seems to me that the pursuer cannot succeed, and that the Lord Ordinary's interlocutor is right and ought to be adhered to.

LORD JUSTICE-CLERK—I agree.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Dean of Faculty (Dickson, K.C.)—Sandeman—Lowson. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defenders (Respondents)—Hunter, K.C.—Chree. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Thursday March 18.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

HOGARTH & SONS *v.* LEITH COTTON SEED OIL COMPANY.

Shipping Law—Carriage of Goods—Contract for Delivery from Ship's Tackles—Landing into Shed at Expense of Consignee—Custom of Port—"Indefinite"—"Uncertain"—"Not Uniform, Universal, and Notorious"—Inconsistent with Contract.

The bills of lading under which a cargo was carried from Bombay to Leith, provided that the cargo should be "delivered from the ship's tackles (where the ship's responsibility shall cease) at the aforesaid port of Leith." The cargo consisted of bags of three different commodities, marked by nineteen different marks and deliverable to eight different consignees. On the arrival of the vessel the shipowners refused to deliver into the consignees' lorries at the ship's side, and landed the whole cargo into shed, where it was assorted according to the various marks. The shipowners thereafter raised an action against the consignees to recover the expense of "shedding" the cargo, and averred that it was "the custom of the port of Leith for ships discharging mixed or general cargoes similar to" the one in question, "with a variety of distinguishing marks and deliverable to a number of receivers, to send the cargo into shed and thereafter assort the several parcels according to the various marks at the expense of the consignees."

Held, after a proof, that as the custom averred by the pursuers was (1) indefinite and uncertain, (2) not uniform, universal, and notorious, and (3) inconsistent with the contract, it could not be imported into the contract, and the defenders were therefore not liable.

Messrs Hugh Hogarth & Sons, the managing owners of the steamship "Baron Fairlie," raised an action against the Leith Cotton Seed Oil Company, concluding for, *inter alia*, the sum of £20, 13s. 6d.

The following narrative is taken from the opinion of Lord Ardwall:—"The pursuers in this case are managing owners of the s.s. 'Baron Fairlie' of Ardrossan, and for the purposes of this action represent the whole owners thereof. The defenders are a company carrying on the manufacture of cotton seed oil and cotton cake, and for the purposes of this action represent the receivers of a cargo of cotton seed, bone meal, and Kurdee cake carried by the said vessel from Bombay to Leith under bills of lading of which No. 10 of process is a specimen.

"By the said bills of lading the pursuers undertook to deliver the cargo 'from the ship's tackles (where the ship's responsibility shall cease) at the aforesaid port of Leith.'

"The cargo consisted of 52,424 bags of cotton seed, 18,280 bags of bone meal, and 727 bags of Kurdee cake.

"These bags were distinguished from each other by nineteen different varieties of marks. The cargo was shipped under twenty-seven separate sets of bills of lading representing different portions thereof, and there were eight consignees or receivers of the cargo. The pursuers having had considerable difficulty in delivering from the s.s. 'Gloamin' a cargo of a somewhat similar nature but not so much mixed, intimated to the defenders before the ship arrived that the entire cargo would probably have to be treated as an ordinary general cargo to be landed by the ship's porters or stevedores, and assorted in shed, the cost of 'shedding' to be paid by the defenders. In reply the defenders gave a note of the bags of cotton seed consigned to them, and intimated that all the bags bearing their marks would be weighed and sampled separately on board the steamer, and would be loaded on to the lorries direct *ex* ship by their own porters. They further intimated that if the seed was put into shed by the pursuers' men, it would be entirely at the pursuers' own expense. Some further correspondence followed, which shows very clearly the positions taken up by both parties from the first. The 'Baron Fairlie' arrived in Leith on 5th February 1907, and the discharge of the cargo started at ten o'clock that day. The pursuers refused to deliver the cargo into the defenders' lorries, which were ready to receive it at the ship's side, and landed the whole of it into shed and assorted the various bags there according to their marks and the bills of lading, and delivered their portion of the cargo to the defenders out of the shed. In the present action they seek to recover, *inter alia*, the defenders' proportion of the expense of putting the cargo into shed and weighing it there, amounting to 6d. or 7d. per ton, or in all £20, 13s. 6d. It ought here to be mentioned that the present is a test case, and represents much more than that amount.

"The defenders maintain that under the contract between them and the pursuers contained in the bills of lading they were entitled to delivery from the ship's tackle at the ship's side. The pursuers maintain

that notwithstanding the clause in the bill of lading they were entitled to 'shed' the goods in respect of an alleged custom of the port of Leith which is so set forth in articles 3 and 4 of the condescendence and the answer to the first statement of facts for the defenders. The result of these averments is very fairly stated by the Lord Ordinary in his interlocutor to this effect—'That it is the custom of all ships discharging at the port of Leith mixed or general cargoes with a variety of distinguishing marks, similar to that carried by the "Baron Fairlie," and deliverable to a number of receivers, to send the cargo into shed and thereafter assort the several parcels according to the various marks at the expense of the said receivers.'"

The defenders pleaded, *inter alia*—"(1) The pursuers' averments as to the custom of the port of Leith being irrelevant, the same should not be remitted to probation."

On 22nd January 1908 the Lord Ordinary (SALVESEN) repelled the first plea for the defenders and allowed a proof.

