Mackinnon's valuation or list of prices arrived, with a letter from that gentleman, mentioning, *inter alia*, that he and the other referee having differed in opinion, 'it remains with you, as oversman, to determine the matter, and I therefore send you annexed my valuation. Mr Mackenzie will of course send you his, and I shall be glad to know your decision as soon as you arrive at it.'

"Having received this letter, and being also in possession of the views of the other referee, the oversman proceeded (without waiting for any meeting), on 8th November to issue his award, and in it he appears to have taken a somewhat different view from either of the referees—a medium view of the prices or valuation of the sheep. In the meantime, the oversman's letter of 5th November to Mr Mackinnon having been received by him, he, on the 8th November (No. 32 of Process), immediately replied, not asking for a meeting or hearing, but explaining that he had written 'on 2d inst, with my valuation of the Lochcarron stock, and as you have got Mr Mackenzie's, I do not see how you can have much difficulty in saying which of us (if either of us) is right.' And again, in his evidence as a witness, he says:—'If there had been a meeting at Inverness, it would have been attended by Mr Murray, Mr Mackenzie, and myself. There would have been no occasion for anybody else, because the whole matter was referred to us. (*Q.*) Would there have been agents and counsel for the purpose of being heard? (*A.*) No; I never heard of such a thing in a sheep valuation. I was taking charge of the valuation on the part of Lord Hill. (*Q.*) And if you had attended the meeting at Inverness, would you have been attending on the part of Lord Hill? (*A.*) So far as Lord Hill was concerned; further than the pricing of the stock, I should have been doing nothing else for him. I don't think I made any other communication to Mr Murray than my two letters of the 2d and 8th November. I cannot remember of making any other.'

"Such being the nature of this case, and of the evidence bearing on it, the Lord Ordinary thinks that the award or decreet-arbitral in question is unassailable on the ground of Lord Hill not having been heard by the oversman. This view he thinks is sufficiently supported, so far as such support is necessary, on the principle recognised and given effect to by the Court in the cases of *Macgregor* v. *Stevenson*, 20th May 1847, 9 D. 1056; *Latta* v. *Macrae*, 9th March 1852, 14 D. 641; and *M'Nair and Others* v. *Roseburgh and Fauld*, 16 February 1855, 17 D. 445."

Lord Hill reclaimed.

JAMIESON for him.

CLARK and CHEYNE in answer.

The Court held that in such a case as this there was no occasion for the oversman to hear parties at all, and that he was entitled to apply his own knowledge and skill to the valuation of the stock; but even if that were otherwise, the oversman, having heard from both parties' arbiters before he pronounced his award, he had sufficiently fulfilled the duty incumbent on him. Any failure to hear must be wrongful before the Court could interfere, and there was no wrong committed here. The oversman had acted throughout with perfect fairness and impartiality.

Agents for Lord Hill—Macrae & Flett, W.S.

Agents for Mr Mackenzie—Cheyne & Stuart, W.S.

Friday, June 5.

MACLEAN & HOPE *v.* FLEMING, *et e contra.*

Ship — Charter-Party — Short Shipment — Dead Freight. Circumstances in which *held* that pursuers suing under a charter-party had failed to prove that a smaller quantity of bones had been delivered to them than had been actually shipped, and owner of ship held entitled to dead freight under the charter-party, in respect a complete cargo had not been shipped.

These are conjoined actions, in which the pursuers of the one, Maclean & Hope, sue the defender Fleming, owner of the ship "Persian," for the value of a quantity of bones. The case arises out of the following circumstances:—On 17th November 1864, Samuel Donaldson, master of the ship "Persian," belonging to Fleming, entered at Constantinople into a charter-party with Alexander Curmusi of that place. It was agreed by the charter-party that the ship should proceed to certain ports therein specified, and should load a full and complete cargo of cattle bones in bulk, to be carried on behalf of the charterer to a port in the United Kingdom—freight to be paid for the same at the rate of 35s. per ton of 20 cwt. of bones. The ship proceeded to these ports and loaded the bones, and then arrived in Aberdeen with 386 tons, 18 cwt., which were delivered to the pursuers sueing under the charter-party, which was transferred to them. Maclean & Hope, in the action at their instance, say that the quantity of bones was not delivered to them that was in point of fact shipped at the several ports. The Lord Ordinary (KINLOCH), on advising a very long proof taken in the case, held that the pursuers had failed to prove that any greater quantity was shipped than was delivered to them. His Lordship also held that the ship could have carried a further quantity of 210 tons. His Lordship accordingly assoilzied the defender. In the action at the instance of Fleming, he concludes for £377, 1s. 6d., under deduction of a sum of £300 paid to account, as the freight due on the bones carried and delivered to Maclean & Hope. He also claims £367, 10s. as the amount of freight on 210 tons of bones which would have been further yielded by the vessel if filled with a complete cargo in terms of the charter-party. The Lord Ordinary decerned for the pursuers in this action.

