out of his employment. That again is a question which the Sheriff had to consider, and is one of fact. There was evidence before him on which he was quite entitled to come to the conclusion that the accident happened while the man was on a part of the ship where he was naturally entitled to be in the course of his employment, and if he came to that conclusion he had further to consider whether it arose out of the employment or not. In the ordinary course of the man's employment it was necessary for him to spend the night on board this vessel, and, as your Lordship has pointed out, it has been decided in many cases that it is not necessary in order to bring the case within the scheme of the Act to show that at the moment at which the accident happened he was engaged in some particular duty, if the accident happened while he was in the ordinary course of his employment, and while he was on premises where his employment required him to be. Now it was for the Sheriff to consider that as a question of fact. It was said that it was quite possible, assuming that the man had fallen overboard by accident, that the accident might have happened not in the course of his employment at all, but because he had gone ashore or had attempted to go ashore on an errand of his own, and had fallen into the water in going from or coming back to the vessel. That was possible, but it was for the Sheriff to consider whether that was a reasonable probability which ought to affect his judgment, or whether it was a mere possibility which ought not to be taken into account, and there were facts before him upon which he required to form his judgment upon that particular question. He had to apply his mind to that question of fact, and consider whether there was any real likelihood that the man met his death in any other way, and he had to consider that in the same way as any reasonable man considers matters of probability in the conduct of his own affairs, and if he came to a conclusion upon a matter of that kind satisfactory to his own mind it is not for this Court, which is not a judge of the facts, to review his decision. It is said that his conclusion was not certain, but there can be no absolute certainty in probable matter; and the decision of the tribunal which is the judge of the fact is nevertheless final although the tribunal is not infallible. I am of opinion that we must answer the question in the way that your Lordship proposes.

LORD PEARSON—I did not hear the case.

The Court answered both questions in the affirmative and dismissed the appeal.

Counsel for Appellant—Blackburn, K.C. —C. H. Brown. Agent—F. J. Martin, W.S.

Counsel for Respondent—C. D. Murray—J. B. Young. Agents—Bruce & Stoddart, S.S.C.

Tuesday, January 19.

SECOND DIVISION.

[Lord Mackenzie, Ordinary

INVERNESS COUNTY COUNCIL *v.* BURGH OF INVERNESS.

Local Government—Burgh—Extension of Burgh—Transference to Burgh of Area Forming Part of County—Adjustment of Liability for Loans Effected by County Council Secured on Rates Assessable on County including Transferred Area—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 11.

The boundaries of a burgh were extended under the provisions of the Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 11, so as to include an area which had formed part of the county and was situated within the first district of the county.

Held that the Town Council of the burgh were not liable in repayment of any part of loans effected by the County Council, prior to the extension, for the general purposes of the county or of the first district, and secured on assessments leviable by the County Council on the county or the first district.

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 11, as amended by the Town Councils (Scotland) Act 1900 (63 and 64 Vict. cap. 49), sec. 3, provides—"Upon the application of . . . the council of any burgh . . . it shall be lawful for the Sheriff, after hearing all parties interested, from time to time to revise, alter, extend, or contract the boundaries of such burgh for the purposes of this Act . . . and the Sheriff shall define in a written deliverance on such application the new boundaries of such burgh for the purposes of this Act, and such deliverance, unless appealed against in manner hereinafter provided, shall be final, and when recorded along with the application on which it proceeds in the Sheriff Court Books of the county, shall fix and determine the boundaries of such burgh for the purposes of this Act. . . . The Sheriff or Sheriffs in revising the boundaries of a burgh shall take into account the number of dwelling-houses within the area proposed to be included, the density of the population, and all the circumstances of the case, whether it properly belongs to and ought to form part of the burgh, and should in their judgment be included therein."

No provision is made by the Act for adjustment or transference of liabilities affecting areas brought within the boundaries of a burgh except in sections 21 and 22, which deal respectively with debts and obligations incurred by local authorities acting under the Public Health (Scotland) Act 1867 (30 and 31 Vict. cap. 101), and amending Acts, and with the expenses payable for the preparation of the parliamentary register.