Opinion.—[*After narrating the nature of the action and the circumstances in which it was raised*]—"The defenders do not admit the custom, but contend that if it exists it is not binding upon them, on the ground that it is inconsistent with the bills of lading under which they took delivery. In particular, they refer to the clause with reference to delivery from the ship's tackles.

"Had the question here raised been new, I think it would have been by no means an easy one; but I cannot distinguish the facts of the present case from those which occurred in *Marzetti* v. *Smith*, 49 L.T. (N.S.) 58. The decision of the Court of Appeal is one of high authority, because of the eminence of the Judges who took part in it, and it has never been questioned in England during the comparatively long period that has since elapsed. Even, therefore, if I saw occasion to differ from the reasoning of the learned Judges, I should be very slow to disregard the decision, as I was asked by the defenders' counsel to do. As matters stand I see no reason whatever for questioning the soundness of the decision, and if so it practically settles the present case in favour of the pursuers. It was there held that in the case of a mixed cargo carried under bills of lading with a clause as to delivery identical with the one with which I am now dealing, the shipowner was not bound to discharge the cargo, as the consignees requested him, direct into lighters, but was entitled at their expense to have it put upon the quay and assorted there. It was suggested that the charges for which the consignees were held liable in *Marzetti's* case were the charges of the dock company in whose sheds the goods were landed, while the charges that are here sought to be recovered are those incurred by the ship in landing and assorting the goods. As the dock company, however, undertook the landing of the goods in *Marzetti's* case, I think the services for which they charged were substantially the same, at all events in part, as those for which the pursuers now claim to be reimbursed. The case at all events settles that the obligation to deliver from the ship's tackles is not inconsistent with the right of the shipowner, where a local custom to that effect exists, to land and shed the goods so that they may be assorted with more leisure than is compatible with the rapid discharge of a ship carrying a mixed cargo, and at present I must assume that the pursuers are in a position to prove the custom averred.

"A separate point was raised with regard to the expense incurred to the consignees in weighing the cargo. According to the sample bills of lading produced, the freight was payable in Leith on nett weight delivered, and, apart from custom, the cost of weighing would probably have fallen upon the ship. This was so decided in the the case of *Coulthurst*, L.R., 1 C.P. 649. Willes, J., in giving his opinion, said—'In the absence of any custom to govern the matter, the person who wants to ascertain the quantity must incur the trouble and expense of weighing. It is by no means an uncommon thing to have goods weighed on board, but I never heard of the merchant being called upon to pay for it.' The shipowner there had attempted to prove a custom under which the consignee was bound to pay for the expense of weighing, but the jury negatived the existence of any such custom. In the present case the point does not, in my opinion, really arise. The defenders do not claim from the pursuers the ordinary expense of weighing the cargo on board ship, but only the extra expenses of weighing caused by the ship landing the cargo instead of delivering it from the ship's tackles. The liability for this extra expense seems to me to depend on exactly the same considerations as the liability for the landing and shed charges with which I have already dealt. I shall accordingly repel the first plea-in-law for the defenders and allow parties a proof of their averments."

Proof was thereafter led, the import of which appears from Lord Ardwall's opinion *infra*.

On 20th March 1908 the Lord Ordinary pronounced the following interlocutor:—"Finds that the pursuers have failed to prove that it is the custom of all ships discharging at the port of Leith mixed or general cargoes, with a variety of distinguishing marks similar to that carried by the 'Baron Fairlie,' and deliverable to a number of receivers, to send the cargo into shed, and thereafter assort the several parcels according to the various marks, at the expense of the said receivers: Finds that in terms of the bill of lading, to which the defenders acquired right, they were entitled to require that the goods therein contained should be delivered to them from the ship's tackles, unless upon the footing of the shipowners paying the extra charges caused by landing the cargo into shed and thereafter assorting it, including in the said charges the extra cost incurred by the defenders in weighing the said cargo in shed: Finds further, that after deducting

said charges and expenses, the amount of freight due to the pursuers amounts to the sum of £4, 3s. 9d., for which sum decerns against the defenders, with interest as concluded for."

Opinion.—"In this case, after hearing parties in the procedure roll, I repelled a plea to the relevancy, and in doing so expressed an opinion that if the pursuers succeeded in establishing their averments of custom they would be entitled to decree for the sum concluded for. In the interlocutor pronounced, however, all questions are left open, and I do not consider myself foreclosed from reconsidering, in view of the fuller information and argument now before me, any of the points to which I adverted in my previous opinion.

"The action is a test one, and raises the general question whether in the case of a mixed cargo, such as the 'Baron Fairlie' carried from Bombay to Leith, it is the recognised custom of the port of Leith that the extra charges incurred in landing the goods into shed and there assorting them fall to be paid by the shipowners or by the receivers of the various parcels of which the cargo consists. The first question is one of fact, namely, whether such a custom has been proved to exist; the second, whether, assuming its existence in the ordinary case, it is not inconsistent with the terms of the contract between the parties as contained in the bills of lading.

