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

ship's responsibility shall cease, in the like good order and condition, at the aforesaid port of Glasgow, or so near thereunto as she may safely get . . . unto order or to his or their assigns, he or they paying freight for the said goods in cash, free of interest, on ship's arrival at the rate of 10s. per ton for 300 tons, and 8s. 6d. per ton for the balance. . . . Weight, contents, quantity, quality, and value unknown." . . .

In April, on the arrival of the vessel in Glasgow, Henderson & Company obtained delivery of the cargo, and paid freight at the stipulated rates on 550 tons. Some ten or fourteen days after the cargo was put over the ship's side, Henderson & Company had it weighed by the Clyde Trustees, without giving notice to Turnbull & Company, and the weight was ascertained to be 498 tons 15 cwts. 1 qr.

In March 1907 Henderson & Company raised an action in the Sheriff Court at Edinburgh against Turnbull & Company, concluding for payment of £153, 12s. 9d., being the market price of the shortage of 51 tons 14 cwt. 3 qrs., or alternatively for repayment of £21, 15s. 6d., being the freight paid on the said quantity at 8s. 6d. per ton.

The pursuers pleaded, *inter alia*—"(5) The defenders having failed to deliver the full quantity of goods received on board by them, and for which the said bills of lading were granted; and the amount and value of the shortage being as condescended on, decree therefor should be granted as craved. (6) Alternatively, the defenders, having failed to deliver the full cargo in their contract with the pursuers, are not entitled to freight on the shortage; and the said shortage and the freight paid by the pursuers thereon being as condescended upon, decree should be granted in terms of the pursuers' alternative conclusion."

The defenders pleaded—"(3) The pursuers having paid freight for and accepted delivery of the cargo in question without protest and not under reservation, the present action is incompetent. (5) As against any claim for return of freight for cargo short shipped, the defenders are entitled to set off an equivalent sum for dead freight in respect of the pursuers' failure to ship the cargo stipulated for. (6) The defenders having delivered all the cargo loaded on board said vessel are entitled to absolvitor."

On 20th November 1907 the Sheriff-Substitute (GUY), after a proof, the import of which sufficiently appears from their Lordships' opinions *infra*, assoilzied the defenders.

[The Sheriff-Substitute did not deal with the second alternative conclusion of the summons.]

The pursuers appealed to the Sheriff (MACONOCHIE), who on 24th December 1907 recalled his Substitute's interlocutor, sustained the defenders' sixth plea-in-law, and assoilzied them from the first alternative conclusion of the summons, repelled the defenders' third and fifth pleas, and granted decree in terms of the second conclusion.

Note.—[*After dealing with the first conclusion, as to which no argument was offered in the subsequent appeal*]—"There remains, however, the question as to repayment of part of the freight paid, which has not been dealt with by the Sheriff-Substitute. There can, I think, be no doubt that the bags delivered did not contain the weight of salts mentioned in the bill of lading; in fact, I do not understand that that is disputed. The defenders have therefore been paid freight for carrying about 52 tons more than they did carry. It is true that the pursuers paid the freight without raising any question of weight, but they paid on delivery and weighed the cargo as shortly thereafter as possible. I do not think that the fact that they paid at the stipulated time bars them from claiming repayment now that they have found out the error.

"The defenders, however, plead that they are entitled to set off dead freight against the claim of the pursuers. Whether dead freight is due to them or not I give no opinion. The question seems to me from a legal point of view, looking to the oral and written evidence, not to be altogether free from difficulty; but however that may be, a claim for dead freight is illiquid, and the amount, if any, which might be found due would depend upon various considerations —*e.g.*, on whether the defenders had tried and failed to get additional cargo to make up the deficit from other shippers. Thus, even if I wished to do so, I could not decide the point in this case, but I do not think that the pleadings are such as to make it competent for the defenders to constitute their claim in the present action."

