grounds pleaded, the petitioners have no title to insist in this application.

It is conceded in the argument for the petitioners, and whether conceded or not it is clear, that the petitioners are only entitled to present an application of this kind if they are able to show that the act complained of was *ultra vires* not only of the directors but of the company under their contract, and that a general meeting of the body of shareholders could not have sanctioned the act and made it binding on the company. If therefore the act was within the power of the directors or within the power of the company it follows that the petitioners have no title. Upon that question I must say that from the moment that the junior counsel for the petitioners in the opening of the case read the fifth article of this contract I was quite unable to resist the conclusion that the act of putting the Caledonian Bank upon the register of the City of Glasgow Bank was plainly within the powers of the directors. I listened to the ingenious arguments of both counsel for the petitioners with every care and attention, but my original impression not only was not removed but deepened as the argument proceeded.

Section fifth of the contract opens with the words that "the trade and business of the company shall consist of banking in all its branches." I am not prepared to say that these words, without the provisions that follow, would necessarily include a power to accept shares in another joint-stock bank, and to put the Caledonian Banking Company on the register of that other bank, with the effect of making the shareholders partners in that bank, and liable for all its obligations. The mere statement in the contract that the business of a company is to consist of banking in all its branches will not, in my opinion, give power of making the company a partner in another bank. "Banking in all its branches" means, I think, *prima facie*, such banking only as is carried on by and subject to the control of the directors of the company themselves, and does not include such business carried on by another company under other management and under a different contract, with the responsibilities of shareholders in that company. But it would be unreasonable to take these words in the contract by themselves. We must look to the whole of the fifth section, and as we proceed with its terms we find an explanation of these opening words, and that one of the favoured securities contemplated to be taken by the bank was shares in any banking company. If they happen to have a surplus of funds at any time, the shares of any banking company are regarded in so favourable a light in point of security that they may even be made a permanent investment, notwithstanding all the liabilities that attach to them. That being so, we obtain the clearest light as to what within the meaning of the contract is included under the term "banking in all its branches." If such stock may be taken even as a permanent investment, it is surely competent for the directors to take it as a security. And so, taking that view of the fifth article of the contract, I am of opinion that this act was within the powers of the company.

I further think it was within the powers of the directors, for the directors had the management of the company, and the fifth article was plainly the code of directions by which they were entitled to walk. It follows that the petitioners, who are complaining of an act which was within the powers of the directors, have no title to interfere, and accordingly I should be disposed to deal with this application by holding that there was no title, and therefore dismiss it. In doing so, no doubt it has been necessary to form and express an opinion on the merits, because the title is strictly dependent upon the merits. It is really a matter of no consequence whether the application be disposed of on the title or upon the merits, for in substance the ground of judgment is that the directors did not act *ultra vires* in accepting the transfer of City of Glasgow Bank stock and registering it, and the petitioners therefore must fail in this application.

The Court refused the petition, with expenses.

Counsel for Petitioners—M'Laren—Trayner—Millie. Agent—J. M. Anderson, S.S.C.

Counsel for Respondents—Kinnear—Balfour—Asher—Lorimer. Agents—Davidson & Syme, W.S.

Tuesday, July 15.

FIRST DIVISION.

[Lord Craighill, Ordinary.

CRAIG & ROSE *v.* DELARGY (M'DONNELL'S EXECUTOR) AND OTHERS.

Shipping Law—Bill of Lading—Endorsee—Act 18 *and* 19 *Vict. cap.* 111 (*Bills of Lading Act* 1856), *sec.* 1 — *Rights of Endorsee of Bill of Lading against Shipowner where Shipper in Fault.*

Held (Lord Shand reserving his opinion) that the onerous endorsee of a bill of lading, suing the shipowner for damages on account of an erroneous statement in the bill, is subject to all the exceptions pleadable against the shipper.

Shipping Law—Bill of Lading—"Not responsible for Leakage"—Burden of Proof.

Held (following *Moes, Moliere, & Tromp* v. *The Leith and Amsterdam Shipping Company*, July 5, 1867, 5 Macph. 988) that in a bill of lading the addition of the words "not responsible for leakage" laid upon the owners of the cargo the burden of proving that the leakage was due to the fault of the shipowner or those for whom he was responsible.

Process—Relevancy—Personal and Representative Liability of Captain for Mis-statements in a Bill of Lading.

Averments and pleas in which *held* (*diss.* Lord Shand) that the question of a ship-captain's personal liability for mis-statements in a bill of lading was not raised.

Opinion (*per* Lord Shand) that in the circumstances as proved the captain was not personally liable.

The defenders in this action were the owners and the master of the vessel "Ann" of Liverpool, and the pursuers Messrs Craig & Rose, colour merchants, Leith, were the onerous endorsees of bills of lading for two lots of olive oil, amounting to 42 and 46 tons respectively, which was shipped

on board the "Ann" at Bougie, in Algeria, in August 1877. The bill of lading for the larger quantity was in these terms—"Shipped in good order and well conditioned, by D. Bankhardt, in and upon the good ship or vessel called the 'Ann,' whereof is master for this present voyage Captain A. M'Gonnell, and now lying in the port of Bougie, and bound for Leith, 280 casks olive oil, weighing 142 tons, being marked and numbered as in the margin, and are to be delivered in like good order and condition at the aforesaid port of Leith (the act of God, the Queen's enemies, piracy, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatsoever nature and kind excepted) unto order or to assigns, he or they paying freight and charges for the said goods as per charter-party signed on the 17th July before J. Crispo, shipbroker in Algiers, with per cent. primage and average accustomed.—In witness whereof, the master or purser of said ship or vessel hath affirmed to four bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void. Dated in Bougie this 25th day of August 1877. Not responsible for weight, quality, leakage, or breakage. ALEXANDER M'GONNELL." The words "not responsible," &c., were added by the captain. The second bill of lading for the 89 casks of oil was in the same terms *mutatis mutandis*. The pursuers acquired these bills from Bankhardt, the shipper, through Robinow, Marjoribanks, & Co., merchants, Leith. On arrival at the port of delivery it was found that the casks in which the oil was contained were leaking to such an extent that over 15 tons of oil had been lost. In consequence this action was raised against James Delargy, executor of John M'Donnell, shipowner, and others, the registered owners of the vessel, and against Alexander M'Gonnell, the master of the vessel. It concluded for £800 in name of damages.

M'Gonnell raised a counter action against Craig & Rose for payment of £33, being a balance of freight which he stated to be due to him. The two actions were conjoined.

It was admitted that the leakage was due to the fault of the shipper, who had used casks of an insufficient quality, but the pursuers averred that this defect was known to the captain. They pleaded—"(1) Under the said bills of lading the defenders were bound to deliver the whole cargo shipped on board said vessel in good order (perils of the sea excepted), and having failed to do so, they are liable to the pursuers, the onerous holders of said bills of lading, for the consequences of such failure. (2) The pursuers having acquired right to said cargo and bills of lading, and paid the price of said cargo on the faith of the statements and representations contained in said bills of lading, the defenders are responsible for all loss and damage resulting to the pursuers through the falsity or inaccuracy of said statements or representations. (3) The shipmaster, for whom the defenders are responsible, having failed to discharge the ship's duty towards the cargo, the defenders are liable for the consequences of his neglect and failure in duty. (4) The pursuers having suffered loss and damage to the extent sued for through the misrepresentation or the fault of the defenders as above condescended on, are entitled to decree as concluded for. (5) The defences stated are untenable as an answer to the pursuers' claim, and ought to be repelled."

