power of selection may be given by implication plain just as well as by express words. I think that was settled so long ago as in the case of *Dundas*, (1837) 15 S. 427, and I do not find that in any subsequent cases in Scotland it has been disputed since.

Now in the will before us the testator appoints trustees in whom he has full confidence, and he gives to them every power which is necessary for carrying out his will. When you come to the particular direction of the will upon which the question arises, it is obvious that unless there be a power of selection in somebody that purpose fails; it is a purpose that cannot be carried out without selection, and I apprehend upon the authority of the case of *Dundas* that it is enough to say that when he has appointed trustees to carry out all the purposes of his will, with all the powers that are necessary to enable them to do so, he gives them by implication such power of selection as is necessary to make this particular bequest effective. That there may be difficulties in the actual selection is possible enough, but that is not a point that goes to the validity of the will. I take it that the true doctrine upon that point is that laid down by Lord Loreburn in the case of *Weir* v. *Crum Brown*, 1908 S.C. (H.L.) 3, 45 S.L.R. 335, that all that is required is that the description should be sufficiently specific to enable men of common sense to make their selection among the objects which are within the ambit of the testator's bequest. I am unable to believe that men of common sense would have any difficulty in selecting proper objects to satisfy the testator's bequest in this case.

LORD ATKINSON—I concur, and I have nothing to add to the judgments already delivered by my noble and learned friends.

LORD SHAW—I concur. May I add these words? It appears to me that for well nigh eighty years a certain construction has been placed and a certain practice has followed upon propositions laid down by Lord Lyndhurst in this House in the case of *Crichton* v. *Grierson*, (1828) 3 W. & S. 329. The decision of the Extra Division in the present case has followed, and in my opinion rightly followed, that construction and practice. The language of Lord Lyndhurst specified the two points—(1) as to the appointment of particular classes of objects of charity, and (2) that there must be a leaving to trustees to select the particular objects within the classes pointed out. Who are the trustees that are thus pointed to? Are they trustees specifically appointed for the purpose of or specifically charged with the duty of selection, or are they trustees in a general sense that they are the recipients of a general power granted under the trust deed to do all the things necessary for carrying out the purposes of the trust deed?

In the case in 1837 of *Dundas* v. *Dundas*, (1837) 15 S. 427, the object pointed out by the trust deed was that the money should "be laid out in charities." The only power given was a "power to see this will executed." There was no further specification than this, and the Court upheld the power of the nominee of the grantees to exercise a power of selection and appropriation among charities.

That was, in my opinion, a broad indication that the law of Scotland interpreted the propositions laid down by Lord Lyndhurst in the sense that a general power to see a will executed or a general nomination of executors under the will, or the constitution of a trust to carry out the trust purposes effectively, worked out in Scottish legal practice the proposition so laid down. That practice was followed for many years. Then there came *Allan's Trust* v. *Allan*, 1908 S.C. 807, 45 S.L.R. 579, and I desire in your Lordship's House respectfully to record my adhesion to the opinion expressed in that case by my noble and learned friend Lord Kinnear. Following these cases is the present, and it appears to me that it would have done violence to the sequence of decisions following upon the propositions laid down by Lord Lyndhurst if any other result than that arrived at by the Extra Division had been reached.

Their Lordships dismissed the appeal with expenses to all parties out of the residuary estate of the testator.

Counsel for the First Parties (Respondents)—Hon. Wm. Watson, K.C.—J. B. Paton. Agents—M'Grigor, Donald, & Company, Glasgow—Macpherson & Mackay, S.S.C., Edinburgh—Grahames & Company, Westminster.

Counsel for the Second Parties (Appellants)—H. P. Macmillan, K.C.—C. H. Brown. Agents—Mackenzie, Robertson, & Company, Glasgow—Martin, Milligan, & Macdonald, W.S., Edinburgh—John Kennedy, W.S., Westminster.

Wednesday, March 1.

(Before the Lord Chancellor (Buckmaster), Lord Kinnear, Lord Atkinson, and Lord Shaw.)

"STRATHLORNE" STEAMSHIP COMPANY, LIMITED *v.* HUGH BAIRD & SONS, LIMITED.

(In the Court of Session, June 29, 1915, 52 S.L.R. 759, and 1915 S.C. 956.)

Ship — Affreightment — Custom — Delivery of Grain Cargoes — Custom of Port — Evidence.

