use for which it was intended, endorsed it to the pursuer, who gave value for it, and now holds it. When he discovered that omission of the word "pay," where does the unreasonableness lie in his filling up that omission? He injures no one, and he puts the document to no other use than that for which it was intended by the parties. It appears to me therefore that the omission was supplied within reasonable time. If there is any loss, it must fall, not on the pursuer who gave value for the document, but on the defenders who issued it believing it to be a bill.

LORD PRESIDENT — The parties have treated this case as one under sub-sec. (2) of sec. 20 of the Bills of Exchange Act, and that being so then the question is whether the bill, which had the word "pay" inserted in it on the 15th February 1898, had that omission filled up within reasonable time. The Act says that that is a question of fact, and therefore it necessarily depends on circumstances. I have in this record, even assuming everything for the reclaimer, a very slender basis upon which to form an opinion, but I am greatly fortified in concurring with your Lordships by the fact that the Sheriff-Substitute sitting as a jury in Glasgow, the centre of commercial operations in Scotland, has come to the same conclusion.

LORD M'LAREN was absent.

The Court dismissed the appeal.

Counsel for the Pursuer—Sym. Agent—Thomas J. Cochrane, S.S.C.

Counsel for the Defenders—Guy. Agent A. C. D. Vert, S.S.C.

Tuesday, January 10.

SECOND DIVISION.

[Sheriff of the Lothians.

MOSSGIEL STEAMSHIP COMPANY, LIMITED *v.* DELLA CASA GRANITE QUARRIES OF ITALY, LIMITED.

Shipping Law—Affreightment—Bill of Lading—Shippers' Charges for Bringing Cargo to Ship Made Payable under Bill of Lading by Consignees.

By the bill of lading of a cargo of granite it was provided that "freight, primage, and other charges if any, as stated on the margin," were to be paid by the consignees on arrival of the goods at port of discharge. The words "Charges for collection at Leith, £141 8s. 9d." were written on the margin of the bill of lading by the shipowners' agent at the port of lading in Italy on the instructions of the shippers of the cargo. When the ship arrived at the port of discharge the consignees' bill of lading was not forthcoming, but the shipowners agreed to deliver the cargo upon an indemnity against all responsibility (1) for doing so and (2) for disbursements. Freight at the rate agreed on between the shipowners and the consignees was paid by the consignees on the amount of granite delivered, but they refused to pay the balance of the sum stated in the margin of the bill of lading, on the ground that it consisted of certain charges made by the shippers for bringing the cargo to the ship, for which they maintained they were not liable, and also on the ground that these charges were excessive. The shipowners then sued the consignees for this balance. At the date when the action was raised the shipowners had not paid the amount sued for to the shippers, but before the case was heard they had done so. *Held* (1) that the case was to be decided just as if the consignees had taken delivery upon presentation of the bill of lading, (2) that as in a question between them and the shipowners, the consignees were liable for the sum stated in the margin of the bill of lading irrespective of how that sum was made up; and (3), that it was irrelevant to inquire whether the shippers' account was overcharged or whether their claim was a liquid claim of debt at the date when the action was brought.

This was an action brought in the Sheriff Court of Edinburgh by the Mossgiel Steamship Company, Limited, owners of the steamship "Burriana" of Glasgow, against the Della Casa Granite Quarries of Italy, Limited, Edinburgh, in which the pursuers craved decree for £34, 5s., being a balance still due and resting-owing of the freight and charges upon 368 pieces of granite carried by them in the "Burriana" from Genoa to Glasgow.

The material part of the bill of lading for the granite was as follows:—"Shipped in apparent good order and condition, by Arecco & Co., in and upon the British Steamer 'Burriana,' now lying in the port of Genoa, being marked and numbered or described as per margin, and to be conveyed to and delivered from the steamer's deck (where steamer's responsibility ceases) at the Port of Leith, or so near thereunto as the steamer may safely get, without having to wait or be detained, unto W. W. Gunn, or to his or their agents. The freight, primage, and other charges if any, as stated in the margin, to be paid by shippers in exchange for bill of lading or delivery order, and are due, if paid by shippers, goods, or vessel lost or not lost, on signing of the bills of lading. If payable by consignees, on arrival of the goods at port of discharge." "Weight to be verified at Glasgow, and additional freight at 15s. per ton to be paid by receivers on any excess on bill of lading weight." On the margin of the bill of lading there was written in red ink, "Charges for collection at Leith £141, 8s. 9d."

The port of delivery was changed by arrangement from Leith to Glasgow.

