have been paid, and it is not here averred that John Cyril Macdougall has paid the measurer's fees to defender. I accordingly sustain defender's first plea-in-law. . . . ."

The pursuer appealed, and argued—The Sheriff-Substitute was wrong, and should have allowed a proof. The claim was not for a rebate on fees but for a commission, and the contract was not so unusual as not to be provable by parole, for the stipulation flowed naturally from the contract of employment—*Forbes* v. *Caird*, July 20, 1877, 4 R. 1141, 14 S.L.R. 672; *Henderson, Tucker, & Company* v. *The United Collieries, Limited*, January 26, 1904, 11 S.L.T. 653. (The Court suggested the alleged contract was illegal.) There was no plea of *pactum illicitum*, and even if there had been it would not have been good. This was not a case of seeking to make a profit or get a commission contrary to the interests of a principal. The fees to be paid to the measurer were the ordinary fees which the principal would have had to pay in any case—compare *Laughland* v. *Millar, Laughland, & Company*, February 19, 1904, 6 F. 413, 41 S.L.R. 325.

Argued for the defender (respondent)—It had been suggested from the Bench that the contract, if there was one, which was denied, was *pactum illicitum* and contrary to public policy. On that ground it was within the powers of the Court to refuse to lend its process to the enforcement of the contract, and though there was no express plea to that effect, the plea of irrelevancy was sufficient. The alleged contract was clearly illegal—*Laughland* v. *Millar, Laughland, & Company, ut supra.* It would have come under the Prevention of Corruption Act 1906 (6 Edw. VII, cap. 34). That clearly proved it was corrupt. To validate such a contract the pursuer must aver that it had been disclosed to the common employer. It could not be enforced at law—*Harrington* v. *The Victoria Graving Dock Company*, 1878, L.R., 3 Q.B.D. 549.

LORD M'LAREN—This action is brought by the assignee of a person who as clerk of works had charge of the erection of certain buildings in Glasgow. This clerk of works, Mr Robert Macdougall, employed John Bremner, the defender, as measurer to make the measurements on which the tradesmen were to be paid, and as a condition of giving him the employment he avers that he stipulated for payment of a commission of ¾ per cent. upon the total amount of the contracts of the tradesmen as ascertained by the measurement. That was a substantial proportion of what Mr Bremner was to get for doing the measuring. The action is brought to enforce payment of this secret commission. The Sheriff-Substitute has dismissed the action on the ground that the contract was an innominate contract of an anomalous and unusual character which could not be proved by parole testimony alone.

I do not think that it is necessary to consider whether the case does fall within the rule on which the Sheriff founds. I am not at all disposed to say that the Sheriff-Substitute's finding is wrong. But it seems to me that there is a clearer and more direct ground of decision, and that is that the stipulation is illegal. It is true that this defence is not specially pleaded. But where the nature of the transaction is disclosed on the face of the proceedings, it is consistent with the known law on this subject that the Court will refuse to give decree in an action to enforce a *pactum illicitum*. There is no doubt that the stipulation which it is here sought to enforce was within the class of obligations contrary to public policy. This is assumed in the Act of Parliament recently passed, because it is impossible otherwise to suppose that the Legislature would have made it punishable to bargain for a secret commission. I am confirmed in proposing to decide the case on the ground I have stated by the case of *Harrington* to which we were referred, and apart from authority I am sure your Lordships would not give the aid of the process of the Court to enforce a bargain which the Legislature has declared to be a crime.

LORD KINNEAR and LORD PEARSON concurred.

The LORD PRESIDENT was absent.

The Court affirmed the interlocutor of the Sheriff-Substitute and dismissed the appeal, finding expenses due to or by neither party.

Counsel for the Pursuer (Appellant)—A. M. Anderson. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defender (Respondent)—Macaulay Smith—Morton. Agent—Norman N. Macpherson, S.S.C.

Thursday, June 27.

FIRST DIVISION.

[Sheriff Court at Dundee.

LANGLANDS & SONS *v.* M'MASTER & COMPANY.

Shipping Law—Carriage—Contract—Cargo—Tally—Liability for Loss of Goods.