The defenders pleaded, *inter alia*—"(2) The said loss being due to the fault or fraud of the pursuers' author, the said Mr Bankhardt, the present action cannot be maintained. (3) The loss of the said oil not having been due to the negligence of the defender or their servants, the defenders are entitled to decree of absolvitor. (4) The loss of the said oil having been due to the insufficiency of the said casks, for which the defenders are not responsible, the defenders ought to be assoilzied, with expenses. (6) *Esto* that the statements in the bills of lading are false, the defenders, the owners, are not responsible therefor, in respect they gave no mandate to the master to sign bills of lading containing statements inconsistent with fact."

In consequence of some evidence that was given at the proof, the Lord Ordinary (CRAIGHILL) allowed the defenders to make this addition to their statement of facts—"The pursuers are suing the present action under an arrangement with Robinow, Marjoribanks, & Co., agents for the shipper of the oil, under which they are guaranteed by Robinow, Marjoribanks, & Co. against all loss through deficiency in the quantity of the oil delivered, or through the present action;" and also to add the following plea—"The loss of oil having been caused by the insufficiency of the casks, for which the shipper is responsible, the pursuers are not entitled to recover, as they are suing the present action in the interest of the shipper."

The Lord Ordinary pronounced this interlocutor:—"Finds as matters of fact—(1) That the casks containing the oil in question when offered for shipment, and when shipped, were in bad condition and insufficient for the voyage, and that the loss of oil from which the claim sued for arises was due entirely to this insufficiency; (2) That this insufficiency was known at the time to Bankhardt, the shipper, from whom the title of the pursuers as purchaser was obtained, for value, by indorsation of the bills of lading referred to on the record; and (3) That the master of the ship 'Ann,' the property of the defenders, which had been chartered by Bankhardt to carry the oil from Bougie, in Algeria, to this country, objected to the condition of the casks when brought forward; but on the representation and assurance of Bankhardt that the casks were sufficient for the carriage of the oil, and that whatever might happen the owners of the 'Ann' would be held free from the consequences, the oil was taken on board, and the said bills of lading were thereupon granted: Finds, as matter of law, the facts being as above set forth, that as in a question with Bankhardt, the shipper, or with any parties suing the defenders in his interest, the value of oil lost upon the voyage through insufficiency of the casks could not be recovered from the defenders: Finds, further, as matters of fact—(1) That the said oil was sold to the pursuers by Bankhardt, the shipper, through Robinow, Marjoribanks, & Co., merchants in Leith, his agents in this country; (2) That it was a condition of the contract between the parties that the pursuers should be protected against all loss from leakage of the oil upon the voyage exceeding one per cent., and the fulfilment of this condition by Bankhardt was guaranteed by his said agents; (3) That the pre-

sent action was raised, and has been prosecuted against the defenders, in the interest, for the protection, and at the risk of Bankhardt, the shipper, and his said agents, in furtherance of an arrangement to this effect concluded between them and the pursuers: Finds, further, as matters of law, that the facts being as these have now been found, a defence which would have been available against Bankhardt and his agents is also available against the pursuers; and that as a consequence the defence rested on the insufficiency of the casks when shipped, and on the representation and assurances given by Bankhardt to the master of the 'Ann,' by which the owners were to be held free from responsibility, has been competently urged against the pursuers, and must be sustained: Therefore assoilzies the defenders from the conclusions of the summons, and decerns: In the second place, in the action in which Craig & Rose are defenders, decerns against these defenders for £33, &c.

"*Note.*—The oil in question was shipped at Bougie, a port in Algeria, on board the 'Ann,' in August 1877, and the bills of lading sued on by the pursuers were granted by the master of that vessel, which belonged to the defenders, after it had been taken on board. These bills bore that the cargo was in good order and well conditioned when shipped; but the facts are—(1) That the casks containing the oil were not in good order and well conditioned; (2) That they were objected to by the master of the ship because of their insufficiency; and (3) That the bills of lading were granted only after he had been assured by the shipper that the casks were sufficient, and that his owners would in no event be held responsible on account of the terms in which the bills of lading were expressed. The first of these facts is not disputed upon either side. On the contrary, it is the basis both of the defence and of the action. The second and third, however, are contested by the pursuers; but both have been proved to the satisfaction of the Lord Ordinary. The evidence of the master is clear, and nobody was adduced to contradict in any way his testimony. On a perusal of the letters which are part of the documentary proof there is no difficulty in seeing why it was that the shipper did not appear as a witness.

"The oil thus shipped was purchased by the pursuers from Bankhardt through the intervention of Robinow, Marjoribanks, & Co., his agents in this country. The stipulated price was full value, and it was a condition of the contract that the shipper should make up to the purchasers whatever loss beyond one per cent. might be suffered through leakage from the casks in the course of the voyage; and for the fulfilment of this condition Robinow, Marjoribanks, & Company interposed for their constituent. Bills of lading having been transmitted in ordinary course to London, and the price, under arrangement between the pursuers and their bankers, having been settled by bankers' acceptance, these were delivered.

"The 'Ann' arrived in Leith in October last, and then the loss of oil, which is the subject-matter of suit, was discovered. As to the extent of the loss there is hardly any controversy, but there is a dispute as to the rate at which the value of the missing quantity should be estimated. This, however, like several other controversies in the case, has come to be immaterial, as judgment in favour of the defenders has been pronounced.

"The action is founded on bills of lading which are regarded by the pursuers as 'clean bills.' The grounds of defence as originally presented were—(1) That these bills were not in effect 'clean bills,' inasmuch as they contained a clause bearing that the ship should not be responsible for weight, quality, leakage, or breakage; and (2) That, however this might be, the pursuers must be held to represent the shipper to the extent at least of being affected by his conduct in shipping the oil in insufficient casks, and in obtaining from the master of the vessel the bills of lading sued on, upon representations and assurances that the casks were sufficient, and that no responsibility for loss of oil, should loss occur, would attach to the ship. On all these points parties joined issues, and a proof was allowed. In the course of the proof something transpired which induced the defenders to put forward an additional defence, rested on the statement then added to the record, that the pursuers are suing under an arrangement with Robinow, Marjoribanks, & Company, agents for the shipper of the oil, to protect the interests of these parties (agents and shipper) against the consequences of the shipment of the oil in insufficient casks. The record as thus enlarged having been re-closed, the proof was resumed, and a large body of evidence, both parole and documentary, touching this new question was adduced.

"The Lord Ordinary has come to the conclusion that upon this new question the defenders are entitled to prevail, and that as this success is enough for the decision of the action, the other points upon which parties are at issue are not points upon which it is necessary, or would be expedient, that judgment should be pronounced.

"That the present action was instituted for the protection as well as at the risk of the shipper and his agents has been, the Lord Ordinary thinks, fully established. He regrets, for the sake of the pursuers, as well as of Robinow, Marjoribanks, & Company, that he has been obliged to come to this conclusion. As regards Bankhardt, the shipper, all that need be said is, that he is entitled to no commiseration For the pursuers it may be urged that they at any rate acted disinterestedly, for they might by following the plain course have obtained almost instant redress for the loss which they had suffered. All that they had to do was to insist that the shipper or his agents should make good the deficiency from leakage beyond one per cent. which had occurred. Instead of so proceeding, they allowed themselves to be influenced by consideration for others; and they did this unfortunately in the knowledge that the result might be, and in fact could not but be, hardship, if not injustice, to the owners of the ship. For the course pursued by the agents of the shipper the mitigating circumstances of disinterestedness cannot be suggested as a palliation; and all the Lord Ordinary will say further regarding them is, that his astonishment is as great as his regret, that they knowing what they knew as to the shipment of the oil, and making the representations they made to the shipper, should even, for the sake of escape from the consequences of an obligation which could not otherwise be averted, have endeavoured, by means of the arrangement into which they entered

with the pursuers, to throw upon the owners of the ship a loss which, as they again and again told him, ought to be borne by their constituent.

