miss the action accordingly, and decern: Find the defender entitled to expenses," &c.

Counsel for the Defender (Reclaimer)—D.-F. Mackintosh—H. Johnston. Agents—Lindsay, Howe, & Company, W.S.

Counsel for the Pursuer (Respondent)—Balfour, Q.C.—A. J. Young. Agent—John Macmillan, S.S.C.

Wednesday, December 7.

SECOND DIVISION.

[Sheriff of the Lothians.

DENHOLM & COMPANY *v.* HALMOE AND ANOTHER.

Shipping Law — Bill of Lading — Authority of Master—Evidence—Foreign Law.

In an action at the instance of the owners of a Danish ship against the indorsees of a bill of lading for freight claimed under a charter-party signed by the master, as acting for the owners, at a Russian port for a voyage from that port to Scotland, the defenders sought to retain from the amount of the freight the value of the difference between the cargo specified in the bill of lading and the cargo actually delivered to them. They maintained that either the Danish law, being the law of the flag, or the Russian law, the *lex loci contractus*, were the laws which applied to the case, and that by these laws a clean bill of lading signed by the master was conclusive evidence that the amount specified was actually shipped as in a question between the owners and an onerous indorsee. The bill of lading, after stating that a certain quantity of cargo had been shipped, provided that the cargo should be delivered to the consignee or his assigns, "he or they paying freight for the said goods at the rate of 24/, say twenty-four shilgs. Br. stg., pr. delivered standard of 165 cubic feet Engl." *Held* (1) that the law of Scotland was the law applicable to the case by which evidence was admissible as to the amount actually shipped, and that the owners were therefore not bound by the terms of the bill of lading; (2) on the evidence, that the statement in the bill of lading as to the quantity of cargo shipped was inaccurate, no more having been shipped than was delivered; and (3) that the defenders, being onerous indorsees only to the extent of the goods actually shipped, were not entitled to claim more than the quantity of cargo shipped, and were therefore liable for the amount of the freight sued for.

This was an action in the Sheriff Court at Linlithgow at the instance of Caroline Halmoe, Marstal, Denmark, and Albert Hansen Petersen, Marstal, registered owners of the schooner "Immanuel," of Marstal, and their mandatories, against Denholm & Company, shipbrokers, Bo'ness, for the sum of £42, 14s. 6d., as the balance of freight alleged to be due under a charter-party entered into at Riga on 11th September 1886 between Albert Hansen Petersen, master and part owner of the "Immanuel," acting on behalf of the pursuers, and Gustav Schmidt & Company, merchants there.

By this charter-party it was agreed that the ship, then at the port of Riga, should proceed to Poderaa Bight, and there load a full and complete cargo of pit-props, and being so loaded should proceed to any good and safe port in the Firth of Forth to which the charterers might direct on her arrival at Leith Roads; the freight stipulated to be paid for the cargo was to be paid at the rate of £1, 4s. for "each St Petersburg standard pit-props of 165 English cubic feet taken on board in frames measured longside of the ship;" in addition to the freight it was stipulated by the charter-party that £2 was to be paid as a gratuity to the master, and that five working days were to be allowed for discharging the cargo.

The "Immanuel" proceeded to Poderaa Bight, and there loaded a cargo of pit-props. The bill of lading granted by Albert Hansen Petersen in favour of Schmidt & Company was in these terms—"Shipped by the grace of God, in good order and well-conditioned, by Gustav Schmidt & Company, in and upon the good ship called the S. 'Immanuel,' whereof is master for this present voyage A. Pedersen, and now riding at anchor in the port of Riga, and bound for orders at Leith Roads, 8481, say eight thousand four hundred and eighty-one pieces white wood props, per specification on the other side hereof, on deck, 1921 pieces being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of a good and safe port of Firth of Forth for orders at Leith Roads (dangers and accidents of the seas, rivers, and navigation of whatever nature or kind they are soever excepted), unto order or to their assigns, he or they paying freight for the said goods at the rate of 24/, say twenty-four shilgs. Br. stg., pr. delivered standard of 165 cubic feet Engl., piled on land and measured in frames by the official Custom-house measurer, ship paying sixpence per frm. of 165 cubic feet, and all other conditions as pr. charter-party with primage and average accustomed."

The facts of the case were thus stated by the Sheriff in his interlocutor of 31st May 1887—Finds . . . "(5) that in the bill of lading dated Riga, 20th September 1886, granted by the said Albert Hansen Petersen in favour of Messrs Gustav Schmidt & Company, the quantity of pit-props shipped on board the 'Immanuel' is incorrectly stated to amount to 59 standards; (6) that the said ship on arriving at Leith Roads was ordered to proceed to Borrowstounness, where she arrived on Saturday the 23d day of October 1886; (7) that previous to the arrival of the said ship at Borrowstounness the defenders had entered into negotiations with Messrs J. F. Napier & Company, timber merchants, Sunderland, for the purchase of her cargo as per bill of lading; (8) that these negotiations were not completed when the ship arrived at Borrowstounness; (9) that the ship was ready to discharge her cargo on Monday the 25th of October 1886; (10) that Johann Anderson, the agent at Borrowstounness of Messrs J. F. Napier & Company, had on Friday the 29th day of October 1886 received

