there is much weight to be given to these objections; because, as I understand the matter, the Court below, in disposing of the third plea, stated their opinion that it was competent for the Commissioners to enter into agreements, and to alter their views as to the line that any particular sewer should take, if they found sufficient reason for doing so—and probably sufficient reason would be found in the difference of expense of the two lines. Therefore, the powers of the Commissioners to alter the direction of the line of sewer is a matter to which the Court has already given their assent. But as to the notion that it was *ultra vires* of the Commissioners to enter into an agreement, and that they had no power to fix upon a deviation line without public notice, the answer is, That before any public notices are given, the statute requires that the Commissioners shall have fixed upon the line. Therefore there is no inconsistency, and there is no incapacity on the part of the Commissioners, to enter into an agreement as to the line which they propose to take.

Being of opinion that the Commissioners fixed themselves by the arrangement with Mr Smeaton, that this should be the line which was to be executed, I think they cannot avoid putting their hands to the deed, which is to be the formal fulfilment of that undertaking on their part. But then, what is to be the effect of that? I think it cannot have the effect that the appellant claims in his summons. I think that is out of the question. He maintains in the conclusions of his summons that they are to do everything that can be done for the execution of this line of sewer; which the respondents say would imply, that if they cannot get it sanctioned otherwise, they must go to Parliament, and get the sanction of Parliament to taking this line. Those are extravagant views, which I do not think the appellant is entitled to insist upon, for I think it may turn out that the Commissioners are not bound to do so. Then the appellant concludes that they shall not make the sewer in any other line than that which he has chosen. These conclusions, I think, are quite out of the question. I think the course to be taken ought to be this, and that the Commissioners will be doing their duty by following this course, namely, to give the statutory notices for the line which they have agreed to adopt, so as to give parties an opportunity of objecting; and I am by no means prepared to say, that if upon those objections the Commissioners are satisfied by the parties objecting, that the line is either impracticable or wholly inexpedient, they would not then be entitled to pronounce judgment against it upon that ground. They are in no different position in this case from what they would have been in if they had originally prescribed this line, and given notices for it. All that they do is subject to the qualifications and conditions of the Act of Parliament. They must give the required notices—they must allow parties to object—the surveyor, who is the statutory officer, is to be called on to give his certificate, and whatever judgment may be pronounced by the Commissioners on hearing the whole matter, it will be competent to the parties interested to make it the subject of an appeal to the Sheriff. I doubt very much whether the Court of Session could deal with some of the matters indicated in the opinions of the Judges, which seem to be raised by the summons, namely, as to the merits of this particular line of sewer. I doubt whether that is a matter for the consideration of the Court of Session. I think the true question we have to deal with, and which the Lord Ordinary dealt with, is whether or not there is an executory agreement. It would not be enough to abide by the interlocutor of the Lord Ordinary, because that finds only in terms of a declarator—there are no operative words in it—nothing out of which operative words can be extracted—and therefore I think the best course is that which has been suggested by my noble and learned friend on the Woolsack, that we should reverse the judgment of the Court of Session, and send the case back to the Court below, expressing the opinion we entertain as to the proper course to be followed. I am not without hopes that when the parties come to look at their true position, they will find it more expedient for both of them to go to their work more smoothly than they seem disposed to do at present.

Lord Chancellor—The question I have to put to your Lordships is, that the interlocutor of the Court of Session of the 10th of December 1868, complained of, be reversed; and that the House declares that the interlocutor of the Lord Ordinary of the 27th of October 1868 ought to have been adhered to; and remit the case to the Court of Session, in order that they may deal with the same according to this declaration; and that there be no costs of the appeal.

Agents for Appellants—Maclachlan & Rodger, W.S.

Agents for Respondents—Maitland & Lyon, W.S.

Monday, March 27.

MACLEAN & HOPE *v.* FLEMING, *et e contra.*

(*Ante*, vol. v. p. 579.)

Ship — Charter-Party — Short Shipment — Dead Freight. Circumstances in which *held* (affirming judgment of Second Division of the Court of Session) that pursuers suing under a charter-party had failed to prove that a smaller quantity of bones had been delivered to them than had been actually shipped, and owner of ship held entitled to dead freight under the charter-party, in respect a complete cargo had not been shipped.

These are conjoined actions, in which the pursuers of the one, Maclean & Hope, sue the defender Fleming, owner of the ship "Persian," for the value of a quantity of bones, and in the other Fleming sues for balance of freight on bones actually carried, and for freight on 210 tons of bones which would have been further yielded by the vessel if filled with a complete cargo in terms of the charter-party. The circumstances under which the case arose are stated at length in the opinion of the Lord Chancellor.

The Lord Advocate appeared for the appellants, Maclean & Hope, and Mr Jessel Q.C. and Sir George Honeyman Q.C., for the respondent.