"It was argued at the debate that if there was an arrangement that the action should be carried on for the benefit of others, that the pursuers Robinow, Marjoribanks, & Company, who had interposed for the shipper by giving a guarantee, were the only persons to be benefited. The Lord Ordinary is of opinion that the proof points and leads to a different result. He thinks that by the parole evidence, particularly by the evidence of the pursuers' managing man Macgregor, and by the correspondence, particularly the letters of Robinow, Marjoribanks, & Company, it is shown that the interests of the shipper were in view, and were to be protected. Whether the legal result would be different, even if the limitation suggested for the pursuers were to be conceded, appears to be doubtful; but it is unnecessary to make that a point of decision. There is, moreover, real evidence which satisfies the Lord Ordinary that his reading of the other parts of the proof is correct. The action covers the value of the oil which was lost through leakage in the course of the voyage; but that is not all which is sued for. There is a sum of over £40 incurred to coopers, porters, and others in Leith, when the cargo was in course of delivery, which is also included in the pursuers' claim. Not one farthing of that sum was paid by the pursuers. Nor was this disbursement covered by the guarantee of Robinow, Marjoribanks, & Company. They paid it; and as the pursuers could not but know they so paid it, as the agents of the shipper, this circumstance, even if more were required than what is afforded by the other parts of the proof, is, in the opinion of the Lord Ordinary, ample corroboration," &c.

The pursuers reclaimed, and argued—The Lord Ordinary had proceeded on evidence which had been incompetently admitted, and which, even if admitted, did not bear out the interlocutor. On the original grounds of action—(1) The bills of lading were clean bills. The addition by the captain did not in any way qualify the leading statement—"Shipped in good order, &c." The added words merely laid upon the owner of the goods instead of upon the shipowner the burden of proving that the master was in fault—*Moes, Moliere, & Tromp.* The bills remained clean bills, *i.e.*, expressions of the captain's belief that the cargo was shipped in good order. Now, in making that implied expression of his belief the captain was stating what was false; for the casks were not shipped in good order, and he did not believe that they were shipped in good order. In fact, he probably added the words with the intention of qualifying the leading statement. But his intention would not give to the words any other than their legal meaning, at least so as to affect onerous endorsees who knew nothing except what appeared on the bills. (2) The Bills of Lading Act 1856 gave an endorsee the right of action on the bill of lading; but he could before the Act have vindicated his right to the cargo on his title of endorsee alone, and if the Act, while permitting him to sue on the contract, subjected him to all the liabilities pleadable against the shipper, its value would be almost *nil.* The true interpretation was that he was subject only to such liabilities as were pleadable on the face of the bill.

Authorities—*Moes, Moliere, & Tromp* v. *The Leith and Amsterdam Shipping Company*, July 5, 1867, 5 Macph. 988; *Steel & Craig* v. *State Line Steamship Company*, March 16, 1877, 4 R. 657—July 20, 1877, 4 R. (H.L.) 103; *Shankland* v. *Athya*, May 28, 1865, 3 Macph. 810; *Bogle* v. *Dunmore*, Feb. 2, 1787, M. 14,216; 1 Bell's Com. 198 (M'L. 212-13); Bell's Prin. sec. 418.

Argued for the defenders—(1) The bills were not clean bills. The words added took them out of that category. The effect of these words was to put an endorsee upon his guard. A clean bill meant, among other qualities, a bill in which the captain and shipowner undertook the *onus* of proving that injuries to the goods did not happen through their own negligence. Now, at the least, the excepting words changed the *onus* on to the pursuers—*Moes, Moliere, &c.* (2) The shipowners were not answerable for a mistake as to quantity in a bill of lading, whatever might be the case as regards the master—*M'Lean & Hope* v. *Munck*—and therefore by analogy they were not responsible for a mistake as to the quality of the casks in this case. But it was more than doubtful on the evidence whether the master even had been guilty of negligence—Was a master bound to know the peculiar properties of every cargo he carried?—*Ohrloff* v. *Briscall.* (3) The Bills of Lading Act conferred upon endorsees a right of action upon the bill—before that Act he could merely vindicate the possession of the cargo with all its faults—but this right of action was conferred subject to all the exceptions pleadable against the shipper. That was the plain construction of the Act. Here obviously the shipper had no right of action for damage due to his own fault.

Authorities—*M'Lean & Hope* v. *Munck*, June 14, 1867, 5 M. 893; *M'Lean & Hope* v. *Fleming*, April 3, 1871, L.R., 2 Sc. App. 128, 9 M. (H.L.) 38; *Ohrloff* v. *Briscall*, June 20, 1866, L.R., 1 P.C. 231.

At advising—

Lord President—The pursuers Craig & Rose became purchasers in the year 1877 of a cargo of olive oil which was to be imported into this country from Algeria, and which was shipped by a person of the name of Duncan Bankhardt, a merchant in Algeria. The contract was entered into between Craig & Rose and Robinow, Marjoribanks, & Co. as agents of the foreign shipper, and the terms of the contract are contained in a letter of Robinow, Marjoribanks, & Co. of the 22d of June 1877, in which they "confirm having sold you," for account of Duncan Bankhardt, Algiers, "a cargo of about 120 tons Algerian olive oil, in its lampante brillante state, at £41, 10s. per ton, including cost and freight. July—August shipment. Out-turn of clear oil guaranteed above one per cent. deficiency. Payment by shippers three months draft on the National Bank of Scotland in London, from date, and against bill of lading." It may be right to mention that there is another letter of the same date from Robinow, Marjoribanks, & Co. to Craig & Rose, in which they undertake to guarantee to Craig & Rose the prompt settlement of any eventual deficiency over one per cent. on this shipment—an under-

taking which has some bearing upon the point decided by the Lord Ordinary. Now, this oil was shipped at the port of Bougie, in Algeria, upon the 25th and 30th of August 1877, conform to bills of lading of these dates respectively. The bills of lading bear that the oil was shipped in good order and condition in eighty-nine casks, and the undertaking was that it should be delivered in the like good order and condition at the port of discharge to the shipper's order or his assignees. On the arrival of the ship at Leith the oil was found to have suffered very much from leakage. The condition of the cargo is stated in the condescendence — "Upon the arrival of the said vessel in Leith, on or about the 8th of October 1877, and the pursuers proceeding to take delivery of their cargo, it was found that a large number of said casks had become depleted of their contents in whole and in part, and that oil to the extent of 15 tons 9 hundredweights and 13 lbs. or thereby had been lost."