A firm of merchants contracted with a firm of shipowners for the carriage of a quantity of damaged jute goods, bought at a sale in one seaport, to another seaport where the merchants had their place of business. The contract of carriage treated the goods, which were piece goods consisting of so many bales and so many odd pieces, by weight only, and included the conveyance to the dock for shipment. At the port of arrival, advice having been sent to the merchants, the goods were either taken direct by their carters or were stored in a shed at the dock alongside the ship, whence the carters took them. Receipts were not given by all the

carters, and no tally was kept at the ship's side. It was proved, though no receipts nor bills of lading had been granted, that the ship had received all the goods purchased and had unloaded at the dock all the goods received.

A deficiency in the amount of the goods having been discovered at the factory to which they were carted, *held* that the shipowners were not liable.

On 20th July 1904 M. Langlands & Sons, shipowners, Dundee, presented a petition in the Sheriff Court at Dundee, in which they sought to recover from D. M'Master & Company, spinners, South Anchor Works, Dundee, the sum of £53, 0s. 3d. as a balance still due for the carriage of goods from Liverpool to Dundee. The defenders without prejudice tendered £21, 10s., but refused payment in full on the ground of short delivery. A proof was taken.

The *facts* are given in the note of the Sheriff (FERGUSON), who on 4th April 1906 sustained an appeal from an interlocutor giving decree in terms of the tender pronounced by his Substitute (CAMPBELL SMITH), on 28th February 1906, by the following interlocutor: — "The Sheriff having considered the cause, sustains the appeal: Recals the interlocutor of 28th February 1906 complained of: Finds in fact (1) that at two sales by auction in Liverpool on 20th and 28th January 1904 the defenders purchased a quantity of damaged jute; (2) that they contracted with the pursuers to carry the said jute by sea from Liverpool to Dundee for a payment at the rate of 10s. per ton, which was to cover freight and the cost of putting the jute on board at Liverpool; (3) that they handed to the pursuers two delivery notes for the said purchases; (4) that the pursuers arranged with a firm of carters to cart the said goods to their steamers at Liverpool; (5) that a quantity of jute, being the whole or nearly the whole, and believed to be the whole of the said purchases, was carted to the pursuers' steamers, was carried by them from Liverpool to Dundee, and was delivered by them on the quay at Dundee; (6) that the said jute was lifted at Dundee by carters in the employment of the defenders, and that its quantity was then found to be deficient to an extent not exceeding 58 pieces or thereby out of a total quantity amounting to about 3700 pieces; (7) that the whole quantity received by pursuers at Liverpool was carried to and discharged at Dundee, and that said loss, except to a certain extent accounted for by the condition of the goods, must have occurred either before shipment at Liverpool or more probably after delivery at Dundee; (8) that no document of the nature of a bill of lading or other receipt was produced or proved to have been granted by the pursuers acknowledging receipt of the specific quantities stated by the defenders; (9) that the account sued for is made up upon the actual weights of the quantities actually carried by the pursuers, and consists of freight, charges for cartage at Liverpool, and other incidental disbursements, and is correct: Finds in law (1) that the pursuers are entitled to payment of the sum sued for in terms of said account; (2) that the pursuers are not liable in damages to the defenders for the loss of said pieces of jute, and that the defenders are not entitled to deduct the value thereof from the freight due by them: Therefore repels the defences; Decerns in favour of the pursuers in terms of the petition: Finds the defenders liable to the pursuers in their expenses of the cause and of the appeal, but modifies the same to one-half of the taxed amount in respect of the unnecessary length of the proof and small amount of the sum at issue," &c.

Note.—"The pursuers sue for £53, 0s. 3d., being the balance of an account of £93, 0s. 3d. for freight, a payment of £40 having been made to account. The freight is charged for the carriage of a quantity of more or less damaged jute from Liverpool to Dundee, and is calculated upon the actual weights carried. The correctness of the account as made up upon the weights received at the ship's side at Liverpool is not challenged, though not specifically admitted, and must be taken as representing the proper charge for the service rendered. The account was made up from the carters' notes of the actual weights ascertained by the independent Liverpool weighing authority of the jute loaded at Liverpool, and it was common ground that the weights in these notes and in the account coincided. The defence is that the full quantity of material which the pursuers were to receive at Liverpool and deliver at Dundee has not been received by the defenders; that they have a counterclaim against the pursuers for a portion of the goods lost amounting to £40, 16s.; and that they are entitled to deduct the amount of their claim from the freight due by them. If this loss in quantity occurred while the pursuers were responsible for the goods the defence is sound.

