LORD DEAS—I have carefully read the Lord Ordinary's very full note, and tested it by carefully reading the proof and comparing the two, and the result is that I entirely agree with him; and that being so, it would be out of place to go over the proof in detail. The real question is, whether the ship had arrived at the place of discharge. By the charter-party, she was to load, &c.—(*His Lordship read the terms of the charter-party*). Now, the question whether a ship has arrived at the place of discharge must depend on circumstances. You must consider the nature of the place, the cargo, and the vessel itself, before you can say if the ship has arrived at the place of discharge, and in that view it is important to notice the nature of this cargo, which was not difficult to deliver without injury, and the nature of the place, whether there was any risk to the vessel. It can hardly be said that there was much usage in the case, which might by itself enable us to decide this question; the place has only been in existence for six or seven years. We must look more at what was reasonable under the circumstances. Now, it is important that there was neither difficulty nor danger in delivering at this place, and though Donaldson tried to say there was, still when you come to Gibb's evidence it is impossible to doubt that there was neither one nor other. You must also take into view that though it may take longer time, and so more expense, to land the cargo in rafts, it makes a still greater difference to the steamer if that be not done. Taking all these things into account, I think it would have been very unreasonable not to land the cargo there. It is plain that the demand to take delivery was made at once, and that the defender did so to the extent of lightening the ship, but he says he was not bound even to do that. As to the lay-days, there is no difficulty about them. I think the Lord Ordinary has taken a right view.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming-note for George Donaldson & Son against Lord Ormidale's interlocutor of 23d December 1873, Adhere to the said interlocutor, and refuse the reclaiming-note; find the pursuers entitled to additional expenses, and remit to the Auditor to tax the account of said expenses, and to report."

Counsel for Pursuer — Asher and Thorburn. Agents—Boyd, Macdonald, & Lowson, S.S.C.

Counsel for Defender—Dean of Faculty (Clark), Lancaster, and J. Gray Webster. Agents — Webster & Will, S.S.C.

Wednesday, May 20.

SECOND DIVISION.

[Lord Shand, Ordinary.

NAPIER *v.* GRAHAM.

Bill—Charge—Suspension—Reference to oath of the charger.

Certain bills were granted and subsequently a party was charged upon them; he thereon suspended the charge, and referred the facts and circumstances to the oath to the charger, *held* that under such a reference it was not competent to examine the charger as to an agreement between the parties, as to which there was no statement in the reference or upon record.

This case arose out of a note of suspension presented to the Court at the instance of John Napier, Eglinton, Irvine, against James Graham, coalmaster in Glasgow. The note set forth that the complainer Mr Napier had been charged to make payment to the respondent—(1) of the sum of £100 sterling, with interest, due by a bill drawn by James Graham upon and accepted by the complainer, dated the 15th day of January 1873, and payable three months after date; and (2) of another sum of £100 sterling, with interest, due by another bill of the same date, similarly drawn and accepted, and payable four months after date.

The complainer averred that on 15th January 1873 he accepted two bills drawn upon him by the charger for £100 each, both dated that day, the one payable three and the other four months after date, and that these bills were given for the charger's accommodation, he, Mr Napier, receiving no value for them, and that he was not and is not indebted to the charger in these sums. On receiving the bills, Mr Graham stated that he would get them discounted at a bank in Glasgow, and engaged to retire them when due. It was admitted, in answer, that Mr Napier accepted the bills drawn upon him by the respondent, being the bills charged on. But the other statements were denied, and it was averred that the bills were accepted for value received by the complainer. Further, the complainer said that on the 25th of January 1873 Graham called upon him and stated that he had been unable to get the bills discounted in Glasgow, and that he found that £160 would meet his present wants, and he asked for a loan of that sum. The complainer declined, but eventually, on 27th January, to accommodate the charger, he accepted two other bills to him, the one for £100 and the other for £60, and payable at three and four months' date respectively. When he received these two bills, the charger mentioned that he had left the other two bills for £100 each in Glasgow, but he stated he would cancel them. The two bills for £100 and £60 which the complainer accepted on 27th January were discounted by the charger, and were both retired by him when they arrived at maturity. But instead of cancelling the two bills of 15th January for £100, the charger protested them, and gave the present charges thereon. The charger (respondent) admitted that the bills had been protested, and the complainer charged, but denied the other statements. Finally, the complainer referred the facts and circumstances in connection with these transactions to the charger's oath.