"The proof discloses that the 'Baron Fairlie' was not loaded under a charter-party. She is a vessel carrying about 7000 tons cargo, and she was sent by her owners to Bombay after only cargo to the extent of 4500 tons had been booked. Instructions were given by the owners to their agents to secure such other parcels of goods as they could at the best rates of freight obtainable, and this they did with such success that in the end she obtained a full cargo. The cargo consisted of three commodities—cotton seed, bean meal, and a small quantity of Kurdee cake, these commodities being easily distinguishable from each other by the size and appearance of the bags which contained them. The cotton seed, however, was of many qualities, which were indicated by different marks upon the bags. For the most part each bill of lading represented a homogeneous parcel, but in one case, where 2958 bags were shipped under one bill of lading, there were three different marks on the bags, and in another case two different marks were covered by the same bill of lading. Although there were twenty-seven bills of lading, the actual receivers of the cargo numbered only eight, and this was known to Messrs Henderson & M'Intosh before the vessel's arrival in Leith. This firm acted as the agents for the 'Baron Fairlie' at the port of discharge, and they had also acted in the same capacity for about two-thirds of the steamers which have carried cargoes of a similar kind from India to Leith during the five years that this trade has been established. The majority of these cargoes were of cotton seed only, or cotton seed with a small proportion of lentils; and where there were different marks upon the bags, these were as a rule not so numerous as to occasion any difficulty in the discharge, more especially as the receivers did not usually exceed two or three in number. Accordingly, with one exception, all the cargoes arriving prior to the 'Baron Fairlie' were delivered to the receivers from the ship's tackles. In the case of the 'Hillgrove,' Henderson & M'Intosh, owing to the number of marks and receivers, directed the cargo to be put into the shed alongside the ship and there assorted, so as to facilitate the rapid discharge of the vessel, and prevent any mistakes in the delivery of the cargo; and the receivers, after some friction, acquiesced in the extra cost of shedding and sorting the goods being charged against them. It was represented for the defenders that this was the result of an arrangement, but I do not think that is made out. At the same time there are cases in which receivers find it to their advantage to have their goods put into shed, even when they require to pay the landing charges, as they may not have available accommodation in their own warehouses, or may desire to sell the goods while they are lying in shed.

"In the subsequent case of the s.s. 'Gloamin,' which arrived in Leith on 9th March 1906 with a cargo of 3140 tons of cotton seed and bone meal, the bags of which had fifteen different marks, delivery was given to the receivers from the ship's tackles. Owing to the difficulty, however, of sorting out the different marks in the ship's hold or on deck, the discharge occupied at least twice as long as if the cargo had been a homogeneous one — a serious matter for vessels of such large tonnage. Accordingly, when Mr M'Intosh received information as to the character of the cargo carried in the 'Baron Fairlie,' he resolved not to expose that vessel to similar risk of detention, and before her arrival he intimated to all the receivers, including the defenders, that the cargo would be treated 'as an ordinary general cargo, *i.e.*, it will be landed by our porters and/or stevedores, and selected in shed, the cost of which will of course be for your account.' The defenders, who were consignees of over 10,000 bags, protested against this, stating that they would take the cotton seed direct *ex* ship as usual, and that if the seed was taken from the ship and the marks separated in shed, the extra expense must be borne by the ship. Parties adhered to their respective positions, the defenders sending down porters to receive the cargo consigned to them, and the shipowners landing the goods in the shed notwithstanding by means of a gang of stevedores employed by them.

"The discharge of the 'Baron Fairlie' was accomplished in the remarkably short period of twenty-seven working hours, as compared with seventy-one hours occupied in discharging the 'Gloamin,' a vessel less than half her size. The shipowners were thus amply justified in their own interests in adopting this method of discharge, and the defenders do not contest their right to

do so. As the bills of lading, however, provided that the cargo was to be delivered from the ship's tackles on payment only of the freight specified, it clearly falls upon the pursuers to establish a custom by which they are warranted in charging the extra expense against the receivers; and I shall now proceed to consider the evidence by which they claim to have done so.

"Parties are agreed that in the ordinary case, under such a bill of lading as this, the shipowners pay the stevedores by whom the goods are attached to the ship's tackles, and put on the ship's deck or over her rail, while the consignees pay the porters by whom delivery is then taken. They are also agreed that where the vessel falls to be discharged as fast as the cargo can be delivered, if the consignee's porters are not in attendance, or are not able to take delivery as fast as it is tendered by the ship, the shipowners have the right of landing the cargo into shed, and charging the extra expense against the consignees. This is obviously in the interest of the consignees, who would otherwise have to pay demurrage. The defenders, however, say that they are entirely unaware of any custom entitling the ship to take this course where they are ready and willing to take delivery as fast as it can be given from the ship's tackles; and it is this contention that the pursuers have to meet. In the case of vessels belonging to regular lines trading between foreign ports and Leith, and which as a rule carry a miscellaneous cargo, consisting of a great variety of commodities, it is, I think, proved that the general custom is for the ship to discharge the goods into shed and deliver them there to the consignees. In such cases the consignees, although not invariably, pay a sum in addition to the freight in name of landing charges. Messrs Currie and Gibson & Company, who have regular lines to near Continental ports, make no express charge for landing, and in other cases the actual cost of such landing (6d. or 7d. per ton) is not debited to the consignees, but a regular charge of 3d. per ton is made against them, which would point to the custom having originated in a compromise. Even where the full charge is made, as it is by Messrs Thomson and Cormack, under bills of lading, which in this matter are comparable with the bills of lading held by the defenders, the evidence rather suggests that the receivers acquiesce in paying these charges, because it might cost them more to have porters in attendance to receive small consignments, since they might have to wait for considerable periods before the goods were brought up from the ship's hold. But even general ships owned by the various shipping lines will in some cases deliver considerable parcels direct from the ship's tackles at the consignees' request, a practice which is equally consistent with such delivery not interfering with the rapid discharge of the steamer, as it is with the shipowner recognising the right of the consignees to take delivery in this manner. What is, however, of much greater importance is that, apart from the case of the 'Hillgrove,' it has not been proved that in any case the owners of a ship carrying miscellaneous cargo have refused to deliver to the consignees from the ship's tackles when the latter sent their porters so to receive the cargo.