When the "Burriana" arrived, the bill of lading was not forthcoming, but it was arranged that the pursuers should give delivery of the granite to the defenders against an indemnity clearing the pursuers from all responsibility for doing so, and also from any responsibility regarding disbursements. This arrangement was embodied in letters between the parties, dated respectively 15th and 16th February 1897, and in terms thereof the defenders' manager, W. W. Gunn, took delivery of the granite at Glasgow. When the granite was reweighed, it was found that the defenders were entitled to a reduction of £9, 3s. 9d., which made the sum claimed by the pursuers £132, 5s. instead of £141, 8s. 9d. as entered on the margin of the bill of lading.

The defenders paid the pursuers £98, being freight on the granite delivered at the rate of 12s. 6d. per ton, but they refused to pay the balance of the amount claimed by the pursuers, being the sum sued for.

The pursuers averred that the freight and charges on said 368 pieces of granite were payable by the consignees, all as per bill of lading, and that the defenders were consignees of the cargo, and the said W. W. Gunn, who is their agent, took delivery thereof on their behalf.

The defence was to the effect that the pursuers had contracted with the defenders at Genoa to carry the granite in question at a freight of 12s. 6d. per ton, that freight at this rate had been paid upon the granite delivered, that the balance sued for consisted of charges by Messrs Arecco & Company, the shippers, in connection with the shipment of the granite, for which the defenders denied all liability, and that although their manager had undertaken to relieve the pursuers from responsibility to Arecco & Company for charges made by them beyond the said freight, the pursuers had not been yet found liable therefor.

The defenders also subsequently put in a minute stating that Arecco & Company's account for the shipment of the goods was overcharged in certain respects specified.

The pursuers put in a minute in answer to the effect that they knew nothing of the charges, and had no concern with how they were made up.

In implement of an order made by the Sheriff, the pursuers subsequently stated that the sum sued for was entirely for charges incurred on the cargo before the shipment of the goods at Genoa, but that they did not know what those charges were for; and that they were personally liable to Arecco & Company, the shippers of the cargo, who were also the defenders' agents, in payment of the sum sued for.

The pursuers pleaded—(1) The defenders being due and resting-owing to the pursuers in the sum sued for, decree should be granted as craved. (2) The defences are irrelevant.

The defenders pleaded—(1) The defenders not being due and resting-owing the sum sued for, decree of absolvitor should be pronounced with expenses.

After sundry procedure the parties lodged a joint minute whereby the agents of the parties concurred in admitting that the words and figures "Charges for collection at Leith, £141, 8s. 9d., were written on the margin of the bill of lading by the pursuers' agent at Genoa when it was issued on 26th January 1897, on the instructions of the shippers, Messrs Arecco & Company, and they concurred in renouncing further probation.

On 1st November 1898 the Sheriff-Substitute (Maconochie) issued the following interlocutor:—"Finds that the pursuers have not stated any relevant averment of a debt due and resting-owing to them by the defenders: Therefore sustains the defences, dismisses the action, and decerns. Finds the pursuers liable to the defenders in expenses, and remits" &c.

Note.—"The parties have now lodged a joint minute in which they concur in stating that the words in red ink on the margin of the bill of lading, viz.—'Charges for collection at Leith, £141, 8s. 9d.,' were written at Genoa, where the bill of lading was issued, on 26th January 1897, by the pursuers' agent on the instructions of the shippers, Messrs Arecco & Company, and they renounce further probation under the Sheriff's interlocutor of 25th August 1898. The freight of the goods, amounting to £98, has been paid by the defenders, and the question comes to be whether the defenders are bound at once to pay to the pursuers, the Shipping Company, the balance (under certain deductions) of the £141, 8s. 9d., set forth on the margin of the bill of lading. The balance is made up of charges for bringing the cargo to the ship, charged by Messrs Arecco & Company. The pursuers have, it will be noticed, accepted payment of the freight from the defenders, and the lump sum on the bill of lading has thus been broken up with their consent into its component parts. The document was signed at Genoa by the pursuers' agent without consultation with the defenders, and when the ship arrived at Glasgow (which had by arrangement come to be the port of discharge) the bill of lading was not forthcoming. The pursuers, however, by letter, No. 16 of process, agreed to give delivery of the goods 'against an indemnity letter clearing us from all responsibility regarding disbursements.' This arrangement was confirmed by letter from the defenders, No. 17 of process, and the goods were delivered. When the note of Arecco & Company's charges became known to the defenders they objected to certain items therein, but the pursuers take up the position that that is no affair of theirs, but is a question between the defenders and Arecco & Company, and that they are entitled to payment, in the first place, of the amount noted in red ink on the margin, under the deductions referred to. I do not think that the pursuers have relevantly set forth a debt due to them by the defenders, though they will be entitled to relief from the defenders of any sum which they are bound to pay and do pay to Arecco & Company under the arrangement above set forth. The contract was in its inception