On 11th May 1903, by interlocutor of the

Sheriff of the county of Inverness, the boundaries of the burgh of Inverness were extended, under the Burgh Police (Scotland) Act 1892, sec. 11, so as to include an area of ground which prior to that date formed part of the county of Inverness, and was situated within the First or Inverness District of the county.

In 1907 the County Council of the County of Inverness and the First or Inverness District Committee thereof raised an action against the Provost, Magistrates, and Town Council of the Royal Burgh of Inverness, concluding for (1) declarator that the defenders were liable in repayment to the pursuers of a share, proportionate to the assessable rental of the transferred area, of all loans existing at 11th May 1903 effected by the County Council for the general purposes of the county or the purposes of the First or Inverness District, and secured on assessments leviable by the County Council on the county or the said district; and (2) payment of certain sums, being the proportionate share of the balance of such loans outstanding at 11th May 1903, or alternatively payment annually of the proportionate share of the annual instalments in repayment of such loans.

The nature and purposes of these loans sufficiently appear from the opinion (*infra*) of the Lord Ordinary (MACKENZIE).

The pursuers pleaded—"(1) The defenders having taken over the administration of the area in question are liable for its debts and liabilities existing at the date of transference, and the pursuers are accordingly entitled to decree of declarator as concluded for, and to decree in terms of one or other of the alternative petitory conclusions of the summons, with expenses. (2) The area in question having become liable in repayment of a *pro rata* share of the loans referred to on record until said loans are repaid, and the said liability subsisting at the date when said area was transferred as condescended on, the pursuers are entitled to decree of declarator as concluded for, and to decree in terms of one or other of the alternative petitory conclusions of the summons, with expenses."

The defenders pleaded—"(1) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons. (4) The defenders are entitled to absolvitor in respect that (*a*) The loans condescended on were effected by the pursuers upon the security of rates leviable by them within the area comprised for the time being within the county of Inverness, or within the First District thereof, exclusive of any royal or parliamentary burgh situate therein, according to the boundaries of such burgh for police purposes. . . . (*c*) No real security affecting any part of said transferred area was constituted by any of the mortgages or bonds and assignations in security founded on by the pursuers. . . . (*e*) The statute under which the transference of said area from the county to the burgh took place contained no provision for adjustment of debts and liabilities between the county and the burgh consequent upon such transference."

On 19th February 1908 the Lord Ordinary pronounced an interlocutor finding the pursuers' averments irrelevant and dismissing the action.

Opinion.—[*After narrating the nature of the action*]—"Now, in order to judge of the soundness of the pursuers' demand, it is necessary, in the first place, to consider what the loans are of which the Burgh of Inverness are asked to bear a rateable or proportionate share. To take first the loans raised by the pursuers for general county purposes, these are (*a*) loan of £2600, dated 18th October 1894; (*b*) loan of £1400, dated 23rd May 1898; and (*c*) loan of £5150, dated 3rd February 1903. No. 6 of process deals with the loan of £2600. It is a bond by the County Council of Inverness in favour of the Scottish Legal Life Assurance Society. It bears that by virtue of (1) the Police (Scotland) Act 1857, and (2) the Local Government (Scotland) Act 1889, and by virtue of the consent of the Standing Joint Committee, the County Council, in consideration of the advance of £2600 as a loan for the purpose of erecting new police houses within the county, bound and obliged themselves and their successors in office and representatives whomsoever, out of the moneys to be raised under the annual assessments by the said Acts authorised to be imposed and levied within the county, and designated the police assessment, and all other rates and assessments which they could competently charge with repayment of the said loan, to repay the sum borrowed to the lenders, and that by thirty equal yearly instalments. Then follows an assignation in security of all and whole the foresaid police assessment, and all other assessments as the same should become due and payable from time to time. There was also an obligation on the borrowers to impose and levy such assessments as should be sufficient to provide for due payment of the principal, interest, and penalties. No. 7 of process is a bond and assignation in security by the County Council of Inverness in favour of the Parish Savings Bank of Dumfries for the loan of £1400, which was obtained in order to provide for the cost of new police stations, and the balance of the cost of those already built. The terms of this bond are practically the same as those of No. 6 of process above referred to. No. 8 of process is a bond and assignation in security by the County Council in favour of the Savings Investment Trust (Limited) for the loan of £5150, which, as the bond narrates, was obtained to pay the price of the building at Inverness purchased from the Prison Commissioners for the purpose of providing accommodation and rooms for the transaction of the business of the County Council, and also to provide certain police accommodation. The only difference between this bond and the two foregoing is that there is in it an assignation in security, not only of the police assessment but also of the county general assessment leviable under the Local Government (Scotland) Act 1889.