"The pursuers' position is that they carried and delivered on the quay at Dundee the whole amount of the goods delivered to them at the ship's side at Liverpool, and have no responsibility for any loss that may have been suffered either before actual shipment or after actual discharge at Dundee. They further maintain that no actual loss of quantity beyond natural wastage in the circumstances, and ordinary shrinkage in the processes by which the jute has been treated, has been proved to have occurred. If either of these contentions is sound they are entitled to succeed.

"It is in my opinion clearly proved that all that was loaded at Liverpool was discharged at Dundee, and there is no trace of any loss having occurred while the goods were on board the ship. It is, however, necessary to consider closely the subject-matter and the terms of the contract. If the pursuers have specifically acknowledged receipt of a precise quantity at Liverpool, and are proved to have failed to deliver that quantity at Dundee, they would in the absence of clear proof that the deficiency had occurred otherwise, be responsible. The subject-matter of the contract

was two lots of jute that had been salved from two vessels, the 'Highland Scot' and the 'Highland Brigade,' which had met with misadventure. The cargo of the 'Highland Scot' was sold by auction on 20th January 1904 and that of the 'Highland Brigade' on 28th January 1904. At the first sale, that of the 'Highland Scot' cargo, the defenders bought quantities which are thus stated—37 bales, 7 broken bales, and 2095 pieces. At the second they bought, *ex* 'Highland Brigade,' 9 bales, 4 broken bales, and 466 pieces. I dismiss further consideration of the 'Highland Brigade' purchase, because it is in my opinion proved that the whole of that lot was bought on the day the last portion of the 'Highland Scot' quantity was despatched from Liverpool, and that the 'Highland Brigade' quantity was carried in two ships, and was fully delivered on the quay at Dundee. One piece is claimed as deficient upon it, but as there is not absolute certainty as to the precise number of pieces contained in a bale, there can be no proof that there was a piece lost. But while it was all carried on the two ships, it was not carried in the precise manner described in the manifests, upon reference to which—in so far as the quantities stated are concerned — the account is evidently made up, and therefore the value of the manifest as a receipt of quantities equivalent to a bill of lading is destroyed.