The complainer pleaded—"(1) The reference to the charger's oath ought to be sustained. (2) The complainer having received no value for the bills charged on, and the same having been granted for the charger's accommodation, the complainer is entitled to have said charges suspended. (3) The complainer not being indebted to the charger in the contents of the said bills, or any part thereof, the charges complained of should be suspended, and the charger found liable in expenses. (4) In the circumstances of the present case, and looking to the terms of the deposition made by the charger in the reference, the complainer is entitled to a proof *prout de jure* of his averments."

The respondent pleaded—"(1) The oath of the respondent is the only competent means of instructing that the bills were not accepted for value. (2) The averments of the complainer being unfounded in fact, the note should be refused, with expenses. (3) The bills having been accepted for value, and the charge having been regularly given, the note should be refused, with expenses."

The Lord Ordinary (SHAND), by interlocutor of 2d August 1873, sustained the reference to the charger's oath, and thereafter the Lord Ordinary on the Bills (GIFFORD) pronounced the following interlocutor and note:—

"*Edinburgh, 28th August* 1873. — The Lord Ordinary officiating on the Bills having considered the note of suspension and answers, report of the deposition of the charger on the reference to his oath, and whole process, on caution passes the note of suspension.

"*Note.*—The Lord Ordinary is of opinion that the terms of the charger's deposition in the reference are not such as to entitle him to have the note of suspension at once refused; and as the suspender offers caution, the Lord Ordinary thinks that the note should be passed on caution.

"There are clerical errors in the report of the deposition which should be corrected; the word 'charger' being used in the whole latter part of the deposition instead of complainer; but assuming this to be corrected, the oath does not prove that the complainer is due the charger the sums charged for. No money passed when the bills were granted; nor were they granted upon any settlement of accounts between the parties, nor as any acknowledgment of debt or balance due. No doubt the charger says that the complainer is due to him a larger amount than that in the bills, but then he admits that he cannot tell what the debt is; and part of it consisted in advances for Riggend Colliery, the charger admitting that it was never settled whether he himself was not the tenant of that colliery. Then there were the bills of 27th January, accepted by the charger to the suspender, but the proceeds of which the charger admits having received; and lastly, there is the agreement between the charger and the complainer's son, dated 14th May 1873, which seems to have been acted on, and under which the charger admits that the two bills now charged on were agreed to be delivered up.

"On the whole, the Lord Ordinary thinks that the questions between the complainer and charger really resolve into a count and reckoning, and as the suspender offers caution for the sums charged for if really due, the charger can ask no more.

"The bills charged on, though called for, have not been produced, and this alone would necessitate the passing of the note."

The record having been closed, the case was sent to the Procedure Roll, and ultimately the Lord Ordinary (SHAND) pronounced the following interlocutor.

"*Edinburgh, 12th January* 1874—The Lord Ordinary having considered the cause, with the oath on reference emitted by the charger, finds that in May last, 1873, at a meeting between the charger and the complainer's son, the agreement No. 14 of process was entered into, and that it was understood and agreed that the bills to be destroyed, and therein referred to, included bills to which the complainer was a party: Finds that, in respect of the agreement thus entered into on the terms stated by the charger, the complainer destroyed an I O U in his favour for £2500, by his son James Napier and the charger: Finds that, in terms of said agreement, the charger became bound to destroy the bills charged on, and that in any view he is not entitled to do summary diligence thereon: Therefore, finds the said oath affirmative of the reference, and suspends the charges complained of, and whole grounds and warrants thereof, and decerns: Finds the respondent liable in expenses: Allows an account thereof, &c.

