dence, and (2) because the damages awarded were excessive.

He contended that there was a distinction, in regard to the liability of railway companies, between the carriage of passengers and the carriage of goods, In the former case, the company was not liable, except in the case of proved fault. No fault was proved here. He quoted the following authorities, Hodges on Railways, pp. 529–32; Chitty & Temple, p. 268; Bell's Com., I. 462; *Latch* v. *Romnor Railway Co.*, 13th Jan. 1858, 27 L. J. Ex., 155: *Bird* v. *Great Northern Railway Co.*, 28 L. J. Ex., 3.

The Court granted the rule.

Dean of Faculty (Moncrieff), for the pursuer.

Young for defenders, in reply.

The Court discharged the rule.

The Lord President said that the case was one of some importance, and required an examination of the evidence in order to see whether the verdict was justified. But there were certain preliminary considerations occurring at the outset of the case. In the first place, the issue required, in order to justify a verdict for the pursuer, that the collision was imputable to the fault of the defenders. On the other hand, it was beyond question that the cause of the accident was the presence of a truck on the main line. That raised a presumption against the defenders, and, in the absence of farther evidence, would be conclusive on the question whether the accident was caused by the fault of the defenders. In the absence of explanation on that point, it would be reasonable to impute it to carelessness on the part of the defenders or their servants. Again, if the defenders undertook to prove that the truck was placed there maliciously, it might be that, in the absence of proof of negligence on their part, that might relieve them from responsibility. Whether it would be sufficient for them to prove that it was done maliciously by some person or persons unknown, was a question of difficulty. He was not prepared to say that in certain circumstances this might not be sufficient; but, if they did not connect some person with the malicious act, they must show it to be impossible that it could be done in any other way. That was just the position of the question here. The burden lay on the defenders to show that the waggon could not have run down from the siding except through the wilful and malicious act of some one, unaided by the servants of the defenders, or any for whom they were responsible. But that burden they had not discharged. The fair result of the evidence is that, while the waggon may have been brought through by some malicious person, it is possible that it may have come through by negligence on the part of the servants of the defenders, or of some one for whom they were responsible. Looking to the evidence, it would not be safe to hold that the waggon could only get out by malicious act. It was said, no doubt, that the siding was in such a condition of obstruction that it was impossible for the waggon to get out without overcoming three different obstacles. There was (1) a chock-block; (2) facing-points; and (3) another chock-block. But, then, on further examination of the evidence, it appeared that the first chock-block was not in good working order, but wanted the very thing indispensable to make it available. Then, as to the facing-points—supposing they were in proper order—most of the skilled witnesses seemed to be of opinion that if there was no one to look after them they ought to be locked. And common sense led to the same opinion, for everyone knew how likely facing-points were to get out of order, and what rough means were sometimes adopted by men working them to save themselves trouble. In the absence, therefore, of a superintendent and locks, it could not be held that these points gave a certain obstruction. Then nothing remained but the other chock-block, and it must be held on the evidence that that was not, any more than the first, in proper order. The Railway Company therefore had not shown that it was impossible for this waggon to get out of the siding on to the line. There was a fair question for the jury; and the jury had returned a verdict for the pursuer, which the Court were not entitled to disturb.

The other Judges concurred.

Rule discharged.

Agents for Pursuer—Hunter, Blair, & Cowan, W.S.

Agents for Defenders—Dalmahoy & Cowan, W.S.

Friday, June 21.

SECOND DIVISION.

MACLEAN & HOPE *v.* MUNCK.

Ship—Bill of Lading—Charter Party—Short Shipment—Failure to Deliver—Owner—Relevancy—Act 18 *and* 19 *Vict., c.* 3. Held that a bill of lading is not conclusive evidence of the amount of shipment in a question with the owner; and an action, at the instance of onerous indorsees of the bill of lading, dismissed as irrelevant, in respect there was no averment that there had been an actual shipment of the amount which it was said should have been delivered.

This case came up on a report from the Lord Ordinary on issues. The pursuers made the following statements.

The pursuers, M'Lean & Hope, are bone and manure merchants in Edinburgh. The defender, C J Munck, is a shipowner in Soderkoping, in Sweden, or elsewhere furth of Scotland, and is the registered owner of the brig 'Sophia' or 'Sophie,' of Soderkoping.