delivery of the greater part of the cargo; (11) that on that day the said Albert Hansen Petersen stopped the discharge of the cargo on the ground that he had not received from Anderson a bank guarantee or cash for the freight; (12) that on Saturday the 30th of October 1886 the said Albert Hansen Petersen received from the defenders the letter intimating that they were 'now the receivers of the cargo pit-props and holders of the bill of lading,' and agreeing to pay whatever freight or demurrage might be legally found due; (13) that on Monday the 1st of November 1886 the unloading of the cargo was resumed, and was finished the same day; (14) that the quantity of pit-props delivered amounted to nearly 54 standards, and that this was the whole quantity put on board at Poderaa Bight; (15) that the difference in value between the quantity of pit-props stated in the bill of lading to have been put on board and the quantity actually put on board and delivered amounts to £28, 16s. 9d.; (16) that the defenders claim to deduct this amount from the amount of freight sued for; (17) that the freight due for the cargo delivered amounts to £64, 14s. 6d., which with £2 as a gratuity to the master, amounts to £66, 14s. 6d., but from which there falls to be deducted the sum of £1, 7s., leaving a balance of £65, 7s. 6d.; that to account of this sum the pursuers have received £35, 5s. 1d."

The defenders averred—"(Stat. 6) The pursuers are Danes, and the vessel 'Immanuel' belongs to a Danish port, but the charter-party and bill of lading was entered into at a Russian port with a Russian subject. The Danish law (being the law of the flag), or alternatively, the Russian law (being the *lex loci contractus*), are the laws which regulate the authority of the master to bind his owners and the responsibility of the pursuers under said bill of lading. By said laws a clean bill of lading signed by the master is conclusive evidence that the amount therein mentioned was actually shipped as in a question between the owners and an onerous indorsee. According to said laws the shipowner is responsible to such indorsee for the value of the difference between the cargo as specified in the said bill of lading, whether signed by himself or his servant the shipmaster, and the cargo actually delivered. Under said law it is within the scope of the master's authority to bind his owners for the quantities mentioned in the bill of lading, where the same could have been ascertained by him during the course of shipment, and the owners are estopped as against an onerous indorsee of the bill of lading, who has taken it for a valuable consideration on the faith of the acknowledgment which it contains, from denying the truth of the statements to which the master has given credit by his signature, so far as these statements relate to matters which are or ought to be within his knowledge. The pursuers have therefore no right to recover freight except subject to payment of the sum due to the defenders in respect of the foresaid short delivery."

The pursuers by minute admitted the defenders' statement of the law of Denmark, but denied that either the Danish or the Russian law had any bearing on the case.

The pursuers pleaded—"(1) The defenders, as holders of the bill of lading, and having taken delivery of the cargo, are liable for the freight thereof."

They afterwards added an additional plea—"(5) The pursuers having given no authority to the master to sign bills of lading for goods not shipped, are entitled to decree."

The defenders pleaded—"(2) The pursuers' liability under said bill of lading falls to be regulated by the laws of Denmark and Russia, and the pursuers being by said laws bound to make good to the defenders the value of the difference between the cargo as therein specified and the cargo actually delivered, the defenders' counter claim should be sustained. (3) *Separatim*—The defenders, as onerous indorsees and holders of the bill of lading signed by the master and owner, are entitled to delivery of the full quantities therein specified, or to retain from the freight the value of the short delivery. (6) The defenders are entitled to retain the freight effeiring to the pursuer Albert Hansen Petersen in satisfaction of their counter claim."

The Sheriff-Substitute (Melville), after proof, the import of which appears from the Sheriff's findings, quoted *supra*, and the Judges' opinions, *infra*, pronounced this interlocutor on 25th March 1887—"That the amount of cargo delivered was short of the amount stated in the bill of lading signed by the master, but that the owners of the vessel are not bound by the signature of the master to the bill of lading, and are entitled to recover the full amount of freight; that the freight, demurrage, and gratuity amount to £65, 7s. 6d., of which a sum of £28, 13s. has been paid: Finds the defenders liable to the pursuers for the balance, viz., £36, 14s. 6d., and decerns therefore accordingly: Finds the defenders liable to the pursuers in expenses, &c.

"*Note.*—The performance of this contract was to be in Scotland, and the contract therefore is regulated by Scottish law.

"The master was a part owner, but in signing the bill of lading he acted as master. The law is settled both in England and Scotland that a master has no power by signing a bill of lading to bind his owners for more than the cargo he receives. The most recent case is *Grieve & Company* v. *Konig & Company*, January 23, 1880, 7 R. 521.

"As to demurrage, the master no doubt caused the delay, but he was not bound to deliver his cargo till he saw that the freight was secured."

On appeal, the Sheriff (Crichton) on 31st May 1887 recalled the interlocutor of the Sheriff-Substitute, and after the findings in fact above quoted, his interlocutor was—"Finds in law that the defenders are not entitled to deduct from the freight payable in respect of the goods delivered the said sum of £28, 16s. 9d.: Further, that the defenders are liable to the pursuers in the sum of £6 for demurrage: Therefore finds the defenders liable to the pursuers in the sum of £36, 2s. 5d., and decerns therefor accordingly: Finds the defenders liable to the pursuers in expenses.

