M'Ginnes were engaged on the morning in question in boring out this unexploded shot." Now, that negatives the fact on which the third plea is founded. It is really the only plea-in-law which bears properly on the matter, because the fourth and fifth bear on the question raised of contributory negligence. I agree with both Sheriffs in negativing the testimony of the manager on this point and hold it established in point of fact that the work was done with his knowledge and authority. That is, I think, proved, and there is no need to go into the details of the evidence bearing on it. M'Ginnes and James Stark, another brother of the defender, were engaged in boring out the hole when the manager told the pursuer to go and take M'Ginnes' place and help James to finish the operation. This is proved as distinctly as possible, and therefore I must concur with the Sheriff in holding that it was with the manager's knowledge and authority that the operations were conducted. But taking the alternative irrespective of the plea of contributory negligence, this is left, that there was no negligence on the part of the manager in allowing the operations to be proceeded with by the pursuer, because although he was a man inexperienced in the work he was nevertheless under the immediate charge of James, who had very great experience in the matter. I can understand a kind of case generally in which all liability might in that view be escaped. A manager of a quarry may not be able personally to superintend all the operations which may be going on in different parts of the quarry, and it may be said truly that a manager will often do his duty well by taking care that no dangerous operations are performed without the immediate presence of some-one who has perfect knowledge of them and of conducting them safely. But here the case is of this nature—the operation to be performed was not only highly dangerous but one of extremely rare occurrence, so rare that in this particular quarry it had never occurred before. The manager knew that they were dangerous and unpredented and that they had been going on for half-an-hour, and he never interfered to see whether they were proceeding safely or not, and I cannot hear him when he says he trusted to his brother James. On the question of contributory negligence it is all very well to say generally that most people of average intelligence know that if you strike rock with steel there will be sparks, and that these sparks are dangerous when they come into contact with gunpowder. But the gunpowder was in a deep hole, packed deep, and I suppose the object was, when the needle failed to extract the charge, to widen the hole at the top. Even the sparks there were not necessarily dangerous. The operations had, I repeat, been going on for half-an-hour. It is sufficient to say it was not so obviously dangerous that the pursuer, an inexperienced workman, is inexcusable in continuing to assist James Stark in obedience to the order of the manager. I therefore negative the plea of contributory negligence. On the whole matter I think we ought to pronounce judgment in conformity with that of the Sheriff.

Lord Craighill—I am of the same opinion. There is no controversy that the work to which the defender was put was very dangerous and not of a kind to which he was accustomed. The question then is, whether the manager knew about it. I think it is abundantly clear that he did. The next question is, whether the manager took all reasonable precautions? Here again I think it is plain that he never gave orders as to the way in which or the implements with which the work was to be done, and therefore if there was no more in the case than that, I think that he was guilty of a fault for which the defender is answerable. But I go further, for I think it is proved that he knew the instrument which the pursuer used was an iron jumper. On the whole matter, I think that the manager neglected his duty, and that the defender is in consequence liable. On the question of contributory negligence I need say nothing more than has been said by Lord Young.

Lord Rutherfurd Clark—I am of the same opinion as Lord Young.

The Lord Justice-Clerk was absent.

The Court pronounced this interlocutor:—

"Find in fact and in law in terms of the findings in the interlocutor of Sheriff: Dismiss the appeal: Affirm the judgment of the Sheriff appealed against: Of new ordain the defender to make payment to the pursuer of the sum of one hundred and fifty pounds with interest thereon," &c.

Counsel for Pursuer — M'Kechnie —Wilson. Agent—W. Duncan, S.S.C.

Counsel for Defender—D.-F. Mackintosh, Q.C. —Dickson. Agents—Dove & Lockhart, S.S.C.

Saturday, October 16.

SECOND DIVISION.

[Sheriff of Lanarkshire.

MACRAE (LIGHTBODY'S TRUSTEE) *v.* J. & P. HUTCHISON.

Carrier—Ship—Carriage of Goods—Conditions Imported into Contract—Circular Advertising Particular Ship for Particular Voyage.