The owners of a ship chartered to carry a cargo of barley claimed right to deliver the cargo at the port of delivery, Leith, in bulk, and not in sacks as received by them at Portland, Oregon. The bills of lading acknowledged receipt of a certain number of sacks of barley "to be delivered in the like good order and condition," and the charter-party provided that the vessel was to discharge according to the custom at the port of delivery. The evidence showed that this trade to Leith in any quantity began in

1896; that from that year there had been about 80 cargoes, all save two delivered according to the alleged custom, but 44 to two firms who spoke of the delivery as having been merely for their convenience; that taking the last ten years 24 out of 32 cargoes had gone to those firms; that an important witness in favour of the alleged custom maintained that it freed the shipowner from responsibility for any shortage of sacks; that one cargo at least during the period from 1896 had been delivered in sacks; and that in correspondence the alleged custom had never been admitted by the shipowner.

Held that the alleged custom had not been proved.

This Case is reported *ante ut supra.*

The defenders Hugh Baird & Sons, Limited, appealed to the House of Lords.

LORD CHANCELLOR—In this case the appellants purchased 103,000 bags of barley shipped from Portland in Oregon by the steamship "Strathlorne," of which vessel the respondents are the owners. The vessel arrived at Leith on the 10th April 1913, and the appellants insisted on taking delivery of their barley in the bags in which it had been shipped. The respondents disputed their right to take delivery in this method, and they instituted these proceedings against the appellants, claiming for freight, demurrage, and the extra cost that was occasioned by this particular method of delivery. To that claim the appellants made answer by saying that as against the freight they were entitled to set off damages incurred by the respondents failing to deliver according to contract, and as to demurrage and the extra cost they said that they were not liable.

Now the bills of lading which covered the goods in question were bills which on the face of them related to barley in sacks. They were four in number, and were all in the same form. The first one is in these terms—"Supplied in good order and condition by M. H. Houser in and upon the good ship or vessel . . . 'Strathlorne,' . . . bound for Teneriffe for orders to discharge according to basis of charter-party 40,310 sacks said to contain" a certain amount of white barley "being marked and numbered as per margin, and are to be delivered in the like good order and condition at the aforesaid port." The charter-party provided that the vessel was to discharge according to the custom at the port of discharge for steamers except as otherwise provided. The respondents aver that the custom of the port of Leith, at which this vessel was discharged, was a custom which bound the appellants to accept delivery of this barley in bulk, and it was upon proof of that averment that the pursuers' success in the action depended.

The question of custom is undoubtedly a *question of fact,* but none the less it is a question of fact which it is quite right and proper for this House to review if there be reason to think that the learned Judge who tried the action either misapprehended the evidence that was given, or that he misunderstood or misconstrued the correspondence which forms part of that evidence, or if for any other reason his opinion on the question is one that ought not to be accepted. I desire to make that statement lest it be thought that the House in a case of this kind would be prepared to avoid the necessity of investigation by the simple assertion that the matter was one of fact which had been determined by the learned Judge who heard the witnesses. Excepting in cases where the findings of fact by certain tribunals are made final by statute there is no reason why questions of fact should not be reviewed by this House, just as questions of law are, subject to this, that where the question of fact depends upon determining as to which between two groups of witnesses are to be believed in their oral evidence in the absence of special and unusual circumstances, their Lordships would greatly hesitate before they interfered with the finding of the learned Judge who had the opportunity of seeing and hearing the witnesses by whom the evidence was given.

Now the custom in the present case is alleged in terms to be this, that in the case of all cargoes of grain from North Pacific ports discharged at the port of Leith the bags in which the cargoes are contained are opened in the ship's hold, the grain is raised in buckets, weighed on deck, and there put into shore bags supplied by the consignees. It was that custom which the respondents set out to establish in the present dispute.

Now in order that a custom, or to use a more exact phrase, a commercial usage, may be binding upon parties to a contract, it is essential that it should be certain, that it should be uniform, that it should be reasonable, and that it should be notorious. To use the words of Sir George Jessel in the case of *Nelson* v. *Dahl* (reported in 12 Chancery Division, p. 568)—"It must be so notorious that everybody in the trade enters into a contract with that usage as an implied term. It must be uniform as well as reasonable, and it must have quite as much certainty as the written contract itself."

Now I do not think it is necessary to consider in this case a matter which has been the subject of some slight discussion as to whether or no this was a reasonable custom. I cannot help thinking that when you are dealing with a custom of this description, which is nothing but a mercantile usage as between people engaged in a particular and important trade, if once it were established that the practice possessed the other attributes necessary in order for it to be recognised as a custom, the question of its reasonableness would be almost necessarily involved in the facts which were necessary to establish that it was a uniform and accepted practice. Nor again do I wish to dwell too long upon the question of its being notorious. It does not mean that it must be known to all the world; it does not even mean that it should be known to the person against whom it is asserted; but it certainly does mean that it must be well known at the place to which it applies, and be capable of ready ascertainment by any person who proposes to enter into a contract to which that usage would apply. It is in fact to be regarded as

though it were a term so well known in connection with the particular transaction that it was nothing but waste of time and writing to introduce it into the contract of which it formed a part.