At advising—

Lord Chancellor—My Lords, in this case there were two actions, an action and a cross action, in relation to a controversy between the parties, Messrs M'Lean & Hope, the appellants, and Mr Fleming, who is a shipowner. It appears that Messrs M'Lean & Hope, by means of their agents, under a certain arrangement, and a certain charter party, to which I shall more particularly refer, caused a cargo of bones to be brought from the Levant, from Con-

stantinople and other ports in the neighbourhood, to Aberdeen. The first action was brought by the appellants in respect of the non-delivery of a certain quantity, which it was alleged had existed as the original cargo and ought to have been delivered to Messrs M'Lean & Hope, and the cross action was brought by Mr Fleming, the charterer, on the ground that the vessel ought to have been laden pursuant to the provisions of the charter party to its full extent, and that there was a particular provision in the charter party that he was to have a lien on the cargo for, amongst other things, "dead freight," whatever that may mean, as well as demurrage, and he claimed a lien for the deficiency in the cargo according to a rate analogous to the rate payable in respect of freight for the actual cargo placed on board. The result of the action was this,—that the respondent was assoilzied in the action against him for the non-delivery of the alleged quantity, and the appellants were found to be liable to him in respect of the lien which he claimed for dead freight, in a certain amount of money which is not material, but which was founded upon the ratio of the rate payable in respect of the goods actually placed on board.

Now the circumstances of the case were these—Messrs M'Lean & Hope, being desirous of having some bones brought over for the purpose of being manufactured into manure, employed certain agents in the east to procure a cargo of bones, and amongst other things those agents secured a vessel which had been chartered originally in the manner described by the charter party. Messrs Whitaker & Co., merchants at the Dardanelles, were employed by M'Lean & Hope to purchase the cargo of bones, and they found when they received those instructions that there was a vessel which could be employed for that purpose, which had been previously chartered by a person of the name of Alexander Curmusi, in the first instance under a charter dated the 17th of November 1864, and they provided for the sending of those bones through the medium of the charter party which they had transferred to them by Mr Curmusi, and which they afterwards transferred to Messrs M'Lean & Hope, the present appellants.

The charter party was this—It was agreed between Donaldson, the captain of the ship "Persian," a vessel of the measurement of 598 tons or thereabouts, and Curmusi, the freighter, that the ship being fitted for her voyage should with all convenient speed, after her then cargo "be made ready to sail and proceed to Ounich Kerrasounda in a third place of Marmora, and to fill up in a fourth place below, namely 'Enos'" and several other places here named; ultimately Enos was the place determined upon. Then the captain was "to sign bills of lading at each port at the option of the freighter, not exceeding what she can reasonably stow and carry, over and above her tackle, apparel, provision, and furniture." And then he was to deliver the goods at a safe port of the United Kingdom on being paid freight as follows, namely "at the rate of 35s. sterling English per ton of bones of 20 cwt., so delivered in full." The captain was "to have the permission to break the bones for the sake of stowage, but is bound to receive from 20 to 25 tons a day when alongside." Then there was this provision as to freight, "the freight to be paid on unloading and right delivery of the cargo, half in cash and the remainder by approved bills." Then there were directions what the bills should be; and then the ship was to be in every respect ready to receive her cargo at a certain time; and then there were ten day's demurrage. Then it was provided "cash for ship's ordinary disbursements to be advanced at port of loading by the charterer's agents, free of interest and commission,"—and several other provisions of that kind. Then the penalty for non-performance of this agreement is to be the amount of freight, and then the charterers bind themselves to "ship at Ounich and Kerrasounda from 170 to 200 tons of said bones. Out of said £300 advanced, £200 payable here before sailing and remainder at the ship's return to this place." Then "it is understood that the ship is to be loaded in four of the above places." There was also a provision as to the lien of the captain or owner, which I omitted to read—"the captain or owner to have an absolute lien on the cargo for all freight, dead freight, and demurrage."

In that state of things the charter was thus dealt with,—the charter was made over first to Messrs Whitaker & Co., who paid a certain sum of money to Mr Alexander Curmusi in respect of this charter party, and afterwards it was made over by them to Messrs M'Lean & Hope, who paid to them all that they had paid to Curmusi for the transfer of the charter party. And it appears to me from the evidence that they became to all intents and purposes the charterers of this vessel, by the transmission to them through Messrs Whitaker & Co., of the charter party originally made between Curmusi and Donaldson, the captain of the vessel, the agent of Mr Fleming, the present respondent.

That being so, bills of lading were at different ports signed by the captain, and all those bills of lading were expressed in language which the captain says was not familiar to him, with which he professes himself to have been unacquainted. Kintals, and other designations were used, with which he says he had not any personal acquaintance, but he signed the bills of lading without any protest or remonstrance till he came to the last port. At the last port he said he perceived that he had not got his full cargo on board. He found on examining the water-mark of the vessel, the draught of water she was drawing, that she could not have loaded more than 400 tons, which on the ultimate arrival of the vessel at Aberdeen, was found to be pretty nearly the actual amount the vessel had brought. He said that, finding that to be the case, he left at the port a protest in the French language, which is set out here, with reference to his not having a full lading.

The bills of lading signed by the captain were from time to time sent over to Messrs M'Lean & Hope; and they put their case in this way: they say, We have here bills of lading signed by the captain upon which we had a right to rely,—we made payments in respect of the cargo. Some attempt was made to say (I do not think it appeared clearly to be so) that the bills of lading misled them in this respect, but in fact many payments were made before the bills of lading were actually placed in their hands. Then they say further that the signature of the captain is conclusive with reference to the amount to be stowed in the vessel. And then they say, further, that the Court below ought to have taken it as being established, and they ask us to take it as being established, that there was originally on board this vessel a full cargo of bones, according to the terms of the charter-party, and that the owner of the vessel is now liable for the full cargo not having been delivered; for when the vessel arrived at

Aberdeen it was found that the cargo was short of the amount required to the extent of 210 tons of bones, and that is the occasion of the first action. Here, they say, is your acknowledgment by which you are bound, and we are entitled to recover to the full extent of this acknowledgment.