The defenders appealed, and argued—The pursuers had paid freight on the whole 550 tons without protest or reservation, and they were thus not entitled to repayment of any part. In the circumstances there was no ground for a *condictio indebiti*, which was an equitable remedy—Ersk. Inst., iii, 3, 54. Further, payment was to be made in terms of the contract on the ship's arrival, *i.e.*, before weighing the cargo (for weighing at Alicante was out of the question), and the contract was therefore of the nature of a lump-freight contract, and the whole sum paid by the pursuers was due whatever the weight of the cargo shipped and carried—*London Transport Company, Limited* v. *Trechmann Brothers*, [1904] 1 K.B. 635; *Merchant Shipping Company* v. *Armitage*, (1873), L.R., 9 Q.B. 99. If 550 tons were shipped at Alicante, then the shortage as ascertained on weighing, so far as it had not occurred in the interval between unloading and weighing, could only be due to shrinkage by drying or evaporation. In that case freight was due on the quantity shipped—*Dakin* v. *Oxley*, 1864, 33 L.J. (C.P.) 115, *per* Willes, J., at p. 119—and there was no over payment. If, on the other hand, only the 498 tons odds was shipped at Alicante, assuming that freight was due only on that quantity, the defenders were entitled to set off against the pursuers' claim for repayment a claim for dead freight equal in amount to the pursuers' claim. It was, doubtless, true that a claim for dead freight was in the normal case an unliquidated claim of damages—Bell's Com., i, 620—but that could not be

argued by the pursuers here, for their claim for repayment only became liquid when there was proof that the shortage existed at Alicante, and that proof also made the defenders' claim for dead freight liquid. The defenders' claim could therefore be set off against the pursuers' claim for repayment—*Lovie* v. *Baird's Trustees*, July 5, 1895, 23 R. 1, 33 S.L.R. 208; *Sutherland* v. *Urquhart*, December 13, 1895, 23 R. 284, 33 S.L.R. 210; *Inch* v. *Lee*, November 7, 1903, 11 S.L.T. 324. The defenders' claim for dead freight could not be barred by the fact that the cargo had been accepted from Issanjou and shipped by the defenders' agents, Raymundo & Company, because in shipping the cargo Raymundo & Company were for the time being acting as the pursuers' agents. In the circumstances there was no obligation on the captain of the "Gladiator" to try to fill up the vessel with other cargo.

Argued for the pursuers (respondents)—It was proved that the cargo delivered was some 51 tons short, and the *onus* was on the defenders to account for that shortage. If there was a difference between the weight at the port of loading and the weight at the port of delivery, freight was payable on the lower weight—Carver's Carriage by Sea, 4th ed., p. 688; *Gibson and Another* v. *Sturge and Another*, 1855, 24 L.J. (Exch.) 121. The contract here was for freight at so much per ton, and the cases of the *London Transport Company* v. *Trechmann Brothers* and the *Merchant Shipping Company* v. *Armitage*, *cit.*, had no application. The case of *Dakin* v. *Oxley*, *cit.*, decided nothing that affected the present question. The defenders had thus been overpaid for 51 tons on account of an error as to the weight of the cargo and were liable to repay. If the shortage existed at Alicante, the defenders were not entitled to dead freight. There was no charter-party and no obligation to provide a full cargo. Further, the responsibility for any shortage in the quantity shipped rested with Raymundo & Company, the defenders' agents. No attempt had been made to get other cargo to fill up the ship, as was necessary if they were to be entitled to dead freight. In any event the claim for dead freight was not liquid, and could not be set off against the sum sued for—Bell's Prin., sec. 430; *M'Lean & Hope* v. *Fleming*, March 27, 1871, 9 Macph. (H.L.) 38, 8 S.L.R. 475, *per* Hatherley, L.C., at p. 42, p. 477; *Harries* v. *Edmonds* (1845), 1 Carrington and Kerwan 686.

At advising—

LORD LOW—The defenders, who are shipowners, contracted with the pursuers to carry for them 550 tons of sulphate of magnesia from Alicante to Glasgow. Freight for the full amount of 550 tons was paid by the pursuers to the defenders when the ship arrived at Glasgow and before she was unloaded. After the cargo had been unloaded it was weighed for the pursuers by the Clyde Trustees, and the total weight was found to be slightly under 499 tons, or some 51 tons less than the amount which the defenders had contracted to carry and in respect of which freight had been paid. In these circumstances the pursuers demand repayment from the defenders of £21, 15s. 6d., being the difference between the freight for 550 tons and 499 tons.