The question then is whether the respondents in this case satisfactorily established that such a custom existed. The Lord Ordinary found that they did not, and the learned Judges of the Second Division of the Court of Session have reversed his finding. The evidence upon which this custom depends is really to be found in the consideration of a document which has been prepared showing the number of cargoes of this description that had been discharged at the Port of Leith coming from the North Pacific Coast from the year 1896 down to the present time. It is not suggested that before the year 1896 there was any such considerable body of trade as could be relied upon for the purpose. Proof of the custom is confined to transactions between the years I have mentioned. Now I think Mr Watson was right in calling your Lordships' attention to the fact that the period of time during which a custom has run is only one of the matters that have to be considered. It is not essential that it should be run for any great length of time; all that is necessary is that during a sufficient period it should have been so well settled and so established that everybody connected with any contract to which it would be attached must be assumed to have accepted it as one of the terms of the bargain.

Now from 1896 down to the time of the present dispute it appears that there were some 80 and odd cargoes discharged from the North Pacific Coast to the port in question, and the list of those cargoes shows that in point of fact, with only two exceptions, they had uniformly been delivered in the manner which is said to be the custom of the port. If that were accepted without some further investigation and explanation it would undoubtedly afford a very strong argument in support of the respondents' case. But examination of the lists shows two things of great importance. The one is this, that of these cargoes, 44 out of 80 were cargoes that were received by two firms—the firm of Herdman & M'Dougal and the firm of Cochrane, Paterson, & Company; and even more important still, that in the last ten years during which this practice is said to have crystallised, these firms have between them received 24 cargoes out of 32. If therefore there were a custom well established and settled at this port, recognised and accepted by people having transactions in this trade, Messrs Herdman & M'Dougal and Messrs Cochrane & Paterson would most undoubtedly be the people who would be best cognisant of the fact.

Now it is a striking incident I think in this case that representatives of both those firms have been called for the appellants, and they both deny that the method of delivery which they have adopted is anything but a method of delivery which they have adopted for their own convenience, and which, if they desired, they might at any moment repudiate. Mr Paterson's evidence seems to me particularly clear on this point. He says—"There is no custom that I know of in Leith that prevents the consignee from getting delivery in bags if it suits his convenience to take it;" and he says a little earlier in his evidence—"I discharge a good many of those cargoes—I usually discharge them by bulking if I can do so. I do it for my own convenience; it saves me expense." I think his evidence should be qualified by saying that he always discharged in bulk; but the point was that he did it not because he was bound to receive cargoes in that form, nor because he recognised any obligation to that effect at all, but merely because it suited his convenience. And Mr M'Dougal gives very similar evidence. He says—"There is no custom so far as I am aware which prevents the consignee getting delivery in bags if he should so choose;" then he adds—"As matter of law it is an open question. It suits us to take delivery in bulk, because if the cargo is sold it makes a more even delivery." The first part of this statement is fairly open to the criticism of the appellants' counsel that it is outside the province of the witness, but the latter shows that the practice is not associated with all persons receiving such cargoes but only with those who deal with the grain in a particular way. Therefore the two people whose practice in connection with this matter must be the practice mainly relied upon by the respondents are both of them people who say that their act is due to the deliberate election on their own part to accept the cargo in this particular form to suit their particular business, and that they have never regarded that they were doing it in connection with any general practice, but that if occasion arose and their convenience would be better suited by another method of delivery, that method of delivery they would adopt.

But the matter does not entirely end there, because the respondents' own witness speaks to this custom in terms that are certainly not identical with the terms in which the custom is alleged on the respondents' behalf. He says that the custom is this. He is asked—"So the custom is not merely for delivery in bulk but a custom of wiping out any claim on the part of the receiver for the number of bags which you admit you have got?" and the answer is "Yes, when it goes into bulk I say the number of bags goes by the board."