"The trade with the United States, which, as regards the external appearance of the commodities carried, is most comparable to the Indian trade, stands on a different footing. When the trade was first started about twenty-eight years ago, delivery was always made from the ship's tackles. These vessels were usually loaded with grain in bulk in the lower holds and flour in bags and general merchandise on the top. As the trade developed, however, and the flour carried came to be marked with numerous marks, it was found that there was difficulty in the consignees obtaining the special consignments to which they were entitled, and that the vessels were liable to be detained when the various parcels were assorted in the ship's hold or on deck. The matter, however, was not left to custom, but the shipowners inserted a special clause in the bills of lading entitling them to land the goods in shed, and to charge the cost of landing against the consignees. No inference can therefore be drawn from the mode of delivery in this special trade with regard to custom. On the contrary, it rather appears that the shipowners were obliged to protect themselves against the inconvenience of delivering a mixed cargo from the ship's tackles by contracting with the consignees that they should receive it on the quay and pay for the expense of landing it.

"If I have fairly stated the result of the pursuers' evidence, it appears to me that they have failed to instruct the custom averred. One searching criticism, which is in itself almost destructive of the alleged custom, was made by the defenders' counsel. He pointed out that the pursuers admitted that in the case of such a cargo as the 'Baron Fairlie' carried, if the steamer in order to obtain extra dispatch chooses to carry on unloading during the night, the extra charges of landing are borne by the ship and not by the receivers. I can find no explanation of this except that after ordinary working hours the consignees are not bound to be in attendance to receive the cargo. If, however, the custom were that whether they are in attendance or not the ship has the absolute right of discharging a mixed cargo into the shed, it would be immaterial to the consignees whether the discharge were carried on during the day or at night, provided the expenses of landing it at night were not in excess of those exigible for daylight discharge.

"So far I have dealt only with the pursuers' case, but it is not unimportant that a large number of merchants have given evidence in the witness-box that although they have carried on business in Leith for many years in commodities similar to those carried by the 'Baron Fairlie,' they have never heard of the custom which the

pursuers aver. If such a custom were a general one it would be impossible to account for this alleged want of knowledge except on the footing that these witnesses were deliberately stating what they knew not to be the fact—an assumption which appears to me to be quite inadmissible.

"If my conclusion in fact is sound, it is not necessary that I should consider the other point raised—namely, whether the alleged custom is not inconsistent with the terms of the contract between the parties. On this point I would only like to say that I rather think I misinterpreted the import of *Marzetti's* case, on which my former opinion largely proceeded. It is, however, difficult to ascertain the exact facts from either of the two reports of the decision in question; but the sole controversy seems to have been as to the right of the ship, in the case of a general cargo, to put it upon the quay and assort it there, notwithstanding the clause in the bill of lading that delivery should take place from the ship's tackles. It was held that the clause was one in favour of the ship, which might be waived, provided that no extra expense was thereby entailed on the consignees. The complaint, no doubt, was that extra expense had been occasioned by the ship's failure to deliver into lighters, but what was the nature of this expense is not clearly disclosed, and the report of the case seems to show that, after the cargo had been landed into shed at ship's expense, the shipowners were willing to put it into the receivers' lighters also at ship's expense. If so, the decision in *Marzetti's* case, instead of being an authority in favour of the pursuers, as I was at first inclined to regard it, distinctly supports the defenders' contention.

"I quite recognise that in the case of the 'Baron Fairlie' the marks and receivers were so numerous that in all probability the discharge of the vessel would have been very much impeded but for the shipowners' resolution to have the whole cargo put into shed; and it may well be that the inconvenience to the ship is out of all proportion to the extra cost that would be thrown upon the consignees. If so, the shipowners' remedy is to amend the contract, as was done by the American liners.

"The pursuers admit that if I sustain the defences, not merely are they not entitled to the sum of £20, 13s. 6d., being the total amount of landing charges applicable to the defenders' consignment, but that the remainder of the freight due requires to suffer a deduction of £12, 4s. 10d., being the extra cost imposed on the defenders in weighing the goods in shed as compared with weighing on deck. The result is that the pursuers are only entitled to decree for the sum of £4, 3s. 9d. As a larger sum than this was offered before the action was raised, the pursuers must be found liable in expenses."

The pursuers reclaimed, and argued—The evidence established that there was a custom of the port of Leith whereby a shipowner in discharging a general cargo was entitled to send the cargo into shed in order to assort it at the expense of the consignee. It was further proved that a cargo such as that carried by the "Baron Fairlie" was properly described as a general cargo. Though it might sometimes be difficult to say whether any cargo was or was not a general one, and though the term "general cargo" might not be capable of exact definition — the question being really one of degree—that did not prevent it being proved that there was in point of fact such a custom—see *Malcolm* v. *Lloyd*, February 4, 1886, 13 R. 512, 23 S.L.R. 371; *Wimbledon and Putney Commons Conservators* v. *Dixon*, 1875, 1 Ch. Div. 362. There was no inconsistency between the custom and the bill of lading. The obligation on a shipowner was to deliver according to the method established by the custom of the port—Carver, Carriage at Sea, 4th ed., sec. 461, p. 540; *Marzetti* v. *Smith & Son*, 1883, 49 L.T. 580, 5 Asp. Mar. Law Cases, 166, 1 Cababé and Ellis, 6. Any contract as to delivery of cargo was made subject to the custom of the port, and must be construed in the light of the custom. Section 493 (4) of the Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60) did not apply—*Marzetti* v. *Smith*, *cit.*