"Turning now to the loans raised by the pursuers for the purpose of the First

or Inverness District of the County, these are (*a*) a loan of £3000, dated 2nd April 1894; and (*b*) a loan of £500, dated 13th October 1899. No. 9 of process is a mortgage to secure the loan of £3000, and sets out that the County Council had re-resolved to borrow that sum under the powers contained in the Roads and Bridges (Scotland) Act 1878, section 58, and in the Local Government (Scotland) Act 1889, section 67, for the purpose of defraying the cost of the construction of new roads and bridges in the First or Inverness District of the county of Inverness under the powers contained in the said Acts; that they had borrowed the said sum from William Carson, repayable by thirty equal instalments. The security for the loan was an assignation of the assessment for maintenance, management, and repair of highways leviable in the First or Inverness District of the county of Inverness under the Roads and Bridges (Scotland) Act 1878 and the Local Government (Scotland) Act 1889, and of all other moneys, assessments, and rates which the County Council had power to levy within the said First or Inverness District, and charge for the purposes of the said security. No. 10 of process is a bond and assignation in security by the County Council in favour of the trustees for the Airdrie Savings Bank for the loan of £500, which was obtained for the payment of the expense of constructing a new bridge across the Craggie Burn, near Craggie Inn, in the First or Inverness District of the county under the provision of the Roads and Bridges (Scotland) Act 1878 and the Local Government (Scotland) Act 1889. The assignation in security was of all assessments to be raised and paid within the First or Inverness District of the county, for payment of the expense of new roads and bridges under section 58 of the Roads and Bridges (Scotland) Act 1878, as amended by section 16 of the Local Government (Scotland) Act 1889, being the road maintenance rate of the said district, and that by thirty equal annual instalments.

"Now what is the theory upon which the pursuers seek to make the defenders liable for portions of these loans as concluded for in the summons? Is it because there is a contract, statutory or otherwise? There is certainly no contract under the Burgh Police Act of 1892, which is the statute under which the Sheriff extended the boundaries of the burgh. That Act contains no provision for the apportionment of debts and obligations, except in the two cases dealt with by sections 21 and 22 dealing respectively with matters pertaining to public health and registration. The Legislature in 1892, having dealt expressly with the adjustment of certain debts and obligations, and said nothing about any other, must, in my opinion, be held, on the ground of *expressio unius*, to have intended that there should be adjustment only in the two cases expressly dealt with. In 1903 a different view seems to have been taken, because in the Burgh Police Act of that year section 96 incorporates section 50 of the Local Government (Scotland) Act 1889. If the boundaries of the burgh had been extended subsequent to the Act of 1903 having come into operation, it is conceded that the pursuers would have had a title, failing agreement, to apply to the Sheriff to adjust their respective liabilities for the debts in question. There is, however, no provision in the Act of 1892 similar to that contained in section 96 of the Act of 1903, and I am unable to read into the Act of 1892 a section which it does not contain. I am accordingly of opinion that plea 4 (*e*) for the defenders is well founded.