"*Note.*—The only finding in point of fact in the preceding interlocutor with regard to which the parties were at issue was that contained in the 14th finding, viz., that the quantity of pit-props delivered at Borrowstounness was the

whole that was shipped on board the 'Immanuel' at Poderaa Bight. On consideration of the evidence, the Sheriff is of opinion that there is sufficient to support this finding.

"The question which was most anxiously debated before the Sheriff was, Whether the defenders had a right to deduct from the freight due to the pursuers the sum of £28, 16s. 9d., being the difference in value between the cargo as specified in the bill of lading and the cargo actually delivered? The answer to this question depends upon whether the law of Denmark or the law of Scotland is to be applied in determining the rights of parties under the contract contained in the charter-party and the bill of lading. It was conceded that if the law of Denmark is to prevail, then the question must be answered in the affirmative, but if the law of Scotland is to prevail, then the question falls to be answered in the negative.

"In dealing with questions similar to that which is raised in the present case it has been laid down that their solution depends on the principle that the rights of the parties to the contract are to be judged of by that law to which it is just to presume they have submitted themselves in the matter.

"For the defenders it was said that the law of Denmark must prevail in determining the rights of parties because the pursuers are Danes, the vessel belonging to a Danish port, and was sailing under a Danish flag. On the other hand, it was maintained for the pursuers that the law of Scotland must be applied to the case in respect that that was the law the parties had in view when the contract was made. It was entered into at a Russian port with a Russian subject; the charter-party and the bill of lading are in the English language, the measurement of the cargo is English measurement, the freight is payable in British money, the place of performance is in Scotland, and payment of the freight is to be made on delivery of the cargo at Borrowstounness.

"The Sheriff, after consideration of the authorities to which he was referred, is of opinion that the contract in this case is to be regulated by the law of Scotland, and he has accordingly decerned in favour of the pursuers for the balance of freight still due to them. The leading authorities referred to were—*Lloyd* v. *Guibert and Others*, 33 L.J., Q.B. 241, 1 L.R. 115; '*The Express*,' 3 L.R., Admiralty, 597; '*The Gaetano and Maria*,' 7 L.R., Pro. Div. 1, reversed on appeal, same vol., p. 137; *The Chartered Mercantile Bank of India, London, and China* v. *The Netherlands Steam Navigation Co. (Limited)*, 9 L.R., Q.B.D. 118 — on appeal, 10 L.R., Q.B.D. 521; *Meyer* v. *Dresser*, 16 C.B. (N.S.) 464 and 665, 33 L.J., C.P. 289."

The defenders appealed to the Court of Session, and argued—This was a question as to the power of the shipmaster to bind his owners in a question with the onerous indorsee of the bill of lading. The shipmaster here had signed a clean bill of lading, of which Messrs Denholm & Son had become the onerous holders. They had become possessors of it on the faith of the amount of cargo stated in the bill of lading. By the law of England the captain, by signing the bill of lading, could not bind his owners for more than the amount of cargo put on board, and evidence could be brought as to that amount, but by the Danish law if a shipmaster signed a bill of lading he bound his owners for the amount stated in the bill of lading, whether that amount had been actually shipped or not. The bill of lading was conclusive evidence against the owners as to the amount of cargo. This was a Danish ship, with Danish owners, and the law by which the authority of the captain must be judged was the law of the flag, *i.e.*, the law of the domicile of the owners of the ship—Guthrie's Savigny, 235; Story's Conflict of Laws, sec. 286 (*b*). The only basis upon which strangers could negotiate with a shipmaster was that as regarded his authority he was bound by the law of the country to which the ship belonged. As the bill of lading was conclusive evidence, and as it was admitted that there had been a shortage in the cargo, the appellants were entitled to deduct the value of the shortage from the freight—*Lloyd* v. *Guibert and Others*, May 31, 1864, 33 L.J., Q.B. 241—*aff.* November 27, 1865, 1 L.R., Q.B. 115; "*The Gaetano & Maria*," Nov. 11, 1881, 1 L.R., Prob. Div. 1; "*The Express*," June 25, 1872, 3 L.R., Adm. 597. The limitation as to the captain's authority on English vessels had been introduced for the benefit of English shipmasters, and a Danish captain could not claim it contrary to what was the law of his country—Bills of Lading Act 1855 (18 and 19 Vict. cap. 111), sec. 3. The defenders were the onerous holders of the bill of lading—*Craig & Rose* v. *Delargy*, July 15, 1879, 6 R. 1269 (Lord President, 1274); Maclachlan on Merchant Shipping, 170. The master was part owner of the vessel, and the defenders were therefore entitled to retain the freight effeiring to his share of the vessel—*Meyer* v. *Dresser*, May 6, 1864, 33 L.J., C.P. 289.