On the other hand, the owner of the vessel, Mr Fleming, says: That amount of cargo was never placed on board, and that amount of cargo never having been placed on board, I have a ground of claim in respect of demurrage, which is not now in question in this suit. He further says: I am entitled also to a lien for dead freight, and I calculate it in this way,—you agreed to pay 35s. per ton for the bones, and you are bound to pay at the same rate for the additional quantity of bones that the vessel would have carried if you had provided her with them; and I have a lien upon the cargo for that. And that is what the Courts in Scotland have awarded to Mr Fleming, the owner.

Now, in the first place, as regards the matter of fact, I think it is proved to demonstration that the cargo never was on board. The signature of the captain, however it might affect him under the statute, which renders the signature of the captain to a bill of lading conclusive against him, has not that effect as against the owner of the vessel. It is evidence, no doubt, and evidence, in one respect, of a very important character; because, unless the captain was strongly supported by extraneous facts, it would throw great discredit upon his own testimony—if we had to rely upon his testimony alone—as to whether or not the bones were put on board. It was undoubtedly his duty, in signing the bills of lading, if he did not know what the terms in the document which he signed meant, to have informed himself, as he could have done, at the place where the cargo was placed on board, and certainly not to have signed documents with the meaning of which he was unacquainted. But as regards the actual fact, we have no evidence given of there ever having been that actual quantity of bones put on board. Some attempt was made to produce evidence upon that subject, but I do not go into that, for I agree entirely with the Court in Scotland that there is nothing which can lead to any sound conclusion that that quantity of bones was ever put on board. We ought to have had that primary fact from the agents of Messrs Whitaker, or some person employed by them. They should have given in very distinct evidence of what the quantity was that was put on board; but some of those who profess to give evidence say that they were not present during the whole time of loading the ship, and some of them profess distinctly to have even seen on board the quantity specified in the different bills of lading to have been put on board at the various places mentioned. On the contrary, we have it clearly proved by the protest made at the last port by the captain, that at that time the full quantity was not placed on board as it ought to have been; and the captain is supported by two other officers of the ship, who state the same thing; and not a single man is produced from on board the ship, or from any other quarter, who professes to give the slightest account of this very disagreeable discrepancy (as it is justly called) between the different statements as to the loading of the ship, or in any way to account for it. It is quite impossible, if the bones were once on board, being articles of considerable bulk and requiring some trouble in stowage, that they could have been removed without anybody knowing it, or that, if they could have been so moved by any conspiracy between the captain and all on board, the secret could have been preserved, and that no trace should remain of their having been placed in the vessel. I think therefore it is beyond dispute, as a matter of fact, that the bones never were on board.

Then comes the question of law, which is this: It is said that this lien for "dead freight," whatever it may mean, cannot be rendered effective on several grounds. First, it was said that the term "dead freight" itself is a term which, if at all understood, is not such a term as has ever had effect given to it by way of lien upon the cargo in any authorities that have been decided, and that, on the contrary, it has been pointed out in one case in the Privy Council, the case of *Kerchner* v. *Venus*, that any lien of this description for unliquidated damage must be considered to be a lien which it is not at all probable that the parties concerned would enter into; because, as was pointed out in that case, undoubtedly the inconvenience of delaying the delivery of the cargo, in respect of a claim of unliquidated damages, would be extremely great as affecting the course of trade. That was perfectly true, but that case was quite different from the one now before us. There is no indication of there having been in that case any such expressed contract as there is here. If the contract has been expressly entered into, it is no answer to say that there is inconvenience in giving effect to the lien. And on the face of this charter-party there is an express engagement that there shall be a lien upon the cargo for "dead freight."

Now, as regards "dead freight" itself, it has been observed by several authorities that the term is not a very accurate term. It is probably the poverty of our language that has prevented a more precise and definite expression being used, but it is intelligible enough. An engagement is made that a full cargo shall be provided. If the engagement is to provide a full cargo, and the ship is obliged to sail with a partial cargo, of course that is a great loss of freight to the owner. Now dead freight has been defined by Lord Ellenborough, in the case of *Phillips* v. *Rodie*, as being "unliquidated compensation for loss of freight by way of remuneration in respect of that loss." That is an explicit and intelligible proposition enough. There is clearly a loss wherever a contract has been made for the supply of a full cargo and a full cargo is not supplied; and there is a claim in respect of the freight which might have been earned if the full cargo had been supplied. The question of unliquidated damages may therefore be a question of proof between the parties as to whether there is any engagement for a lien or not. If there be there is no difficulty in ascertaining what the engagement was in this particular case. The cargo was of a uniform description. It does not appear to me that there is any difficulty, or anything to induce us to suppose that there was any misunderstanding between the parties as to what the real contract was. So much per ton has been agreed to be paid for a full cargo of a uniform description. A full supply of a uniform description of goods has been agreed to be supplied, and there is no difficulty in ascertaining either the quantity of the cargo agreed for, or the amount agreed to be paid per ton for the cargo. The payment is to be at the same rate in respect

of the goods not supplied as for the goods supplied. Of course there may always be some difficulty in liquidating the damages, because it may be that the captain may have had it in his power to fill up the cargo; he may have had an offer from other parties to fill up the deficiency; he may have had an offer from the very parties who entered into the agreement to secure him in respect of dead freight. All that will have to be considered if the case occurs. There is nothing to show that the captain was guilty of any negligence in not filling up the freight. As the contracting parties neglected to fulfil their engagement, there does not appear to have been any difficulty when the ship arrived in ascertaining at once what the amount of dead freight was, and the lien would consequently have its full effect.