In an action against the owner of a trading steamer on a regular line for loss by negligence in the carriage of goods, he maintained in defence that in a circular issued with regard to the voyage to the port where the goods were taken on board he referred to conditions in his sailing-bills which excluded his liability on the common law grounds alleged against him. *Held* (1) that the alleged special contract by the circular was not proved, even assuming that the circular relating to the *outward* would make the conditions applicable to the *inward* voyage; (2) that negligence which would make liable at common law as a carrier of goods was established, and *therefore* that he was liable in damages.

This was an action of damages raised by the trustee on the sequestrated estate of John Lightbody, a marble merchant in Glasgow, against J. & P. Hutchison, shipowners, Glasgow, in respect of damage through the alleged negligence of the defenders as carriers of a quantity of marble slabs

which they had received from Messrs Millar & Moon, marble manufacturers, customers of the bankrupt at Galway, on 19th February 1884, to be conveyed in their steamship "Clara" to Glasgow. The pursuer averred that the marble was in good condition when delivered, and denied that he or the bankrupt had any knowledge of the conditions founded on in defence. The defence to the action was twofold—1st, denial of the averments as to negligence, and an averment that the marble was in bad condition and badly packed when brought to the ship; 2nd, averments to the following effect:—That the defenders, in conformity with the usual custom, had sent to Messrs Millar, Moon, & Co. a circular in the following terms:—"Direct steamers. Glasgow to Galway and west of Ireland.—The undernoted or other first-class steamer, is intended to be despatched from Glasgow direct to Galway—s.s. 'Clara,' on [a particular date], carrying goods at lowest rates for Athenry, Athlone, &c. *** All goods carried on conditions as per sailing-bills." These sailing-bills were hung up and left lying in their office, and ran as follows:—"Hutchison's Direct Line. Regular line of steamers between Glasgow and Galway. The first-class Clyde-built screw-steamers 'Neptune' and 'Clara,' or other suitable vessels, are intended to sail, &c. . . . carrying goods on the conditions set forth on the back hereof. To Galway from Glasgow [on dates set forth]." On the back of the sailing-bills, printed in small type, was the following:—"The owners and agents of these steamers give notice that they carry passengers and goods on the following conditions only, viz.—that they are not liable for inward condition, leakage or breakage, contents or weight of packages;" nor for any loss or damage "arising from the act of God, . . . steam navigation, or from any peril of the seas or rivers, or act, neglect, or default whatsoever of the company, or their agents or servants, or from any defect in the steamer, its machinery, equipments, ballusting or stowage, . . . or any other cause whatsoever, or from any consequences of the causes above stated, it being an express condition that the . . . owners of . . . goods undertake all risks whatsoever." Further, the "shipping and landing of goods is performed at shipper's risk," and "all bills of lading and other receipts for . . . goods signed by any agent or officers of the company shall be subject to these conditions, whether or not the same be repeated therein."

The defenders averred that the terms of these shipping bills were well known to shippers of goods.

The defenders pleaded—"(2) Pursuer's statements, so far as material, being unfounded in fact, defenders are entitled to absolvitor with expenses. (3) Any damage to said goods occurring while in defenders' hands, having been caused by the risks of carriage for which under their conditions of carriage defenders are not responsible, they should be assoilzied. (4) Any damage to said goods having occurred through the unsafe and insecure way in which they were packed, defenders are entitled to absolvitor."

The import of the proof, which was directed to the two questions of the transmission of the circular and the stowage, on both of which points there was a conflict of evidence, sufficiently appears in the Judges' opinions.