"The contract was made in pursuers' office at Liverpool, and the only evidence of what transpired there is that of defender and his co-adventurer in the transaction, Mr Barclay. The pursuers' clerks had no authority to bind them otherwise than in terms of their sailing conditions. But the defender stated that his attention was not called to the sailing conditions, and that he was at the time ignorant of them. It is, however, proved that they had been fully and regularly published and sent to Dundee merchants, including the defender, and that he had at least once received a letter on business from the pursuers in which they were distinctly referred to. This is a very different state of facts from that in *Henderson* v. *Stevenson* (2 R., H.L. 75), and the case which most closely corresponds is the English one of *Phillipp* v. *Edwards* (28 L.J., Ex. 52), in which Chief-Baron Pollock said—'We are of opinion that the contract is to be taken from the notice given in the papers in respect of the time for sailing, which was communicated to the public, as it appeared, not only on that occasion but on a variety of other occasions when the defendant's vessel sailed from that port.' The case is not a direct authority, for the Court were satisfied that the plaintiff was aware of the conditions, but it was observed in another case by Lord Blackburn that *Henderson* v. *Stevenson* could only be an authority where the facts are clearly similar. In the view, however, that I take of this case it is not necessary to determine whether the defender was bound by the sailing conditions. If he was bound by them they would be conclusive, on the view of the facts which I proceed to state, in favour of the pursuers. There is no trace of any specific quantities having been stated at the interview at which the contract was made. It was to carry a quantity of jute—the property of the defenders—of from 100 to 150 tons in weight, at a slump charge of 10s. per ton, the 10s. covering any expenses incurred in getting the goods on board at Liverpool. The goods in this case were not being sent by the seller to the purchaser. It appears to me that they cannot be considered while in transit to the ship as in the pursuers' custody in the same sense as when actually on board. In arranging for their being brought to the ship's side the pursuers were not acting as carriers by sea, but merely assisting the defender, and their responsibility is not that of insurers if any loss occurred before the goods were put on board. As was observed by Lord Esher in one case, in the absence of express provision in a charter-party, an agreement that the ship should bring the goods from the shore where that was at a distance (or, as here, from a distance on land), would be an independent contract—*Nottenbohn* v. *Richter*, L.R., 18 Q.B.D. 63. But it is not proved that any loss occurred before shipment. I do not forget the point raised upon two of the counterfoils and the notes on the back, from which pursuers' agent suggested the failure to deliver forty pieces to the ship. But the explanation seemed reasonable, and I think the whole effect of the evidence is to support the conclusion that the whole amount bought was shipped. It was so stated by the pursuers as the result of their inquiries afterwards at Liverpool. At the same time it is to be observed that the delivery note handed to them in the case of the 'Highland Scot' cargo described it by reference to the lots in the catalogue, and not by numbers of bales and pieces. There is not produced any receipt by the pursuers, either in favour of the auctioneer's firm or of the carting contractors, which saddles them with a specific quantity, and I am not prepared absolutely to affirm that the total quantity described actually reached the ship at Liverpool. The total quantity stated in the manifest corresponds with the total quantity purchased by the defenders. The advice notes sent on arrival at Dundee are simply a statement of the quantities noted in the manifest as shipped in each of the three vessels. These documents have their origin, as far as specific quantities are concerned, not in any actual count at the ship's side, but on information made up apparently originally from the sale catalogues and weigh notes. A book kept by the pursuers, in which the carters who lifted the goods at Dundee for the East Port Calender, to which they had been transferred, and the quantities lifted by each, are noted, shows carters' signatures or quantities noted against the carters' names, as follows:—On 27th January, 14 bales; on 29th and 30th January and 1st February, 23 bales and 1193 pieces; and on

3rd and 4th February, 978 pieces and a number of loose pieces. Assuming for the moment that these were all that were unshipped, there was therefore a deficiency of 7 bales and a surplus of 76 pieces. The 7 missing bales probably, but not unquestionably, represent the 7 broken bales in the catalogue, and if so they were counted by the witness Boultbee at Liverpool, and are said by him to have contained 134 pieces. There was therefore a net deficiency of 58 pieces, or, upon the whole transaction, 58 or 59 out of a total quantity of about 3700 pieces. The deficiency represents something less than two cart loads, even allowing nothing for the loose quantities, assuming the absolute accuracy of Boultbee's count, and also assuming, what is not proved, that all the bales which arrived in pieces at Dundee were the identical ones counted by him. It is in evidence that carters sometimes failed to sign the book and drove off, and there appears in the notes at the Calender the name of a carter who brought 30 pieces, which does not appear in the pursuers' book. On the other hand, the tallies kept in the Calender appear to correspond with the number of pieces signed for or noted in the pursuers' book, and in the case of any carter who failed to sign, the entry seems to have been made for him. Upon these facts it is, I think, quite clear that some 50 to 58 pieces less than the quantities stated in the catalogues of the sale at which defenders bought reached the East Port Calender, and I do not think it necessary to go into the long evidence as to what happened to the jute in the Calender, and the precise correspondence of the amounts subsequently sold, to one or other contention. The defenders' view upon this is consistent with pursuers' carters' receipt book, and the Calender tallies. At the same time my impression is that some shrinkage is made out but not sufficient to account for the ultimate deficiency in quantity stated by the defenders, and that in reducing the deficiency to 5000 odd yards the pursuers have counted part of the jute twice over.