Another case which was cited was *Pearson* v. *Goschen*, on which some observations were made by the learned judges who heard the case as to the effect of the lien for dead freight being a lien in the form of general words in the charter party. The reminder was made upon that particular charter party that they were printed formal words which had been introduced into the print as general ordinary words without sufficient consideration as to what they would be applicable to, and in that particular case it was held "dead freight" was to be struck out as having been inserted heedlessly, as meaning nothing, but as being only general words having no applicability to the actual contract entered into between the parties, or to the words in the charter party. That case, we understand, is under appeal, and is likely to be brought before this House, and therefore it is better to say no more upon that subject. It is enough to say that the circumstances existing in that case are extremely different from the circumstances existing here, where we find a clear case of an omission to supply a full cargo as contracted for, and a clear case therefore for applying the definition given by Lord Ellenborough as to what "dead freight" is—a definition exactly agreeing with that which is given by Mr Bell in his Commentaries.

Then the remaining question is, how far the petitioners Messrs M'Lean & Hope are bound by this charter party. They say we are not tied to the terms of the charter party in respect of dead freight. We entered into no contract in respect of dead freight, and, even apart from that, we have a right conferred upon us by the bills of lading which specify the quantity of bones to be delivered on the arrival of the ship. Now, I do not read the letters relating to this subject because they have been so recently before us that they must be in the memory of the House. The letters which passed between Whitaker & Company with reference to the chartering of the vessel, and with reference to the transfer of the charter party from Curmusi to Whitaker & Company, and the handing over the charter party by Whitaker & Company to M'Lean & Company, as their employers, establish clearly that whatever lien was conferred by the charter party must attach to those who availed themselves of it. Now, the charterers of this ship availed themselves of the provisions of the charter party of this ship for the purpose of bringing that cargo from the ports where it was shipped to Aberdeen. I apprehend therefore if you once get at the principle that a lien for dead freight may exist by a specific contract, there never could be a case in which the meaning of those words could be more easily ascertained than in the present instance, and never a case in which it could be clearer that the parties who accepted the services of the ship were bound to submit to the conditions of the charter party.

I am therefore of opinion that the findings which have been come to in both actions—that which assoilzied the defender in the one case, and that which gave him the remedy which he sought in the other—are correct conclusions, which should be affirmed in all respects, and that the appeal should be dismissed, with costs.

Lord Chelmsford—My Lords, the charter party on which the question of this appeal arises is dated at Constantinople, 17th November 1864, and is entered into between Samuel Donaldson, the master of the respondent's vessel, called the "Persian," of the measurement of 598 tons, and Alexander Curmusi, as the freighter, and states that it had been agreed that the vessel should proceed to Ounich Kerrasounda in a third place of Marmora, and to fill up in a fourth there—viz., Enos and other places mentioned, "a full and complete cargo of cattle bones in bulk," and deliver the same on being paid freight at the rate of 35s. sterling English per ton of bones of 20 cwt. delivered in full; and the charter contains the following stipulation, "the captain or owner to have an absolute lien on the cargo for all freight, dead freight, and demurrage."

The ship "Persian" proceeded to Ounich and Kerrasounda and shipped a quantity of bones, for which the captain afterwards signed a bill of lading. Further quantities of bones were afterwards shipped at the Golden Horn, at Rodosto, and at Enos, for which bills of lading were respectively signed by the captain. The total quantity of bones stated in the bills of lading to have been shipped amounted to 701 tons and a fraction. The actual quantity in the ship on her arrival at Aberdeen was 386 tons, which was 210 short of a full and complete cargo. When the ship arrived at Aberdeen the appellants, the owners of the bones, demanded the delivery to them of the quantity of bones mentioned in the bills of lading, of which they were the holders. In reply to this demand the master, claiming a lien on the cargo, offered to deliver the actual cargo on board on the appellants satisfying the claim for freight, dead freight, and demurrage.

After some discussion between the parties upon the subject of their respective claims, cross actions were brought, that of the appellants claiming damages to the amount of the sums paid by the appellants for the bones, on account of the alleged wrongful failure and refusal of the respondents to deliver to them the entire quantity of 701 tons, and the action of the respondents being for the freight upon the quantity of bones brought to Aberdeen, and for dead freight upon the quantity of the cargo deficient, and demurrage.

The Lord Ordinary conjoined the two actions, and after hearing evidence on both sides pronounced an interlocutor in which he found that the quantity of bones of which delivery was tendered was 386 tons 18 cwt.; that according to the capacity of the ship she could have received 210 tons more; that the appellants had not proved that any further quantity of bones than the 386 tons 18 cwt. was shipped or delivered to be carried, and he assoilzied the respondents from the conclusions in the action. In the counter action the Lord Ordinary found that the appellants were liable to the respondents

in the sum of £377, 1s. 6d. for freight on the bones actually carried by the ship, after deducting £300 paid to account, and in the name of dead freight in the sum of £367, 10s. as the amount of freight on 210 tons of bones which would have been further yielded by the ship if filled with a complete cargo. The case was carried by a reclaiming note to the Second Division of the Court of Session, and that Court having adhered to the interlocutor the present appeal was brought.

