from liability for an injury which does not disable the workman for a period of at least a week. There was no liability, they contend, at the outset, for *non constat* that disablement will continue for a week. If the workman applied, they say, on the next day after the accident he must fail because at that date there was no liability. I do not follow the argument. The most that can be said is that for a week it is not matter of certainty that there is liability. Further, the effect of section 1 (2) (*a*) is that there are some injuries by accident to which the Act does not apply. Section 1 begins by saying that the employer shall be liable for injury arising from all accidents of a defined kind, but section 1 (2) (*a*) restricts these words by excluding certain accidents from their ambit. This leaves the construction of the Act as regards injuries which do fall within it unaffected.

If this view be right the arbitrator in the present case had jurisdiction, but what order ought he to make? There was no incapacity at present. There could be no present order for payment of compensation. In such cases a practice has grown up principally (if not exclusively) in applications to review under Schedule I, article 16, to take either one of two courses, namely, either (*a*) to make an order for a nominal weekly payment of a penny a week, or (*b*) to make a declaration of liability and adjourn the question of compensation. So many orders of a penny a week have been made that your Lordships would hesitate I think to say that such an order is wrong, but I may say that I myself much prefer a form of order which does not award a nominal payment by way of compensation for a non-existent present incapacity but which recognises the true facts and postpones the question of compensation until the time arises for awarding it. If I am right in thinking that in such a case as the present (assuming that there is evidence of incapacity to be reasonably anticipated in the future) there is a dispute from which there arises jurisdiction in the arbitrator, the following, I think, results. He can adjudicate upon the questions—(1) whether there has been an accident arising out of and in the course of the employment; (2) whether the accident has resulted in personal injury; (3) whether incapacity has resulted or (if none has yet resulted) whether incapacity is upon the evidence reasonably to be anticipated as resultant in the future. In the latter case he can direct the application to stand over with liberty to either party to apply to restore. The workman could restore the application if he was in possession of evidence that incapacity had supervened. The employer could restore it if he was prepared to show that all reasonable probability of resultant incapacity was past.

In the present case the evidence was, I think, sufficient to justify such an order as I have indicated, and that was in substance though not in form the order which the County Court Judge made.

There is another point in the case dependent upon the dates. The accident was on the 18th December 1915. The arbitration proceedings were commenced on the 12th July 1917. This was long after the expiration of the six months mentioned in section 2 (1) of the Act. This in itself, however, is not material, for it was decided in this House in *Powell* v. *Main Colliery Company* that the "claim for compensation" mentioned in that section is not the initiation of arbitration proceedings but a notice of claim for compensation sent to the employer. No such notice of claim, however, was in this case sent within the six months, and the question is whether within section 2 (1) (*b*) the failure to make a claim within the six months was occasioned by "reasonable cause." Upon this part of the case there is no finding of fact by the County Court Judge. He only states his conclusion in the words that "the circumstances disclosed . . . are such as to enable me to afford the relief" provided for by section (2) (1) (*b*). It is, however, the fact that the evidence is before your Lordships and you are in a position to infer what the learned judge meant by "the circumstances disclosed." In my opinion they were sufficient to satisfy in law the words "reasonable cause;" I say "in law" because the question whether the cause which existed in fact was reasonable or not is, I apprehend, matter of law. The decision in *Luckie* v. *Merry* I think was right.

The result is that upon both points I think the appellant is right and that the appeal should be allowed. But for the form of order made in the County Court should, I think, be substituted an order approved by your Lordships.

Appeal allowed with costs. Order to be drawn up in the terms set out in the judgment of the Lord Chancellor.

Counsel for the Appellant—Rigby Swift, K.C.—Kingsbury. Agent—R. Wilberforce Allen, Solicitor.

Counsel for the Respondents — Sir J. Simon, K.C. — C. B. Marriott. Agent — Ernest Glenshaw, Solicitor.

HOUSE OF LORDS.

Friday, December 12, 1919.

(Before Lords Haldane, Dunedin, Atkinson, Wrenbury, and Buckmaster.)

VAN LIEWEN *v.* HOLLIS BROTHERS & COMPANY, LIMITED, AND OTHERS—THE "LIZZIE."

(On Appeal from the Court of Appeal in England.)

Ship — Charter-party — Construction — Custom of the Port of Hull—Demurrage.