In the month of February 1865, the pursuers, through Mr Albert Carosus of Glasgow, the agent of Messrs Mowinckel & Hüffer, of Genoa, purchased from them a cargo of bones, amounting to about 200 tons, which was then in course of shipment at Genoa, or, at all events, was to be shipped there and sent to this country. The terms were 115s. per ton, cost and freight, out-turn guaranteed within 2½ per cent., the cargo to be sent to Leith, and a previous claim to be deducted from the price. These terms are stated in the letters of Mr Carosus and the pursuers, dated 13th February 1865, produced, and referred to.

On 20th January 1865 the said Mowinckel & Hüffer entered into an agreement with Carl Hagström, the master of the said brig 'Sophia' or 'Sophie,' and, as such, acting on behalf of the defender, C J Munck, for chartering the said ship for the conveyance of the said quantity of bones to this country. The said agreement was concluded by a charter party between the said Mowinckel & Hüffer and the said Carl Hagström on behalf of the defender, dated 20th January 1865, and which *inter alia* bears:—'It is this day mutually agreed between Carl Hagström, master of the good brig, ship, or vessel, called the 'Sophia,'

of Soderkoping, of the burthen of 185 tons register measurement, or thereabout, and warranted to carry tons dead weight, now lying in the port of , and Messrs Mowinckel & Hüffer, agents, of Genoa, mercants and carterers of the said ship: That the said ship being tight, staunch, and strong, and in every way fitted for the voyage, shall load here in the customary manner a full and complete cargo of bones, in bulk as the charterers may require, not exceeding what she can reasonably stow and carry over and above the necessary tackle, apparel, provisions, and furniture. . . . Being so laden and despatched, the said ship shall immediately, wind and weather permitting, proceed with the said cargo to a good and safe port on the east coast of the U. Kingdom, Plymouth included, order on signing b/ of lading, or so near thereunto as she may safely get, and deliver the same agreeably to the bills of lading, on being paid freight of 21s. sterl. for every ton of 20 cwt. Eng. delivered in full, and with £5 gratuity to the master.' The said charter party, signed by the said Carl Hagström on behalf of, and as duly authorised by, the defender, is produced herewith, and referred to for its terms.

In pursuance of the said charter party, a quantity of bones was put on board the ship at Genoa. The bones were said to have been duly weighed, and a bill of lading therefor was signed by the said Carl Hagström, as master foresaid, and as such acting on behalf of and duly authorised by the defender, on 27th February 1865, in which the quantity shipped is stated at 217,239 kilogrammes, which is equal to 214 tons and 28 pounds, and that quantity was accordingly invoiced by the said Mowinckel & Hüffer to the pursuers, of the same date, and the price thereof has been paid by the pursuers to the said Mowinckel & Hüffer, who indorsed the bill of lading to the pursuers, under deduction of 10 per cent. allowed to remain in their hands, according to the custom of trade, until the vessel should be discharged, to meet contingencies. When the said bill of lading was signed, the ship was ordered to proceed with the said cargo to Leith. The defender, by said charter party and bill of lading, became bound to deliver the bones at Leith, agreeably to and conform to the weight stated in said bill of lading, to the pursuers, as endorsees of the said Mowinckel & Hüffer.

The said brig sailed from Genoa for Leith immediately after the said bill of lading was signed; and on her arrival at Leith, the cargo of bones was discharged. The quantity of bones discharged from the said brig was only 169 tons 14 cwts. 1 qr. and 19 lbs. The quantity shipped, or which ought to have been shipped at Genoa, as aforesaid, having been 214 tons and 28 lbs., there was thus a deficiency in the quantity discharged of 44 tons 5 cwts. 3 qrs. and 9 lbs. The pursuers, however, admit that some natural inleak on the quantity shipped may have taken place, and they are willing that 5 per cent. on the quantity shipped—which is a liberal allowance for such natural inleak—should be deducted from the said deficiency. The said allowance of 5 per cent. on 214 tons and 28 lbs., the quantity bearing to have been shipped, is 10 tons and 14 cwts., which being deducted from the said deficiency of 44 tons 5 cwts. 3 qrs. and 9 lbs., leaves a deficiency of 33 tons 11 cwts. 3 qrs. and 9 lbs. entirely unaccounted for, and for which the defender is responsible. The cost price or value of the bones was £5, 15s. per ton, but from this must be deducted £1, 1s. of freight, and the said 33 tons 11 cwts. 3 qrs. and 9 lbs., at the rate of £4, 14s. per ton, amount in value to £157, 17s. 6d. The defender is farther indebted to the pursuers in the difference between the price paid by the pursuers for the said quantity of 33 tons 11 cwts. 3 qrs. and 9 lbs. of bones, and the price at which the same quantity of bones could be purchased at the said port of Leith, at the current market rates at the time of discharge of the said cargo. The said difference in price was 7s. 6d. per ton, and, at that rate, the loss incurred by the pursuers in purchasing 33 tons 11 cwts. 3 qrs. and 9 lbs. of bones to meet the said deficiency amounts to £12, 12s. The bones, when delivered, were also found to be of very inferior quality to that represented by the shippers or their agent, and, in respect of this inferiority, the pursuers claimed from the shippers the sum of £59, 12s. 11d., which has been paid by their draft, as aftermentioned. No part of this sum has ever been sought from the defenders." The pursuers also relied on the provisions of the Act 18 and 19 Vict., c. 3.