one between Arecco & Company and the pursuers, and the latter are primarily liable under it; the consignees at the date of the contract did not know anything of its terms, and they did not accept the goods under the bill of lading, which had not come to hand when delivery was given. No doubt the Shipping Company might have retained their goods under their lien, but they did not choose to take that course, and I do not think that the words of the bill of lading import any mandate assigning Messrs Arecco's claim for disbursements to the pursuers. The words of the bill of lading do not seem to me to assist the pursuers in any way. The lump sum on the margin has, as I have said, been divided up into its component parts, and the printed words, 'freight, primage, and other charges,' &c., in my opinion, looking to the whole clause, refer to 'other charges' of the same nature as 'freight and primage,' and there seem to be no other charges of that kind payable to the ship by the consignees. On these grounds, I think that, primarily, the debt averred is a debt due by the pursuers to Arecco & Company. It is admitted by the pursuers that they have paid nothing to Messrs Arecco & Company in respect of their charges, and it is further admitted by the defenders that they are bound by their undertaking of relief to relieve the pursuers of all charges which they are legally bound to pay, and do pay, to Arecco & Company, but this action is not laid upon the guarantee, and I do not think that it has yet come into force. The whole case resolves itself into this—Who is to settle with Arecco & Company whether certain items in their account are overcharged or not? The whole matter will probably be a very small one, from a pecuniary point of view, but in my opinion the duty of meeting Arecco & Company falls upon the pursuers."

While the case was pending the receiver on the estates of Messrs Arecco & Company, who had become bankrupt, sued the present pursuers in Italy for the sum which was sued for in the present action, and the pursuers, after giving intimation of the action to the defenders, and being advised by their Italian lawyer that they had no defence, paid the amount of the claim made. Their intention to do so was announced to the defenders by a letter dated 18th November 1898.

The pursuers appealed to the Court of Session, and argued—The pursuers were bound to pay Arecco & Company, because they had parted with the goods, and they had no answer to their claim, but under the indemnity the defenders were bound to reimburse the pursuers what they had to pay to Areccos. The pursuers need not have delivered the cargo except upon payment of the whole sum mentioned on the margin of the bill of lading subject to the admitted reduction, and they ought not to be now put in a worse position because they had given delivery without demanding production of the bill of lading, especially in view of the fact that they had done so to oblige the defenders, whose bill of lading was not forthcoming.

Argued for the defenders—This action could only be sustained upon contract. That contract must be either the arrangement made in Glasgow or the contract embodied in the bill of lading. As to the arrangement made in Glasgow, the defenders were not bound to pay anything except what the pursuers were bound to pay to Areccos. No reason was alleged for the pursuers being liable to Areccos. As to the bill of lading, the charges now sued for were due to the shippers and not to the ship, and it was not legitimate to use a bill of lading for the collection of anything except what was due to the ship. The defenders were no parties to the insertion of the entry in the margin of the bill of lading, and could not be bound by it. The defenders were only liable for what was payable by the consignees, and these charges now sued for were not payable by the consignees. Further, they were only liable for other charges *ejusdem generis* with freight and primage, and these charges made by the shippers were not of that kind.

LORD JUSTICE-CLERK—It is plain that this case would never have arisen if it had not been that unfortunately Arecco & Company became bankrupt. It appears to me that, as matters stood between the pursuers and defenders at the time of the arrival of the cargo in this country the defenders could only get delivery on the the conditions specified in the bill of lading, and one of these conditions was payment of these charges, the amount of which is now sued for. If the defenders had thought that it was not desirable to take delivery on these terms they could have refused to do so, and the shipmaster could then have worked out his remedy for himself. But the defenders were not entitled to delivery except on payment of these charges.

The only question is, whether the shipowners are put in a different position owing to the circumstances under which the cargo was in fact delivered by them. The terms of the transaction between the pursuers and defenders under which the cargo was delivered are to be found in the letters dated 15th and 16th February 1897, and they come to this, that the defenders were to get delivery of the cargo on the same conditions as if they had been getting it on presentation of the bill of lading.

The whole difference between the parties as to what is payable under the arrangement between them is £10 or £12, taking into account the tender which the defenders have made. This is the difference between the amount of the charges made by Arecco & Company and the charges which the defenders say Arecco & Company ought to have made. With that question it does not appear to me that the defenders have anything to do. As the defenders took the cargo on the conditions specified in the bill of lading they must be held to have taken it on condition of paying the sum of £141 specified on the margin. If there are any valid objections to the amount of that sum

the defenders must settle that in Italy with Messrs Arecco & Company or their trustee.