I think that to the extent of some nine tons it is clear enough that the pursuers have no claim. The salts which were lying in store at Alicante were put up, according to custom, in bags which were capable of containing and were supposed to contain 100 kilogrammes each. A British ton is equal to 1015 or 1016 kilogrammes, but in Spain 1000 kilogrammes are regarded as being equivalent to a ton, and I think it is proved that that is the recognised basis upon which an order for so many tons of sulphate magnesia is carried out. That was certainly the view of Issanjou, in whose stores a large quantity of salts belonging to the pursuers was lying, because in fulfilment of an order by the pursuers to deliver 550 tons of salt to the defenders he gave out of his store 5500 bags. In like manner Raymundo & Company, the defenders' agents in Alicante, who, as the pursuers had no agent there, were directed by the defenders to present the delivery order to Issanjou and ship the goods, accepted as a matter of course 5500 bags of 100 kilogrammes each as proper implement of the order. Accordingly if upon the bags being weighed they had been found actually to contain 100 kilogrammes each, I do not think that the pursuers could have complained, although the total weight would have been less by some nine tons than 550 British tons.

The question therefore comes to be whether the pursuers are entitled to claim repayment from the defenders of the proportion of the freight applicable to 42 tons or thereby?

How precisely it came about that the 5500 bags when weighed by the Clyde Trustees were found to be so far short of 550,000 kilogrammes it is impossible on the evidence to say. It is not disputed that 5500 bags of the capacity of 100 kilogrammes each were put on board at Alicante and delivered at Glasgow, because although the bags were counted as being two bags short at Glasgow, it is admitted that so trifling a shortage need not be considered. It is also admitted that the bags were received in good condition, and there is nothing in the evidence to suggest that anything happened to them when being taken from the store to the ship, or on board ship, or between the unloading of the ship and the weighing of the goods, which could account for the decrease of weight. The probability therefore seems to me to be that, from some unexplained cause, the weight of the goods when taken from the store was less than the weight of 5500 bags of 100 kilogrammes each ought to have been by some 42 tons. In these circumstances the question arises, Which of the parties was responsible for a cargo short of the stipulated weight being loaded? The pursuers maintain that the defenders are liable, in respect that they undertook to uplift from Issanjou's store, and put on board ship, the

full cargo of 550 tons, or, in other words, that they undertook to see that the full weight stipulated for, and no less, was put on board ship. I do not think that that is a correct statement of what the defenders undertook to do. The cargo was to be supplied by Issanjou, whom the pursuers ordered to deliver 550 tons to the defenders. The latter, upon the other hand, only undertook to receive the goods from Issanjou, convey them to the ship, and put them on board. Although I think that that is the position of matters disclosed by the evidence, and in particular by the correspondence, I do not mean to say that the defenders had no duty in regard to the amount of the cargo, because I think that they were bound to use reasonable care to see that they obtained from Issanjou the goods specified in the delivery order. For instance, if Issanjou had tendered to them only 5000 bags, or bags which were plainly of less capacity than the 100 kilogrammes each, they would have been bound to object in the interest of all parties concerned. But nothing of that sort occurred. On the contrary, the proper number of bags of the requisite capacity was delivered, and all the bags appeared to be in good condition. There was therefore nothing to suggest that the goods delivered did not weigh 550,000 kilogrammes, which, for the reasons which I have given, would, in my opinion, have been sufficient implement of the delivery order. But it was said that the defenders' agents Raymundo & Co. should have had the bags weighed. I do not think so. They had no instructions to have the bags weighed, and to have done so would not have been in accordance with the custom of the port, and would further have involved delay and expense which they were not authorised to incur. Accordingly the defenders are not, in my opinion, responsible for the cargo supplied by Issanjou being deficient in weight.

The pursuers further argued that there was nothing in this case to take it out of the general rule that freight is only payable on so much cargo as has been shipped, carried, and delivered. But that of course depends upon what was the contract between the parties. Here I take the contract to have been this—the pursuers undertook to supply a cargo of 550 tons, and the defenders undertook to carry that cargo, and no other, for a certain stipulated freight. Now, if I am right in the view which I have taken, that the defenders were in no way responsible for the cargo put on board being short weight, but, on the contrary, had good reason to believe that it amounted to 550 tons, and there being nothing to suggest that the goods lost weight during the voyage, it seems to me that the defenders fulfilled their part of the contract and earned the full freight.