By a minute of restriction the sum concluded for was limited to £78, 11s. 9d.

The pursuers proposed the following issue.

"It being admitted that Carl Hagström, as master of the Ship 'Sophia,' of Soderkoping, of which the defenders are owners, signed the bill of lading, No. 7 of process; and that the said bill of lading was indorsed to the pursuers,—

"Whether the said Carl Hagström, as master foresaid, failed to deliver to the pursuers, in terms of the said bill of lading, the amount of bones specified in the same, to the extent of 44 tons, or any part thereof, to the loss, injury, and damage of the pursuers?"

Jameson, Gifford, and Asher for pursuers.

Clark and Watson in answer.

At advising,

Lord Justice-Clerk—This is an action at the instance of Messrs M'Lean & Hope, concluding for payment of a sum of £170, 9s. 6d., against Munk, the owner of the ship "Sophia." The amount from a payment to the pursuers by the shippers has been reduced to £78, 11s. 9d.

The ground of the demand, as set out in the record, is this:—The pursuers say that they were induced by the agent at Glasgow of Messrs Mowinkel & Hüffer of Genoa to purchase a cargo of bones of about 200 tons, in the course of shipment at that port, at a price of 115s. per ton, outrun guaranteed under 2½ per cent.; the cargo to be sent to Leith.

They then set out the terms of a charter party entered into between Mowinkel & Hüffer and Carl Hagstrom, the master of the "Sophia," as acting for the defender, the owner, whereby the master for the owner undertakes to ship a cargo of bones to such port on the east coast of the United Kingdom as should be indicated at the time of signing the bill of lading, and deliver the same "agreeably to the bills of lading," on payment of a certain freight and a certain gratuity to the master.

They go on to state, in the 4th article of the condescendence, that the contents of the cargo were invoiced to them by Mowinkel & Hüffer, from whom they made the purchase, as amounting to 217,239 kilogrammes, or 214 tons 28 lbs.; that the bill of lading, which was indorsed to them by the shippers and signed by the master, contained a statement of the shipment of bones to that amount, and that they paid, subject to a certain usual deduction, the full price of the whole bones represented to have been shipped on the

face of the bill of lading. In the 5th article of the condescendence they say that the quantity of bones actually delivered at Leith was short of the quantity appearing on the face of the bill of lading by upwards of 44 tons. They take off what they consider a fair amount of inleak, and leave 33 tons or thereby unaccounted for, and they seek to make good the liability for that amount against the defender.

The question of liability on the part of the defender, as owner, as raised upon the facts only of the subscription by the master of the bill of lading, and the purchase and payment made on the alleged faith of its being accurate, raises a pure question of law. If liability is sought to be attached, not by reason of the master's mere subscription of that instrument, and the transaction upon the faith of it, a different issue is raised, and one depending upon fact, which fact, if disputed, would require to be investigated. The defenders, by their 6th plea, have raised the question of the relevancy of the averments as made in the record, and we must consider with a view to that question, what the averments on the record really are. If the case of the pursuer were one of actual shipment of the bones stated in the bill of lading, nothing could be simpler than to say so. We have given the pursuers an opportunity of offering any amendment on the record which might make their meaning clear, if they really mean to make the averment. They have declined to make any alteration, and have done so in the face of an intimation of our probable view of the statement as it actually stands.

Upon the best consideration I can give to the record, as laid, the averment of an actual shipment of the bones sought to be the ground of claim against the defender is absent. The record seems to be studiously framed with a view to avoid any such averment, the presence of which would have made the action plainly relevant.

The 4th statement affirms as facts only the signing of the bill of lading, the invoicing of the bones, and the arrangement as to the price. The bones were said—by whom is not specified—to have been duly weighed. This is an averment, not of a fact, but of a statement made by somebody as to a fact. The concluding portion of the 4th article is a plea in law, irregularly introduced, but pointing to an obligation incurred by the owner, not under the contract to carry goods actually shipped, but under an obligation incurred by the act of the subscription by a third party to the instrument mentioned.