His Lordship added the following note to his interlocutor:—

"*Note.*—The leading question between the parties arises in the action at the instance of Messrs Maclean and Hope. In order to success in that action, it appears to the Lord Ordinary necessary that it should be proved, or assumed, that a certain quantity of bones was shipped on board the defender's vessel, the "Persian," for carriage on behalf of the pursuers, and that less than the quantity so shipped was delivered or tendered at the port of discharge. The action is in substance an action of reparation on account of the non-delivery of the alleged deficient quantity.

"In such an action the *onus* of proof lies on the pursuer; and it appears to the Lord Ordinary, on a consideration of the whole evidence, that the pursuers in the present instance have failed to establish their case. It is expressly deponed to by the captain of the vessel, and by both the first and second

mates, that they brought home and delivered the whole bones which were shipped. And there has no reasonable account been given of the way in which the bones were abstracted after being shipped, supposing such to have been the fact. The evidence which, on the other hand, was led by the pursuers, appears to the Lord Ordinary to fall far short of what was necessary to prove the amount shipped to have been what is stated. Mr Edgar Whitaker, who was seller or shipping agent of the bones (it is not quite clear what character he held), depones that he can state nothing on the subject of his own personal knowledge, having left the whole matter to his clerks. Mr David S. Ogilvie, who was agent at Gallipoli for Whitaker & Company, was only connected with the shipment at Enos, as to which he says—'E. Whitaker & Company being in difficulties, I took up the contract at their request;' but he also was not personally concerned in the shipment, which was effected by his agent at Enos; and his evidence is only remarkable for its extreme exhibition of negatives. Casimir Alexich and Nicoli Sklero, clerks of Whitaker & Company, were respectively concerned in shipping the bones—the one at Ounich and Kerrasounda, the other at Redosto, three of the five ports of shipment. But on the subject of quantity their evidence is unsatisfactory. The first of these witnesses says—'At Ounich we sometimes weighed the bones and sometimes not, on account of the bad weather at that time;' —adding afterwards, 'I nevertheless did make an approximate calculation of the weight of the bones from the baskets already weighed.' The second of the witnesses, when asked, How was the quantity ascertained?—answers, 'The bones were weighed by the Turkish Custom-house,' without testifying to any check on his part. In the case of neither of these witnesses is it possible to deduce, with any reliance, a specific and determined quantity of bones as that of either of the partial shipments to which they speak. The pursuers referred largely to the entries in the log-book of the ship; but these also come far short of exact and specific proof. To speak of so many lighters of bones being brought to the vessel is of little moment, unless the quantity contained in each lighter is established; and so little certain evidence is there on this head, that one witness (Askin) estimates the lighters at Enos (from the lighterman's language on his fingers, all else being literally Greek to him) at twenty to twenty-five tons each; another (Pardew) states the same lighters as one to seven tons at most, and only one or two of the last-mentioned size; 'the others ran a ton and one and a half-ton.' As to such a specific entry in the log-book as '198 cantars 7 okes of bones,' its value is considerably diminished when the mate, who kept the log-book, says concerning it, 'I got both the figures and the names of the weights from the Greek before mentioned; I did not myself understand what they meant.'

"The pursuers, at the outset of the case, mainly relied on the terms of the bills of lading signed by the captain, which acknowledged so many 'kintals' of bones as shipped at the respective ports, but were subscribed under the express declaration, 'weight and quality unknown,' or, in the major number of instances, 'weight, quality, and contents unknown.' The pursuers coupled this reference to the bills of lading with a reference to the terms of the Act 18 and 19 Vict., cap. 111, which declares that 'every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of that shipment as against the master or other person signing the same.' The pursuers pushed this argument so far as to maintain that these bills of lading formed conclusive evidence against the defender, the shipowner. At the debate on the proof this argument was not repeated. After the judgment and opinions in the recent case of *Maclean & Hope* v. *Munk*, 14th June 1867, 5 M., 893, the argument was hopeless. It was ruled in that case, in terms of the rubric, that 'the master of a ship, by signing a bill of lading, does not bind the owner for a greater quantity of goods than is actually shipped.' The principle, of course, holds *à fortiori* where the bill of lading is signed under a declaration of 'weight and contents unknown.' The bill of lading signed by the master, more especially taken in connection with the master's evidence, may rightly be held an item of proof in the question of fact, What was the amount or quantity actually shipped? But its value as such will, of course, vary with the circumstances. When the evidence of Mr Whitaker is viewed in combination with that of the master, it is plain that the bills of lading in the present case were, wholly or partially, prepared for the master in the office of Whitaker, and were signed by him without any inquiry, and, as he says himself, without his even knowing what the phrase 'kintal' meant.