The respondents argued—This was not a question of the master's authority, but of the construction of a contract. Goods had been shipped upon the "Immanuel" for conveyance to this country, the bill of lading was in English, the place of performance was Scottish, and the contract must be judged according to Scottish law—*The Chartered Mercantile Bank of India, &c.* v. *The Netherlands India Steam Navigation Company*, March 24, 1882, 9 L.R., Q.B.D. 118—*aff.* 10 L.R., Q.B.D. 521. The pursuers could only be liable under the Bills of Lading Act 1855 (quoted *supra*), and it had not been proved that the defenders had suffered any damage from the shortage. If there was any fraud, it was that of the shipper, and not of the shipmaster, who had delivered all the cargo that was put on board, and only asked the freight for the cargo as delivered according to terms of the bill of lading—*Grieve, Son, & Company* v. *Konig & Company, &c.*, January 23, 1880, 7 R. 521.

At advising—

LORD JUSTICE-CLERK—This is an action raised by the owners of the schooner "Immanuel," of a port in Denmark, against John Denholm & Company, shipbrokers, Bo'ness. The claim of the pursuers is for the balance of an amount of freight due by the defenders in repect of a cargo of propwood which it is admitted was received by the defenders under a bill of lading, of which they were the indorsees. The defence in substance is, that the defenders are entitled to withhold the sum in question against an alleged short

delivery of the propwood as specified in the bill of lading. It is admitted that the quantity specified in the bill of lading was erroneous, but it is replied that all that was received by the master of the schooner was delivered to the defenders, and that although a larger amount was specified in the bill of lading, yet in point of fact no greater amount was delivered on board than that received by the defenders. The Sheriff and the Sheriff-Substitute have both decided in favour of the claim of the pursuers, and we are now to consider the view of the learned Sheriffs on the merits of the question.

It is not denied on the part of the defenders that if the case were to be considered in the light of the law of this country the pursuers could not have been made liable for short delivery if they carried and delivered the whole cargo received by them. But it has been maintained on the record, and is now admitted by the pursuers, that by the law of the place of the contract, which was Riga, a Russian port, and also by the law of the domicile of the owners, who are Danes, the bill of lading is conclusive evidence of the amount of cargo shipped; and that consequently it was incompetent to receive any evidence to the contrary effect. I may remark in passing that it seems doubtful whether this allegation of foreign law is relevantly stated, for the alternatives alleged on the record are mutually destructive of each other, and the defenders nowhere specify which of these two alternatives they hold to rule the present case. I think they were bound to specify by what foreign law the case was in their view to be decided. Besides, the alternative presented two inconsistent allegations, not susceptible of being remitted to proof. Indeed, when the case came up for argument before us, we were still left in doubt whether the defenders maintained the law of Russia, being the *lex loci contractus*, or that of Denmark, the law of the domicile of the owners, to be applicable to the case. They are no doubt said to be identical, and both are admitted, and I do not need to press this view of the subject further. I therefore proceed to another aspect of it.

The Sheriff in his interlocutor has very accurately stated the facts as he has found them proved by the evidence before him, and it is therefore unnecessary that I should go over these facts in detail. But there are two facts established, as I think, by the testimony, and substantially found by the Sheriff, which are probably sufficient of themselves to enable us to dispose of this case. I think it clearly proved that the master delivered at Bo'ness the whole of the cargo which he received at Riga. On this subject the defenders have not ventured to make any specific allegation, but the master and the crew sufficiently establish the fact. The second matter of fact which appears to me to be material is, that the defenders are not truly onerous indorsees of the bill of lading beyond the amount carried, delivered, and received.

In regard therefore to the first of those grounds on which the pursuers rest, if the allegation of foreign law is thrown out of view, there could be no question at all on the principles by which this case should be determined. Ever since the case of *Grant* v. *Norway*, 10 C.B. 665, in England, and the case of *Maclean & Hope* v. *Munck*, 5 Macph. 893, in this country, it has been settled law that the owners of a trading vessel under a contract of affreightment cannot be made liable for a greater amount of cargo than they actually received on board. The case of *Maclean & Hope* v. *Munck* is specially valuable on this subject, and I refer in particular to the opinion of Lord Neaves in that case as giving effect to the elementary principles of the law of contract of affreightment. The general rule is thus stated by Story in the Conflict of Laws (280)—"Where contracts are made in one country to be executed in another, where the contract is either expressly or tacitly to be performed in any other place, the general rule is in conformity to the presumed intention of the parties that the contract as to its validity, nature, obligation, and interpretation is to be governed by the law of the place of performance." And the contract before us is eminently an illustration of the general principle, for from its nature it necessarily, or at least generally, implies that the place where the contract is made is not to be the place of performance. The case of *Maclean & Hope* v. *Munck* was simply an application of this rule. In that case a foreign vessel had been chartered in Genoa in Italy to carry a cargo of bones to Leith. Therefore the place of the contract was foreign. Munck, who was master, and represented the owners, was a Swede, and the vessel was Swedish, while the vessel was chartered to Leith, where the contract was to be performed. When the cargo came to be delivered it was found not to be in terms of the bill of lading, which represented a larger amount than the vessel brought. Therefore, the question which arose in that case was precisely the question which we have to deal with here. Maclean & Hope, the indorsees of the bill of lading, raised their action for the deficiency of cargo against Munck. But the Court held that, as the goods had never been put on board, the contract of affreightment never attached to them at all. In his opinion in that case Lord Neaves goes back to the foundation of this principle of international law, and demonstrates very clearly that the contract of affreightment proceeds on principles entirely exclusive of any such claim. He says—"The indorsement substitutes the indorsee for the shipper, and constitutes him the owner, so as to give him the right to bring a *rei vindicatio*, but the idea of a man being the proprietor of goods which never existed is nonsense." . . . "There cannot be a contract of affreightment without a cargo," And he ends by saying—"Upon these solid principles of general law, I have arrived at the same result with your Lordships. There is no basis for this action as an action on a contract of affreightment, and no relevancy in it as an action of damages." It is true that neither in this case, nor in any of the preceding cases, had it ever been decided that the law by which they were to be judged was that of the home of the carrier-ship. Nor, as far as I know, was any such plea ever maintained. Even if it had, I should have thought it unfounded without the aid of those previous decisions. I am not aware of any case in which the effect of a bill of lading has been judged of by our Courts otherwise than by the law of this country, and that upon the general principle which I have already announced.