On the whole matter, I think the Sheriff-Substitute was wrong, and that we ought to recal his interlocutor and grant decree for the sum sued for, with expenses.

LORD YOUNG—I am of the same opinion. The defenders practically admit liability for these charges so far as just. They admit that they are just except as regards the sum of £10, 15s. which they say is not justly due to Arecco & Company. I agree that we cannot indulge the defenders by allowing an inquiry as to the justice of these charges. I think that is a question with which the present pursuers have no concern. They were not bound to contest it with Arecco & Company. They were entitled to keep the cargo until they were paid or relieved of liability for the sum noted in the margin of the bill of lading. I think this is just an action to enforce that right, that is, to enforce payment of the sum which the defenders were bound to pay to the pursuers, or to keep them free from responsibility for, as a condition of getting the cargo. They have not been paid, and they have not been kept free from responsibility. I do not think they are bound to fight the question whether the charges are just charges or not. I do not see what answer they can have to the pursuers' claim, and I am consequently of opinion that they are entitled to decree for the sum sued for with expenses.

LORD TRAYNER—I am of the same opinion. The Sheriff-Substitute has dismissed this case on the ground that "the pursuers have not stated any relevant averment of a debt due and resting-owing to them by the defenders." Now, although this record is not a model, and might have been fuller in the matter of averment than it is, I think the Sheriff-Substitute has done it some injustice. The pursuers state that they brought this cargo to Glasgow in their ship on the terms stated in the bill of lading, and that the bill of lading stipulated for payment by the consignees of the charges in the margin thereof. The pursuers then aver that the defenders were the consignees who took delivery of the cargo (which is admitted), but the pursuers do not go on to say that the consignees were consequently liable for these charges. It is not difficult to draw the conclusion which obviously follows from the statements the pursuers make. I do not take the view of the Sheriff-Substitute that there is no relevant statement of an obligation on the part of the defenders towards the pursuers. It may be that there is no averment of debt, but there is an averment that the consignees were under obligation to make certain payments to the shipowners. It rather strikes me that if the Sheriff-Substitute had been able to get over the technical objection to the record he would have decided differently.

I must say that I see no answer to the pursuers' claim. They were entitled under the bill of lading to get £141 from the consignees. It is not stated in the bill of lading how that sum is made up—of what items it consists—but that is the sum which the consignees are to pay as the condition of their getting delivery of the cargo, and for which they made themselves liable by taking delivery.

In this case the matter is somewhat complicated by the fact that the bill of lading was not forthcoming when the cargo arrived. It was arranged, however, that the defenders should get delivery of the cargo on the terms expressed in the letters which are produced. Under that arrangement the defenders undertook to keep the pursuers free from "all responsibility" for giving delivery of the cargo without the production of the bill of lading, and from "any responsibility regarding disbursements."

Now, what has happened is this—the shipowners gave delivery of the cargo without obtaining payment of the charges noted in the bill of lading—a thing they would not have done had the bill of lading been before them. In consequence of this they have had to pay the shipper of the cargo the amount of these charges (a claim which I think they could not have successfully resisted), and they ask the defenders to free them from this responsibility and to reimburse them what they have had to pay. This is just what the defenders undertook to do. But the primary obligation upon the defenders arose upon the bill of lading and not upon the guarantee. It was only in absence of the bill of lading that the guarantee was resorted to, but the bill of lading is now produced and upon it the defenders are liable as consignees for the sum sued for apart from the guarantee.

LORD MONCREIFF—I am of the same opinion. It may be that this was a somewhat unusual use to make of a bill of lading. The primary use of a bill of lading no doubt is to state the conditions upon which the shipowner is supposed to carry the cargo. In this case it has been used for the purpose of getting the shipowners to collect certain charges due not to them but to the shippers. That may be an unusual use, but that was the contract between the shipowners and the shippers, upon which the cargo was shipped; and in terms of that contract the shipowners were bound to retain the cargo until the whole sum of £141 noted on the margin was paid. They were not entitled to give delivery without getting payment. They had no concern with the alleged overcharges. I think this case arises just as if the consignees had demanded delivery on presentation of the bill of lading. It is clear that in that case they could not have got delivery without payment of the whole sum of £141.

A question is raised whether the pursuers were entitled to sue until the claim for these charges was liquidated. I think the shipowners had nothing to do with that. They were entitled to get the whole sum of £141 specified in the margin of the bill of lading.