The first question to be considered is, whether there was evidence that the cargo shipped was to the extent only of the quantity found to be in the ship on her arrival at Aberdeen. On this point your Lordships entertained so clear an opinion at the close of the argument for the appellants that you did not require any answer on the part of the respondent. It was contended, and properly contended, by the learned counsel for the appellants, that the bills of lading signed by the master were *prima facie* evidence that the quantities of bones mentioned in them had been received on board the vessel. The master is the agent of the shipowner in every contract made in the usual course of the employment of the ship; and though he has no authority to sign bills of lading for a greater quantity of goods than is actually put on board, yet, as it is not to be presumed that he has exceeded his duty, his signature to the bills of lading is sufficient evidence of the truth of their contents to throw upon the shipowner the onus of falsifying them and proving that he received a less quantity of goods to carry than is thus acknowledged by his agent.

I am not disposed to lay much stress on the words at the foot of the bills of lading "weight and quality and contents unknown," nor upon the evidence of the captain that he had no knowledge what was the weight of a kintal, because the bills of lading state that the cargo was cattle bones, which would inform the captain of the contents and quality, and if he was ignorant of what a kintal meant he should not have signed without asking for information. If the action had been against the captain himself, under 18 and 19 Vict., c. 111, his signature to the bills of lading would have been conclusive evidence of the quantity of the bones represented to have been shipped, and his ignorance, not induced by any fraud of the shipper, would have furnished no excuse. But it being admitted that it lay upon the shipowner to rebut the *prima facie* evidence arising from the bills of lading, he appears to me to have satisfactorily shown that the quantities stated to have been shipped cannot be correct. How the large deficiency of 210 tons arose must be matter of speculation. But if the evidence of the captain is to be believed (and there seems no reason to doubt it) it is impossible that this additional quantity of bones could at any time have been on board the vessel. In the course of his evidence the captain said, "I brought to Aberdeen the whole of the cargo that was shipped. No part of it was put away either by myself or any one else. No part of the cargo was interfered with from the time it was put on board till it was landed at Aberdeen," and he stated that his notion of the weight of the cargo, which he judged of from the ship's draught of water, was that it would be somewhere about 400 tons—a conjecture which proved to be not very wide of the mark. It is no slight confirmation of the evidence that there was not a full and complete cargo when the ship sailed from Enos, the last place of loading; that the quantity of bones delivered on the 3d April 1865 having exhausted all that were there for delivery, the captain on the following day—the 4th April—went before the Vice-Consul at Enos, and in a formal document stated that he had informed the agent of Whitaker & Co., in the presence of the Vice-Consul (who must have known whether the statement was correct) that not having received a full cargo for his vessel he reserved the right to protest against any one liable for the failure; and by the same document he formerly protested against the freighter. The appellants were not able to meet this evidence by proof that the quantities mentioned in the bill of lading, or any more than the 386 tons, were actually shipped. And this question was therefore properly determined by the Lord Ordinary and by the Court of the Second Division in favour of the respondent.

The questions then remain, first, Whether the 210 tons short of a complete cargo can be regarded as dead freight to which the lien in the charter-party applies. And, secondly, supposing a lien to have existed, whether it was available against the appellants.

The Lord Advocate argued that dead freight was inapplicable to a case where the neglect to supply a full cargo under a charter-party results in a claim to unliquidated damages, and that by law dead weight can exist only where there is an express stipulation for a certain amount to be payable *eo nomine*. Upon the question of enforcing the lien against the appellants in respect of dead freight, he contended that they were indorsees for value of the bills of lading, which bound them merely to pay freight for the goods as per charter-party, and imposed upon them no liability for dead freight even if any were payable under the charter-party.

It must be admitted that the term dead freight is an inaccurate expression of the thing signified by it. "It is," as Lord Ellenborough said in *Phillips* v. *Rodie*, 15 East. 544, "not freight, but an unliquidated compensation for the loss of freight recoverable in the absence and place of freight."

The learned counsel for the appellants, in support of their argument that no dead freight properly so called was agreed to be paid under the charter party in question, cited the cases of *Kerchner* v. *Venus*, 12 Moore (P. C.), 361; and *Pearson* v. *Goschen and Others*, 17 C. B. (N. S.) 352.

The case of *Pearson* v. *Goschen and Others* was referred to for some dicta of the judges not defining what dead freight was, but stating what it was not. In the case of *Kerchner* v. *Venus* there was no attempt to define and no necessity for a definition of the term dead freight. The Judicial Committee merely decided that a sum of money payable before the arrival of the ship at her port of discharge, and payable by the shippers of the goods at the port of shipment, did not acquire the legal character of freight because it was described under that name in a bill of lading; that it was in effect money to be paid for taking the goods and undertaking to carry, and not for carrying them.

With respect to the observations of the learned Judges upon the subject of dead freight in the case of *Pearson* v. *Goshen*, your Lordships were told that there is a case standing for judgment in the Court of Exchequer Chamber in which their opinions may have to be considered. I shall therefore abstain from any remarks upon them.