Now, upon these facts, without going further into the case, the shipowners are *prima facie* answerable for the loss. But of course if they can show that this partial destruction of the oil, or injury to the cargo, is not due to their fault, but to the fault of the shipper of the cargo, then a very different result may be attained, and in this case the peculiarity of the pursuers' position, as lying at the very foundation of their case, is that the shipper was to blame, and that the fault of the shipper was the cause of the loss of the cargo. They have examined the master of the vessel, and also the mate, and they both distinctly depone that the casks of oil when they were presented for shipment were in a very defective and leaky condition; that the master called the shipper's attention to this, and pointed to him that the casks were not fit to carry that oil upon a voyage to the United Kingdom; and that although some slight attempt was made to patch up some of the casks, they still remained in a most imperfect condition, and unfit for the voyage when they were put on ship board. This is supported also by the log of the vessel, and there is no counter evidence. The shipper is not examined, and the person who seems to have acted for the shipper (a brother of his) in putting the cargo on board is not examined, and, in short, there is no evidence at all to exoner the shipper from the fault thus imputed to him by the only evidence which we have before us. But not only is this so, but as I said before, the true ground of action discloses this fault of the shipper. It is said in the condescendence — "The said casks were not shipped in good order and well conditioned, as stated in said bills of lading. On the contrary, it is averred that they were leaking, and otherwise in bad order, and not fit to stand the voyage, and that to the knowledge of the said Alexander M'Gonnell, the master of the said vessel; entries to that effect were made in the vessel's log-book." Now, no doubt that statement is made for the purpose of implicating the master of the vessel in fault, and as regards the liability of the master, and the extent to which that liability may affect the owners of the vessel, I shall speak immediately, but in the meantime this statement in the condescendence clearly establishes that which the evidence also, I think, makes very plain, that the original fault, and the true cause of the loss and injury sustained by the pursuer was the fault of the shipper.

But this action was met by a defence which does not seem to have been originally stated on the record, but which was afterwards added. The defenders' statement is—"The pursuers are suing the present action under an arrangement with Robinow, Marjoribanks, & Co., agents for the shipper of the oil, under which they are guaranteed by Robinow, Marjoribanks, & Co. against all loss through deficiency in the quantity of the oil delivered, or through the present action;" and the relative plea is in these terms—"The loss of oil having been caused by the insufficiency of the casks, for which the shipper is responsible, the pursuers are not entitled to recover, as they are suing the present action in the interest of the shipper." Now, that is the defence which the Lord Ordinary has sustained; but I must say I have not been able to agree with his Lordship in sustaining that defence, because I think it is not established that the pursuers are suing the present action in the interest of the shipper; and if the pursuers have a good action upon the facts of the case against the owners of the vessel, it will not prevent them from suing that action that they have also a good action against the shipper. If, indeed, they were using their advantage in that respect for the purpose of producing an unjust result, they might be restrained from doing so; but I cannot see that they can be said to be suing the present action in the interest of the shipper. In short, I think that averment is not proved, and therefore I cannot agree in sustaining that defence.

But then there remains a very important question for consideration, and that is, whether the pursuers of the action are entitled to prevail against the owners of the ship upon the facts thus averred and proved? The master of the vessel, it is said, falsely stated in the bills of lading that the goods were shipped in good order and condition.

Now, let us consider what would have been the position of Craig & Rose as the endorsees of the bills of lading before the passing of the statute of the 18th and 19th Victoria, c. 3. They would have had the property in the cargo, and they would have had nothing else. Whatever that cargo might be, the cargo which was carried from Bougie to Leith would have been their property, but they would have had no right to sue upon the contract of affreightment. But they could not have vindicated under that right anything but the cargo which was carried—the same cargo which was put on board at Algeria and delivered at Leith, with all the faults and all the consequences of fault attaching to that cargo at the time it was shipped. If it was a cargo deficient in quantity as compared with the bill of lading, or if it was a cargo inferior in quality as compared with the statement in the bill of lading, or if it was in any way disconform to any statement contained in the bill of lading—provided it was the identical cargo shipped at Algeria, only affected in the way of diminution or otherwise by faults attaching to it at the time it was shipped—that cargo and nothing else under the endorsation of the bill of lading would have belonged to the pursuers, and they could have asked for nothing more.

Now, what does the Bills of Lading Act pro-

vide beyond this, and what rights does it give to the pursuers as endorsees? It is provided "that every consignee of goods named in the bill of lading, and every endorsee of the bill of lading to whom the property in the goods therein mentioned shall pass by, or by reason of, such consignment or endorsement, shall have transferred to him and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself." In short, he is entitled to sue to the same effect as if he had been the actual shipper. But he is not only entitled to sue; he is also subject to the same liabilities in respect of such goods as if he had been the actual shipper. Now, then, if the injury which has been done to a cargo occurs entirely through the fault of the shipper, can it be maintained that the endorsee of the bill of lading suing upon the contract of affreightment —for he can sue the owners on no other grounds, as he represents himself here—can say that the owners of the vessel are to be answerable for the fault of the shipper. I do not understand how that can be made out at all. Or can it be said that because the master of the vessel has by the form of the bill of lading concealed the fault of the shipper, therefore the endorsee of the bill of lading is to have recourse against the shipowner? The injury done to the cargo is not done by the master of the vessel. The injury done to the cargo is done by the shipper, and the shipper only. Anything that the master of the vessel has done is to conceal what the shipper has done—nothing else; and whether the master of the vessel may be personally answerable for the false statement or concealment in his bill of lading is a question which we have no occasion to consider here at all, because this is an action against the shipowners, and not against the master. No doubt the master is called, but the action is directed against the shipowners, and there is no ground of liability sought to be established at all on the fact of the master's misrepresentation as a ground of personal liability against him. Therefore, as I said before, I give no opinion whether upon the ground of false representation or deceit an action would lie against the master. That would depend very much upon the circumstances of the individual case as they may be disclosed. Certainly the 3d section of the Bills of Lading Act suggests that for such a false statement possibly the master may be answerable, because he is personally answerable under that section if he misrepresents in the bill of lading the amount of goods shipped. But it is unnecessary to pursue that further, because the question here is, whether the shipowners are answerable to the endorsee in respect of his title under the Bills of Lading Act for the injury done to the cargo?

Now, it is quite settled that supposing the bill of lading to contain a mis-statement as to the amount of goods shipped, and that the quantity actually shipped is less than that specified in the bill of lading, the endorsees of the bill of lading will have no recourse against the shipowners for the difference between the quantity delivered and the quantity contained in the bill of lading. That was decided in the case of *M'Lean & Hope*. But it seems to me that the principle of that case is not confined to a difference of quantity. The principle is founded upon the effect of the Act 18 and 19 Victoria, and the rights thereby vested in the endorsee of the bill of lading, and it seems to me that if other mis-statements of a somewhat different kind than the mere matter of quantity appear in the bill of lading, the very same result must follow. Suppose that grain were shipped in bags, and that in the bill of lading it were described as bags of wheat, but it turned out at the port of delivery to be bags of oats, and that oats and not wheat was the cargo actually shipped, is it possible that the endorsee of the bill of lading could have a property in anything but a cargo of wheat, or that he could have any right, as if he had been actually the shipper himself, to recover a cargo of wheat instead of a cargo of oats, or to recover the difference of value between the one and the other as against the shipowners? It seems to me that the same result must follow there as was arrived at in the case of *M'Lean & Hope*. Again, suppose that the bill of lading bears that a cargo of wheat was shipped, and that it was all contained in bags, and that when it comes to the port of delivery it turns out that it is not in bags but in bulk—that it never was in bags, but was shipped in bulk—it is impossible for the endorsee of the bill of lading to demand the difference of value between wheat in bags and wheat in bulk. The one is more valuable than the other unquestionably, at least under ordinary circumstances, but I apprehend he could never recover for that difference. And so it appears to me that the difference between sound casks and leaky casks is just a case of the same kind. In short, I think, as regards all this matter, the endorsee of the bill of lading cannot make the shipowners answerable for the fault of the shipper, but that as the endorsee or assignee of the shipper he must bear the consequences of that fault himself. Such, I think, is the result of all the authorities.