It is said that a bill of lading is substantially equivalent to a bill of exchange, and cannot be redargued or contradicted by evidence. But

that is not in the least the nature of the document, and so Lord Neaves in the opinion already quoted from, says—"A bill of lading is not a *literarum obligatio* like a bill of exchange. It is a shorthand charter-party, by which in a simple form the liability of the shipowner is expressed, and the owner of the goods is enabled to transfer the property."

The same law was laid down in the case of *Konig*, quoted by the Sheriff-Substitute, and in that case also the ship was foreign.

No authority was quoted to us for the contention maintained in regard to the operation of foreign law in so far as a contract of affreightment was concerned. The case quoted from the Probate Court in England of "*The Gaetano & Maria*" related to a matter entirely different, namely, by what law the powers of the master of a trading vessel to take up money on bond, and hypothecate the vessel of which he was master for necessary furnishings was to be judged, and the Court of Appeal found that his powers were to be regulated by the law of the home of the ship, which is substantially the law of the domicile of the owners, who were the debtors in the bond. This question was in fact an old controversy as regards maritime law, and it is one dealt with by Mr Story in his work on the Conflict of Laws. He states the view which the Courts in England had been in use to maintain, and not altogether with entire favour, he says—"In England it would be held, at least such seems the course of the adjudications, that a master's authority to bind the ship or the owner in a foreign port would be governed by the law of the domicile of the owner, and that consequently the master of an English ship could not bind the owner for advances or supplies in a foreign port which were not justifiable by the English law. But it is far from certain that foreign courts, and especially the courts of the country where advances or supplies were furnished would adopt the same rules if the lender or supplier had acted with good faith, and in ignorance of the want of authority in the master." But it is quite unnecessary that we should enter into or decide that question. A bottomry bond is simply a bond for borrowed money secured upon the property of the owners, namely, the ship itself. That is plainly a contract to be adjusted on different principles from those which regulate a contract of affreightment, which is to be performed in a country presumably different both from the country of the contract or the country of the home of the ship. It does not appear to me to have any bearing whatever on the controversy we have before us. I am the more satisfied that the Court of Appeal in the case of *Lloyd* meant to confine their judgment to the master's power to bind his owners for advances borrowed on the security of the ship, that I find that a similar question came before the same tribual in the course of the past year 1883, but with a different result. The case is that of *The Chartered Bank of India* v. *Netherlands Steam Navigation Company*, 10 Q.B. Div. 521. That was a case of collision, and the vessel said to be in fault belonged to Dutch owners, and to a Dutch port. It was pleaded that the law of Holland must govern the obligations contained in the bill of lading, but the Court disregarded the plea, and applied the law of England. Lord Justice Brett thought that the vessel might have been considered to be English, although registered in Holland, on grounds which he states, but that "even if this is to be regarded as a Dutch ship, it seems to me that the contract is nevertheless English."

I hold therefore that the tender of the allegation of foreign law did not, and could not, exclude the ascertainment of the fact, and the competency of admitting the evidence was for the *forum* to decide. The plea founded on it was properly disregarded.

But, in the second place, it is perhaps not necessary that we should even come to that result, although for myself I do not think that the question presents any real difficulty. This bill of lading is tendered on the part of the indorsee as an onerous holder. He alleges that he holds it for value, or at least he sues upon that assumption. But in point of fact it has, I think, been clearly shown upon the proof that that is not so. He acquired the bill of lading from Messrs Napier, of Sunderland, who were the consignees of the cargo. It seems that the master of the vessel had commenced to deliver the cargo without any security for payment of the freight, and that after he had delivered a certain portion of it, he stopped delivery until he should get security for payment. At this time, according to the statement of the defenders, Denholm & Company were in negotiation with Napier, the consignee, for the acquisition of the bill of lading; and they paid to the master a certain proportion of the freight, and thereupon the remainder of the cargo was delivered. The master was quite within his right in the course which he followed, as he was under no obligation to deliver until his freight was secure. But we have it in the evidence both of the defender himself, Mr Denholm, and of Mr Welsh, who was acting for him in this negotiation, that this bill of lading was acquired from the consignee on the express condition that the indorsees should only be responsible for the cargo delivered, and should pay on that only. The evidence of Mr Welsh is quite precise on that subject. He went to Bo'ness to see Mr Napier, and he says by that time a portion of the cargo had been delivered. "On Saturday, the following morning," he says, "Mr Napier himself came to Bo'ness, and we arranged with him that we would take the cargo and pay for it as delivered from the ship." Mr Denholm says he is the sole partner of Denholm & Company, and that he heard the evidence given by Mr Welsh. He adds, "I concur in all that he has said." He also makes the remark that the mistake arose from the captain not having taken precautions to ascertain what cargo he took on board at Riga. That this was an oversight on the part of the master there can be no question, but as regards the present defenders they have suffered nothing by it, seeing that they are only asked to pay freight on the cargo which they actually received. And, as far as I see, they have never become responsible in any way for any further sum. The result of the defence would be to liberate them from payment of freight for the cargo they actually received—a result which I cannot sanction.