Argued for the defenders (respondents)—The custom averred by the pursuers was inconsistent with the contract between the parties, whereby the pursuers undertook to deliver the cargo from the ship's tackle, and it could therefore not be imported into the contract—*Tancred, Arrol, & Company*, v. *Steel Company of Scotland, Limited*, March 7, 1890, 17 R. (H.L.) 31, 27 S.L.R. 463; *Robinson* v. *Mollet*, 1879, L.R., 7 H.L. 802, *per* Blackburn, J., at p. 811; *Hayton* v. *Irwin*, 1879, 5 C.P.D. 130; *"The Nifa,"* [1892] P. 411; *Holman* v. *Wade*, the *Times*, 11th May 1877 (also reported in Carver, Carriage at Sea, 4th ed., section 463, p. 544); *Kearon* v. *Radford & Company*, 1895, 11 T.L.R. 226. The case of *Marzetti* v. *Smith*, *cit.*, was in the defenders' favour. In general the duty of a shipowner was to put the goods carried by him in such a position that the consignee could take delivery—*Peterson* v. *Freebody & Company*, [1895], 2 Q.B. 294, *per* Esher, M.R., at p. 297, and no freight was due till the ship was ready to give delivery —Scrutton, Charter-Parties and Bills of Lading, 5th ed. p. 287. It followed that the obligation to separate his cargo fell on the shipowner—Carver, Carriage at Sea, 4th ed., sec. 462, p. 542; Merchant Shipping Act 1894, section 493 (4); *Bradley* v. *Dunipace*, 1862, 31 L.J. (N.S.), Ex. 210, 32 L.J. (N.S.) Ex. 22. In any event the evidence did not establish the existence of the custom averred. In order to be imported into a contract, a custom must (Scrutton, Charter-Parties and Bills of Lading, 5th ed. p. 18), in addition to being consistent with the contract, be reasonable, certain—Carver, Carriage at Sea, 4th ed., section 186, p. 229; *Sewell* v. *Corp*, 1824, 1 Car. and Payne, 392; universally acquiesced in—*Armstrong & Company* v. *M'Gregor & Company*, January 19, 1875, 2 R. 339, *per* L. P. Inglis, at p. 342, 12 S.L.R. 243, p.

246; *Brown* v. *M'Connell*, June 7, 1876, 3 R. 788, *per* Lord Gifford; and not contrary to law. The custom must also be known to both parties—*Kirchner* v. *Venus*, 1859, 12 Moore P.C. 361, *per* Lord Kingsdown, at p. 399; *Norden Steam Company* v. *Dempsey*, 1876, 1 C.P.D. 654, *per* Brett, J., at p. 662; *Holman & Sons* v. *Peruvian Nitrate Company*, February 8, 1878, 5 R. 657, *per* Lord Shand at p. 663, 15 S.L.R. 349, at p. 352. No custom complying with these conditions had been proved to exist. Counsel also referred to *Clacevich* v. *Hutcheson & Company*, October 28, 1887, 15 R. 11, 25 S.L.R. 11.

At advising the opinion of the Court was delivered by

LORD ARDWALL — [*After the narrative above quoted*]—The first observation that I desire to make is that the custom averred by the pursuers is too indefinite and uncertain in its terms to admit of its being held to be a term or condition under which the contract of affreightment in this case was entered into. The terms are in themselves ambiguous and uncertain, particularly the term "mixed or general cargoes," and for this I need only refer to the evidence of Mr M'Intosh, who is a shipowner in Leith and whose firm acted as agents at Leith for the "Baron Fairlie" on behalf of the pursuers, and to the evidence of Mr Hogarth, one of the pursuers. Mr M'Intosh in the proof says—"The right to land into shed applies to general cargo. It applies also in cases where the merchant does not fulfil his duty in taking it from the ship's tackle, where he has failed to take it from the ship's tackle when he ought to have done so. In cases where the consignee awaits the arrival of the ship, and offers to take delivery of the cargo, the custom to which I have spoken applies to general cargo. I don't know that I can define what is general cargo; I don't know that it has ever been defined. All I can say is that this is a very good illustration of it. In my opinion a general cargo is one where there are a number of shippers, a number of receivers, a number of marks, and a number of commodities. I don't say that each and all of these elements are essential for a general cargo, but the major part. I merely say this is an illustration of a custom which exists, and a custom which obtains in the case of general cargoes only. (Q) I want to know what constitutes a general cargo?—(A) Well, I don't think, unless you are prepared to accept my definition, that I am bound to lay it down. I say this is an illustration of a general cargo; I don't think it can be defined by anybody more closely than I have done." And again—"(Q) Is it entirely a question of circumstances whether a cargo is or is not to be deemed to be a general cargo?—(A) I don't know that I can answer your question any further than I have done; it is an exceedingly difficult one; you can quite appreciate that those Indian cargoes have come on to the border line of general now and again. The border line is difficult to define in certain cases. In each case it is a question of degree to a certain extent. We have to consider the circumstances of the whole case. It depends on the circumstances to a certain extent undoubtedly." Mr Hogarth, one of the pursuers, says:—"*Cross.*—It is somewhat difficult to define a general cargo; if you give me a hypothetical case I will define what is a general cargo and what is not. A general cargo can be various things. A general cargo, I should say, roughly speaking, would be a cargo consisting of various commodities, various different marks, shipped by different shippers, and possibly consigned to various different consignees, but a general cargo need not be all these things; in my opinion, it need not have all these elements. In order to constitute a general cargo the essential element is different kinds of cargo. *By the Court.*—One expects various consignees of different cargo. A general cargo could be to one consignee. *Cross continued.*—(Q) Then the number of receivers is immaterial; it is entirely the variation in the number of commodities carried?—(A) No, not entirely. I have applied my mind to this, but I find it very difficult to define what is a general cargo. I consider that the essential elements which go to constitute a general cargo are different kinds of merchandise, and I should say also probably different marks. *By the Court.*—(Q) Or different kinds of marks on the same kind of merchandise?—(A) Yes. *Cross continued.*—(Q) Is no cargo a general cargo unless it has different kinds of marks upon the same kind of goods?—(A) Yes, it can be a general cargo. (Q) Then don't you agree that different kinds of marks must go out as an essential element?—(A) No, I don't think so." And again—"*By the Court.*—(Q) You mean that if there is only one commodity, then it would not be a general cargo unless that commodity had different marks upon it?—(A) Well, I should say it would. I consider it would be a general cargo if there were a great many different marks upon the bags containing the same commodity. *Cross continued.*—I consider the variation in commodity would be an essential to the idea of a general cargo. I consider that when you have a ship loaded with bags of flour from stem to stern, but with different marks upon it, consigned to one consignee, that would be a general cargo. A ship loaded with a variety of different kinds of merchandise, none of which were marked, but all consigned to the same consignee, would certainly be a general cargo."