But then there is a point in the case that still remains to be considered. This bill of lading was originally conceived in the ordinary terms, without any special exception; or, in other words, it was what is called a clean bill of lading; but the master of the vessel, in consequence of the condition in which he found these casks of oil, and being very much perplexed as to what he ought to do in the circumstances, insisted upon adding these words to the bill of lading—"not responsible for weight, quality, leakage, or breakage." Now, what is the construction and effect of these words? I think we find authority for construing these words in the case of *Moes, Moliere, & Van Tromp*, which was decided by this Division with the assistance of the other Division in the year 1867. That was a case of breakage. The words were almost identical with what we have here; and what the Court in that case held was that the shipowners were not to be answerable for the goods being in a broken condition when delivered at the port of delivery. And so I think here the effect of this exception is that the shipowners are not to be answerable for the goods being delivered in a leaking or leaked-out condition at the port of delivery.

Now, what is the effect of that? In the case of breakage we held that the effect of it was to shift the *onus*. But for this special exception in the bill of lading the *onus* would have lain upon the shipowners to show that the broken condition of

the goods was not brought about by their fault, but in consequence of the exception the *onus* was shifted, and it lay upon the consignee of the cargo, or endorsee of the bill of lading, to show that the breakage was caused by the fault of the shipowners. Now, I apply that doctrine here, and I think it is a doctrine founded upon sound principle. I think the *onus* lies upon the pursuers of this action to show that the leaking or leaked condition of these casks at the port of discharge was brought about by the fault of the shipowners. But have they shown that? They have shown the reverse. It is the foundation of their case, and it is the whole scope of the evidence, that that leaking condition of the casks was brought about, not by the fault of the shipowners but by the fault of the shippers, and therefore upon that exception in the bill of lading, even apart from the other grounds of judgment which I have suggested, I should be quite prepared to assoilzie the defenders, because I think they have by means of that exception exempted themselves from a liability which might otherwise, at least in the first instance, be attached to them.

I am for altering the Lord Ordinary's interlocutor, but I am also for assoilzieing the defenders.

Lord Deas—I come to the same conclusion with your Lordship, and so much upon the same grounds that I do not think it necessary to repeat them at length. I concur with your Lordship in thinking that the ground of judgment stated by the Lord Ordinary has not been proved, and that the question at issue depends upon the soundness of the two grounds stated by your Lordship. The first of these is that prior to the Act 18 and 19 Vict. cap. 3, the endorsee would have had the property of the cargo as it was at the date of the shipment, and nothing else. But that Act conferred upon him, on the one hand, all the rights under that contract as contained in the bill of lading, and, on the other, all the liabilities under that contract, thus placing the endorsee of the bill of lading in the same position as if he had been the actual shipper. That is the first ground. The second ground of judgment is directly supported, I think, by the judgment which along with the other Division we pronounced in the case of *Moes, Moliere, & Co.* with reference to breakage. We held there that the endorsee in the bill of lading, where breakage was excepted, required to prove that the broken condition of the goods excepted in the bill of lading was attributable to the fault of the shipowners, and that that not being proved the shipowners were not liable. In the same way here I think that the burden of proof that this leakage was the fault of the shipowners lay upon the endorsees of the bill of lading, and as your Lordship has observed, in place of that being proved, the reverse has been proved, because it is perfectly clear that the leakage was attributable to the fault of Bankhardt, the shipper of the goods, who ought to have known, if he did not know, the leaking condition in which the goods were when they were shipped. It was in consequence of the plainly leaking state in which they were when shipped that the master added the exception to the bill of lading, which of course was palpable upon the face of it to the endorsee of the bill of lading.

There may be some nicety as to whether this action did not include that ground of liability of the master to which your Lordship has alluded, viz., whether there was not some deceit on his part in representing the goods to be as they are represented in the bill of lading. I am disposed to think with your Lordship that that ground of action is not included here, but I am also disposed to think that it would be very difficult to sustain any such ground of action upon the evidence which we have here, because seeing the leaking condition of the casks was the very reason why the master added upon the face of the bill of lading that the owners were not to be responsible for leakage, it would be very difficult therefore to say upon the merits that there was any deceit or misrepresentation by the master to found that ground of action against him. Upon the whole matter, on the grounds I have indicated, and which were more fully stated by your Lordship, I have come to the same conclusion at which your Lordship has arrived.

Lord Mure—I have also come to the same conclusion. The action is laid upon the bill of lading, the first part of which is in the ordinary style of such a document. It was argued that on a bill so framed the shipowners were bound to deliver the goods to the persons to whom they were consigned, in the same good order and condition as that in which the master by signing the bill of lading had acknowleged them to be received. And I see on looking into the evidence that the main ground on which the pursuers proceeded in this matter was that they considered the bill of lading to be what is called a clean bill of lading—that there was no notandum upon it which expressly stated that the goods or any part of them were received in a deficient condition, and that therefore they were bound to deliver the whole of them in terms of that bill of lading. Now, I do not think that is a strictly accurate view. It is in the usual terms, if the words added in manuscript by the master had not been there, but these additional words appear to me distinctly to qualify the obligation of the master and owners of the ship, and to render them responsible only in the event of its being proved that the loss sustained was occasioned by the negligence of the owners or of those for whom they are responsible. Now, the words in manuscript inserted in the bill are, "not responsible for weight, quality, leakage, or breakage." But the responsibility that is sought to be attached to the owners under this action is a responsibility for the leakage of the oil. Now, I think it is very clearly proved upon the evidence that that leakage was not occasioned by the negligence of the master or the owners of the ship on the passage from Algeria to this country, but that the condition of the casks when put on board by the shipper was such that there was negligence on the part of the shipper in putting oil into casks of that description. That is distinctly made out by the evidence of the captain and mate of the vessel, and it seems to me to be also pretty clearly made out by this, that when the casks were landed at Leith, persons skilled in such matters say that they were of very defective quality, and that the oil should not have been put into them. Now, that being so, this bill of lading must be read as one in which the captain of the vessel, seeing that there was some apparent

defect in what was taken on board, had protected himself, as he said he intended to do, by the insertion of these words. Your Lordship has referred to the case of *Moliere*, where the word breakage was so interpreted by the Court in 1867, and exactly the same construction was put upon a bill of lading with reference to a cargo of oil, where the words "not responsible for leakage" were added as they have been added here. I refer to the case of *Ohrloff* v. *Briscall*, in 1866, 1 P.C. App. 239, where it was laid down distinctly—substantially on the same ground on which your Lordships proceeded in the case of *Moliere*, and only a very short time before that case—that "the condition that the shipowners are not to be accountable for leakages does not, in its ordinary and grammatical sense, put any limit to the quantity of leakage; and on principle therefore we do not think it would be justifiable to add any such limit to its terms, nor are we aware of any authority for doing so. It follows that in our judgment the memorandum in the bill of lading protects the shipowner as to all leakage except that caused by negligence, and therefore if no negligence is shown, there is no cause of action." Upon that ground I agree with your Lordship that on these two authorities, decided about the same time with reference to bills of lading, qualified in precisely the same way, the pursuers of this action are not entitled to recover on this bill of lading.