I think that that view is not only not inconsistent with, but is confirmed by, the terms of the bill of lading.

The pursuers founded upon two matters in the bill of lading—first, the fact that the goods are acknowledged as having been received from Raymundo & Company; and secondly, that the goods are acknowledged to be of the weight of 550,000 kilogrammes. In regard to the first of these points the pursuers argued that Raymundo & Company being the defenders' agents, the bill of lading supported the argument that the defenders had undertaken the responsibility of providing a cargo of the requisite weight. The answer to that argument is that Raymundo & Company, in uplifting the goods and putting them on board ship, were acting as the pursuers' agents, because that was work which properly fell upon the pursuers as shippers, and it was done at their expense. In regard to the second point, it is to be observed that the acknowledgment of the receipt of goods weighing 550,000 kilogrammes, is qualified by the words "weight unknown." I think that these words mean that although it had been represented to the master that 550,000 kilogrammes had been put on board, and although he had no reason to doubt that representation, he could not undertake to say that it was in fact correct.

In other respects the bill of lading seems to me to be in favour of the defenders. It is provided that the goods shall be "delivered from the ship's deck, where the ship's responsibility shall cease," and that the freight shall be paid "on ship's arrival." These provisions seem to me to indicate that it was not contemplated that in order to ascertain the precise amount of freight due, the goods should be weighed after being discharged. The clauses are more applicable to a contract by which the shippers undertook to supply a cargo of a definite amount and pay therefor a definite freight, and I think that the pursuers acted upon that view, because they paid the full freight upon the arrival of the ship, and afterwards had the cargo weighed when it suited their own convenience without any notice to the defenders.

I am accordingly unable to agree with the learned Sheriff that the pursuers are entitled to repayment of part of the freight, and I am of opinion that to that extent the appeal should be sustained.

If, however, I am wrong in the view which I have expressed, and assuming that the pursuers were only liable to pay freight upon the goods actually shipped and delivered, I think that the defenders are entitled to set off a claim for dead freight against the pursuers' demand for repayment of the excess of freight.

The learned Sheriff says that a claim for dead freight is an illiquid claim which cannot be set off against a liquid claim. No doubt a claim for dead freight is in its nature an illiquid claim. It is defined by Mr Bell (1 Com. p. 620) as "an unascertained claim of damages or unliquidated compensation for the loss of freight, recoverable in the absence and place of freight."

There are, however, two circumstances in this case which it seems to me it is important to keep in view. In the first place, the pursuers' claim cannot be regarded as properly a liquid claim, because it is a *condictio indebiti*, which is a purely equitable

remedy, and the person claiming repayment can only recover if he proves that the payment was made in ignorance or error. In the second place, it seems to me that the counter-claim for dead freight cannot, in the peculiar circumstances of this case, properly be regarded as a claim for unliquidated damages. The agreement was for the carriage of 550 tons of goods of the same description at so much per ton, and therefore whenever the weight of the goods shipped and delivered was ascertained, the basis upon which dead freight falls to be calculated was also ascertained. In short, the process of weighing the goods, which, according to the pursuers' contention, fixed the amount by which freight had been overpaid, also substantially fixed the amount of dead freight. I think that the only thing which it could be suggested fell to be deducted from the amount of dead freight so ascertained would be the additional expense which the ship would have incurred in loading the additional forty-two tons, but such expense, if any, would, I imagine, be a trifling matter, and I think that dead freight, or, in other words, the damages due to the defenders in respect that the pursuers did not load a full cargo, may, in the circumstances, be fairly assessed at the amount of the additional freight to which the defenders would have been entitled had a full cargo been loaded.

Upon that point I may refer to the case of *M'Lean & Hope* v. *Fleming* (9 Macph. (H.L.) 38). In that case M'Lean & Hope had chartered a ship from Fleming, and engaged to supply a full cargo. The capacity of the ship was 596 tons, but only 386 tons were delivered. M'Lean & Hope accordingly brought an action against Fleming for delivery of the full cargo, or alternatively for damages, and Fleming brought a counter action in which he claimed freight at the stipulated rate per ton upon 386 tons, and dead freight at the same rate upon 210 tons.