Now, as was remarked by Sir George Jessell, M.R., in *Nelson* v. *Dahl*, 1879, L.R., 12 Ch. D. 575, "a custom of trade must have quite as much certainty as the written contract itself." The reason of this is evident. If the custom is not definite, it is not possible to say what is the term which is to be held to be incorporated in any individual contract. But in this case the uncertainty does not end with the description of the class of cargo to which the alleged custom is to apply. It also extends, according to the proof, to the amount or proportion of charges to be paid, for there seems to be no doubt that with

regard to the lines which carry what are always called "general" cargoes, such as the regular lines of steamers from Hamburg, Rotterdam, and Antwerp to Leith, and whose practice is relied upon by the pursuers, it is not the custom that the consignee should pay the whole charges for shedding cargo, because in the case of these lines it is proved that a modified charge overhead of threepence per ton is what is charged against the consignees, the full charges for "shedding" cargoes at the port of Leith being 6d. or 7d. per ton.

But, in the second place, a usage or custom of trade will not be admitted to add to or explain a contract unless it can be shown to be uniform and universal in the trade to which it relates, and so notorious that both parties to the contract must either have known or be held to have known of it. Now, I agree with the Lord Ordinary that this has not been made out by the pursuers with regard to the alleged custom.

Proof has been led with regard to various branches of the Leith shipping trade. First, there are the cargoes brought to Leith by steamers belonging to regular lines trading between Leith and continental ports, such as the Leith, Hull, and Hamburg Line, and the line to and from Rotterdam, Antwerp, and Dunkirk. The former of these lines is managed by Messrs Currie, and the latter by Messrs Gibson & Co. Their steamers, as a rule, bring to Leith miscellaneous cargoes, consisting of a great variety of commodities and manufactured articles, and with regard to these it has been certainly proved that the general custom is for the ship to discharge the goods into shed and deliver them there to the consignees.

But the second part of the alleged custom, namely, that the expenses of shedding the goods are paid by the consignees, is not borne out by the practice with regard to these cargoes. In some cases the consignees pay a sum in name of landing charges, but in most cases the actual cost of the landing charges is not debited to the consignees, but an overhead charge of threepence per ton is made against them, which seems to show that a compromise or other agreement had been come to under which such expenses were shared.

With regard to the Russian and Baltic trade, which is spoken to by the witnesses Mr Cormack and Mr Thomson, while it appears that in the case of mixed cargoes it is their practice to put the goods into shed and charge the consignees with the cost, yet they give only one instance of a case in which consignees of portions of a ship's cargo demanded delivery direct from the ship's tackles and were refused. It seems also that Mr Cormack has had disputes over the amount of landing charges, though not, he says, over the principle of the consignees paying these, and in these cases, to use his own words, "we simply held on to the goods until the man paid us."

With regard to the American flour trade, the proof is to the effect that when that trade first began at Leith, delivery was always made from the ship's tackles, but as the trade developed, and flour came to be carried in bags marked with numerous varieties of marks, so that difficulty was found in apportioning their special consignments to the various consignees, and so that the vessels were liable to be detained until the bags were assorted in the ship's hold or on deck, the practice began of putting the bags into shed, but the matter of payment was not left to custom, for the shipowners inserted a special clause in the bills of lading entitling them to land the goods in shed and to charge the cost of shedding against the consignees. The proof regarding this class of trade accordingly does not afford support to the custom alleged by the pursuers.