"The loss must have occurred either at the place of sale or between the place of sale and the ship at Liverpool, or between the ship and the carts at Dundee. In this conclusion I am supported by the conviction of the Sheriff-Substitute that 'the issue most clearly proved is that the ship delivered all the goods it got.' The first two alternatives are possible but not probable. Constructive delivery to the pursuers of the precise quantities is not made out, for there is no receipt of the character of a bill of lading properly made up, fixing them with precise quantities shipped on board. The probability is that the loss occurred at Dundee. Now, the unloading and carrying away of the jute *ex* 'Highland Scot' from the three vessels at Dundee went on on six days, the first being January 27th and the last February 4th. The 'Princess Olga's' cargo took from January 29th to February 1st to lift. The 'Princess Maud's' was lifted on February 3rd and 4th. It appears to me that it was on the 'Princess Olga's' cargo that the deficiency arose, and if this is so it negatives defenders' suggestion that on February 3rd 50 pieces, being part of his goods, went to the Trades Lane Calender, and supports the pursuers' explanation of the mistaken and transferred entry. This really reduces the question to one of law, which is—at whose risk were the goods after discharge from the ship on to the quays? Now, the terms of the pursuers' carter receipt book are somewhat against them, for they describe the day of lifting as the date of delivery. There is also evidence that some of defenders' witnesses understood that the liability of the ship only ceased on signature by the removing carter, and expressions are used or assented to by some of pursuers' witnesses which might bear this construction. On the other hand, if the sailing conditions of the pursuers are applicable to the transaction, it is clear that they have no liability after the goods are on the quay, and their advice notes expressly state that the goods are at owner's risk when on the quay. Putting aside for the moment the sailing conditions, I find the pursuers' tender distinct evidence that after the goods are on the quay they have no responsibility, and that the porters in loading on the carts are acting as the servants of the consignee and not as their servants. This evidence is supported by being in accordance with the sailing conditions, which proclaim to the public the pursuers' general profession and practice. Beyond that it is in accordance with the general rule of law, and in accordance with the practice of the port of Dundee, as explained in the case of the *British Shipowners' Company* v. *Grimond* (3 R. 968). The note of the Sheriff (Maitland Heriot) in that case deals with corresponding facts to these, which, in the absence of previous decision, would have caused, to my mind, great difficulty. 'It is no doubt true that the owners' clerks' (including the ship's clerk, see p. 969) 'do not take a note of the bales in their respective books until they have been placed in the carts in lots of five for removal. This is what creates any difficulty that may exist in the case; but, on the whole, the Sheriff cannot regard that fact as determining the *punctum temporis* of delivery. . . . That period of marking their entries seems to the Sheriff to be adopted for the mere convenience of the clerks, and not as affecting the question of delivery.' The judgment of the Sheriff was adhered to by the Court of Session. It is conclusive in support of the general rule that delivery is complete when the goods are put on the quay, and I am unable to distinguish the present case on any grounds strong enough to justify a different conclusion. (See also *Knight Steamship Company* v. *Fleming, Douglas & Company*, 25 R. 1070, and *Petrocochino* v. *Bott*, L.R., 9 C.P. 355). The case in favour of delivery is perhaps a more favourable one for the ship, where it is bringing a man's own goods, than where it is bringing goods

from another consigner to a consignee who may not take delivery. In the two Dundee cases referred to, the question was as to liability for damage, but the legal principle must be the same for loss. On the proof there may be a great difference, and the fact of shortage on lifting raises a certain presumption against the ship. In this case, however, I am satisfied on the evidence that the ship discharged at Dundee all she received at Liverpool; that there is not absolute proof, but great probability, that she received the whole quantity at Liverpool; and that, if so, beyond a certain amount of wastage due to the condition of the cargo, the loss must have occurred after delivery on the quay at Dundee, and when the goods were at owner's risk. Expenses must follow the result, but the volume and expense of this case is so out of proportion to the sum at issue, that they are modified to one-half."

