of the First Division, that a special case to the Court of Session bringing under review his decision was competent.

Landlord and Tenant—Lease—Break in Lease—Notice by Tenant that he will Remove at Break in Lease.

A tenant under lease of a croft wrote to the landlord's agents—"I have a break in my lease at Whitsunday 1915 and I asked the yearly rent down to £24 and a water supply from the cistern which supplies Minnes to be brought across in metal pipes"; and they replied—"We have received your letter of yesterday's date and shall submit your request for a reduction of rent and a water supply to Mr H. for instructions. We may point out, however, that Mr H. already agreed to provide a water supply but you declined to accept it." Nothing further was done, and the tenant, on the basis that he had taken advantage of the break, applied to the Land Court to fix a first equitable rent.