With regard to cargoes of produce from India, of which the present is an example, it is proved, in the first place, that this trade, so far as Leith is concerned, only began some five or six years ago, and accordingly, with regard to this special trade, there has hardly been time for a custom to grow up. But, of course, if it had been proved that a general and universal custom existed with regard to similar cargoes from other places, as alleged by the pursuers, and that as soon as the Indian trade began, the cargoes brought from India to Leith had all been dealt with in a similar way, that might have gone so far, apart from other objections, to prove the pursuers' case. But according to the proof matters do not stand in that position. On the contrary, as proved by Mr Thomson, from 1903 onwards, several cargoes, though not, it is true, with the same number of marks, bills of lading, and consignees as the "Baron Fairlie," but still with mixed cargoes, have been landed from the ship's tackles, the merchants taking the cargoes, irrespective of marks, though in one case—that of the "Asia," where there were seven consignees and fourteen bills of lading with a general cargo of peas and wheat—the shipowners discharged it into shed, and the consignees paid the expenses. But with regard to the trade generally, there has been no uniformity of custom to the effect that in mixed cargoes the cargo should be shedded and the cost of shedding paid by the consignees, and up to the present Mr M'Intosh says that he does not know of any case in which a ship declined to give delivery over the ship's side to a consignee who was ready and willing to take delivery, as the defenders were in the present case.

But in my opinion it is unnecessary to go into the special circumstances of the comparatively few ships which of late have come from India to Leith loaded with mixed cargoes consisting of cotton seed and such like produce, because in a question of this sort, in which shipowners are concerned on the one side and merchants on the other, it is necessary in order to establish a usage that shall be binding as part of contracts of affreightment that it should be so notorious as to be known to both parties interested. It must not be a custom which men on one side of a particular business are trying to set up in their own

favour against men on the other side of that business who never heard of it—(see J. Brett's remarks in *Robinson* v. *Mollet*, 1875, L.R., 7 E. and I. App. 818). Now in the present case it is noticeable that not a single Leith merchant is brought by the pursuers to say that he is aware of the alleged custom, while on the other hand the defenders adduce a number of well-known Leith merchants and manufacturers as witnesses who say that they never heard of the custom alleged by the pursuers. Among these are Mr Cross, one of the defenders, who is frequently receiving cargoes of bone meal and cotton seed from India and elsewhere; Mr Mouat, another party interested in this cargo; Mr Wilson, who has been in business in Leith for thirty-two years; Mr Hill, who has been a grain merchant in business for twenty-five years; Mr Cownie, another grain merchant in Leith; and Mr Douglas, an importer of cotton seed; and all of them declared that they know of no custom to the effect that with a mixed cargo, such as that of the "Baron Fairlie," the shipowners under bills of lading such as those in question are entitled, where the consignee is ready to receive the cargo at the ship's side, to put it into shed and charge the expenses against the consignee.

Accordingly, I consider that on the evidence that has been led in this action it has not been proved that the practice alleged by the pursuers is either uniform, universal, or notorious.

In the third place, I am of opinion that the alleged custom is contrary to the contract between the parties, and therefore cannot be given effect to in the present case, even supposing it had been otherwise proved.

The bill of lading, which is the bill of lading applicable to the portion of the cargo of the "Baron Fairlie" with which this action is concerned, provided, *inter alia*, that the bags of cotton seed should be delivered "from the ship's tackles (where the ship's responsibility shall cease), at the aforesaid port of Leith, or so near thereto as she may safely get, unto Messrs E. D. Sassoon & Company, or to his or their assigns, on payment of freight for the said goods in cash as *per* margin in Leith," and it contains also the following clause—"Should the goods not be taken delivery of by the consignees or assigns as soon as the steamship is ready to be discharged, they will be landed and warehoused, or if necessary discharged into hulks or lighters, at the risk and expense of the owners of the goods, and the shipowners shall have the right to claim demurrage for any detention which the steamer may sustain thereby." And also the following—"In case where the ultimate destination at which the shipowners may have engaged to deliver the goods is beyond their port of discharge, they act as forwarding agents only from that port, and in all cases the liability of the shipowners on account of all goods is to cease as soon as the goods are free from the tackles of the ship."

It appears to me that under these clauses the defenders as indorsees of the bill of lading were entitled on payment of the freight (which was tendered) to have their goods delivered to them from the ship's tackles without further charges, and that the pursuers were not entitled to discharge these goods into shed and to recover the expense thereof from the defenders, and accordingly, if there is a custom entitling them to do so, such custom is against the express terms of the contract.

I am accordingly of opinion that in the present case the terms of the contract are so express to the contrary effect as to exclude the custom of trade alleged by the pursuers.

The only case which was quoted at the discussion which seemed to introduce some doubt upon this matter was the case of *Marzetti* v. *Smith* (49 L.T. 580, and Aspinall's Maritime Law Cases, vol. v, p. 166 (1884), see also Cababé and Ellis's Reports, p. 6). In that case it was proved that there was a well-known custom for steamships with general cargoes coming into the port of London and using the Victoria Docks to discharge the goods on to the quay and thence into lighters, and not to discharge them directly into lighters, and it was held that this custom was not inconsistent with bills of lading which provided that the goods should be delivered from the ship's tackles.