The defenders appealed, and argued—The contract was to carry the goods from Liverpool to Dundee, and the pursuers were responsible for any loss in transit. It was proved that the goods had been received at Liverpool, and the onus was on the shipowners to show they had been landed—*Smith & Company* v. *Bedouin Steam Navigation Company, Limited*, November 26, 1895, 23 R. (H.L.) 1, 33 S.L.R. 96. The shipowner could only escape his responsibility by proving that less had been shipped than had been stated in the documents, here the marked catalogues and delivery orders—*Horsley* v. *J. & A. D. Grimond*, January 23, 1894, 21 R. 410, 31 S.L.R. 321. The shortage was also proved, but there was nothing to show that it had not occurred on board the vessel. No tally at the quay had been taken. If the shipowner had wished to escape responsibility he should have had a tally taken, and must take the consequences of not having done so. (On the question of the sailing conditions *Richardson, Spence, & Company and "Lord Gough" Steamship Company* v. *Rowntree*, [1894] A.C. 217, was referred to.)

The respondents argued—The contract was to carry an undisclosed amount of goods to Dundee according to weight only. The quantity shipped was not proved, for there was no tally taken at that time, and the delivery orders were merely a command to the merchants' agent, no duty being thereby put on the shipowner to check the quantity. If the goods were lost on the way to the ship negligence must be proved. The ship was therefore not charged with any specific quantity, but she was proved to have discharged at the quay all she had received. The shipowners' responsibility ceased when the goods passed over the ship's side—*British Shipowners Company, Limited* v. *Grimond*, July 4, 1876, 3 R. 968, 13 S.L.R. 623; *Knight Steamships Company, Limited* v. *Fleming, Douglas, & Company*, July 1, 1898, 25 R. 1070, 35 S.L.R. 834. The Sheriff was therefore right, and should be affirmed.

LORD M'LAREN—I agree with the Sheriff in his conclusions, and in the main in his analysis of the evidence, and I do not propose in the observations which I offer to enter minutely into questions of detail. The question is, whether the respondents Langlands & Son, a firm of Liverpool shipowners, are liable to the appellants for an apparent deficiency in the quantity of jute goods, called Hessians, received by the appellants at Dundee, when compared with the quantity shipped or supposed to be shipped at Liverpool. The goods in question were part of the salvage of two wrecks. They were damaged by sea water, and were purchased by the appellants at a low price at an auction sale at Liverpool. The deficiency only applied to the goods got from the wreck of the "Highland Scot," with which alone we are concerned. By the contract of carriage, as proved, the respondents undertook to carry a quantity of jute, estimated at from 100 to 150 tons in weight, from Liverpool to Dundee at the rate of ten shillings per ton, which included the cost of lifting the goods and loading at Liverpool. The respondents received from the appellants the auctioneers' delivery orders entitling them to uplift the jute from the dock where it was stored.

They employed carters to bring the jute goods to another dock where they were to be shipped, and the jute was sent in portions in three of the respondents' ships which sailed at different times, all, I think, within ten days of the receipt of the goods at Liverpool. No bills of lading were issued, and apparently the respondents were not even asked for receipts for specific quantities. This is not very surprising when it is considered that the goods were damaged goods purchased at a low price, and that in the contract of carriage the goods were treated like goods in bulk and charged by weight.

The absence of specific receipts is, however, in my opinion, not material to the question of liability, because I am satisfied on the evidence that all the jute sold to the appellants *ex* "Highland Scot" was collected by the respondents, and put on board their ships, and was carried safely to Dundee. In particular, the auctioneers' foreman, Boultbee, gives his assurance that all the goods sold to Mr M'Master were delivered to Messrs Langlands or the persons employed by them. Equally clear and unshaken is the statement of the respondents' wharfinger, that all the jute brought by the carters was put on board their ships under his personal supervision. It is admitted that at the Liverpool docks the theft of bulky goods is practically impossible. The next step in tracing the goods is the custody and care of the goods on the respective voyages. The master and the chief mate of each of the ships were examined, and their evidence is to the effect that all the jute put on board at Liverpool was carried to Dundee, and that no mistakes were made. From their evidence I think that it is also reasonably certain that all the jute carried to Dundee for the appellants was put over the ships' side in each case, and either delivered straight into the appellants' carts, which

were waiting to receive it, or, when the carts were not there, placed under a shed on the quay which was appropriated to the reception of goods in course of loading or unloading.