The Sheriff-Substitute (GUTHRIE) pronounced this interlocutor—"Finds that in February 1884 Messrs Millar & Moon shipped at Galway, for delivery to the bankrupt, on whose estates the pursuer is trustee, on board the defenders' general cargo steamer 'Clara,' the quantity of black marble in slabs condescended on: Finds that by the advertisements or sailing bills of said ship it was notified that the defenders carried goods on the conditions only (*inter alia*) that they were not liable for any loss or damage to such goods, arising from any peril of the seas or rivers, or act, neglect, or default whatsoever of the company or their agents or servants, or from any defect in the steamer, its machinery, equipments, ballasting, or stowage, or from any consequences of the causes above stated, it being an express condition that the owners of goods undertake all risks whatsoever: Finds that the advertisement or sailing bill was duly intimated to the public and intending shippers, including Messrs Millar & Moon, who must be taken as acting for the pursuer in this matter: Finds that the marble was badly and unskilfully stowed, the slabs being laid in the hold flat, and not as they ought to have been, on their edges, whereby many slabs were delivered broken: Finds that by the terms of the said advertisement or sailing bills, constituting the contract with the pursuer's author, the defenders are not liable for the damage arising as aforesaid: Therefore assoilzies the defenders, and decerns.

"*Note.*—I am disposed on the merits to think that the pursuer would be entitled to succeed, although the defenders have thrown some doubt upon the condition of the marble when shipped. It is at least clear that the mode of stowing the slabs which the defenders' men adopted was negligent and improper. But it is not very important to decide this question as the pursuer's action is excluded by the terms of the defenders' advertisements. The case is not, I think, exactly governed by the decisions in England and Scotland upon railway and cloak-room tickets, for these are documents which profess by their very nature and use to make or evidence the contract between the parties, and they pass between the parties for that purpose and only for that purpose. The cases on the subject are now numerous, and are (except *Highland Railway Company* v. *Menzies*, 1878, 5 R. 887) well reviewed by Mr Justice Stephen in *Watkins* v. *Rymill*, 10 Q.B.D. 178, to which I was referred by Mr Spens. It is not unnatural to hold that when a document of that kind is accepted without objection by the person to whom it is tendered, he is, as a general rule, bound by its contents whether he reads it or otherwise informs himself of its meaning or not. But there is an obvious difference in documents which do not by delivery constitute or prove a contract, and which may reach many hands without giving rise to any contract. That is the nature of all mere advertisements or notices, and a bargain in the terms which they set forth, obviously cannot be proved by mere evidence of their receipt. It may perhaps be said that it is necessary to prove some act by one of the public to whom the advertisement is addressed, done in reliance on it, and on its invitation. The advertisement of a general ship has always been regarded as an important document

in questions as to the constitution and conditions of contracts of carriage with her owners. See Maclachlan, p. 389, Bell's Princ. 412, and the other books. It is readily, I might say necessarily, presumed that the shipper had its information in view in sending his goods on board, and while the books show that it has been effective generally in creating a liability against the ship, there is no reason why it should not be used to limit the liability of the ship or impose a risk on the shipper. It is the natural and ordinary means of acquainting the shipper with the time of sailing and the course of the voyage. It may be said that it requires no evidence to establish the shipper's knowledge of its announcements on these points, for it is his duty and interest to know them, and it will be assumed that he acted upon its information in delivering his goods to the master for carriage. It ought not to require any further evidence to impose upon him conditions set forth upon its face, or as in this case on its back, with a sufficient reference to them on the face of it. It seems, therefore, that although there is this difference between the tickets, about which so many cases have occurred, and the sailing bills of a general ship, the principle is the same, and that a merchant who has acted upon an advertisement containing such conditions as that in question must in general be taken to have assented to them. Here there is more than sufficient evidence that the advertisement was generally circulated, and must have reached the shipper's hands. If that be so, and especially as they must have relied on its information in regard to the sailing of the ship and the course of its voyage—for it is hardly suggested, and certainly not proved, that they had other means of knowledge—it follows that there having been no objection and no different bargain, the pursuer must be bound by the terms which his agents or authors might and ought to have known, if they did not know them."

On appeal the Sheriff (Clark) adhered, referring also to *Steel & Craig* v. *State Line Company*, March 16, 1877, 4 R. 657.

The pursuer appealed, and argued—The case must be viewed as one where the defenders had incurred a common law liability, as common carriers, for improper stowage. The Sheriffs were both agreed that the stowage was defective, but were in error as to the special contract which the defenders averred in order to take the case out of the category of ordinary carriage, for (1) in point of fact there was no sufficient proof of the transmission of the circular. The conditions in the sailing-bill, too, were of so unusual a nature (*e.g.* the shipowners were not even bound to supply a seaworthy ship) that there must be the clearest proof of the assent to them. At best the circular only applied to the voyage from Glasgow to Galway, and could not be applied to the present voyage, which was from Galway to Glasgow.