But it is necessary in considering that case to keep in view the facts as compared with the facts of the present. The cargo was one of boxes of tea. The shipowners, in order to assort these, put them out upon the quay, not into sheds, and assorted them there. They had not made, and did not intend to make, any charge against the consignees in respect of this. On the contrary, they had declared their willingness, as soon as the cargo was assorted, which could not conveniently be done upon deck, to take it up from where it was on the quay by means of the ship's tackles and swing it over the ship and discharge it into lighters upon the other side as originally demanded by the consignee. It seems, however, that the consignee, being in a hurry to get his chests of tea away, took them off the quay, put them on lorries, and drove them through the dock gates, where he was charged dock dues upon them. He then brought an action against the shipowners for the dock charges; and it was held in these circumstances that the shipowners were not liable, as the mere putting out of the boxes on the quay for assortment, in pursuance of the custom to that effect, was not inconsistent with their delivering them when assorted from the ship's tackles, as provided by the contract, into lighters on the other side of the ship. From what I have already said as to the effect of "shedding" the goods in this case it will be seen that the two cases are very different. The Lord Ordinary seems to think that if he had been made fully aware in the Procedure Roll of the import of *Marzetti's* case, which, I may remark, is to be gathered from two separate and not very distinct

reports, he would probably not have allowed a proof, and in this I am disposed to agree with him.

I am accordingly of opinion that the pursuers must fail in their case on each of these three separate grounds—(1) that the custom averred by them is indefinite and uncertain; (2) that it is not uniform, universal, and notorious; and (3) that it is inconsistent with the terms of the written contract of affreightment. Perhaps, however, it is not altogether unfortunate that a proof has been taken. I think it has been demonstrated that with a cargo such as that carried by the "Baron Fairlie," with 71,431 bags of cargo loaded, as it appears, higgledy-piggledy into the various holds, and consisting of three different varieties of commodities, nineteen different varieties of marks, and shipped under twenty-seven bills of lading to eight different consignees, it would have been practically impossible to have delivered the whole cargo assorted and weighed over the ship's side to the respective consignees except at the cost of very serious detention to the ship. From their point of view, then, it was not unreasonable that the shipowners should put the cargo into shed, but if they chose to do so in order to obtain greater despatch for their vessel, it is, I think, clear that the expense of doing so must be borne by themselves, such expense being a charge for which the consignees are not liable under the bills of lading.

I may observe that Mr Cross, one of the defenders, says in reply to the Court—"Where we cannot give the steamer quick despatch, I certainly recognise the right of the ship to put it into shed"—and probably that would occur where, for instance, the merchants failed to send down men or lorries sufficient to take delivery of the cargo; but no such case occurred here, nor indeed did the pursuers give it the opportunity of occurring. At the same time it must be remembered that as a general rule the shipowner is bound to separate a mixed cargo so as to give delivery over the ship's side to the several consignees of the various descriptions of goods, unless, as in the case of *Clacevich* v. *Hutcheson* (15 R. 11), the goods, though consisting of different materials, have been shipped in bulk as one cargo.

The result of the proof in this case shows very clearly that if in the case of mixed cargoes shipowners wish to avoid delay to the vessel by delivering the cargo into shed, and desire so to do at the expense of the consignees, they must insert a clause giving them that right in the bills of lading applicable to such cargo, as has been done by the shipowners in the American flour trade. It would not be difficult to put such a clause on the margin of a bill of lading such as we have in No. 10 of process, and there seems to be no reason why shipowners should not do this. It is only fair that the indorsees of bills of lading should have notice on the face of the bills what charges they are liable to pay, and it is the only satisfactory method for shipowners themselves to follow, as, owing to the difficulty of defining what is and what is not a mixed general cargo in each particular case, it seems impossible that they should ever be able to satisfactorily establish and prove a custom such as that they have contended for in the present case.

Accordingly, I move your Lordships to adhere to the Lord Ordinary's interlocutor.

The Court adhered.

Counsel for the Pursuers (Reclaimers)—Horne—Jameson. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Defenders (Respondents)—Murray — Macmillan — W. T. Watson. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Friday, March 19.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

HENDRIE AND OTHERS *v.* CALEDONIAN RAILWAY COMPANY.

Railway — Statute — Level-Crossing — Precautions for Safety of Foot-Passengers—Highway (Railway Crossings) Act 1839 (2 *and* 3 *Vict. cap.* 45), *sec.* 1—*Railways Clauses Consolidation (Scotland) Act* 1845 (8 *and* 9 *Vict. cap.* 33)—*Provisions of Later Statute rendering Inapplicable Unrepealed Provisions of Earlier Statute.*

The Highway (Railway Crossings) Act 1839 enacts, section 1—"... Wherever a railroad crosses, or shall hereafter cross, any turnpike road or any highway, or statute labour road for carts or carriages in Great Britain, the proprietors ... of the said railroad shall make and maintain good and sufficient gates across each end of such turnpike or other road as aforesaid at each of the said crossings; and shall employ good and proper persons to open and shut such gates, so that the persons, carts, or carriages passing along such turnpike or highway shall not be exposed to any danger or damage by the passing of any carriages or engines along the said railroad. ..."

The Railways Clauses Consolidation (Scotland) Act 1845 (sections 39, 40, and 52) deals with level-crossings and the making and maintenance of gates and the employment of persons to open and shut such gates, and enacts (sec. 40), with regard to a public carriageway, that "such gates be of such dimensions and so constructed as when closed to fence in the railway and prevent cattle or horses passing along the road from entering upon the railway, and the person entrusted with the care of such gates shall cause the same to be closed as soon as such horses, cattle, carts, or carriages shall have passed through the same. ..."

Held that the Act of 1839 did not apply to a level-crossing authorised by