The cargo consisted entirely of bones. It was proved that only 386 tons had been shipped, and that the deficiency of cargo was not due to negligence on the part of the captain. In these respects the case is, in my opinion, indistinguishable from the present.

The House of Lords, affirming the judgment of this Division, assoilzied Fleming in the action against him, and gave decree in the action at his instance for freight upon the goods shipped at the rate specified in the charter-party, and for dead freight at the same rate.

The view of the majority of the House in regard to the measure of dead freight was succinctly stated by Lord Chelmsford thus —"This case can hardly be considered to be one of unliquidated damages, because the captain not having brought home any other goods than those of the appellants, the proper measure of the shipowner's claim appears to be the amount of the agreed freight which he would have earned upon the deficient quantity of 210 tons of bones."

I am therefore of opinion that the defenders should be assoilzied.

LORD ARDWALL—In this case the pursuers, who are chemical brokers in Glasgow, sue the defenders, who are shipowners in Leith, for a sum of £153, 12s. 9d. sterling, representing the value of 51 tons 4 cwts. 3 qrs. of Epsom salts at £3 per ton, which is proved to have been the quantity short delivered by the defenders from the s.s. "Gladiator" of a cargo of Epsom salts as compared with the quantity set forth in the bill of lading under which the cargo was shipped. Both the Sheriff and the Sheriff-Substitute have found that the defenders are not liable in payment of the above amount, and at the discussion on the appeal counsel for the pursuers did not attack the findings upon this point. I have only to remark regarding it that I consider the statement of law by the Sheriff is the correct one, and that the *onus* of proving that all the cargo which was shipped was in point of fact delivered to the pursuers, rested on the defenders. I also agree with him on the grounds stated by him that the defenders have discharged that *onus*.

But alternatively the pursuers sue for the sum of £21, 15s. 6d. sterling, with interest, being the amount of freight which was paid by them to the defenders for the carriage of the said 51 tons 4 cwts. 3 qrs. of salts, on the ground that the defenders not having carried that quantity are not entitled to freight therefor.

As provided by the bill of lading, the pursuers paid the freight for the whole quantity of 550 tons therein mentioned to the defenders on the arrival of the ship at Glasgow. The pursuers might have weighed these goods on the ship's deck or at the ship's side, but they did not do so, and in point of fact the cargo was not weighed for some ten days after they obtained delivery of it, and then it was weighed without notice to and outwith the presence of the defenders.

In answer to this alternative claim the defenders state in answer 7 of the record that "had the cargo been less than the defenders contracted to carry, they would have been entitled to a claim for dead freight in respect of the shortage, said dead freight amounting to the sum alternatively sued for"; and in their fifth plea they plead that they "are entitled to set off an equivalent sum for dead freight in respect of the pursuers' failure to ship the cargo stipulated for," against any claim for return of freight for cargo short shipped.

It is necessary now to examine the position of parties under the contract of affreightment entered into between them.

There was no formal charter-party between the parties, but by letters passing between the defenders' agents and the pursuers, and dated 20th December 1905, 8th March 1906, and 14th March 1906, a contract of affreightment was concluded between the pursuers and defenders for the carriage by the defenders from Alicante to Glasgow of 300 tons Epsom salts at a freight of 10s. per ton, and of an additional quantity of 250 tons Epsom salts at a freight of 8s. 6d. per ton, all upon the conditions specified in the said letters.

Under the contract so concluded the

defenders became bound to carry by ship from Alicante to Glasgow a cargo consisting of 550 tons of Epsom salts, and to provide ship-room for the same in any ship or ships—for none were mentioned by name —which they sent to Alicante in fulfilment of the contract. Ultimately the s.s. "Gladiator" was sent for the purpose, and that vessel was quite capable of carrying the stipulated cargo of 550 tons of Epsom salts. On the other hand, it is equally clear that under the said contract the pursuers were bound to load on the defenders' vessel a cargo of 550 tons of Epsom salts and to pay for its carriage to Glasgow the stipulated rates of freight.