It was argued for the appellants that, even if a claim for damages for breach of a covenant in a charter-party to furnish a full lading to a ship may be correctly called dead freight, yet that no lien can exist where the damages are unliquidated.

But I understand the case of *Phillips* v. *Rodie* not to have unliquidated. There might have been a lien upon the cargo for them if the contract of the parties had stipulated for it, which it had not. And in the case of *Besley* v. *Gladstone*, 3 M. and S. 216, cited by the counsel for the appellants, there was no actual decision upon the question of lien for dead freight, but it was held that a clause mutually binding the shipowner and the freighter and the cargo in a penalty could not be considered as intended to give the shipowner a lien for the non-performance of the covenant in the charter-party to load a full cargo. It may be observed that even where there is no express stipulation to pay full freight, as if the goods had been actually loaded on board, and that the master shall have the same lien upon the goods actually on board as if the ship had been fully laden, the case may be one of unliquidated damages, for the master may have filled the vacant space with the goods of other persons, and the freighter would be entitled to have an allowance for the profit thus made.

In construing the charter-party it must be assumed that the parties understood the meaning of the terms employed, and that, amongst others, the term dead freight meant (according to Lord Ellenborough's definition) "an unliquidated compensation for the loss of freight." The freighter, with this understanding, agrees to load on board the respondent's ship a full and complete cargo of cattle bones, and to pay a freight at the rate of 35s. sterling English per ton. He knows that if he fails to perform his covenant to load a full and complete cargo he will be liable to the ship owner in damages under the name of dead freight, and he agrees to give the captain or shipowner an absolute lien on the cargo for all freight, dead freight and demurrage. Why should not his agreement have its intended effect?

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. But whether the amount of his damages is to be regarded as ascertained or not, I am of opinion that the charter-party gives him a lien for his claim on account of the deficient cargo. Was this then available against the appellants? I quite agree that if they were merely holders of the bills of lading for valuable consideration, the shipowner would not have been entitled to a lien upon the cargo on board the ship for anything more than the freight upon the quantity actually shipped and brought home, the appellants being only liable to pay freight for the goods as per charter-party. But it appears to me that there is evidence to show that the charter-party was entered into by their agents on their behalf. The charty-party is dated the 17th November 1864. On the 24th September 1864 the appellants sent to Whitaker & Co. a purchase note of 300 tons of cattle bones, in which it is provided that shipment is to take place by vessel, to be taken up by M'Lean & Hope, which is to be loaded with Newcastle steam coal, and despatched to Gullipoli or the Dardenelles. The respondent's ship the "Persian" having been despatched by the appellants for the purpose of receiving the bones which they had purchased, the charter-party was entered into for the carriage of these bones by Mr Curmusi as the freighter. There can be no doubt that Curmusi was acting for Whitaker & Co. Curmusi gave the captain of the "Persian" £40, and also advanced him £200 against his freight. On the 22d November 1864 Curmusi transferred his right and interest in the charter-party to Whitaker & Co., and received from them a sum of £50; and on the following day—the 23d November—Whitaker & Co. wrote to the appellants advising them of the charter or re-charter of the "Persian," and sent them the charter-party, debiting them with the £50 paid to Curmusi, the £40 to the captain, and the £200 advanced upon freights, and charging them with 5 per cent. commission, which they state includes brokerage. This evidence appears to me to prove that the appellants were really the charterers of the respondent's ship through their agents Whitaker & Co.; and therefore, although, as indorsees of the bills of lading merely, they would not be bound by the stipulation as to lien in the charter-party, yet as the real charterers it is binding upon them.

I am of opinion that the interlocutors appealed from must be affirmed.

Lord Westbury—My Lords, it is perhaps quite unnecessary that I should add anything to the elaborate opinions which have been given by my noble and learned friends who have preceded me; and I will only trespass upon your Lordships with a very few words, for the purpose of summing up the points which we think are fit to be decided.

My Lords, two questions were argued at the bar. First—What is the meaning of the term "dead freight" as contained in the charter-party, in respect of the remedy which it gives the shipowner?—Does it entitle the shipowner to say that the deficient quantity shall be paid for at the rate assigned per ton in the charter-party? My Lords, I think that that would be a very unreasonable interpretation; for undoubtedly, if the full freight had been furnished to the captain, the expenses of the loading, and the other expenses attendant upon the 210 tons which were wanting, would have occasioned some expenditure to the shipowner. I cannot, therefore, agree that the stipulation for payment of the dead freight, without more, entitles the shipowner to have the deficient quantity assessed at the price per ton stipulated to be paid for the cargo that is put on board. The result, therefore, is that, in a charter-party giving no specific sum as the amount to be recovered by way of compensation for the dead freight, the shipowner becomes entitled only to a reasonable sum, which is another word for unliquidated damages.

Supposing that the claim for "dead freight," without any specific sum assigned, results only in a claim for unliquidated damages, the question arises, Whether considerations of convenience would prevent the shipowner from having a lien upon the cargo on board in respect of unliquidated damages, seeing that he would become entitled to retain the cargo during the time occupied by the ascertainment of the amount of unliquidated damages. There may be some inconvenience in that, but that ought to have been considered by the parties when they entered into that express stipulation. There being a clear stipulation that the

lien shall enure for dead freight, which will make it enure for the sum to be assigned as the proper compensation for the dead freight, I think it is impossible to set up any consideration of inconvenience in answer to the clear terms of the contract which has been entered into.