"There is left, undoubtedly, an unpleasant mystery as to the great deficiency of the bones received by the pursuers, as compared with the quantity set forth in the invoices sent to them by Messrs Whitaker, and for which they had to a large if not the whole extent, accepted bills by anticipation. But this can be no reason for charging the defender with bones not received by his vessel for carriage to Great Britain. Such a charge could only be sustained by clear and conclusive proof that the bones had been actually put on board; and it appears to the Lord Ordinary that such proof has not been adduced by the pursuers.

"The action at the instance of Messrs Maclean and Hope being disposed of in favour of the defender, it appears to the Lord Ordinary that the defender must be found entitled in his own action to the full freight due for the bones delivered; and also to dead freight on the amount of tonnage which was left unoccupied, contrary to the stipulation in the charter-party, which expressly provided that a full and complete cargo should be shipped. The Lord Ordinary is of opinion that the defender has not sufficiently cleared the small sum of demurrage claimed by him. The other claims originally set forth by him he some time ago abandoned."

Maclean & Hope reclaimed.

Solicitor-General and Mackenzie for them.

Watson in answer.

At advising—

Lord Justice-Clerk—The important question of fact involved in these conjoined actions is, Whether there was delivered from the vessel of Mr Fleming, at Aberdeen, the entire cargo of bones put on board the vessel at the ports in Turkey at which the shipment was made.

Messrs Maclean & Hope affirm that the cargo actually shipped amounted to 701 tons, 3 cwt., 1 quarter, and 20 pounds. The quantity delivered amounted to only 386 tons, 18 cwt. Their case is in so far supported by the bills of lading signed by the master, which acknowledges shipment of quantities of bones, expressed in Turkish weight, which, being converted into tons, brings out the quantity to delivery of which they say they are en-

titled. These bills of lading, though stating each a specified quantity of kintals or kantars, contain an exception of weight, quality, and contents unknown.

Messrs Maclean & Hope at first pleaded that the bills of lading were absolutely binding on the shipowner, so far as the particular quantities were specified, but that plea was not maintained in the discussion. It is now fixed that such instruments are not binding to the effect of compelling the owner to deliver the quantity specified on the face, but they no doubt afford materials to be taken into view in determining the fact. Cases may be conceived where such bills of lading may be nearly conclusive as to the fact. In other cases they may go a very short way in proving the fact. The question is, What effect is due to them here? The master who granted these bills of lading has been examined, and, if reliance can be placed upon his evidence, they cannot be of much value, for, although subscribing these bills according to the wish of the parties interested in obtaining them, he was ignorant of the meaning of the words importing the weight, and had no knowledge from any source, except the statement of others, as to how the fact was.

The persons engaged in the loading showed great looseness in the process of weighing. No note was kept of the weight—as in some cases the weight was only judged of by observation, not by weighing—while there is entirely absent an element of proof which might, for all that is shown, have been recovered and adduced in support of the case of Messrs Maclean & Hope, had it been favourable to them. It appears that an export-duty is charged by the Turkish Government on bones exported. No evidence has been brought to show the payment made, or that such evidence could not have been obtained.

The log is referred to, and calculations are made as to the amount which may be held proved, by taking into view the number of the lighters supplying the bones, the days spent in loading, and the number of kintals in some instances mentioned. These views are deserving of consideration, but there are elements of uncertainty in the calculation, arising from the varying sizes of the lighters, as to the quantities shipped in a day—the only evidence approaching to certainty being adduced as to the shipment at Enos, the last port touched at; and as to the kintals mentioned in the log, the mate, who kept it—as ignorant as the master of Turkish weights—says that he put down the quantities stated to him on information.