In the 5th article it is said that the brig sailed immediately on the signing of the bill of lading, not with the bones to the amount mentioned on board, but with a cargo which was discharged. The cargo is discharged. No other account is given as to the way in which any of the actual cargo could have disappeared than by inleak; and the deficiency is not of bones shipped, but "bones which were shipped, or ought to have been shipped;" *i.e.*, bones which, according to the pursuers' allegations, were either shipped, or, if not shipped, ought to have been shipped. This does not raise an issue of shipment or not, but an issue under which the party who makes the allegation would fully verify his averment by showing that the obligation subsisted to do the thing, not that there was an obligation on somebody to do it. We all know what is the extent of meaning attached to such an affirmation. If it is said that a thing was done, or should have been done, we know that the party does not affirm the fact; but as he couples it in the same breath with an alternative view of facts, he cannot be held bound to the averment of the fact, which in reality he shrinks from affirming.

The plea in law is in precise conformity with the view I have taken of the averment of fact.

We must therefore judge of the relevancy of this case on the footing of the absence of any averment of the actual shipping of the bones; the price of which is sought to be recovered.

The case is, that the owner is liable for goods not actually shipped, because the master of his vessel subscribes a bill of lading on which the quantity of goods taken on board is set forth.

The owner here is not said to have given any special directions, or to have interfered in any way, directly or personally, in reference to this cargo. Confessedly, the expression "duly authorised" in the 4th article of the condescendence, means only that the master had such authority as his position as master gives him.

Is it relevant in law to charge upon the owner a difference in the amount of goods, between the amount of goods mentioned to have been shipped in the bill of lading and goods actually shipped?

The proper object of a bill of lading is set forth very clearly in Mr Bell's Commentaries.

It does not constitute an obligation to carry—that is constituted by the charter party—it is evidence against the shipmaster who signs it, in a question between the shipper and him, and it passes the property of the goods actually on board.

As indorsee of a bill of lading for onerous causes, the holder of the bill of lading has a right of property in the goods on board. It seems to me impossible to conceive that it can convey a right of property in goods not on board, but which ought to have been put on board. The signature of a master to a bill of lading cannot certainly give a right to non-existing quantities. As holder of the bill, the indorsee of a bill of lading may enforce delivery of the goods on board, because the indorsation gives him the property. How can such indorsation vest a right against the owner of the ship for goods unshipped?

The case must be laid—and was so put—upon a case of imposition. The pursuers say that they were deceived if the goods were not there, by a misrepresentation that they were; and they hold, that as bills of lading are important mercantile instruments, so it is necessary that indorsees shall be indemnified by the owner of the ship. But why visit the owner with the consequences of a fraudulent or careless statement, made probably in consequence of the statements of the shippers? The indorsee takes out an instrument in favour of the shipper, who, on the assumption, has short shipped, and in virtue of an indorsation by him of such a document, claims to make good the consequences of an act of which the owner is ignorant, and in reference to which he is perfectly innocent. The master has a delegated duty, but assuredly he has no delegation to the effect of signing bills of lading, except for goods shipped. A shipmaster, in collusion with a pretented shipper, grants a bill of lading for a cargo, no part of which was ever on board, how can he be under obligation for an act so unauthorised? To the extent of short shipment his acknowledgment is as little within his implied authority as a subscription of a bill of lading without any cargo would be.

But it is unnecessary, in the actual state of the law, as fixed by decisions and I think illustrated by

statutes, to consider the question viewed in the abstract. It is idle, I think, to speculate at this time of day upon the question as to innocent indorsees being entitled to depend upon such assurances, and on the implied authority of masters to bind their owners in such a matter. The question has received full consideration, and must be held to have been fixed.

The case of *Grant and Norway* affirms the principle that a bill of lading for goods not put on board, does not bind the owner; that of *Hubbersty* that a master cannot charge his owner by signing two bills of lading; and, finally, the Act of the 18 & 19 Vict., by the plainest possible implication, leads to the conclusion of a liability limited to the party himself who signs the bill.

The provision of the statute to which the pursuer appeals is 18 and 19 Vict., cap. 111.

The provision as to the exception in favour of the shipmaster is noteworthy in reference to the argument urged so strongly in favour of the expediency of supporting the rights of onerous indorsees. The shipmaster is not bound if he can show absence of default by the shipper.