The appellant claimed demurrage under a charter-party, clause 3 of which provided that the cargo was "to be loaded and discharged with customary steamship dispatch as fast as steamer can receive and deliver during the ordinary working hours of the respective

ports, but according to the custom of the respective ports. . . . Should the steamer be detained beyond the time stipulated as above for loading or discharging, demurrage shall be paid at £25 per day." He maintained that by the custom of the port there was an absolute obligation upon the respondents to provide immediately upon arrival a berth for the ship and facilities for unloading.

Held that unless the charter plainly defines the period of time within which delivery of the cargo is to be accomplished such phrases as "with all dispatch" or "as fast as the steamer can deliver" only import an obligation to use all dispatch reasonable under the circumstances of the case.

Decision of the Court of Appeal *affirmed.*

Appeal from an order of the Court of Appeal reversing an order of the Divisional Court which set aside a judgment of the County Court Judge of Yorkshire.

The proceedings in the Divisional Court, *sub nom.* the "Lizzie," are reported 23 Com. C. 332, and in the Court of Appeal, [1919] P. 22.

The s.s. "Lizzie" was chartered to carry wood from Sweden to Hull. By clause 3 of the charter-party the cargo was "to be loaded and discharged with customary steamship dispatch as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports. . . . Should the steamer be detained beyond the time stipulated as above for loading or discharging, demurrage shall be paid at the rate of £25 per day and *pro rata* for any part thereof."

The ship was fully loaded at Nyhamn under several bills of lading assigned to the respondents separately shortly before the ship arrived at Hull. On 29th September 1915 the ship reached the Humber, but owing to the congestion of the port it was 7th October before she could start discharging. The discharge was completed on 18th October. By the custom of the port of Hull, embodied in a printed statement drawn up in 1899 by a committee of shipowners and timber merchants, it is the duty of the receiver of a cargo of wood at Hull to provide upon her arrival a clear quay space the full length of the vessel and (or) a sufficient and continuous supply of bogies and (or) open lighters alongside. Relying on this custom the appellant asserted that had it been complied with the cargo would have been discharged by 7th October. He therefore claimed 11 days' demurrage. The County Court Judge held that the incorporation of this custom in the charter-party imposed no greater obligation upon the respondents than to use (as he held they had used) their best endeavour to find accommodation. He therefore found in favour of the respondents. The Divisional Court (HORRIDGE and HILL, JJ.) reversed this decision on the ground that the custom imposed upon the respondents an absolute duty to provide accommodation.

The Court of Appeal reversed that judgment, by SWINFEN EADY, M.R., and WARRINGTON, L.J., on the ground that the evidence failed to establish any uniform custom as alleged; by DUKE, L.J., on the ground that the custom did not apply to a case where the bills of exchange were held by several receivers.

At delivering judgment—

LORD HALDANE—I have had the advantage of reading the judgment which my noble and learned friend Lord Dunedin proposes to deliver relative to the implications of the charter-party and custom of the port of Hull, and on this question I do not desire to add anything to what I understand him to be about to say. If his view of these is the true one, then I think that a conclusion which is fatal to the appeal may be rested on a single point.

Since this House decided *Hulthen* v. *Stewart* ([1903] A.C. 389) it must be taken to be the law that charter-parties fall into two classes. There are some that prescribe a definite time — generally measured by a certain number of days—within which the discharge is to be taken by the charterers. The obligation is in that case an unqualified one, and if the time fixed is exceeded demurrage is payable irrespective of the circumstances, but the charter-party may merely stipulate that the discharge is to be taken "with all dispatch" or "as fast as the vessel can deliver according to the custom of the port," or may embody language which, as in these expressions, does not either name a period of time or necessarily imply one of an altogether inelastic character. In such a case the liability of the charterer is treated as being only an obligation to take delivery with the utmost dispatch practicable, excluding affection by circumstances not under the control of the charterer. If a liability not qualified in this fashion is to be imposed, the language employed must be definite on the point and free from ambiguity.

The charter-party under construction belongs to the second of these classes. Neither by its terms nor by the custom of the port of Hull as proved at the trial before the learned County Court Judge is a definite and unqualified period of time prescribed within the meaning of the rule of construction as stated. It makes no difference to the general character of the obligation that there is a special clause in the charter-party providing for strikes and epidemics.

This consideration disposes of the argument of the appellants and makes it unnecessary to consider any other point raised.

I think that the appeal ought to be dismissed with costs.

LORD DUNEDIN—I think it unncessary to re-state the facts which are set out in the judgments of the Courts below.