"The pursuers, however, urge that they have a claim in equity. They contend, as I understand their argument, that anyone who takes land must take it *cum onere;* that it was incumbent upon the burgh to have got from the Sheriff a declaration that the area in question should cease to be burdened with any portion of the debts for which it was liable at the date of the transference, and that as they failed to do this the debt still affected the transferred area. They founded upon the cases of *Caterham Urban Council*, [1904] A.C. 171, and *West Hartlepool Corporation*, [1907] A.C. 246, in support of this contention. All that these cases decided was that, on a construction of certain statutory provisions, a rural district in the one case and a county in the other were not entitled to compensation for any loss of assessment in respect of areas transferred from them. Certain expressions in the judgments were founded upon, particularly in the opinion of Lord Davey in the *Caterham* case, to the effect that, when a severance takes place of an administrative unit, some adjustment is necessary. It has to be observed, however, that this opinion was expressed in a case where the statute under consideration contained careful provision for such adjustment. It was urged for the pursuers here that in the *Caterham* case it was recognised there is a right to adjustment independent of these provisions. This, however, does not appear to me to affect the defenders' argument above referred to, that as regards the Burgh Police Act of 1892 the Legislature must be held to have made provision for all that was then considered necessary in the way of adjustment. A reference may be made to the *Govan* case, 4 F. 479, in which the Lord President pointed out that a county council has no *jus quæsitum* to a valuable rate-producing area, so as to entitle them on that ground to object to the area being withdrawn from them.

"It was argued, however, for the pursuers that the burdens in question were inherent in the transferred area. The answer contained in the defenders' plea 4 (*a*) and (*c*) appears to me to be conclusive upon this point. The loans in question were effected by the pursuers upon the security of the rates leviable by them within the area comprised for the time being within the county, or within the district, exclusive of any royal or parliamentary burgh situate therein, according to the boundaries of such burgh for police purposes, and no real security affecting any

part of the transferred area was constituted by any of the mortgages or bonds and assignations in security above referred to.

"An examination of the statutes makes this clear. Under the Police Act of 1857 (20 and 21 Vict. c. 72), secs. 28 and 29, show that the police assessment is to be imposed upon all lands and heritages within a county. Section 78 defines the word 'county' as being exclusive of a burgh which has a Police Act or an establishment of police of its own. Inverness is a royal burgh having a separate establishment of police of its own. The section which confers power on the commissioners of supply to borrow is section 57, and this confers power to charge the future police assessments with the amount of the loan. It is only necessary to notice in passing sections 13 and 60 of the Local Government Act of 1889 in order to say that these do not affect the question here.

"As regards the county general assessment which, as above stated, is assigned in security by No. 8 of process (the bond for £5150), this is dealt with by sections 26 and 27 of the Local Government Act 1889. Section 27 (1) and (3) shows that this rate is to be imposed upon all lands and heritages within the county. Sections 44 and 105 show that the expression 'county' is exclusive of any burgh wholly or partly situate therein. The County Council's borrowing powers are contained in section 67 of the Local Government Act of 1889, and the only security they can give is that of any rate leviable by the Council.

"Dealing next with the roads and bridges assessment, the management and maintenance of the roads in each county is vested by section 11 of the Roads and Bridges Act of 1878 in the County Road Trustees, the transfer to the County Council of these duties being contained in section 16 of the Local Government Act 1889. Section 52 provides for the assessment in counties; section 54 for the assessment in burghs. 'County' means, except where otherwise expressly provided, the county exclusive of any burgh wholly or partly situate therein, as provided by section 3, and 'burgh' includes, *inter alia*, royal burghs. In section 58, the section referred to in the loans in the present case, there is the same limitation of the assessment to the county, and sections 74 and 75 show that the county and burgh authorities have power to levy assessment within their respective boundaries.

"The result of all this is to show that it is incompetent for a burgh to levy assessments to pay any portion of a county debt, or for a county to levy any assessments within a burgh. Reference in this connection may be made to the case of *M'Arthur* v. *County Council of Argyll*, 25 R. 829. Moreover, the creditors in these loans contracted to take as their security assessments leviable from a restrictable area.