The question as to blank in bill of lading seems to me to be unnecessary, and probably not proper to be entertained at this stage of the proceedings.

I therefore hold that the action, as laid, is irrelevant, and falls to be dismissed.

The other judges concurred.

The action accordingly was dismissed as irrelevant.

Agents for Pursuers—White-Millar & Robson, S.S.C.

Agents for Defender—Murdoch, Boyd, & Co., W.S.

Tuesday, June 25.

FIRST DIVISION.

M'DOUGALL AND MANDATORY *v.* GIRDWOOD.

(*Ante*, vol. iii, p. 367.)

Jury Trial—New Trial—Bill of Exceptions—Infringement of Patent. Motion for new trial, on the ground that the verdict was against evidence, refused. Exceptions disallowed.

In this case, Alexander M'Dougall, manufacturing chemist, Manchester, was pursuer, and Robert Girdwood, wool-broker, Tanfield, Edinburgh, was defender. The pursuer set forth that, by letters-patent, he had obtained for fourteen years the exclusive privilege of making and vending his invention within the United Kingdom. In his specification he claimed, as secured to him by the letters-patent,—1st, The use of carbolic acid in the preparation of materials or compositions for destroying vermin on sheep and other animals, and for protecting them therefrom; 2d, The use of alkalies and tallow, or other saponifiable substance, in combination with the above products, when used for the purposes set forth. In his subsequent disclaimer and memorandum of alteration, the pursuer declared—"My invention consists in the use of the heavy oil of tar, or dead oil, or crude carbolic acid, as it is sometimes called, or creosote obtained in the destructive distillation of carbonaceous substances. These materials I treat with an alkali, and add a saponifiable fatty substance." The issues tried before the Lord President and a jury in April last, were—1. "Whether, between 28th January and 17th May 1866, the defender did, within or near his premises at Tanfield, near Edinburgh, wrongfully, and in contravention of the said letters-patent, use the invention described in the said specification, as altered as aforesaid?" 2. "Whether, between 28th January and 17th May 1866, the defender did, wrongfully, and in contravention of the said letters-patent, vend a material for destroying vermin on sheep and other animals, and for protecting them therefrom, manufactured by the use of the invention in the said specification, as altered as aforesaid?"

The defender denied that the "Improved Melossoon or Sheep Protecting Dip" sold by him was the same, or substantially the same, as the pursuer's invention, and explained that he used in his manufacture light pitch oil, having a less specific gravity and a lower boiling point than water, and also vegetable poisons; heavy oil of tar, or dead oil, or crude carbolic acid, or creosote, being carefully excluded, as being injurious to the wool. A number of scientific witnesses were examined. The jury returned a verdict for the pursuer. The defender now presented a bill of exceptions to the Judge's charge, in so far as he had left it to the jury to say, on the evidence, whether the words in the specification, "the heavy oil of tar," &c., do, in their ordinary meaning, as known in trade, comprehend oils produced from the destructive distillation of coal tar, of a specific gravity less than the specific gravity of water; and, particularly, the oil used by the defenders in the manufacture of the composition complained of, as a contravention of the patent; and had directed them in law, that they must find for the defender if they should be of opinion that the said words did not comprehend such oils. The defender also asked the Judge to direct the jury (1) that, according to the true construction of the letters-patent, specification, and disclaimer, no oil of a less specific gravity than water is comprehended within the said patent, specification, and disclaimer; (2) that if the tar oil used by the defender was, prior to the date of the patent, commercially known and used, and was of a lighter specific gravity than water, the pursuer was not entitled to a verdict on either issue. The Judge refused to give these directions.

A hearing took place on the bill of exceptions and also on a rule, obtained by the defender on the pursuer, to show cause why the verdict should not be set aside as against evidence.

YOUNG, MACKENZIE, and BALFOUR for pursuer.

CLARK, WATSON, and R. V. CAMPBELL for defender.

LORD CURRIEHILL, after reading the issues sent to trial, and the first exception, said that the question was, whether the judge ought to have left it to the jury to say so and so, and it appeared to him that the judge could do nothing else with propriety. The article was described by the words "the heavy oil of tar," &c.; and the defender said that the judge should have told the jury whether or not these words, in their ordinary meaning as known in trade, comprehended oils of a certain specific gravity. How could the judge do that? How was he to know the meaning of the words "heavy oil of tar," &c.? These were not technical words, or words of which the judge was bound to know the meaning. They indicated a certain mercantile commodity,—their meaning was to be ascertained from people who are acquainted with that commodity. But the argument was, that in the specification itself words were to be found which enabled