Mr Macmillan has quite fairly argued that this witness is attempting to impose upon the custom a further consequence in his own favour; but I cannot accept that view of his evidence at all, because this is a man who has been acting as a shipowner throughout the history of the time during which this custom is alleged to have arisen, and he says he does not accept the custom itself as settled and then attempt to extend its terms, but that he regards this condition as something which has grown up with the custom and become inseparable from it; in other words, one of the essential conditions of a custom, that it should be settled and certain and definite, seems to me to be

entirely lacking from the view presented by Mr Burrell. Therefore so far as those witnesses are concerned it appears to me that the proof of the custom is sadly lacking, and that is a matter of considerable consequence, because an essential condition of this custom being as I have stated, that anyone engaged in this trade should be able whenever he entered into a bargain to find out if it existed, the appellants in this case would have been quite unable if they had applied either to the two large firms of receivers or to the shipowners in this case to have ascertained in answer to their inquiry the custom which the respondents allege in fact at all.

In my view that really disposes of the whole of this case. But there are two other considerations which have been the subject of argument and deserve attention. It is said, and said truly, that there are only two exceptions to this uniform routine; one is in the case of the steamship "*Siam*," and the other is in the case of a vessel that was wrecked. In the case of the steamship "*Siam*" there is no doubt that the delivery took place in bags. If the delivery took place in bags because the receiver asserted his right to receive it in bags, and nothing more was done, that would be a very serious blot on the evidence upon which the respondents rely. The evidence does not affirmatively establish this fact, but on the other hand there is no evidence to show that this delivery in bags was by concession of the shipowner. I think it cannot be more fairly stated in favour of the respondents than this, that the evidence upon the matter so far as arrangement between the shipowner and the receiver is concerned is blank, and the only fact that we know is that it was delivered in bags, and that a question arose as between the stevedores and the receivers as to what the terms of remuneration should be in those circumstances.

Finally there remains a matter which in some ways is the most significant feature of the case. I refer to the correspondence which has passed between the receivers and the shipowners when these cargoes were being delivered. It begins in 1895, and the first letter which is written by the master of the ship to a firm of receivers is in these terms—"As you are taking delivery of the cargo per this steamer in bulk instead of in bags as received on board by me, I beg to inform you that I cannot be held responsible in the event of any bags turning out short. It seems to me impossible to suggest that that letter can be read as proof of the recognition of a custom by the master of the ship. Nor indeed is it so suggested, because it was written at the very inception of the trade. Nothing transpires between that date and 1907. 1907 is the important date, because after 1907, as I have already pointed out, of the remaining thirty-two cargoes that were received—the cargoes during the last ten years being much fewer than those in the first ten years—twenty-four were taken by the firms to which I have referred. The next letter in 1907 is written to one of those very firms, and it is in these terms:—"Seeing you have elected to empty the bags containing this vessel's cargo in the ship's hold, please note that owners will not be responsible for any shortage in the number of bags that may be found." That is a clear statement by the owners of the ship to the receivers that the receivers have adopted a method of delivery which relieves the shipowners from certain obligations which would otherwise be imposed upon them. They say—"If you are going to take this method of delivery you may do it if you will, but we will not in those circumstances be responsible for loss in the number of bags"—in other words, they were adding on to the contract on their own behalf a further term which had never been the subject of express arrangement between themselves and the receivers, which they intended to insist upon if the receivers took delivery in the manner mentioned.

Now that class of letter—not quite so distinct possibly in terms—continues throughout the whole of the subsequent history of this case. It is quite true, as Mr Macmillan pointed out more than once, that the letter written by receivers frequently asserted that their right to accept delivery in bulk was a right due to the custom of the port, and I think he is well founded when he says that the shipowners when they answer do not in terms deny that a custom exists, but their letters effect such repudiation by implication just as effectually, because if such a custom existed the shipowners would have had no right whatever to have imposed upon the receivers of the cargo the position that they, the shipowners, should be freed from liability for the bags, yet throughout the whole of this correspondence that note is constantly to be found.

This matter is of considerable consequence for this reason, that if this custom exists it must bind not only the receiver but the shipowner as well, and a custom of this kind could not be established against the shipowners who, throughout the whole period during which the custom is said to have arisen, have been definitely asserting that the delivery of cargoes by this method frees them from responsibility which they would otherwise have been under. There is no suggestion either that in any one of these cases, although it may well be that there has been a shortage in bags, the shipowners have in fact been made responsible. The evidence therefore to my mind falls far short of evidence that is required to establish a custom which must possess the attributes and qualities to which I have already referred. I think therefore that the appellants in this case must succeed upon this point, and I desire to avoid making any statement to show that the other points to which the appellants refer have been subjects for consideration by your Lordships' House. They may be points of great consequence but they are not involved in this decision. And I cannot part with this case without expressing my personal appreciation of the extremely fair and able manner in which counsel for the respondents have dealt with a case of undoubted difficulty.

LORD KINNEAR—I agree entirely with my noble and learned friend on the Woolsack, and I have nothing to add to what he has said.