"It was said by the pursuers that if the debt attaches to the area transferred, it was no concern of theirs to point out the fund out of which the debtor ought to make payment. In my opinion the absence of any statutory authority either to levy assessment, or to borrow money to pay any part of the loans in question, goes far to show that Parliament did not intend in 1892 to saddle the burgh with this obligation. The section which provides for the general purposes assessment in the Burgh Police Act of 1892 is section 340, but that only empowers the commissioners to levy assessments for the general purposes of the Act. The payment of a debt incurred by the county would not be one of these purposes. Section 374 gives the commissioners power to borrow, but here again the same observation applies, because it is only for any of the purposes of the Act. Under the combined effect of section 96 of the Burgh Police Act of 1903 and section 50 of the Local Government Act of 1889, it would now be competent for the burgh to borrow any sum required to be paid for the purpose of any adjustment. The want of such statutory authority in the Act of 1892 appears to me to emphasise the strength of the defenders' position in the present case. The pursuers founded upon the case of *Conn* v. *The Corporation of Renfrew*, 8 F. 905, as an authority that the defenders might apply the funds belonging to the Common Good, which it is alleged they possess, to pay their share of the debt in question. The possession, however, by a burgh of such a fund is an entirely fortuitous circumstance, and does not seem to me to affect the present question.

"It does not appear to be necessary to decide which side is supported by the stronger equitable considerations. The fact that Parliament in the Act of 1903 made provision for adjustment may be taken as a recognition that in certain cases equity requires this. Dealing, however, as I have to do in this present case, solely with the Act of 1892, I am unable to read into it any such provision as that for which the pursuers contend.

"Upon the whole matter I am of opinion that the pursuers have set forth no relevant case, and that the action should be dismissed, with expenses."

The pursuers reclaimed, and argued—Where a burdened subject was transferred there was an implied obligation on the transferee to relieve the transferor of the burden. In this case the transfer was no doubt effected under a statute, but that made no difference if the statute was silent on the subject. In particular, when an area was transferred from a county to a burgh there must be some means for the adjustment of liabilities affecting it—*Caterham Urban Council* v. *Godstone Rural Council*, [1894] A.C. 171, *per* Halsbury, L.C., at p. 173, and Lord Davey at p. 176. If the Legislature did not specially provide the means for such adjustment, the proper course was an action in the Court of Session—*Inspector of Galashiels* v. *Inspector of Melrose*, May 12, 1892, 19 R. 758, 29 S.L.R. 663, distinguishing *Parochial Board of Borthwick* v. *Parochial Board of Temple*, July 17, 1891, 18 R. 1190, 28 S.L.R. 897. The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. c. 55), sec. 11, provided for the extension

of burgh boundaries "for the purposes of this Act," and that could not affect bonds granted on the security of assessments on the transferred area, in virtue of the provisions of other statutes. The same section enumerated certain things which the Sheriff was to take into consideration in revising or extending the boundaries of a burgh, and no mention was made of liability for debts affecting an area proposed to be transferred to the burgh, as would certainly have been done were it intended that there should be no adjustment of such liability. What the pursuers were asking here was adjustment and not compensation, and if the extension had been made under the Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50) (which authorised extension for all purposes) the pursuers could have availed themselves of the statutory means provided for such adjustment. The fact that the last-mentioned Act and the Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33) contained provisions as to adjustment did not imply that there was no such adjustment otherwise, because these provisions dealt with the machinery for securing adjustment. Further, though it could not be maintained that the debts here were heritable debts, they might still be said to inhere in the lands. They were secured on assessments levied on "lands and heritages"—Police (Scotland) Act 1857 (20 and 21 Vict. c. 72), sec. 29; Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. c. 51), sec. 52. The bonds contained an obligation to assess the lands and heritages till the debts should be paid off. Assessments were preferable to heritable debts affecting the lands — *North British Property Investment Co., Limited* v. *Paterson*, July 12, 1888, 15 R. 885, 25 S.L.R. 641; *Greenock Board of Police* v. *Liquidator of the Greenock Property Investment Society*, March 13, 1885, 12 R. 832, 22 S.L.R. 535. It made no difference that no money had been expended on the transferred area, or that the creditors in the bond knew that the area, the assessments of which formed their security, might be restricted. That would also be true where the extension of the burgh was effected under the Local Government (Scotland) Act 1889, but that Act made provision for adjustment. If liability were once established against the burgh, it was no answer to say that there were no funds out of which payment could be made. In any case it would be competent to pay the debt out of the common good—Burgh Police (Scotland) Act 1892, sec. 358; *Royal Burgh of Renfrew* v. *Murdoch*, June 2, 1892, 19 R. 822, 29 S.L.R. 742; *Conn* v. *Corporation of Renfrew*, June 7, 1906, 8 F. 905, 43 S.L.R. 664 — or the burgh could raise the money by borrowing — Burgh Police (Scotland) Act 1892, sec. 374.