The case of Maclean & Hope is thus not entirely satisfactory, in the absence of evidence; but the evidence adduced by Mr Fleming goes to this, that every portion of the bones shipped was delivered. He is supported in this proposition by the very clear testimony of the master, the mate, and a seaman employed on the vessel, and there is no evidence from any one as to the abstraction of a single cwt. of bones, nor a reasonable suggestion of any possible way in which so enormous a quantity as is deficient could have been abstracted, or could advantageously have been realised. A conspiracy to unship and dispose of bones actually put on board, to the extent of more than 300 tons weight—if it had existed and been carried out—is a thing nearly incredible; and assuredly, if it had existed and been carried out, would have been detected. There is no shadow of suspicion thrown upon any one of the crew by any fact proved against them in the case. It is not implied that the parties engaged in loading should have been guilty of deceit as to the amount shipped, or been themselves deceived. It seems to me in the highest degree improbable that such a commodity, once shipped, should have been abstracted and disposed of. Perjury of three respectable men (there must have been so according to the view of Maclean & Hope) is as little to be credited as the conspiracy to steal, and the success of such a conspiracy.

The master, before leaving the last port at which he touched, on being called upon, as he says, to leave with a deficient cargo, protested against the deficiency of cargo. We have the protest, and we find it founded on at the moment of the vessel's arrival at Aberdeen. The protest is an element in the case strongly confirmatory of the fact that there remained a void in the ship, which was not and could not at the time be filled. The vessel leaving Turkey is not in a situation to part with any part of its cargo on the way, and, if so, the case of Messrs Maclean & Hope not only fails, but a case is established by Mr Fleming, complete in itself.

This disposes of the question in so far as relates to the claim for cargo carried. It also establishes that there was a deficiency in the cargo, giving rise to a just claim for dead freight. But Messrs Maclean & Hope dispute their legal liability; they plead that they were not parties to the contract of charter-party, and that the parties to that contract may be liable—they, and the cargo belonging to them, are not affected.

By the charter-party the cargo is made subject to a lien for dead-freight. If they are in right of the charter-party, it is clear, in law, that they are liable to fulfil that obligation.

The weight of evidence seems to me to be in favour of the view that this charter-party was truly held by Whitaker & Co. for them. Whitaker & Co. acquired right to the charter-party by a payment of £50 premium. They charge this payment against Maclean & Hope, and they pay Whitaker & Co. the £50. A premium is paid to the master, amounting to £40, in connection with this very charter-party, and it is paid by Whitaker & Co., charged against Maclean & Hope, and paid. In a letter at the time of the purchase, Whitaker & Co. detail the transaction, and the statements in that letter are acted on by Maclean & Hope without any disclaimer of the act as unauthorised; on the contrary, by fulfilling all that is suggested.

Coupled with the fact that commission is charged and paid on purchases made by Whitaker & Co., and paid by Maclean & Hope, I am prepared to hold that they were the true holders of the charter-party through their agents Whitaker & Co. The evidence of Mr Hope is not, if implicitly taken, to be held as adverse to this, for he says, in one part of his evidence—"They," that is Whitaker & Co., "chartered the ship, and handed over the charter-party to us;" and in another, when asked "if the charter was for you?"—*i.e.*, the firm of the witness—he says "that he cannot answer the question."

But, if not holders for themselves, they knew well the contents of the charter-party which was sent to them; they were mixed up with the transactions under which the shipment was made; and they could not but know that the cargo was liable to lien for dead-freight according to these terms. Under these circumstances, their plea as to freedom for the liability under the charter-party is inad-

missible. Their case is, that under the bills of lading reference is made to the charter-party simply as regulating the rate of freight, and that, nothing appearing on the face of the bills to import the other conditions of the contract, they are unaffected by it. They plead that they acquired right to these bills of lading for value, and they appeal to the doctrine recognised in the case of *Fry* and previous cases, that onerous holders of bills of lading may take the cargo, subject only to the conditions appearing on the bills, or imported by reference on the face of the bills. The case is distinguishable from the present in the circumstance that the freight was there due for a mere portion of the cargo, and that the holder of the bill of lading was a stranger, wholly ignorant of the terms of the charter-party. Here Messrs Maclean & Hope knew the conditions, and could not give the first bill of lading, or take right to the other bills of lading, honestly ignoring the conditions of the shipment as appearing from the contract of charter. They state themselves, in a letter of the 1st February 1865, as under a heavy claim for demurrage in regard to the vessel. If liable in demurrage, they could be so only under the charter-party, under which also this claim arises. The case seems to me to be clearly within the authority of *Kerr* v. *Deslandes*, where, under similar circumstances—not stronger, but less conclusive—liability was inferred against the holder of a bill of lading.

The other judges concurred.

Agents for Maclean & Hope—Millar, Allardice, & Robson, W.S.