LORD ATKINSON—I also concur with my noble and learned friend on the Woolsack, and as he has entirely expressed everything I should desire to express myself, and better probably than I should have done it, I have nothing further to add.

LORD SHAW—I concur. Having considered the documents and evidence I accept with full agreement the very careful analysis made thereof and the cogent conclusions reached thereon by the learned Lord Ordinary. I regret to have to differ from the judgment of the Second Division. I have anxiously examined that judgment to ascertain what appeared to be the grounds upon which the learned Judges felt warranted in differing from the Lord Ordinary upon this question of fact as to the existence of a certain custom of the port. I gather that the learned Judges appear to have considered that the custom of the Port of Leith was established by the number of instances in fact in which the practice of unloading in bulk had been adhered to. There was much plausibility in the observation made by the learned counsel who addressed this House that that view was justified by the language of Lord Blackburn in the case of *Postlethwaite*, (1880) 5 A.C. 599, in which that distinguished Judge grounded the question of custom upon what he called "settled and established practice." If by settled and established practice the learned Judge meant (as I am certain he did not) that all that was required to establish an obligatory custom was to tick off through a course of years a number of instances in which a certain practice had been followed, then I should certainly venture to doubt whether such an opinion was sound. For I would venture to add to a general proposition as to settled and established practice this. In the first place, no number of contracts to do a thing which is expressly specified can ever establish a binding custom to do that thing without its being specified. In the second place, you cannot build up a custom of trade or of a port out of a series of protests against it. These protests may be expressly against the admission of a custom, or they may be by implication against it in respect of making demands which would have been unfounded if such a custom had already bound the parties. With regard to this case, the letters founded on contain the characteristics of both of these protests.

I desire respectfully to offer these observations, because in view of the grounds of judgment of the Court below I think that the distinction should be made plain between a settled and established practice in the general sense of the mere occurrence of instances (many of which may have sprung from express contract) and a settled and established practice which amounts to the acceptance of a binding obligation of a custom apart from particular bargain.

Their Lordships reversed the interlocutor of the Second Division and restored that of the Lord Ordinary.

Counsel for the Pursuers (Respondents)—Macmillan, K.C.—Hon. W. Watson, K.C. Agents—Bannatyne, Kirkwood, France, & Company, Glasgow—Beveridge, Sutherland, & Smith, W.S., Leith—Botterell & Roche, London.

Counsel for the Defenders (Appellants)—Leslie Scott, K.C.—Lippe. Agents—Maclay, Murray, & Spens, Glasgow—Boyd, Jameson, & Young, W.S., Leith—Thomas Cooper & Company, London.

Wednesday, March 1.

(Before the Lord Chancellor (Buckmaster), Lord Kinnear, Lord Atkinson, and Lord Shaw.)

GAIRDNER *v.* MACARTHUR.

(In the Court of Session, March 9, 1915, 52 S.L.R. 427, and 1915 S.C. 589.)

Process—Appeal—House of Lords—Facts Established in Court of Session on an Appeal from Inferior Court—Court of Session Act 1825 (6 *Geo. IV, cap.* 120), *sec.* 40.

In an appeal from the Sheriff Court the Court of Session allowed additional proof on the ground that the words "if necessary" in section 72 of the Court of Session Act 1868 meant "if necessary for the ends of justice."

Held that an appeal to the House of Lords, on facts set up after such additional proof, was incompetent, being excluded by 6 Geo. IV, cap. 120, sec. 40.

This Case is reported *ante ut supra.*

The defender Captain A. J. Macarthur appealed to the House of Lords from an interlocutor of July 20, 1915, which, on the whole proof, recalled the Sheriffs' interlocutors, gave new findings in fact, and a finding in law that the defender was liable to the pursuer in the value of certain articles, with decree for £150. The respondent objected to the competency of the appeal.

LORD CHANCELLOR—It is easy to appreciate the motives that have prompted the appellant's counsel to urge that he is at liberty to bring before your Lordships' House the further consideration of this case, for it undoubtedly involves serious consequences to his client. It is, however, plain that the appellant cannot proceed with this appeal unless he can show that the provisions of the statute of 6 Geo. IV, cap. 120, have no application to these proceedings.

Now the facts are these—The case was originally heard before the Sheriff-Substitute. Accordingly the cause commenced in the Courts of the Sheriff within the meaning of the statute to which I have referred. The Sheriff supported the finding of the Sheriff-Substitute, and from his judgment an appeal was taken to the Second Division of the Court of Session. On proceeding before this Court the appellant urged, as I gathered from a statement in the judgment of one of the learned Judges, that the evidence of two witnesses which had been given