Authorities—*Stevenson* v. *Henderson and Others*, Nov. 25, 1873, 1 R. 215—*aff.* June 1, 1875, 2 R. (H. of L.) 71.

The defenders replied—(1) The fair reading of the circular was a notification that their steamers carried goods either way on the conditions as per sailing-bill. In *Watkins* v. *Rymill*, January 16, 1883, L.R., 10 Q. B. Div. 178, it was held that if a document containing a reasonable stipulation is delivered by one of two contracting parties to and accepted without objection by the other, it is binding on him whether he informs himself of its contents or not—*Vide* also *Steel & Craig* v. *State Line Company*, March 16, 1877, 4 R. 657. (2) The import of the proof was to the effect that no facts inferring liability as common carriers had been proved.

At advising—

Lord Young—The Sheriffs are both of opinion that liability was here incurred according to the rules of common law which must prevail in the absence of special contract. But the defenders allege, and the Sheriffs are both of opinion, that they have established a special contract excluding the common law liability, and the real question here is, whether this is so or not? The case for special contract is that the defenders had in their offices exhibited and lying about sailing-bills advertising their steamers between Glasgow and Galway to carry goods and passengers, but on conditions as to liability specified on the back which are summarised by the Sheriff-Substitute, and which exclude, *inter alia*, their liability for defective stowage. In short, the conditions exclude all the common law liabilities attaching to shipowners, and it is contended by the defenders that the conditions were imported into the contract of carriage of these goods through the *media* of post-cards or circulars, specimens of which we have had before us. The goods in question I remark were shipped to Glasgow from Galway on the 19th February 1884 by the steamer "Clara," and the circumstance through the medium of which the defenders seek to introduce the conditions is in terms really an advertisement of a particular steamer to sail from Glasgow to Galway on a particular day, with a note at the bottom that "all goods are carried on conditions as per sailing bills." There is evidence—and this is an essential point of the defenders' case—that these cards or circulars were posted to customers of the defenders, and further there is evidence, which they maintain as sufficient, that a copy of these circulars notifying the sailing of the "Clara" from Glasgow immediately prior to her sailing from Galway to Glasgow on the 19th February was posted to Millar, Moon, & Co., the pursuer's agents, who were customers of theirs. On this matter I am clearly of opinion that the defenders have not established their case, and therefore that disposes of the ground of judgment on which alone the Sheriffs have proceeded when they held that a special contract had been proved excluding the common law rules, which according to their view of the evidence would import liability for the defective conditions of the goods. It is not necessary to decide the point, though I think it may be proper to indicate an impression, approaching at least to an opinion, which I hold that I should not be satisfied in point of law that proof of the reception of the circular applying to the sailing of a particular vessel on a particular day from Glasgow to Galway, and importing conditions into the contract of carriage of goods by that vessel and voyage by reference to the back of a sailing bill was sufficient to import these conditions into a contract of the carriage of goods from Galway to Glasgow. One would not be disposed to be subtle or astute to

hold proved a set of conditions to a contract which would have the effect of discharging all common law rules of liability. I should think that as a general proposition a carrier of goods, whether by sea or land, who desires to free himself from the common law rules of liability ought to make a special contract for the purpose. There are many cases showing how such may be made. Whether a notification on the back of the contract itself is sufficient with or without reference on the face of it to what is on the back is a question. But here we have no concern with the particular contract itself as containing on the front or the back of it any particular conditions. It was by parole, by sending the goods, and I should not be disposed to be subtle in introducing by argument that which would place the contract on other than the ordinary legal terms. But as I say, this point need not be decided in the view which I take of the evidence as regards the transmission of the circular. On the whole matter, then, I am of opinion that we should find in point of fact that there is no evidence of any special contract, and that therefore the common law rule of liability applies, and the defenders' liability amounts to £26 of damages.