On the whole matter I am of opinion

that the interlocutor appealed against is erroneous, and that the pursuers are entitled to decree for the sum sued for.

The Court pronounced the following interlocutor:—

"Sustain the appeal and recal the interlocutor appealed against: Ordain the defenders to make payment to the pursuers of the sum of £34, 5s. sterling with interest as concluded for, and decern: Find the defenders liable in expenses in this and in the Inferior Court, and remit," &c.

Counsel for the Pursuers—Ure, Q.C.—Salvesen. Agents—J. B. Douglas & Mitchell, W.S.

Counsel for the Defenders—A. S. D. Thomson—Munro. Agents—Douglas & Miller, W.S.

Thursday, January 12.

SECOND DIVISION.

[Sheriff of the Lothians.

GLASS *v.* ROBERTSON.

Process—Multiplepoinding—Competency—Double Distress.

In an action of multiplepoinding brought in name of the holder of a fund as nominal raiser, the real raiser averred that the nominal raiser had received the fund from A to be held by him for behoof of A's creditors, and to be applied by him in payment of a composition to them. The nominal raiser lodged defences, and averred that he had received the fund with instructions to apply the same *primo loco* in paying his account of expenses against A, and *secundo loco* in paying a composition to A's creditors, and that he was willing, after satisfying his own claims, with the consent of all parties interested, to divide the balance among A's creditors. It was not maintained by the real raiser that there was any dispute among the creditors as to their respective rights *inter se.* The nominal raiser pleaded that the action was incompetent. The Court *dismissed* the action as incompetent in respect that there was no double distress.

This was an action of multiplepoinding brought in the Sheriff Court at Edinburgh in name of J. M. Glass, solicitor, Edinburgh, as nominal raiser, by John Robertson, grocer and wine merchant, Musselburgh, as real raiser. The defenders called were John Robertson, the real raiser, and W. F. Leslie, insurance agent, Musselburgh, as creditors or pretended creditors of the deceased Karl Kupka, ironmonger, Musselburgh, and also Karl Kupka's widow.

The real raiser averred that in 1897 the affairs of Karl Kupka became embarrassed, that he offered his creditors a composition of five shillings in the pound, which was accepted; that "Kupka on various dates handed to the nominal raiser, Glass, who acted as his agent in the matter, sums amounting to £40, to be held by him for behoof of the said creditors, and to be applied by him in payment to them of the said composition;" that when the nominal raiser was about to divide this fund among the creditors Karl Kupka died; that the nominal raiser was requested by Kupka's widow to proceed with the division, and that he undertook to do so, but that he had not fulfilled this undertaking, and that he had been repeatedly requested by the real raiser to divide the fund among the creditors.

Defences were lodged for the nominal raiser, in which he averred, *inter alia*, as follows—"(Ans. 2) Averred that Kupka handed to the nominal raiser sums amounting in all to £30, 1s. 10d., with instructions to apply the same *primo loco* in paying the nominal raiser's account of expenses against Kupka, and *secundo loco* in paying a composition to Kupka's creditors. (Ans. 3) The nominal raiser is advised that on the death of Kupka his mandate to divide the money among the creditors fell, and that he became a holder thereof under a duty to account to anyone having a title to represent the deceased. In order, however, to save trouble and expense the nominal raiser has been and still is ready and willing, provided he obtains the consent of all parties interested, to divide the balance in his hands, after satisfying his own claims, rateably among Kupka's creditors."

The real raiser in his condescendence averred a contention on the part of the nominal raiser to the effect that he held the fund for behoof of the creditors other than the defender Leslie, and an opposing contention on the part of Leslie that he was entitled to a share of the fund along with the other creditors, and that in respect of these two contentions there was here double distress. It appeared, however, from correspondence produced that the nominal raiser had intimated his willingness to rank Leslie's claim, provided it was properly vouched, and in view of this it was not ultimately maintained on appeal that there was double distress for the reason stated on record, but it was nevertheless contended that double distress arose here from the fact, disclosed in the averments of the nominal raiser, that he himself was a claimant upon the fund, whereas the real raiser averred that the nominal raiser held it for Kupka's creditors solely.

The real raiser pleaded—"(3) The defence being untenable, the same should be repelled with expenses."

The nominal raiser pleaded—"(2) The action is incompetent as laid. (3) No double distress."

On 9th June 1898 the Sheriff-Substitute (HAMILTON) issued the following interlocutor:—"Sustains the 2nd and 3rd pleas-in-law for the pursuer and nominal raiser, dismisses the action, and decerns: Finds the real raiser liable in expenses, and remits," &c.