There remains but one further question to be considered, and that is, whether the shipowner has a right in respect of dead freight, and the damage pertaining to it, as an endorsee of the bill of lading for valuable consideration? Now, my Lords that has been examined specially by my noble and learned friend who has just sat down; and I agree with him that, substantially, the present appellants are not only endorsees of the bill of lading, but that in reality they are bound as the persons who originally authorised the chartering of the ship, and who remained entitled to the benefit of that charter-party, and were therefore subject to the obligations contained in it. The result is, that their title to the bill of lading is controlled by their liability under the charter-party.

I am of opinion, therefore, that there is no foundation for the appeal in any particular, and that it ought to be dismissed, with costs.

LORD COLONSAY—My Lords, there are here two actions, one at the instance of the appellants against the respondent, and another at the instance of the respondent against the appellants. Both of them arise out of the charter-party which has been referred to; and that charter-party may be generally stated to be a charter-party for taking on board at certain parts in the east quantities of bones amounting to a full cargo, to be delivered at some port in the United Kingdom. The bones were taken on board, and the vessel did arrive at Aberdeen, but while it appears from the charter-party that the vessel was a vessel of 596 tons measurement, it appears that the quantity of bones that she brought to Aberdeen amounted only to 386 tons. The vessel was mentioned specially in the charter-party as 596 tons register; and it appeared from the evidence that she was capable of carrying a good deal more. It appeared that she had not on board goods to the amount of a full cargo, although it appeared that when the bones were put on board in the east, bills of lading had been signed, indicating that she had shipped 701 tons. A very strange state of circumstances arose. On the one hand, the appellants declined to pay the balance of the freight of 386 tons, in respect that there was a disappearance of part of the quantity of bones which the bills of lading bore to have been shipped, and they demanded the delivery of the whole quantity. On the other hand, the shipmaster refused to deliver up any of the bones until he obtained payment of the balance of freight due upon the 386 tons, and also till he obtained what he described as "dead freight," which he said should amount to at least 210 tons, being the difference between his registered measurement of the vessel and the amount of the cargo on board, that being the loss to the owner of the vessel in respect of the cargo not being filled up.

In this state of circumstances the consignee of the cargo brought an action to enforce his rights to obtain the full quantity of bones, or to obtain damages in respect of the deficiency. On the other hand, the owners of the vessel brought an action in the Court of Session, concluding to have it found that they were entitled to freight for the 386 tons, and that they were entitled also to dead freight at the same rate for 210 tons, and also concluding, I think, for demurrage. That was simply an action for constituting a right to the freight and to dead freight.

The question as to the right of the appellants to refuse payment of freight until they obtained the delivery of the full quantity of bones which they alleged to have been put on board the vessel turned upon the question of fact whether the bones had been actually shipped. The bills of lading bear that the quantity had been shipped and more; and they pleaded that upon the face of the bills of lading they were entitled to maintain that the full quantity had been shipped. Proof was allowed upon the subject. It was held that, although bills of lading might be *prima facie* evidence, they were not conclusive, and that inquiry ought to be made into the facts of the case. That inquiry was made, and the result of that is before your Lordships. Your Lordships were all of opinion, upon hearing the argument for the appellants, that the evidence established that the full quantity of bones had not been shipped. It is needless to go through the evidence, which appears to be very conclusive upon that point.

That brings us to the consideration of the claim of the shipowner. Now, in respect to the claim of the shipowner for the freight of the 386 tons, it was never disputed that he is entitled to that. But there still remains the important question, whether or not the shipowner was entitled to dead freight? Upon that point an argument was maintained in the Court below to the effect, in the first place, that no payment for dead freight was due, because the cargo had been fully put on board. But that is displaced by evidence of the fact.

Then it was maintained that the appellants were not liable for "dead freight," inasmuch as they were not the charterers of the vessel. The Court decided against them upon that point. When the case came up here, certain other pleas were pleaded. It was maintained here, as I understood the argument of the Lord Advocate, that under this charter party there could be no such thing as a claim for dead freight, that there was no stipulation for dead freight, and that therefore there could be no claim for dead freight; and further, that, even supposing there could be a claim for dead freight, there was no lien for dead freight.

On the plea maintained in the Court below, as to the appellants not being liable for dead freight in law on the charter party, I think the argument for the respondents here is conclusive. It is alleged on the record that Whitaker & Co. were the agents of the defendents; and it is sufficiently evident, I think, from the documents that they, as such agents, chartered for the appellants this vessel to carry the goods for M'Lean & Co.

But then two other questions remain, whether under this charter party there is any claim for dead freight at all, and if there be a claim for dead freight, whether there is a right of lien in the cargo. Now I cannot find the slightest difficulty in holding that under such a charter party as this there is a claim for dead freight. We were told that dead freight was not an accurate expression, and that it could not apply where there is merely an obligation to furnish a full cargo, and that in the case of a failure to furnish a full cargo the claim must be for damages and not for dead freight. Now the term "dead freight" is not a very accurate expression, but it is the only expression we have for the claim which arises in consequence of

the failure to furnish a full cargo. It is so described in the English authorities. It is so in Professor Bell's Commentaries. It is particularly so described in Professor Bell's Principles. It is a name which has obtained a place both in our mercantile authorities and in our law authorities. Now in this charter party there was an obligation to load a full cargo, and that obligation was not fulfilled, hence arises this claim which is made by the subsequent proofs in the case.