Now the jute as salved consisted in part of bales containing an uncertain number of pieces in each, and in part of loose pieces. When the jute was delivered at Liverpool, there were, I think, seven broken bales containing 134 pieces which became loose pieces in the course of the voyage, and at least two other bales are said to have gone to pieces in handling, thus increasing the number of loose pieces. After allowing for these changes, and treating all the bales as delivered, there was a deficiency on arrival at the calendering establishment at Dundee of a number of loose pieces estimated at fifty eight.

I understood that counsel on both sides were satisfied that the deficiency was in the cargo carried by the "Princess Olga," one of the respondents' steamers. I think it is also common ground, at all events it is clear on the evidence, that all the bales are accounted for, and that the deficiency arose on the tally of the loose pieces. The missing pieces seem to have disappeared after they were landed at Dundee, because I think the respondents have satisfactorily discharged themselves of the obligation to prove that all the goods entrusted to their care were brought safely to Dundee.

Now, the appellants' case was put in two ways. First, they say the ship can only be legally discharged of its obligation by producing receipts from the consignees or the carters employed by them for the entire quantity of goods which were put on board. Alternatively they say there must at least be taken what they call a tally of the goods put over the ship's side corresponding with the quantity put on board.

I think the first proposition is not maintainable, because it supposes a state of facts which is impossible in practice—that at every moment of time when the ship is unloading there should always be a cart on the spot ready to receive the goods and a carter to give a receipt. But even if a sufficient number of carts are sent to receive the cargo, it will unavoidably happen that from time to time the unloading goes on somewhat faster than the carting, and it is out of the question to say that the ship is to suspend the business of unloading until carts arrive. In this case the ship followed the usual practice of unloading into the shed provided for the reception of the goods, from which the goods were taken by the carts as they arrived. If any of the goods disappeared from the quay (which is a not improbable explanation of the deficiency) I do not think that the ship can be made responsible, because the contract of carriage is at an end as soon as the goods are put on shore. There may be exceptions, as in the case where the indorsee of a bill of lading does not come forward on the ship's arrival and the goods have to be stored. But here the consignee received notice and sent carts for the goods against the ship's arrival. If, then, there was any possibility of pilfering, it was the business of the consignee, and not of the shipowner, to have a person stationed at the landing shed to look after the goods until they were carted away.

The objection that no tally was taken of the goods as landed raises a different question. It is evident that if a tally is to be of any use in fixing responsibility it must be taken by two persons representing the two parties respectively. Now, if the case of the appellant were that he had sent a representative to check the quantities landed, and that the ship's officers had refused to co-operate in taking a tally, or had professed that there was not time for effective checking, I should have thought there was force in the argument. But it is not said that the respondents were asked to take a tally of the goods, and if they did not think it necessary to do so for their own protection, the only effect of the omission, if it be such, is that the respondents must prove that they landed all the goods which they received at Liverpool. I think they have proved their case on this point, and I will only add that a tally, while it might have saved the cost of this litigation, would have been of no avail for tracing the missing pieces, because there were no marks of identification of any kind on the loose pieces.

In the view I take of the case it is unnecessary to consider the respondents' points—(1) that they do not hold themselves out as common carriers; and (2) that they have disaffirmed liability for loss of goods by notices sent to all their customers. I think, however, it is safe to affirm that if a shipowner runs his ships as general ships, and takes goods from everyone who offers to send them, he is in fact a common carrier, and his saying that he is not a common carrier will not alter the fact. We should then have to consider the effect of the notice disaffirming all responsibility for the safe delivery of goods which the shipowner had contracted to carry, including the two questions which have been so often considered, whether the other party may be taken to have accepted the condition, and whether it is a reasonable condition. There is perhaps a third question—whether there can be a contract in which the one party is liable to pay freight and the other party is under no obligation to deliver the goods? But as I am of opinion that the respondents have performed their obligation (which would attach to them as common carriers) by restoring the goods on the completion of the voyage, I do not propose to answer any of these questions.

It follows that the respondents are entitled to our decree for the unpaid part of the freight of the goods from Liverpool to Dundee, and that the appellants' counterclaim should be disallowed.

LORD KINNEAR and LORD PEARSON concurred.