With reference to the terms of the Act of Parliament which your Lordship has quoted, the words of the first section appear to me to place the holder of the bill of lading, who is suing upon it, in the same position as that in which the original party to it was—he is subject to the liabilities in respect of the contract. That was very strongly put to us by Mr Asher, and I see no answer to it. If the shipper had been here himself suing for the damage, he would not have had a case, when it is plain he put the goods on board knowing them to be in a defective state. And the consignee being under that clause of the statute subject to liability for the state of the goods, he is under the terms of that clause also responsible for the shipper having sent the goods to him in the condition in which they arrived.

Lord Shand—I am also of opinion that the judgment in this case must be for the defenders.

The Lord Ordinary has stated his ground of judgment in the third finding in fact, which is to this effect—"That the present action was raised, and has been prosecuted, against the defenders in the interest, for the protection, and at the risk of Bankhardt, the shipper, and his said agents, in furtherance of an arrangement to this effect concluded between them and the pursuers." I am of opinion that the proof fails to establish any such arrangement. If such an arrangement was made, the persons who made it were the partners of Craig & Rose's firm and the firm of Robinow & Marjoribanks, or persons acting for them. But it appears, I think, from the evidence given by the representatives of both of these firms that no such arrangement was made. Mr Marjoribanks had given his firm's guarantee with reference to loss from leakage on the cargo, and holding the view that there was a claim in justice and in law against the shipowners, he said to Messrs Craig & Rose—"You ought first to proceed against the shipowners." Craig & Rose yielded to that suggestion, but so far as I can see there is no proof of any arrangement that Mr Marjoribanks should bear the expense of the litigation, and certainly no proof of any arrangement that Mr Bankhardt, the person who had shipped the goods, should bear that expense. It is true we find that in some correspondence put into the process, and in evidence, at the very close of several days' proof, there are a number of expressions—I mean in the letters of Mr Marjoribanks' firm to Bankhardt—calculated to convey to Bankhardt that an action was being carried on substantially for his behoof. But, in the first place, I do not think that in his part of the correspondence Bankhardt ever gave any sanction to such a proceeding, or accepted the position of being the *dominus* of any action; and, in the next place, having regard to the parole evidence as to the alleged agreement, I think the expressions in the letters to which I refer—and as to which no questions were put to Mr Marjoribanks or any of his firm—are to be accounted for, not on the footing of an existing agreement, but because he desired to keep open a claim to any expense that might ultimately be incurred in litigation, in case he should be induced to relieve the pursuers of such expense in so far as not otherwise recovered by them. I do not think the letters prove the arrangement alleged, and I should have the utmost difficulty in giving such an effect to them in the absence of any questions put to Mr Marjoribanks as to the expressions founded on.

I must add, however, that even if such an arrangement had been proved, I do not think it would have justified this interlocutor—I mean an arrangement merely to the effect found in the Lord Ordinary's judgment, and in the absence of any transaction by which Bankhardt, the shipper, had in the meantime paid or undertaken the loss upon this cargo, and become truly the person interested in the litigation. Mr Marjoribanks was quite entitled, if he thought fit, to arrange that he would pay the expense of such a litigation. If he had paid for the damage sued for under his personal guarantee, he would have been entitled to an assignation to Craig & Rose's claim, and thus to have the benefit of their rights as onerous endorsees of the bill of lading. Therefore, so far as he is concerned, I can see no good objection to his giving a guarantee for the expenses of the litigation. In regard to Mr Bankhardt, if he had actually paid the amount sued for to Craig & Rose, and was taking the benefit, or I may say the cover, of their name to get into the position of an onerous assignee of the bill of lading, to which he had no right, then I could concur in the Lord Ordinary's judgment; but in the absence of a transaction of that kind I do not see that even an arrangement such as the Lord Ordinary refers to would lead to the result to which he comes. The view I entertain on this point may be illustrated by a single additional observation. I observe that the Lord Ordinary has granted absolvitor in this case on the ground that this action was being pursued practically for Bankhardt. Suppose that judgment to be affirmed, have Craig & Rose in the meantime lost the right to bring an action for themselves? They have never got the damage to which it must be

assumed in dealing with this question they had right; they have no agreement or undertaking by Bankhardt to pay that damage; they are onerous assignees of the bill of lading, and have never lost that character; and I am at a loss to see what can possibly discharge the defenders' obligation if it existed as contended for so as to prevent Craig & Rose raising an action in their own right at any time they think fit. And accordingly it appears to me that the judgment cannot be properly rested on the ground on which it has been put.

The question that remains behind is certainly one of some difficulty. There can, I think, be no doubt that in a question between Bankhardt, the shipper of this oil, and the defenders, Bankhardt could not recover for loss by leakage caused by defective casks, and it is clear that parole evidence would be admissible to control the contract in the bill of lading. Even on the assumption that the protective words "not liable for leakage" were absent from the bill of lading, it would be competent to have parole evidence as to what occurred at the shipment of the cargo, and if it were shown that Bankhardt had shipped casks unfit for the conveyance of the cargo, he could not throw on the shipowner the responsibility for oil lost through leakage arising from this cause. It is true that the receipt in the bill of lading acknowledges the goods as being in good order, but that creates a presumption only which could have been redargued. It is said, however, that an onerous endorsee has higher rights than Bankhardt, the shipper, would have had—that onerous endorsees, as Craig & Rose are, were entitled to rely on the statements in the bill of lading, and cannot be affected by the consideration of anything that occurred at the time of shipment which would affect the shipper. It has been maintained, on the other hand, by the defenders that the onerous endorsee has no higher right than Bankhardt has, either in our law or in the law of England. I do not think there is any clear authority to the effect contended for by the pursuers—I mean that they had a higher right than the original shipper. A bill of lading undoubtedly confers in the first place a right of property, and in the next place a right to sue upon the contract of carriage. But the terms of the Bills of Lading Statute are peculiar, and may be fairly represented to be limited in their effect, and to give the endorsee no higher rights than those of the shipper. The question, I think, is one of difficulty, whether it shall be held that an onerous endorsee in a question of this kind has higher rights? and I observe in the Privy Council case of *Ohrloff*, to which Lord Mure has already referred, that question was expressly reserved by the Judges at the close of their judgment, for they say at p. 240—"Another point was raised and argued before us, viz., that the conduct of the shipper as to the stowage was such that it would support a plea of leave and license by the shippers if the action had been brought by them. But it was contended on behalf of the respondents that by reason of the Bills of Lading Act (18 and 19 Vict. c. 111) such a plea was not allowable in an action by the endorsees of the bill of lading. It is unnecessary, however, to decide this point, as our opinion is against the respondents on the question of negligence." I find there is some authority on the point, as one of general principle and apart from the statute, in a writer of considerable weight in American law, in a passage which was not quoted to us. I refer to Parsons on the Law of Shipping, who says at p. 190—"A bill of lading has a twofold character—first, that of a receipt; and second, that of a contract. In a recent case in Massachusetts the following rules have been laid down to govern it in its character of a receipt:—First, The receipt in the bill of lading is open to explanation between the master and the shipper of the goods; secondly, The master is estopped as against a consignee who is not a party to the contract, and as against an assignee of the bill of lading, when either has taken it for a valuable consideration, upon the faith of the acknowledgments which it contains, to deny the truth of the statements to which he has given credit by his signature, so far as these statements relate to matters which are or ought to be within his knowledge; thirdly, When the master is acting within the limits of his authority the owners are estopped in like manner with him, but it is not within the general scope of the master's authority to sign bills of lading for any goods not actually received on board." That passage from a writer of eminence on this subject undoubtedly gives countenance to the argument of the pursuers on this matter, but I find that, with the exception of a case which is referred to in support of the concluding words of the passage, the whole of the authorities referred to are American. I do not think it is necessary here to decide the general question as to the effect of a representation in the bill of lading, though if it did arise I must say that I think the American law seems to me to be rested upon reasonable grounds. Dr Lushington in the case of *Ohrloff* appears to have held that an endorsee was not affected by circumstances which did not appear in the body of the bill of lading as a part of the contract, and of which no notice was given by a memorandum or exception in writing on the document, so that the proposition has the benefit of his high authority. The question, however, does not here arise for decision, because I think there are two answers to the present demand, either of which is in my opinion sufficient for the defence. In considering these defences I take the case on the footing that it is directed not merely against the shipowners but against the captain personally, and also that it is maintained in part upon what I see is pleaded in the second plea-in-law for the pursuers, viz., that the pursuers having acquired right to the cargo and paid the price on the faith of the statements and representations contained in the bill of lading, the defenders are responsible for the loss and damage.