Lord Young—The case presented by the pursuers in this action is a simple one, and taken by itself it is conclusive upon the admitted facts. He seeks the payment of freight for certain goods which were carried from Riga to Bo'ness. It is admitted that the goods were carried safely, and that they were in good order when delivered, and the charges in respect of the cargo are admitted, and therefore on the admitted facts the pursuers' case is clear from the beginning.

But the defenders make a counter claim, and on that counter claim, which is of the money value of £28, all this litigation has proceeded. I think it is not unimportant to observe again that on the admitted facts the pursuers' claim is unanswerable. Now, what are the facts upon which this counter claim was pleaded as a set-off to the pursuers' demand for freight in a case tried in the Scottish Courts? It was said that the defenders were the holders of a bill of lading which specified that the value of the goods placed on board ship was £28 more than the value of the goods when delivered to the defenders, and that they are therefore entitled, according to the law of Denmark, to be paid the sum of £28 for their loss, and that therefore in an action in a Scottish Court they can claim to set off this sum against the freight which they are asked to pay. Now, here we have a question of Scottish law at the outset, that we should entertain a plea of set-off in answer to a demand for payment of a liquid debt. I do not know whether the law of Denmark allows such a demand to be pleaded as a set-off to a liquid debt. I think our own law makes distinctions. I am not sure if I had been the Sheriff here that I would have allowed a proof upon the matter at all, but think I should have given judgment in favour of the pursuers for the sum sued for, and have let them make their claim for damages in respect of short delivery in an appropriate action.

But it is not necessary for us to consider that point, as the Sheriff allowed a proof to establish, if that could be done, the counter claim, and as the result he has found that there was entered in the bill of lading cargo to the value of £28 more than was delivered to the defenders. That is to say, there was an error in the bill of lading to that extent. Therefore if we were of opinion that the counter claim should be admitted we know that the value of that is £28.

The question that was principally argued before us was, whether the case was governed by the Danish or by the Scottish law, and the first proposition was this, that by the law of Denmark the bill of lading is conclusive evidence as to the quantity of cargo put upon the ship. Let us admit that that is the law of Denmark. But here is a ship sent into the world, not to carry goods within Danish waters, but to carry them from Russia to Great Britain, and we were told in answer to a question that even if the contract had been to carry goods from one British port to another the case would have been the same, and that the contract of carriage must have been read according to Danish law because the ship was Danish. Now, supposing that contract to be produced in the Danish courts, I think the first thing that they would do would be to get it translated, because it is in English. A Danish shipmaster makes a contract in English to carry goods from one English port to another, and it is said the conditions of that contract are to be judged of by Danish law; I think the Danish courts would be much surprised if they had such a contract submitted to them. I have no idea that the contract is to be construed according to Danish law because the ship belongs to Denmark, or that the incidents of it are to be so judged. We must interpret this contract, written in our own language, and expressed in our form, for ourselves. We understand it, and it contains no technical matter of Danish law on which we require assistance.

But what was pleaded on the part of the defenders was, that the authority of the shipmaster was to be regulated according to the law of Denmark. But all that they could say was that he had the power to make a contract for the carriage of goods in his ship. When he has made a contract of carriage, so far as regards the owner, the relation between the master and the owner is just a specimen case of general agency. No doubt when we come to such special matters as borrowing money upon the security of the ship or the cargo, we may have to refer to the law of the country under whose laws he was appointed owner. But I should assume without inquiry, and I understand it to be the case, that if a Danish shipowner has sent out his ship to trade between Russia and Great Britain, that the master has authority to sign contracts of carriage. But there the question of his authority in this case ends. How he exercises it depends on the contract he makes. I have this contract here before me in English, and need no help to construe it from the law of Denmark.

Now, interpreting this contract, I find that its terms are inconsistent with the notion that the statement of the bill of lading is to be conclusive evidence of itself. The captain of the vessel could not speak English, and I rather think that there was an attempt—not a very serious attempt—to impose upon him. He is a Dane, and is examined through an interpreter, and he says in his evidence that he protested against the consigner not entering in the bill of lading the measurement of the cargo, looking to the question of freight which was his owner's interest and his duty. But he said that the goods were to be measured on the arrival of the vessel, and so it is stated both in the charter-party and in the bill of lading. The latter says—"He or they paying freight for the said goods at the rate of 24/, say twenty-four shilgs. Br. stg., per delivered standard of 165 cubic feet Engl., piled on land and measured in frames by the official Custom-house measures, ship paying sixpence pr. frm. of 165 cubic feet."