In these circumstances I am of opinion that the pursuers were bound to pay to the defenders freight upon the cargo actually carried and also dead freight, being the damages for failure to supply the full amount of 550 tons, leaving only the question remaining as to the amount due in respect of dead freight. The amount of dead freight in the ordinary case falls, according to maritime law, to be assessed by ascertaining the actual loss sustained by the shipowner, taking into account the amount of freight that would have been earned above that actually earned had a full cargo been shipped in terms of the contract of affreightment, and deducting from that amount any extra expenses the shipowner would have been put to if the whole cargo had been shipped; but with such a small amount of shortage of cargo as that here in question, and having regard to the nature of the cargo and the decision hereafter quoted, I think the dead freight in this case may very well be estimated at the sum of which repetition is claimed, which represents the freight that would have been earned over and above that actually earned if the full 550 tons of salts had been shipped.

The Sheriff has declined to give effect to this claim for dead freight on the ground that it is an unliquidated claim, and that the amount, if any, which might be found due would depend upon various considerations, *e.g.*, whether the defenders had tried and failed to get sufficient cargo to make up the deficit from other shippers, and he further states that he does not think that the pleadings are such as to make it competent for the defenders to constitute their claim in the present action. I regret to be unable to concur with this view of the learned Sheriff. The claim for dead freight is, in my opinion, competently and relevantly stated, and a proof has been taken upon the claim for repetition and the answers thereto. In that proof the pursuers have failed to show that there was any negligence on the part of the defenders in not trying to fill up the ship with other cargo, but indeed such an attempt would have been wholly futile. The ship in question was not a general ship, but was a ship chartered to carry a special cargo of Epsom salts in bags, and it is vain to say that the captain was bound to incur trouble, expense, or delay in going about Alicante and endeavouring to make up a cargo of other goods which perhaps might have been damaged by contact with a cargo of a moist chemical. Further, I am of opinion that the judgments delivered in the House of Lords in the case of *M'Lean & Hope* v. *Fleming*, 9 Macph. (H.L.) 38, are sufficient authority for holding that the amount of dead freight may, in a case of this description, be taken to be the difference between the freight actually earned and what would have been earned if a full cargo had been shipped in terms of the contract of affreightment.

There was, however, another objection stated by the pursuers to the claim for set-off of dead freight, and that was that the defenders, through their agents Messrs Raymundo, were themselves responsible for a full cargo not being shipped. I cannot accept this defence. It is true that Messrs Raymundo were the defenders' general agents at Alicante, and were indeed acting as their agents and by their instructions in seeing to the shipping of the Epsom salts on behalf of the pursuers; but while they were the defenders' general agents, there is no doubt that so far as their acting in connection with the shipping of the goods was concerned they were truly doing the business of the pursuers, and therefore acting as their agents and at their expense, and the best proof of this is that in the bill of lading Messrs Raymundo are stated to be the shippers, and the captain signs the bill of lading on behalf of the defenders. It appears that as the pursuers had no agents of their own at Alicante, the defenders, as a favour to the pursuers, instructed their agents Raymundo & Company to act as the pursuers' hands in shipping the salts, but their doing so did not make the defenders in any way responsible for a full cargo being loaded. Messrs Raymundo & Company accepted from M. Issanjou, on whom the pursuers had granted an order, what he represented to be, and what according to the custom of the port was supposed to be, the number of bags of Epsom salts which would have made up the full quantity of 550 tons had the bags been up to weight. It seems, however, that they were not up to weight, and the pursuers and M. Issanjou apparently have had disputes subsequently regarding their shipments by this and other vessels, with which, however, it is obvious that Messrs Raymundo and the defenders have nothing whatever to do.

I accordingly am of opinion that the defenders are in no way liable for the short shipment which undoubtedly took place, and that they are entitled to dead freight.

I have gone into this in some detail, as the case was anxiously argued on these points, but it appears to me that the case may be disposed of very shortly on another ground. This action, so far as it concludes for repetition of freight alleged to have been overpaid, is of the nature of a *condictio indebiti*. Now the *condictio indebiti* is an equitable remedy, and will not be granted by the Court unless it clearly appears that it would be inequitable for the party to whom a payment has been made to retain the sums alleged to have been

paid under error. In the present case that is not so, for it is according to both law and equity that the defenders should obtain from the pursuers under their contract of affreightment payment both of freight for the goods actually carried and of dead freight for goods which under the contract of affreightment ought to have been loaded by the pursuers on board the defenders' ship. I am accordingly of opinion that no relevant grounds for a *condictio indebiti* have been proved by the pursuers.