The first point to settle is What was the extent of the admission made at the trial? I hold without hesitation that the defendants through their counsel admitted that there was a custom at Hull in connection with the discharge of wood cargoes, and

that custom is accurately set forth in the statement issued by the representatives of the Timber Trade Federation and the Documentary Committee of the Chamber of Shipping. Such an admission was most proper to give. Bray, J., had found the custom and it would have been otiose to have insisted upon the reproving of the custom. But to give this admission the further effect of saying that it was an admission which barred the respondents from contending that the law applied to the case by Bray, J., was wrong is in my view quite out of the question, and I ought to add that the learned counsel for the appellants did not so press it. On the other hand the admission accepted was sufficient proof of the custom, and I cannot understand the view of the Court of Appeal that the custom to the extent of what was contained in the document remained unproved. Now it is admitted that the words "the steamer shall be discharged with customary steamship dispatch as fast as the steamer can deliver during the ordinary working hours of the port" import an obligation that the charterers shall use all reasonable dispatch, but "reasonable" must be reasonable under all the circumstances of the case. The appellant puts his case on the succeeding words, "according to the custom of the respective ports," and finding in the custom of Hull, as stated, that it is the duty of the receiver of cargo to supply and have ready a clear quay space the full length of the steamer and a sufficient and continuous supply of bogies, he argues that this is a superadded absolute obligation the object of which cannot be excused by its being impeded by causes over which the receiver of cargo has no control.

I think the question is really quite concluded by authority. The only difficulty that has arisen is from the rather uncertain doctrine which was laid down in some of the decided cases, and especially from *Wright* v. *New Zealand Shipping Company* (1879, 4 Ex. Div. 165). I do not think I should serve any useful purpose by examining and stating the somewhat numerous authorities. I will go at once to the cases in your Lordships' House which in my opinion settle the law. The most recent is *Hulthen* v. *Stewart* ([1903] 3 A.C. 389). That case, as this, contained the obligation for customary discharge according to the custom of the port, which there was also the port of Hull. Indeed, the document there construed was a White Sea wood charter, commonly called Merblanc, which is a sister of the charter in the present case, commonly called Scanfin. The cause of delay was the crowded state of the port. The argument put forward that the normal period of discharge could be expressed in terms of days and then constituted an absolute obligation, was rejected, its having been found as a fact that the charterers had done all that they reasonably could to discharge the vessel and the existence of a strike clause being held to make no difference. The general proposition was laid down by Lord Macnaghten as follows—"It is, I think, established that in order to make a charterer unconditionally liable it is not enough to stipulate that the cargo is to be discharged 'with all dispatch,' or 'as fast as the steamer can deliver,' or to use expressions of that sort. In order to impose such a liability the language used must be in plain and unambiguous terms, define and specify the period of time within which delivery of the cargo is to be accomplished."

It was just possible here to say that the impediment there was unconnected with the special duty undertaken by the charterers under the custom—namely, to provide bogies. The passage which exactly deals with such a case will be found in the words of Lord Selborne in *Postlethwaite* v. *Freeland* (5 A.C. 599), where he quotes the words of Lord Blackburn, in *Ford* v. *Cotesworth* (1868 L.R., 4 Q.B. 127)—"If by the terms of the charter-party the charterer 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 the cargo within a reasonable time—that is, as was said by Blackburn, J., in *Ford* v. *Cotesworth*, 'a reasonable time under the circumstances.' Difficult questions may sometimes arise as to the circumstances which ought to be taken into consideration in determining what time is reasonable. If as in the present case 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 charterer could not have overcome by the use of any reasonable diligence ought, I think, to be taken into consideration."

Now that passage from *Ford* v. *Cotesworth* was approved and quoted by A. L. Smith, L.J., in *Lyle Shipping Company* v. *Cardiff Corporation* ([1900] 2 Q.B. 638), as well as by Lord Selborne in *Postlethwaite* v. *Freeland* in this House, and Lord Blackburn in the same case, while naturally adhering to his own view in *Ford* v. *Cotesworth*, does, in explaining *Ashcroft* v. *Crow Orchard Company* (1874 L.R., 9 Q.B. 540), give the only ground on which *Wright's* case can be supported, namely, the view that on the facts the charterer failed through what he calls a self-imposed inability. That is really viewing the expression "overcome by the use of reasonable diligence," from, so to speak, the other side, and makes the whole of the cases, if that view of the fact in *Wright* is taken, consistent. If that view of the facts is not possible, then *Wright* as an authority must disappear, for we have the dictum in *Ford* v. *Cotesworth* approved both by the Court of Appeal and by this House, and the same thing said by Lord Macnaghten again in this House in *Hulthen*.