I put the question to Mr Salvesen—"If you claim the price of the quantity of cargo by which there was short delivery, do you admit your liability to pay the freight?" and he answered, "Yes," but then that is not what is meant by the bill of lading being conclusive evidence. If it is to be conclusive on one side, it must be conclusive on the other, and is that according to the bill of lading? The defenders' counsel says—"I am to have the quantity specified in the bill of lading, and to pay freight for it." But the cargo was to be measured in frames when delivered, and freight only to be paid upon the cargo as delivered, and the master explains how he insisted on that condition.

Well, under that contract the goods were landed and measured on arrival, and this action is for the freight of the goods so carried. I have no doubt the law of Scotland is to determine the effect of that contract. It is really a question of evidence in any view, and laying aside the specialty which the captain says was introduced, and which the defenders' cashier also speaks to, which seems to have caused a good deal of difficulty at Bo'ness, laying that aside, I repeat it is a question of evidence. That belongs to the law of the country where the remedy is sought, and it was so treated, and quite properly, in the examination of the captain in the Sheriff Court. When the captain was examined he was asked—"Did you deliver at Bo'ness the same quantity of cargo that you received from the shippers at Riga?" [Objected to on the ground that the bill of lading is conclusive evidence of shipment against the master, who signed the bill of lading, and could not be reduced or set aside by parole evidence. Objection repelled.] (A) Yes."

Now, was that a question of evidence for the Sheriff to decide or was it not, because by the law of Denmark the bill of lading is conclusive evidence that the captain received all the cargo specified in it. It was said that it was incompetent because by the law of Denmark it would not be allowed. I think it clear that it is a question of evidence, and it is a misuse of words to call it a question of the captain's power. It is not a question of his power, but of his liability, and a fact to be established by evidence competent according to the law of the place of remedy. It may be proved either by parole or by written documents only, but still it all depends upon the evidence of the facts. It might conceivably be, for example, that by the law of Denmark a bill of lading was no evidence as to what the contents of the cargo might be, but a Scottish Court applied to for a remedy on the contract would say that a bill of lading was *prima facie* evidence of what was put on board, for that is our law. So, again, the law of the foreign country might not admit parole evidence, where according to our law it would be admitted. This question is one entirely of evidence, and my opinion is entirely against the defender here, and I would be prepared to decide against him. My opinion is also against him on the remaining point in the case. The ship arrived at Bo'ness upon 23d October, and the defenders became indorsees of this bill of lading upon 30th October, and it may be noticed that they became indorsees after their suspicions at least had been roused as to the quantity specified in the bill of lading not being on board. They say so themselves. Upon record it is stated—"(1) In or about the month of October Messrs. J. F. Napier & Company, timber merchants, Sunderland, entered into negotiations with the defenders for the sale and delivery to the defenders of the cargo per the 'Immanuel' as per bill of lading, but the said negotiations were not completed when the vessel arrived at Bo'ness, and Messrs Napier & Company, or their agent Johann Anderson, shipbroker, Bo'ness, demanded and received delivery of nearly the entire cargo, and the remainder would have been duly discharged by them within the stipulated lay-days had not the master on the previous afternoon of Friday 29th October 1886, without any previous warning or intimation, stopped delivery and refused to proceed further therewith until he received cash or a bank guarantee for the full freight. The defenders thereafter purchased and agreed to accept from the said Messrs J. F. Napier & Company that portion of the cargo delivered to and received by them, and to discharge the remainder thereof." "The defenders became, on or about the said 30th October 1887, the onerous indorsees of the bill of lading granted by the said master of the vessel 'Immanuel' in favour of Messrs Schmidt & Company of Riga, on 20th September 1886." Was it not present to their minds then that the full quantity might not be on board the vessel? Take the evidence of Mr Welsh, with whom the defender Denholm concurs, who says—"We had bought the cargo, but that provisionally. Previous to that we had had some difficulty owing to a shortage in the delivery of the cargo of the 'Clara,' which had been shipped by the same shippers, Messrs Schmidt & Company of Riga, and we had some doubt as to the receiving of this cargo fearing some shortage thereof. Ultimately Messrs Denholm & Company bought the cargo, and became the onerous indorsees of the bill of lading. When the ship came to Bo'ness these negotiations were continuing, and we refused to take delivery of the cargo unless that the captain undertook the responsibility of any shortage. He did not undertake any responsibility nor say anything on the subject. . . . On Saturday (30th) Mr Napier himself came to Bo'ness, and we arranged with him that we would take the cargo and pay for it as delivered from the ship. Mr Anderson was to continue and to complete the discharging, and then hand over the cargo to us. I saw the captain of the 'Immanuel' that evening and told him the arrangements we had come to. He made no objections to the arrangements. I had several conversations with the captain as to my fear of a shortage of the delivery of the cargo owing to our former experience of the same shippers." Thus it turns out that as regards the fact on which this plea of set-off is founded, viz., that they were deceived by this bill of lading, which they say they accepted in reliance on thel fact that all the timber mentioned in it was rea ly on board the ship as stated,—that this fact is really the other way. They knew the state of the case when they became the indorsees of the bill of lading. Therefore upon the whole matter, and dealing with the case as one to which the law of Scotland applies, I think the Sheriff did right in refusing to sustain this counter claim. I think I should not myself have entertained it at all, but I think that having entertained it, he did right in rejecting it, and giving decree against the defenders. That disposes of the whole case except a question of £6 as demurrage, but we need not consider that, as Mr Salvesen for the defenders said he would not speak to that point.