Argued for respondents—The extension of burghs under powers similar to those exercised here had been known since 1857 or 1862 — Boundaries of Burghs Extension (Scotland) Act 1857 (20 and 21 Vict. c. 70); Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. c. 101)—but there was no authority for a claim such as the pursuers made here. The pursuers must point to some statutory authority for their claim, and no such authority was to be found in the Burgh Police (Scotland) Act 1892 (55 and 56 Vict. c. 55) under which the extension had been made. Further, there were provisions for the adjustment of liabilities in the Local Government (Scotland) Act 1889 (52 and 53 Vict. c. 50), sec. 50; the Roads and Streets in Police Burghs (Scotland) Act 1891 (54 and 55 Vict. c. 32), sec. 6; and the Burgh Police (Scotland) Act 1903 (3 Edw. VII, c. 33), sec. 96. It was to be presumed, therefore, that adjustment was not intended unless provision was expressly made for it. Further, since the Act of 1892 dealt with adjustment in regard to matters of public health and registration—sections 21 and 22—the doctrine of *expressio unius exclusio alterius* applied. The extension involved no hardship on the creditors in the bonds affecting the transferred area, because they knew that the area on the assessment of which their debts were secured, might be restricted. While it was no doubt true that the absence of funds wherewith to pay would be no answer if liability were once established, still, in deducing the intention of the Legislature as set forth in the Act, the fact that there were no funds out of which to meet the liability sought to be established was an important element. The discharge of such a liability as the pursuers contended for here, could not be regarded as one of "the purposes of the Act" in the terms of sections 358 or 374 of the Burgh Police (Scotland) Act 1892, and payment out of the common good or borrowing for this purpose was therefore not competent. In any event, the claim made by the pursuers on record was not a claim for adjustment, but for compensation for loss of rateable area, and such a claim was clearly not maintainable — *Caterham Urban Council* v. *Godstone Rural Council*, *cit.*, *per* Lord Davey at p. 174.

LORD LOW — I am of opinion that the judgment of the Lord Ordinary is right. The question depends entirely on the construction of the statute. The Act of Parliament under which the area in question was transferred from the County of Inverness-shire to the Burgh of Inverness was the Burgh Police Act 1892. By section 11 of that Act power was given to the Sheriff to extend the boundaries of burghs. In that section nothing whatever is said about the transfer of liabilities affecting the transferred area. But in sections 21 and 22 of the Act it is provided that the adjustment of obligations connected with public health and registration shall be dealt with in a particular way. I agree with the Lord Ordinary that these cases having been specially provided for, the plain inference is that no further adjustment was considered necessary. The Lord Ordinary has dealt very fully with the case, and I agree so entirely with what he has said that I do not think it necessary to add anything more.

LORD ARDWALL—The Lord Ordinary has dealt with this case very fully, and I am of opinion that the decision he has arrived at and the arguments by which he supports it are well founded. I have read the Lord Ordinary's opinion more than once, and I do not think it can be improved upon in any particular. It may be that there existed prior to 1903 a legislative omission with regard to the allocation of existing county debt when a portion of a county was annexed to a burgh, and that it would have been fairer if the statute of 1892 had contained a clause which would have entitled the pursuers to the decree which they ask in this action, but that is a matter with which we have nothing to do; our duty is simply to apply Acts of Parliament as they stand on the Statute Book.

The LORD JUSTICE-CLERK and LORD DUNDAS concurred.

The Court adhered.

Counsel for Pursuers (Reclaimers)—Dean of Faculty (Scott Dickson, K.C.)—Malcolm. Agents—Baillie & Gifford, W.S.