It follows that the unreported judgment of the case (*Beatley* v. *Bryson, Jameson, & Company*) decided by Matthew, J., and the

Court of Appeal under the Presidency of Lord Esher cannot, in my view, be supported. The view I have taken makes it unnecessary to consider the further question argued as to whether the custom being proved as regards one receiver of cargo held good in the case where there were more than one receiver of cargo under separate bills of lading. I am not satisfied that the above statement of the proposition is accurate. After all, a custom consists in a method of doing something, and the question whether the ensuing legal result which applies in the case of one will apply in the case of many is, I rather suspect, a question for the law to decide and not for custom to prove. In any view I reserve my opinion on this matter until it is necessary to decide it.

For these reasons I am of of opinion that the result reached by the Court of Appeal was right, although I cannot tread the path which they took to reach it.

The appeal should be dismissed.

LORD ATKINSON — In this case all the terms of the exceptions contained in the charter-party are expressly incorporated in the bills of lading of which the three defendants are endorsees. There is no such inconsistency or conflict between the provision of these bills of lading and the charter-party as existed in the case of *Serraino & Sons* v. *Campbell and Others* ([1891] 1 Q.B. 283) to which your Lordships have been referred. In that case "The Act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever" were expressly excepted in the bill of lading; then followed the words "and all other conditions as per the charter-party." The charter-party contained not only the same exceptions as the bill of lading, but the further exceptions "strandings and collisions. and all losses and damage caused thereby even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners." Owing to tho negligence of the master the ship was stranded and the cargo lost. The plaintiffs who sued the shipowners for the loss of their goods, part of the cargo, were the endorsees of the bill of lading but strangers to the charter-party, and it was held on review of all the authorities that the words "all other conditions as per charter-party" did not incorporate into the bill of lading the exception "stranding occasioned by the negligence of the master," and that the shipowners were consequently liable to the plaintiffs.

No such conflict or inconsistency as this exists between the provisions of the bill of lading and the charter-party in the present case. It is untouched by this authority, and the present respondents are therefore bound by the terms of the charter-party. The nature and extent of the duties imposed upon charterers touching the discharge of the cargo from the ships they have chartered are well established.

If by the terms of the charter-party the charterers have agreed to discharge the chartered ship within a fixed period of time that is an absolute and unconditional engagement for the non-performance of which they are answerable, whatever be the nature of the impediments which prevented them from performing it and thereby causing the ship to be detained in their service beyond the time stipulated. If no time be fixed expressly or impliedly by the charter-party the law implies an agreement by the charterer to discharge the cargo within a reasonable time, having regard to all the circumstances of the case as they actually existed, including the custom or practice of the port, the facilities available thereat, and any impediments arising therefrom, which the charterer could not have overcome by reasonable diligence—*Postlethwaite* v. *Freeland*, 1880, 5 A.C. 599; *Hick* v. *Raymond and Reid*, [1893] A.C. 22; and *Hulthen* v. *Stewart*, [1903] A.C. 389.

In the last of these three cases the charter-party provided that the cargo was to be "discharged with customary steamship dispatch as fast as the steamer can deliver during the ordinary working hours" of the port of discharge, "but according to the custom" of the port, "Sundays, general or local holidays unless used excepted." These are very precise and peremptory words, much better calculated to impose an absolute and unconditional obligation than are the words upon which, in my view, the question for decision in the present case turns. Lord Macnaghten held in *Hulthen* v. *Stewart* that the meaning of the above-mentioned words was not tantamount to fixing a certain definite number of days or hours as the period within which the discharge of the vessel was to be accomplished. That what the words pointed to was, he said, "the discharge of the cargo with the utmost dispatch practicable, having regard to the custom of the port, the facilities for delivery possessed by the particular vessel, under contract of affreightment, and all other circumstances in existence at the time, not being circumstances brought about by the person whose duty it is to take delivery or circumstances within his control." The learned Judge who tried the case, Phillimore, J., as he then was, had found as a fact that the respondents had done all they reasonably could to discharge the vessel. In the present case the trial judge has found that the respondents were not responsible for ordering the ship into dock, and that the delay in the discharge of the ship was not due in whole or in part to circumstances over which the defendants or the charterers had control. Having regard to this finding, I think the first question for decision in this case resolves itself into this —Do the words of the written statement of the custom and practice concerning the discharge of steamships laden with wood cargoes existing at the port of Kingston-upon-Hull impose upon the charterers of the 'Lizzie,' and also upon the respondents who are bound by the terms of the charter-party, an obligation to discharge this ship as absolute and unconditional in character as if a definite number of days had been fixed for her discharge? It has been contended that they do impose such an obligation

because the paragraph headed "Discharging Berth" imposes an absolute duty upon the receiver of the cargo to provide or arrange (on or before the arrival of the ship) a vacant available and suitable berth to which she can forthwith proceed and be at liberty to forthwith commence her discharge, and that there is a correlative duty of the same absolute character imposed upon the receiver to enable the ship to take advantage of this liberty.