Lord Craighill—I am of the same opinion. The special contract averred is a very peculiar one, and would require the very clearest proof, because the result must necessarily be, if effect is given to it, that no liability can attach to the shipowners for any injury in whatever way done. I agree that such a contract has not been proved.

Lord Rutherfurd Clark—I am of the same opinion. I am perfectly satisfied that there is no sufficient proof that the circular on which the pursuer's case depends was ever transmitted to Millar, Moon, & Co. I think it was incumbent on the defenders to give the very clearest and most certain proof of this in order that it should support so remarkable a contract as this one. I confess, further, that I share in Lord Young's doubts as to whether the circular is so expressed as to entitle us to hold it could apply to the inward as well as to the outward journey. This however I merely state as an impression. That being so, the only other question is, whether the goods were delivered in the same condition in which they were received? I am satisfied they were badly stowed, and therefore the defenders are liable for breach of contract of carriage according as we have ascertained the contract to be.

The Lord Justice-Clerk was absent.

The Court pronounced this interlocutor—

> [After findings in fact to the effect that the goods were delivered to the pursuer in a damaged condition]—"Find, 4th, that the parties are agreed that the money value of the said damage is £26 stg.; 5th, That there was no contract or agreement between the parties whereby the legal liability of the defenders at the common law as the carriers of the said marble was limited or affected: 6th, In particular, and *separatim*, that the terms of the defenders' sailing bills referred to by them on record were not communicated or known to Mr Lightbody or to Messrs Millar & Moon, and that the contract for the carriage of the said marble slabs was not made with reference to the said conditions: Find in law that the defenders are liable to compensate the pursuer as trustee aforesaid for the damage to the said marble slabs: Therefore sustain the appeal; recal the interlocutors of the Sheriff and Sheriff-Substitute appealed against; ordain the defenders to make payment to the pursuer of the said sum of £26 with interest."

Counsel for Pursuer (Appellant)—Strachan—Salvesen. Agent—Peter Douglas, S.S.C.

Counsel for Defenders (Respondents)—Dickson. Agents—J. & J. Ross, W.S.

HIGH COURT OF JUSTICIARY.

Monday, October 18.

(Before Lord Mure.)

H. M. ADVOCATE *v.* M'LEAN AND OTHERS.

Justiciary Cases—Mobbing and Rioting—Deforcement—Indictment—Relevancy.

> An indictment charging several panels with the crime of mobbing and rioting, as also deforcement of an officer in discharge of his duty, objected to on the ground (1) that the indictment stated that the officer was serving "copies" of a note of suspension and interdict, and that the duty of an officer is to serve the "note" itself, and that therefore the charge did not set forth that the officer was in discharge of his duty; (2) that the interlocutor of the Lord Ordinary on the Bills, which was the officer's warrant for serving the note, did not bear the words "and to be intimated," and was therefore incomplete; (3) that the libel was irrelevant, because it stated that the deforcement was committed when the messenger had served some copies of the writs and was proceeding to another farm to serve the remainder, which meant that the alleged deforcement did not happen when he was in the actual discharge of his duty. *Objections repelled* and the libel found relevant.

Alexander M'Lean, Colin Henderson, Hector M'Donald, John Sinclair, George William Campbell, John M'Fadyen, Gilbert M'Donald, and Donald M'Kinnon, all residing in the Island of Tiree, county of Argyll, were charged with mobbing and rioting, as also deforcing an officer in the execution of his duty. The indictment charged them with being guilty of those crimes, in so far as the Duke of Argyll, proprietor of Tiree, having raised before the Court of Session a note of suspension and interdict against certain persons (not the prisoners) to have them interdicted from trespassing on the farm of Greenhill there, and obstructing the complainer and his tenant in the peaceable possession of it, and to interdict them from keeping violent and illegal possession of it and doing certain acts thereon, on which note the Lord Ordinary on the Bills had pronounced an order "to see and answer within fourteen days, reserving as to interdict in the meantime," and the messenger-at-arms with an assistant and an escort of police having proceeded on the 21st day