Counsel for Defenders (Respondents)—M'Lennan, K.C.—Murray. Agents—Skene, Edwards, & Garson, W.S.

Saturday, January 23.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

HENDERSON & COMPANY, LIMITED *v.* TURNBULL & COMPANY.

Shipping Law — Freight—Dead Freight—Contract for Carriage of Certain Number of Tons at Certain Rate per Ton—Shortage in Quantity Shipped—Payment of Freight on Whole Contract Quantity—Action for Repayment — Counter Claim for Dead Freight — Liquid or Illiquid — Set-off — Condictio Indebiti.

A broker who had acquired right to a quantity of sulphate of magnesia stored at Alicante, Spain, contracted with a shipowner for the carriage from Alicante to Glasgow of 550 tons at a certain rate per ton, and gave the shipowner a delivery order for 550 tons on the party with whom the sulphate of magnesia was stored at Alicante. In exchange for the delivery order the shipowner received 5500 bags, estimated to weigh 550,000 kilogrammes, and said to be equal to 550 tons. Bills of lading were signed by the captain, in which the goods were described as "5500 bags . . . Ks. 559,000," with the subsequent qualification, "weight unknown." The bills of lading further provided that the goods should be "delivered from the ship's deck, where the ship's responsibility shall cease," and that freight should be payable on the ship's arrival. The whole cargo was delivered in Glasgow to the broker, who then paid freight on 550 tons. The cargo was thereafter weighed and ascertained to weigh only 499 tons. In an action by the broker for repayment of the freight on 51 tons, the shipowner pleaded that he was entitled to set off an equal sum for dead freight.

Held that as the proper measure of the defender's counter claim was the freight he would have earned at the stipulated rate on the 51 tons not shipped, it could not be regarded as an unliquidated claim of damages, and that it could therefore be competently set off against the sum sued for.

M'Lean & Hope v. *Fleming*, March 27, 1871, 9 Macph. (H.L.) 38, 8 S.L.R. 475, *followed*.

Opinion (*per* Lord Low) that as the obligation on the broker was to supply a cargo of a definite amount, and pay therefor a definite freight, he was not entitled to recover any part of the sum sued for, the defenders not being in any way liable for the short shipment.

Opinion (*per* Lord Ardwall) that as the action was of the nature of a *condictio indebiti*, and as the defender was entitled to payment under the contract of freight for the goods carried, and of dead freight for the goods which ought to have been shipped by the pursuer, it was not inequitable for the defender to retain the whole sum paid by the pursuer, and that there was therefore no relevant ground for a *condictio indebiti*, which was an equitable remedy.

By letters dated 20th December 1905 and 8th and 14th March 1906 a contract was entered into between George V. Turnbull & Company, shipowners, Leith, and Thomas Henderson & Company, Limited, chemical brokers, Glasgow, who had acquired a quantity of sulphate of magnesia stored with Senor M. Issanjou at Alicante, Spain, whereby Turnbull & Company undertook to carry from Alicante to Glasgow 300 tons of the sulphate of magnesia at 10s. per ton, and an additional 250 tons at 8s. 6d. per ton. Henderson & Company granted to Turnbull & Company a delivery order on Issanjou for 550 tons, which Turnbull & Company forwarded to their agents at Alicante, Raymundo & Company. In exchange for this order Raymundo & Company received from Issanjou 5500 bags of sulphate of magnesia, estimated to weigh 550,000 kilogrammes, said to be equal to 550 British tons. The whole of these bags were shipped at Alicante on board the "Gladiator," which Turnbull & Company had on a time-charter, and which they sent to Alicante for the purpose. The captain of the vessel signed bills of lading in the following terms —". . . Shipped in good order and condition by Sucesores de Raymundo y Ca. in and upon the steamship called the 'Gladiator,' whereof Boer is master for this present voyage, and now lying in the port of Alicante and bound for Glasgow. . . . . 5500 (five thousand and five hundred) bags of sulphate magnesia, ks. 550,000, being marked and numbered as per margin, and to be delivered from the ship's deck, where the