Agents for Respondent—Henry & Shiress, S.S.C.

Friday, June 5.

INNES *v.* IRONSIDE.

Poor—Residential Settlement—Absence from Parish—Birth Settlement—Erroneous Admission of Liability. Circumstances in which *held* (1) that a person being able-bodied did not affect the capacity of his residence for acquiring a settlement by relief afforded to his wife in another parish; (2) that a derivative residential settlement acquired through the husband had not been lost, the parties living during their absence from the parish in a state of recognised pauperism; (3) that an admission of liability by the parish of birth, made in error, was not binding.

This is an advocation from the Sheriff-court of Aberdeen of an action in which the inspector of poor of the parish of Fyvie sues the united parishes of Tullynessle and Forbes for the sum of £16, 11s., on account of advances made by the pursuer to Mrs Margaret Forrest or Cruikshank from the 14th of August 1862, being the date of the statutory intimation. The pursuer makes the following statements:—"1. James Cruikshank, gardener or labourer, the husband of Mrs Margaret Forrest or Cruikshank, was born in the parish of Fyvie. 2. The said James Cruikshank went to the united parishes of Tullynessle and Forbes in the year 1837, where he resided till Whitsunday 1857, with the exception of a month's absence in Fifeshire. 3. The said Margaret Forrest or Cruikshank went to reside with James Cruikshank in the year 1840, and acted as his housekeeper till the 17th day of May 1857, when she was married to him. 4. James Cruikshank did not receive parochial aid from the united parishes of Tullynessle and Forbes till the year 1855, about two years before he left the said united parishes of Tullynessle and Forbes, and had, consequently, acquired a residential settlement therein. This fact was admitted by the defender's predecessor, Mr James Smith, in a letter, dated 11th May 1850, addressed to the inspector of poor of the parish of Banff, which is herewith produced. 5. The said James Cruikshank and his wife left the united parishes of Tullynessle and Forbes at Whitsunday 1857 (26th May of that year), and went to the parish of Premnay, where they remained two years. 6. Thereafter, the said James Smith addressed a letter to the Rev. John Mann, inspector of poor of the parish of Premnay, dated 21st June 1858, which is herewith produced. In this letter Mr James Smith requested the Premnay inspector to treat Cruikshank as he would treat one of his own poor, showing thereby that he still looked upon him as a pauper belonging to the said united parishes of Tullynessle and Forbes. 7. The said James Cruikshank and his wife left the parish of Premnay at Whitsunday 1859, and went to the parish of Inverury, where James Cruikshank died on the 25th day of September 1860. 8. The said Margaret Forrest or Cruikshank left the parish of Inverury at Whitsunday 1861, and went to the parish of Methlic, where she only remained till Martinmas of that year, when she went to the parish of Meldrum. 9. The said Margaret Forrest or Cruikshank left the parish of Meldrum at Whitsunday 1864, and went to the parish of Old Machar, where she presently resides. 10. The said James Cruikshank and his wife, after they left the said united parishes of Tullynessle and Forbes at Whitsunday 1857, continued to receive parochial aid. 11. The pursuer, the said William Ironside, who for some time previously had supported the said Margaret Forrest or Cruikshank, intimated the chargeability of the defender to the said John Innes, as representing the parochial board of the said united parishes of Tullynessle and Forbes, by written notice sent to him upon the 14th day of August 1862—all in terms of the Act 8 and 9 Vict., cap. 83, intituled 'An Act for the Amendment and Better Administration of the Laws relating to the Relief of the Poor in Scotland.' 12. The chargeability, which commenced as aforesaid, still continues; but the defender disputes his liability, and refuses or delays to repay the said advances, or to relieve the pursuer of the aliment of the said Margaret Forrest or Cruickshank."

The letters referred to in these statements are:—

Inspector of Poor, Tullynessle, to Inspector of Poor, Banff.

"*Tullynessle, 11th May* 1850.

"Sir,—James Cruikshank has acquired a settlement in this parish. I wish you would apply to him for support to his wife. He is in receipt of good wages.—I am, &c.,

"JAMES SMITH, *Inspector.*"

Inspector of Poor of Tullynessle to Inspector of Poor of Premnay.

"*Tullynessle, June* 21, 1858.

"Dear Sir,—James Cruikshank has sent along petition to the chairman of this parochial board enumerating his ailings, &c. I am afraid my last note to you was not explicit enough, and has been misunderstood by you. I had no wish to prevent you giving him what aid you saw necessary. Treat him as you would do one of your own poor in simi-