"*Note*—In the note of suspension the complainer referred to the oath of the charger 'the whole facts and circumstances in connection with' the bills in question, and the Lord Ordinary is of opinion that the charger has admitted facts under the reference which preclude him from proceeding farther with the diligence complained of.

"There is considerable room for holding, as maintained for the suspender on the terms of the charger's oath, that the charger's statements constitute an admission that the complainer received no value for his acceptance of the bills in question. There was no account made up when the bills were accepted. The charger says the bills were given on account of advances made by him, 'some of them indirectly to Mr Napier, and for the business in which he was interested' alluding to the Riggend Colliery as the business referred to; and taking the statements in the oath as a whole, there is much ground for the contention that the charger has admitted that he and the suspender's son were the parties truly interested in the Riggend Colliery until some months after the date of the bills in question, when the complainer took it over.

"The Lord Ordinary has thought it unnecessary, however, to make up his mind on this question, for he entertains a clear opinion that, apart from this question, the charger has admitted an agreement which precludes the use he now attempts to make of the bills charged on. The agreement referred to, which is made part of the deposition, contains an obligation to destroy all bills between the parties to it. It is admitted that though in terms this obligation would include only bills by James Napier and the charger, it was intended and agreed to apply to bills to which the complainer was a party; and it is matter of obvious inference that in entering into it James Napier was acting also for his father, the complainer, for he undertook to have the I O U for £2500, in which his father was the creditor, destroyed also. The charger states that the I O U was then destroyed. Yet, two months afterwards, he proceeded with diligence on the bills in question, which in the meantime he got up from the banker with whom they had been deposited. The Lord Ordinary is of opinion that this proceeding is entirely against the faith of the admitted agreement. The counsel for the charger maintained that this proceeding was competent and justifiable, because, according to the terms of the deposition, the suspender had undertaken 'to settle all money matters' with the charger, or, as it is expressed in another passage, 'to square up all matters connected with the Riggend Colliery, and pay all money that was due to me;' and it was said to be enough that the charger now deponed that the complainer 'has never settled up with me yet,' and that the contents of bills in question, and more, was due to him. The Lord Ordinary cannot adopt this view. He thinks summary diligence is out of the question after the arrangement between the parties: but he is further of opinion, that the true arrange-

ment, as disclosed by the terms of the oath, with the destruction at the time of the I O U, on which the charger was bound for £2500, was, that both parties were to destroy the written obligations they held from each other, and that the complainer was to pay any balance which was due by him on an accounting in connection with Riggend Colliery. Under this obligation, the charger's remedy is an action for payment when he has made up his account, if he can show a balance due; but he cannot enforce payment of bills which he ought to have destroyed.

"At the debate the Lord Ordinary alluded to the absence of any statement in regard to the agreement on which judgment has now been given on the record as made up and closed on the passed note. He is of opinion that, under the general terms of the reference, it was competent to examine the charger as to this agreement, to which the charger was himself a party; but he thinks it should have been set forth in the note, and, at all events, in the closed record. The matter is one, however, on which the charger cannot plead that he was taken by surprise; and the Lord Ordinary has felt himself entitled, even in the absence of a special statement on the record, to proceed on the agreement, as its existence has been fully admitted by the charger himself."

Against this interlocutor the respondent reclaimed

The following authorities were referred to—*Stair*, 4, 44, 18, (More's Notes, 418); *Greig* v. *Boyd*, 8 S. 382; *Mather* v. *Nisbet*, 16th Dec. 1837, 16 S. 258; *Macfarlane* v. *Watt*, 6 S. 1095; *Phœnix Fire Insurance Co.* v. *Young*, 10th July 1834, 12 S. 921; *Soutar* v. *Soutar*, 14 D. 140.