I think that contention is unsound. It is not thus that absolute unconditional obligations can be spelt out and imposed. Adopting the words of Lord Macnaghten in the judgment which I have already quoted, I may say that in order to impose the liability contended for the language used "must in plain and unambiguous terms define and specify the period within which delivery of the cargo is to be accomplished." The language relied upon in this case is not of this character.

I therefore think that the appeal upon this point fails, and that being so it is unnecessary to deal with the second point, namely, the possibility of holding the consignees as liable as one consignee would be. I think the appeal should be dismissed with costs.

LORD WRENBURY—I agree, and I have not thought it necessary to prepare an independent judgment of my own.

LORD BUCKMASTER—I had prepared a written independent opinion on this case, but after reading the opinions of the other noble and learned Lords who have preceded me I realised that I should be only clothing in different words exactly what they have already expressed. In such circumstances it would be vain repetition to deliver my opinion to the House, and I therefore content myself with expressing my entire agreement with the proposed motion and with the reasons put forward in its support.

Appeal dismissed.

Counsel for the Appellant—Compston. K.C.—Hardy. Agents—Botterell & Roche, Solicitors, for Andrew M. Jackson & Company, Hull.

Counsel for the Respondents—Mackinnon, K.C. — W. H. Owen. Agents — Trinder, Capron, & Company, Solicitors.

HOUSE OF LORDS

Friday, January 30, 1920.

(Before Lords Haldane, Dunedin, Atkinson, and Buckmaster.)

MARTEN *v.* VESTEY BROTHERS, LIMITED.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Insurance — Marine Insurance—Duration of the Risk — Voyage Policy — "Final Port"—Printed Form of Policy—Alteration in Writing—Construction.

A policy insured a ship but not its cargo against total loss upon a voyage "at and from any port or ports . . . on the River Plate to any port or ports . . . in France and/or in the United Kingdom (final port) . . . *via* any ports in any order." The last of the ship's cargo was discharged at Havre, and the captain then proceeded to Cardiff to coal. On the way there the ship was wrecked upon the Scilly Isles. The owners brought an action against the underwriter for the sum covered by the policy. *Held* that "final port" meant the port where the cargo was discharged, in this case Havre, and that the voyage terminated there. *Held* further (Lord Dunedin *dissenting*, and Lord Buckmaster *reserving* his opinion) that where a printed form of policy is used which but for alterations in writing would include both ship and cargo, in construing a policy confined to the ship alone the printed words though inapplicable to the particular policy may be looked at to determine the character of the adventure.

The decision of the Court of Appeal (BANKES, WARRINGTON, and SCRUTTON, L.JJ.) *reversed*. The judgment of Bailhache, J., *restored*.

The *facts* appear from the judgment of Lord Dunedin.

Their Lordships' considered judgment was delivered as follows:—

LORD HALDANE—The question here is one simply of construction of the policy of marine insurance before us. I have come to the conclusion that the view taken of what the answer should be by Bailhache, J., is preferable to that of the Court of Appeal.

It is agreed on all hands that notwithstanding the wide words of the printed form used in its preparation, the introduction into this form of the words written in and appearing in italics is enough to limit the insurance to the vessel itself, and to exclude the interest in the cargo even of its owners. If it were not for the introduction of these words it would be plain that the insurance extended to the cargo also. But the policy is drawn up with the limiting words inserted into a printed form which by usage they are held to govern, and it is agreed that by the practice of Lloyd's the limitation is so sufficiently expressed as to make the policy one concerning the vessel alone. That, however, does not seem to me to render all the words remaining in the printed form wholly negligible. They are retained in the print and belong to the framework on which the actual contract is grafted, and outside of that general framework there is no language which constitutes an agreement. They suggest that the policy read as a whole had reference to a voyage, and that expressions which refer to the general character of the adventure insured can hardly be excluded from notice. These expressions point to an adventure terminating so far as concerns the ship insured when she with her goods and merchandise have reached a port where the cargo has been discharged and landed. The insurance is to endure until the ship with her cargo shall be arrived at "any port