This consideration absolves the Court from going into any nice questions as to the amount of dead freight or its illiquid nature, even were it otherwise necessary to do so, and I have no hesitation in holding that the defenders' fifth plea-in-law should be sustained, and that they should be assoilzied from the whole conclusions of the summons.

The LORD JUSTICE-CLERK and LORD DUNDAS concurred.

The Court found that the defenders were not liable to the pursuers in the value of the shortage of cargo in terms of the first alternative conclusion of the summons, and that the defenders were entitled to set off against the claim for freight on the shortage of cargo the claim for dead freight, and assoilzied the defenders.

Counsel for Pursuers (Respondents)—Murray—Carmont. Agent—Thomas Crow, Solicitor.

Counsel for Defenders (Appellants)—Aitken, K.C.—C. H. Brown. Agent—F. J. Martin, W.S.

Wednesday, January 27.

SECOND DIVISION.

EWING'S TRUSTEES *v.* EWING.

Succession—Faculties and Powers—Power of Appointment—Exercise of Power—Fund Destined to Children in such Proportions and subject to such Conditions and Restrictions as Donee of Power might Appoint—Gift of Liferent with Power of Disposal of Fee by Inter vivos or Mortis causa Deed—Validity—Right to Demand Immediate Payment.

By her antenuptial contract of marriage A conveyed her whole estate to trustees and directed them to hold the fee or capital thereof "for the use and behoof of the child or children of the . . . marriage . . . in such proportions and subject to such conditions, limitations, and restrictions, and with such terms of payment of vesting as" she should "appoint by any deed under her hand." A died predeceased by her husband and survived by a son and a daughter. She left a deed of appointment whereby she directed the trustees to set aside and retain "three fourth shares of the trust estate for behoof of my daughter in liferent for her liferent alimentary use only, and to pay to her or apply for her behoof . . . the free annual income thereof during her lifetime . . .; and on the death of my daughter to dispose of or apply the capital of the shares so liferented by her . . . in such manner as my said daughter may direct by any writing under her hand, whether *inter vivos* or *mortis causa*, and failing such appointment to pay and convey the same to her heirs *in mobilibus*."

Held (1) that the deed of appointment was a valid exercise of the powers conferred by the marriage contract; and (2), following *Mackenzie's Trustees* v. *Kilmarnock's Trustees*, December 4, 1908, 46 S.L.R., p. 217, that the deed of appointment did not confer on the daughter a right of fee to the effect of enabling her to demand immediate payment of the capital.

Trust—Administration—Marriage Contract—Power of Appointment—Exercise of Power—Direction that Share of Marriage-Contract Funds Dealt with in Deed of Appointment should be Held and Administered by Testamentary Trustees—Duty to Transfer.

By her antenuptial contract of marriage A conveyed her estate to trustees and directed them to hold the fee of the estate for behoof of the children of the marriage in such proportions and subject to such conditions, limitations, restrictions, and with such terms of payment and vesting, as she might appoint. By deed of appointment she directed the trustees to hold a certain share of the estate for her daughter in liferent alimentary, and on the death of the daughter to apply the capital as she (the daughter) might direct. A left a trust-disposition and settlement conveying to trustees estate which did not fall under the marriage contract, and also a holograph writing in which she directed that the provisions in the deed of appointment in favour of her daughter should be paid over to her (A's) testamentary trustees to be administered by them in terms of the deed of appointment.

Held that the marriage-contract trustees were bound to hand over the capital of the provisions in favour of the daughter to the testamentary trustees to be administered by them in terms of the deed of appointment.

By antenuptial marriage contract between William Ewing and Miss Harriett Janet Jones, dated 26th January 1866, Miss Jones (who afterwards became Mrs Ewing) conveyed her whole estate to trustees for purposes herein mentioned.

The fourth purpose was as follows:—"The said trustees shall hold the fee or capital of said means and estate for the use and behoof of the child or children of the said intended marriage . . . in such proportions, and subject to such conditions, limitations, and restrictions, and with such terms of payment and vesting, as the said Harriett