The Court pronounced this interlocutor—

"Recal the findings in fact contained in the interlocutor of the Sheriff dated

4th April 1906, and in lieu thereof find in fact (1) that at two sales by auction in Liverpool on 20th and 28th January 1904 the defenders purchased a quantity of damaged jute; (2) that they contracted with the pursuers to carry the said jute by sea from Liverpool to Dundee for a payment at the rate of 10s. per ton, which was to cover freight and the cost of removing the jute and putting it on board at Liverpool; (3) that the whole quantity of jute specified in the auctioneer's delivery-orders was uplifted, taken by the carters employed by the pursuers to the pursuers' steamers, and shipped and carried to Dundee in terms of the contract; (4) that on the arrival of the pursuers' steamers at Dundee, the defenders, who were duly informed of the respective arrivals, sent carts to take away the jute, and that the pursuers in the ordinary course of business proceeded to unload cargo, putting the jute in question under cover in sheds provided for the reception of goods that are in course of being loaded or unloaded, whence the jute was taken away in carts provided by the defenders, and that the whole of the jute carried for the defenders was in fact put on shore at Dundee; and (5) that on the completion of the discharge of the cargoes it was found that the jute received by the defenders from their carters at their warehouse did not correspond to the quantity purchased in Liverpool, but there was a deficiency of 58 pieces or thereby out of a total quantity amounting to about 3700 pieces: Also recal the findings in law contained in said interlocutor, and in lieu thereof find in law that in the circumstances above mentioned the pursuers have performed their contract to carry the jute in question to Dundee, and are not liable in damage for the deficiency in the quantity of jute received at the defenders' warehouse: Therefore of new decern in favour of the pursuers for payment of the sum concluded for, being the unpaid balance of freight: Dismiss the counter claim of the defenders: *Quoad ultra* affirm the foresaid interlocutor of the Sheriff: Find the pursuers entitled to the expenses of the appeal, and remit the account thereof together with the expenses found due in the Sheriff Court to the Auditor to tax and to report."

Counsel for the Appellants—Scott Dickson, K.C.—Lippe. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Respondents — Hunter, K.C.— C. D. Murray. Agents — Elder & Aikman, W.S.

Thursday, June 27.

FIRST DIVISION.

PARISH COUNCIL OF EDINBURGH *v.* THE MAGISTRATES OF EDINBURGH.

Assessments — Burgh — Poor — Statute — Exemption — "Police Establishment" — Exemption from Poor Rate of Premises Connected with the Police Establishment of a Burgh—The Edinburgh Municipal and Police Act 1879 (42 *and* 43 *Vict. cap. cxxxii*), *sec.* 70.

The Edinburgh Municipal and Police Act 1879, sec. 70, which exempts from burgh assessments many premises in the hands of the municipality for city administration, including "the police offices, station houses, and other buildings or grounds connected with the police establishment," provides — "And the said police offices, station houses, houses, and other buildings or grounds connected with the police establishment shall also continue to be exempted from the payment of all cess or poor rates imposed or to be imposed."

The Act, *inter alia*, made provision for the branches of city administration at one time in the hands of a police commission and transferred to the municipality in 1856, and the exemption from poor rates was a repetition of an exemption in the Act of 1848 regulating the police commission. That statute again followed on a series of earlier ones. The police commission's administration had not been restricted to "police," but included, *e.g.*, lighting, cleansing, fire, and it appointed a large staff of officials. The exemption had been given a wide construction, and much property not connected with "police" had been given exemption both before and after 1879, though some premises had been exempted in one year and not in another. The municipality claimed that the exemption covered all premises used for the administrative duties placed on it by statute, or at least by the Police Commissioners' Statute of 1848, though not those used for such duties as were only optional, and that where premises were used for these as well as other purposes, or where parts of premises were used for these purposes, a partial exemption fell to be allowed.

Held that the exemption was limited to premises used for "police" administration, *i.e.*, the preservation of order and the prevention of crime, and used exclusively for that administration, the portions of premises used for such administration falling, where local separation was possible, to be separated from the remainder of the premises and the *cumulo* rent rateably apportioned.

Application to various premises.