I think the appeal should be dismissed, and the judgment affirmed with expenses.

Lord Craighill—The present action is raised by the owners and master of the Danish ship "Immanuel" against the defenders as the indorsees of a bill of lading for a cargo which was brought from Riga to Bo'ness in October 1886.

What is sued for is payment of a balance of freight. The full freight, according to the rate and measurement specified in the bill of lading, with £2 added as stipulated gratuity to the master, was £66, 14s. 6d., from which, however, must be deducted a sum of £1, 7s., being ship's proportion of Custom-house measurer's dues for measuring the cargo, leaving £65, 7s. 6d. as the nett sum chargeable by the ship. There has been paid £28, 13s., leaving unpaid, as the pursuers say, the sum of £36, 14s. The defenders do not dispute that the account thus stated is correct, but they bring forward a counter claim amounting to £28, 16s. 9d., which they contend they are entitled to deduct, to compensate them for the value of cargo covered by the bill of lading, but undelivered; and the question between the parties really is, whether or not judgment ought to be given in favour of this counter claim? The Sheriff has found in the negative, and I concur in his judgment.

Several questions of greater or less importance were raised during the discussion affecting the law of the case, and upon one of those questions in particular the defenders have ably insisted—the question, namely, whether the bill of lading must not be held to be conclusive of the quantity of cargo put on board the "Immanuel?" That is said to be the law of Denmark, which is the home of the ship in question, but it is not the law of Scotland or of England, nor is it the ordinary maritime law of Europe. But however that may be, the question thus raised does not call for decision on the present occasion. For it seems to me the defenders have no case except upon the assumption that they are the onerous holders of the bill of lading for the full quantity specified in that document, which they are not. They have received all that was put on board. They bought and they paid only for what they received. That is according to my reading of the evidence, and particularly the evidence of the defenders' cashier, Mr Welsh, and of the defender himself, who concurs with his cashier. There is certainly no evidence to the contrary. The defenders got the bill of lading only to cover the cargo actually shipped. This was their contract with the Napiers, by whom the bill of lading was indorsed to them. They have received all to which they acquired right, and they have no claim to anything beyond. The consequence is that they have suffered no loss on account of short delivery. This seems to me to be conclusive of the case. There being no damage, there is no ground for withholding payment of the balance of the freight, and for that balance therefore the decree given by the Sheriff must be sustained.

Though it is unnecessary as a ground of judgment, I think it right to add that the contention maintained by the defenders as to the effect of the bill of lading on the obligation of the owners and the master appears to me to be unsound. The question is one of evidence, and therefore is one of procedure. Even on the assumption that the bill of lading would be conclusive as to the quantity taken on board, in a court subject to the law and practice of Denmark—taking these to be as alleged by the defender—there is no rule of the kind to which the defenders can appeal in Scotland. Procedure is governed by the rules of the tribunal appealed to, and a bill of lading, even when held for value, not being conclusive on the question whether the quantity acknowledged to have been received was actually put on board, this Court may receive such evidence as is offered or may be thought necessary for the determination of this controversy. *Tota re perspecta*, the true conclusion is that the quantity delivered at Bo'ness was the full quantity shipped, and indeed this was not really disputed at the debate.

On the whole matter, my opinion is that the appeal ought to be dismissed and the judgment of the Sheriff sustained.

Lord Rutherfurd Clark—Your Lordships are of opinion that the defender acquired right to the cargo which was actually on board ship, and that he was indorsee of the bill of lading to that extent, and to that extent only. I am willing to decide the question on that footing. On the questions of international law which were argued before us, I desire to reserve my opinion.

The Court pronounced this interlocutor:—

"Find in fact that the goods delivered by the pursuers to the defenders at Bo'ness comprised the entire cargo shipped on board the 'Immanuel' at Poderaa Bight by the charterers; and find in law that the defenders, as holders of the bill of lading, are not entitled to claim more: Therefore dismiss the appeal, and affirm the judgment of the Sheriff appealed against: Of new ordain the defenders to make payment to the pursuers of the sum of £36, 2s. 5d. sterling, with interest thereon at the rate of five pounds per centum per annum from the date of citation to this action till paid: Find the pursuers entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for the Appellants—Salvesen. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Respondents—Balfour, Q.C.—Dickson. Agents—J. & A. Peddie & Ivory, W.S.

Wednesday, December 7.

FIRST DIVISION.

MUIR, PETITIONER.

Trust—Nobile Officium—Allowance to Parent for Education of Children.

A trust-estate was held by testamentary trustees for the purpose of paying the half of the income to the truster's son and accumulating the other half for his children. The income of the estate was £4623, and the son had eight children. In a petition presented by him, the Court authorised the trustees to make payment to the petitioner, out of the income of the trust-estate other than that portion of the income which was payable to him, of an amount equal to one-half of the sum expended by him in each year on the education of his children, not exceeding the sum of £500 in any one year.

William Campbell Muir of Inistrynich presented this petition, which prayed the Court to authorise