At advising—

Lord Neaves—After narrating the facts of the case—It is not maintained that the reference to oath has established any of the special facts set forth in the suspension. What is brought out in the oath is something not to be found in the suspension, viz., a complex agreement between the parties about which the reference stated nothing. The interlocutor proceeds on the principle that "under the general terms of the reference it was competent to examine as to this agreement, to which the charger was himself a party." I cannot assent to this. I read the reference, not as one of the general and sweeping kind contended for, but one of all facts and circumstances tending to instruct the leading averments, namely want of value for the debt of the charger, and that the bill was not a document of debt at all. This is just springing a mine on the party by proving something of a different date and character from the averments, and this cannot be allowed. I think the oath here is negative of the reference, and that we should repel the reasons of suspension.

The other Judges concurred.

Counsel for Reclaimer and Respondent—Watson and Robertson. Agents—Lindsay, Paterson & Hall, W.S.

Counsel for Respondent and Complainer—Solicitor-General (Millar) Q.C. and Asher. Agents—J. & R. D. Ross, W.S.

BILL CHAMBER.

[Lord Gifford, Ordinary.

WILLIAMS *v.* CARMICHAEL.

Process—Extract Decree of Absolvitor—Agent-Disburser—Decree for Expenses.

In an action between two parties the defender was assoilzied from the conclusions of the summons. The defender's agent thereafter obtained an extract decree of absolvitor, containing also a decree in his own name, as agent-disburser, for expenses incurred. The pursuer having declined to pay the expenses unless upon delivery of the extract decree, a charge was given therefor. Against this charge a note of suspension was presented. *Held* that the suspender was not entitled to delivery of the extract decree on payment of the expenses found due, and note refused.

Observed that the decree of absolvitor was the main thing, but that it might be otherwise in a petitory action for a sum of money to be paid.

This was a note of suspension at the instance of Mrs Williams, sometime proprietrix of Little Earnoch, near Hamilton, against Mr Thomas Carmichael, S.S.C. The complainer prayed for suspension of a charge for the sum of £234, 8s. 11d. of expenses, decerned for against her in an action brought by her against Mr Thomas Smith, farmer, Little Earnoch, from the conclusions of which Mr Smith was assoilzied. The extract decree of absolvitor in this action contained a decree in the name of Mr Carmichael, as agent disburser, for the expenses incurred in the action, and Mrs Williams having declined to pay the expenses unless upon delivery of the extract decree, a charge was given therefor.

The ground upon which the note of suspension proceeded was that the complainer was willing to pay the expenses upon receiving a discharge and delivery of the extract decree; and it was also pleaded that the charger, having no interest to retain the extract decree, was bound to deliver the same to the complainer. The amount of expenses having been consigned, execution was stayed, and answers ordered to be lodged by the 4th of May. In his answers the charger contended that his client Mr Smith was entitled to retain the extract decree as his discharge from the conclusions of the action brought by Mrs Williams, and that she was not entitled to withhold payment of the expenses until the extract was delivered.

On 7th May 1874 the Lord Ordinary on the Bills (Gifford) pronounced an interlocutor, with note appended, as follows:—"The Lord Ordinary having resumed consideration of the note of suspension, answers, and whole process, Refuses the note of suspension, and decerns; but finds that the whole sums charged for having been consigned by the suspender, the charge is no longer insisted in: Grants warrant in favour of the charger Thomas Carmichael for payment to him of the whole consigned money, and that upon his duly executing a holograph or tested discharge in terms of the form No. 18 of process, and lodging the same in process for behoof of the suspender, and grants authority to the clerk or other custodier of the deposit receipt to deliver up the same for payment, and grants authority to the bank to pay the whole sum consigned to the said Thomas Carmichael, and decerns: Finds the charger, the said Thomas Carmichael, entitled to expenses, and remits, &c.

"*Note.*—The sole question in dispute in the present case is, Whether the suspender, on payment to the charger of the expenses found due to the charger in the action at the suspender's instance against Thomas Smith, is entitled to delivery of