The first answer, which I think is a sufficient defence to the action, is that the bill of lading on its face is qualified in terms which in my opinion are sufficient to relieve the master and owners. The goods were no doubt acknowledged as being shipped in good order, and there is an obligation to deliver them in the same order and condition. But there is an important addition—an addition in manuscript—and therefore of a class to which the Court always gives the greatest weight in questions of this kind—by which the captain stipulates that he and his owners shall not be responsible for leakage. These words must have

some effect. The defenders say that the true meaning of them is this—"Though at the request of the shipper I have acknowledged that the goods are shipped in good order, I do not profess to have the skill to judge of the sufficiency of casks for the voyage for a peculiar cargo of this kind, and I will not take the responsibility of leakage." It appears to me that, with the knowledge we have from the evidence as to the nature of cargoes of oil, that is fairly to be taken as the true meaning to be attached to this bill of lading. If the pursuers be asked what meaning they attach to the words added in manuscript, they are in very great difficulty to give a satisfactory answer. The addition cannot be taken as having been inserted as a protection against ordinary leakage, because the law will protect against ordinary leakage without any such clause, and in the passage already read by Lord Mure from the case of *Ohrloff* the Privy Council have expressly so held. That cannot be the meaning of a clause of this kind. The only other suggestion which can be made by the pursuers is, that the clause was intended as a protection against damage from perils of the sea, or caused by negligence on the part of the shipowner or his servants. But, again, it is of no use for either of these purposes. The clause is not required as a protection against damage from perils of the sea, and it is of no avail as a protection against damage caused by negligence. That has been settled again and again by a number of cases. The only meaning therefore that the clause can have is, that taking the casks as they are, and assuming that the captain receives them as a cargo which appears to be in good order, he declines to take the responsibility of leakage that may occur in the course of the voyage. The pursuers have, I think, been unable to suggest any other meaning which can be legitimately attached to these words. The result therefore is that this bill of lading contained on its face notice to any endorsee taking it sufficient to put him on his guard. It was not a clean bill of lading, if thereby be meant a bill of lading that is free from all exception, and particularly from exception on the ground of leakage, which is the ground of complaint in this action. I find that two cases have occurred recently in England which have some analogy to the present, in which questions arose on words of exception in bills of lading. The first of these is the case of *Jessel* v. *Bath*, 1867, L.R., 2 Excheq. 267. The shipmaster there gave a receipt for a specified quantity of manganese, giving the precise weight in detail, and that in writing on the bill of lading, but the bill of lading contained in print the words "weight, contents, and value unknown." It was found when the cargo came to be delivered to an onerous endorsee that there was a considerable deficiency in the weight; and although there was a receipt for a given quantity of goods, and an undertaking to deliver, upon which the onerous endorsee founded, the Court held that the exception "weight, contents, and value unknown" reduced the bill of lading to this, that it was simply a receipt for a certain parcel of goods, and an undertaking to deliver that parcel. Chief-Baron Kelly says—"The whole may be reasonably and fairly read as meaning that a quantity of manganese had been received on board, appearing to amount to 33 tons, but that the person signing the bill would not be liable for any deficiency, inasmuch as he had not in fact ascertained, and therefore did not know, the true weight;" and Baron Martin says—"The person signing the bill of lading, by signing for the amount with the qualification 'weight, contents, and value unknown,' merely means to say that the weight is represented to him to be so much, but that he has himself no knowledge of the matter." The other judges adopt the same view. Baron Bramwell says—"This document, though apparently contradictory, means this—a certain quantity of manganese has been brought on board, which is said by the shipper, for the purpose of freight, to amount to so much, but I do not pretend or undertake to know whether or not that statement of weight is correct. On a bill of lading so made out I think no one could be liable in such an action as the present." And, again, in the case of *Lebeau* v. *The General Steam Navigation Company*, in 1872, L.R., 8 Com. Pleas, 88, such a case as was figured by his Lordship in the chair occurred, in which a parcel of goods was shipped described as linen, whereas in truth the contents of the bale were a particular kind of silk, and a question arose whether that was a valid contract at all, as there had been misrepresentation regarding it. The Court had to consider the effect of the bill of lading, on which the words "weight, value, and contents unknown" had been stamped before signing; and Chief-Justice Bovill said—"By the printed memorandum they—the Steam Navigation Company—repudiated all knowledge of the contents of the case, and all intention of contracting with regard thereto, and contracted to carry the package whatever its contents might be." And Mr Justice Denman says—"I think the true effect of what took place with reference to the bill of lading was to create a contract on the part of the shipowner to carry the package whatever it might contain. During the argument the suggestion was thrown out that the expression 'contents unknown' might not go so far as to be inconsistent with the contract being for the carriage of linen goods; but all doubt on that point appears to me to be removed by the passage cited from Parsons on Shipping," &c.

Now, I suppose the bills of lading in these two cases—the one for so much manganese, and the other for so much linen—would in loose language have been referred to as clean bills of lading, just as I see Mr Parker, one of the witnesses in this case, speaks of the bill of lading in question. The onerous endorsee would say—I have got a clean bill of lading, and I may rely on getting my full quantity of manganese, or the silk contained in these bales. But there having been words of a qualifying kind—"contents unknown"—it was held that there was notice sufficient to put the shipowner in the position of saying—I have merely undertaken to carry this parcel of goods or the quantity of manganese on board. And so it appears to me here that as the shipmaster at the close of the bill of lading appended a note in which he stated that he would not be responsible for leakage, that was a qualification of the contract to the effect that although the goods appeared in good enough condition, yet he declined to undertake responsibility for leakage; and in a question even with an onerous endorsee I hold there was no responsibility.