But the important question here is whether, in respect of this claim for dead freight, there is a right of lien? Now there may be a claim for dead freight where there is no right of lien. I think it is quite clear that where there is merely a failure to fulfil the obligation of furnishing a full cargo there is a claim for dead freight, but no right of lien. On the other hand, I think it is equally clear, both on principle and on authority, that if there be a stipulation in the charter-party that dead freight shall be exigible, and that there shall be a lien for it on the cargo, then there is a lien constituted by contract. Lien is not properly a contract in the strictest sense of the law, because lien is more properly a right which the law gives without contract, but it may be constituted by contract. I think in that respect we have plenty of authorities—we have the authority of Mr Bell; we have the authority of the Law Dictionary I have referred to,—whether it be a lien arising out of the usages of trade, or out of express stipulation, it is all the same. I adopt the words of Sir William Grant in the case of *Gladstone* v. *Burley*, where he says—"Taken either way, however, the question always is, whether there be a right to retain goods till a given demand is satisfied?" The right must arise from law or contract. The question is, whether any such right exists here? This charter party says in so many words that there shall be a lien for freight. That is the contract. We are told that these words are in print and not in manuscript. I do not think that affects the question. The words being in print were allowed to remain, and the stipulation is a very natural one. It is quite plain that the words are introduced there because it does happen not unfrequently that there is a stipulation for dead freight; and that being so, and the contract being so expressed, I can entertain no doubt that it is a valid contract. The circumstance that the precise amount is not specified does not affect the principle. In almost any case that might happen there might be some inquiry raised as to the amount of the dead freight. It may be alleged on the part of the charterers that other goods were received, or it may be alleged that certain things have to be deducted, and so forth, but still the contract is there. It may be inconvenient or not that it should receive effect, but still there it is, and it is binding on the parties. But in this case I see no difficulty at all. It was not pleaded in the Court below that the claim of 210 tons was an exorbitant claim, or a claim which ought to be subject to any deduction. It is clear upon the evidence that the vessel was capable of carrying a great deal more, and there is no allegation that from that anything ought to be deducted.

I therefore think, upon the whole aspect of the case, that the judgment of the Court below was right, and that this appeal should be dismissed.

Interlocutors affirmed, and appeal dismissed, with costs.

Agents for Appellants—Millar, Allardice, & Robson, W.S., and Simson & Wakeford, London.

Agents for Respondent—Henry & Shiress, W.S., and W. & H. P. Sharp, London.

Monday, March 20.

VICKERS *v.* HERTZ.

(*Vide ante*, vol. vi. p. 417, for parallel case of *Pochin & Co.* v. *Robinow and Marjoribanks.*)

Mandate—Delivery Order—Sale—Pledge—Fraud—Factors Act, 5 *and* 6 *Vict. c.* 39, §§ 1 and 4.

Where A had purchased iron from the Carron Company, and held the company's ordinary delivery note for it, and employed B Brothers to dispose of it for him, sending them delivery orders upon the company in the ordinary form as if to purchasers; and B Brothers, instead of selling it, fraudulently gave it in pledge to C for advances made on it to themselves, and transferred to him the delivery warrants, which transference he, in *bona fide* and ignorance of the fraud, intimated to the company, and had the iron placed to his credit in their books, and upon B Brothers' bankruptcy sold it to cover his advances to them:—*Held*, affirming the judgment of the Court of Session, that B Brothers had been placed by A in a position effectually to make over the right to the iron to C in security of his advances to them, and that he was entitled to sell it, and recover these advances—the ground of their Lordships' judgment being, that the Factors Act, 5 and 6 Vict. c. 39, applied to Scotland as well as England; that it applied to goods not specific as well as specific, if the goods were deliverable on demand; and conferred on B Brothers a power to deal as they had done with the documents of title.

This was an appeal from the judgment of the First Division of the Court of Session in a case parallel in all respects to, and decided at the same time with that of *Pochin & Co.* v. *Robinow and Marjoribanks* (*vide ante*, vol. vi, p. 417; and Macph. vii, p. 622). The present case, however, was the one taken to the House of Lords to try the question involved in both. The main circumstances of the case, which will be more fully gathered from the report in the case of *Pochin & Co.*, above referred to, were as follows:—In 1866 the pursuer Vickers had purchased from the Carron Company a quantity of pig-iron of the quality called No. 1 Carron pig-iron. For this iron Vickers held the usual delivery note of the Carron Company in his favour, but had received no actual delivery. Wishing to dispose of it he employed Messrs Campbell Brothers, iron brokers and merchants in Glasgow, to sell it for him at 67s. 6d. per ton. He accordingly sent to Campbell Brothers delivery orders upon the Carron Company, authorising delivery to them in the usual terms, as though they had been themselves the purchasers. On receiving these orders, Campbell Brothers took them to Hertz, a merchant in Glasgow, who advanced a sum of £2400 upon them on receiving the orders indorsed in his favour to the Carron Company. In this transaction Mr Hertz was acting quite in *bona fide*, and without any knowledge of the fraud which was being committed by Campbell Brothers. Hertz immediately intimated the delivery order to the Carron Company, who returned an acknowledg-