But even supposing this protective addition to the bill of lading had not been there, I am not prepared to say that there was responsibility either upon the captain or the owners in this case, and I say so after a careful consideration of the evidence. The case that is presented on that view is this:—It is said—the action being founded on representation—the bill of lading contains a representation that the goods were received in good order and condition, and an undertaking that they shall be delivered in the same good order, whereas in point of fact they were delivered in bad condition. Now, if the statement was made by the captain in all honesty, and according to a reasonable exercise of his judgment at the time, I do not think it is enough for the pursuers to show merely that the goods were not in good order and condition at the port of shipment in the view of persons experienced in the shipment of oil cargoes. I assume that a captain, and it may be his owners, if he be acting within the mandate which they have given him, may be responsible on the ground of representation where there has been clear negligence on the part of the captain, or anything amounting to a wilful mis-statement; but I am not prepared to say that in the absence of such negligence or of wilful mis-statement such responsibility will attach either to the captain or the owners. It is said here that the captain did know that the casks were in bad order and condition, and reliance is placed on the log. It must be observed that the only evidence we have from the port of shipment — in the absence of Bankhardt, who unfortunately could not be examined—is contained in the log and the statements on oath by the captain and mate, and it is clear that the log must not be taken alone, but must be taken with the parole evidence explaining the state of the cargo at the time of the shipment. Now, in regard to the log-book, two entries occur, and it is to be kept in view that in regard to a cargo containing 369 casks altogether the entries made have reference only to two lots of these casks, viz., a lot of 62, and another lot of 34, which taking them together do not amount to a third of the cargo. The observation made is this—"Drew merchant's attention to a great many casks leaking and otherwise in bad condition; a cooper sent down to stop the leak; nothing done to the others in bad condition;" and again "Attracted merchant's attention to a few casks in bad condition and leaking." The captain and the mate are both asked about this, and one important point in their evidence as it strikes me is this, that there does not appear to have been much leakage when these casks were originally shipped. On the contrary, the captain says when that point is put to him—"I could not say exactly how much oil was lost by leakage on the quay, but I think a gallon would cover the whole loss;" while the mate says—"The quantity of oil which escaped on the quay at Bougie was very small; it was not gallons." Now, if that be so—even if it be assumed that this does not give a literally correct account of it, and that a few gallons of the oil leaked upon the quay—that presents a very different case from what would arise if there had been a large amount of leakage; and without going in detail over the captain's evidence otherwise, I think it comes to this, that observing the leakage of some oil on the quay with a cargo that had been standing for some time in the hot sun of that country, and that the casks were old in appearance, he made a remonstrance on the subject; there was a certain amount of coopering done; he had an assurance by the shipper, who knew about such matters, that the casks would be quite sufficient for the short voyage that they were to take—occupying about six weeks—and upon the whole he was not satisfied in his mind that the casks were not sufficient for the voyage, or that he would be warranted in refusing to take them as in good order and condition. He did not profess to be a judge of the kind or quality of casks required for carrying cargoes of this kind, and apparently never had carried such a cargo before, although as a boy on one occasion he had been on board a ship with a cargo of paraffin oil. Then the mate, examined on the same subject, confirms the impression which the captain's evidence gives me; for the mate, on cross-examination, after saying that the casks seemed to be properly filled, says the general condition of the casks as regards quality was pretty fair, but some of them were old casks. "(Q) Did you attribute the leakage that you saw before the casks were put on board to the shrinkage of the old casks?—(A) That and the heat of the sun might do it. I mentioned that to the captain. I think I was present when he spoke to Mr Bankhardt, the agent, about the matter. I had no conversation with Mr Bankhardt myself further than drawing his attention to the leaking casks. Coopers were sent down and the casks mended. The hoops of some of them were taken off altogether. These casks were not emptied while the hoops were being taken off and refitted." Then he speaks of the spaces in the casks being filled up, and in a subsequent passage of his evidence he says Bankhardt spoke of the heat of the weather as causing such leakage as he saw, and said the leakage would cease after they got to sea. Further on he is asked—"Is it your belief that a number of the casks were in that condition, and went on board as you got them?" And he says—"Yes, what I call 'bad condition' are the old casks. These old casks were not leaking."

That is the substance of the whole evidence as to what was seen at the time of shipment, and I am not prepared to say that it makes out that the captain in accepting the goods as in good order and condition did not act to the best of his judgment in the honest belief that the casks would serve the purpose perfectly well, or that he was satisfied he would be entitled to decline to give a receipt for the cargo in the usual terms as shipped in good order and condition. Then as to the proof with regard to the state of the casks when they came to this country, I have read carefully the evidence of the two men on whom I think most reliance should be placed in this matter,—not merchants and others speaking from casual observation, but the two coopers employed by Robinow, Marjoribanks, & Co., viz., Blackhall and Robert Smith. Now, I do not read their evidence as amounting to this, that the state of the casks was such that the captain must have known them to be insufficient for the voyage at the time of

shipment; on the contrary, it appears to me that according to their evidence the captain might fairly and honestly have taken the casks as sufficient for the voyage. Blackhall in particular, speaking of the casks as they came out, says—"I saw that the hoops got very slack. I do not think they were ever tight. I mean that the hoops when put on had not been drawn tight. (Q) Was the original construction of the casks bad in your opinion?—(A) I would not say it for the construction; it was, I think, the way the casks had been coopered when the oil was put into them. (Q) If from any cause the casks had been expanding and contracting, would that have produced the result in regard to the hoops? (A) Yes." And again he is asked—"Must not the casks have been in a different condition then?"—that is, at shipment—"(A) They would be full, and the casks would be tight. (Q) And had they got slack on the voyage? (A) Yes." At the close of his evidence he says that if the casks had been properly coopered they would have been sufficient. The same evidence is given by the succeeding witness. He is asked, Were the casks of too thin material, and answers—"They were casks that had not got a proper overhauling before they were put on board." The result seems to me to be this, that with their special knowledge these witnesses cannot say that to an ordinary unskilled observer the casks were not sufficient at shipment; that they believe heat during the voyage would cause expansion, and if expansion occurred leakage would be the necessary result. And it rather appears to me that the true reading of the evidence as a whole is, that the casks, no doubt thin (as a number of the witnesses say), were yet in a fair condition as regards cooperage when they were shipped, but that the thinness of them, along with the heat during the voyage, aggravated by a quantity of locust beans having been loaded by the shipper on the top, all combined to cause them to leak on the voyage. Now, was the captain to know all that? Was he in accepting these casks as in good order and condition to be held as acting negligently or as making a wilful mis-statement in his bill of lading for which he shall be responsible as a misrepresentation? A captain carrying a cargo of this kind does not profess to have such knowledge as men of skill must possess in dealing with such cargoes, and to be aware of the importance of not putting the oil in thin casks or to know the risk of expansion during the voyage? Taking it that he had, or must be held to have had, all the knowledge that a captain of ordinary judgment and experience would have, it appears to me, looking at the evidence as a whole, and having regard to the statements made to him by the shipper, that he was fairly entitled to give the receipt he did for this cargo, and to represent it as in good order and condition, and that there is no such misrepresentation on the face of the bill of lading as can make either him or his constituents responsible for a claim of this kind. The person naturally responsible for such a claim, founded on the shipment of unsuitable and defective casks, and to whom the buyer of such a cargo should look, is the person who sold and shipped it. I quite admit that the shipowner may incur responsibility. Although he is merely earning a freight, he may incur responsibility to the full value of a cargo, but in a question like the present I think such responsibility should not be imposed upon him unless the case comes up to distinct negligence on his part in the statement which he has made in his bill of lading, or to a wilful mis-statement as to the condition of the cargo. And so upon the two separate grounds I have stated I am of opinion that the defenders should be assoilzied.

The Court pronounced the following interlocutor:—

"The Lords having considered the reclaiming note for Craig & Rose against Lord Craighill's interlocutor . . . in the conjoined actions—the first at the instance of Alexander M'Gonnell against them, and the second at their instance against James Delargy and others, owners of the ship 'Ann' of Liverpool, and also against the said Alexander M'Gonnell, master of said ship—Recal said interlocutor, and in said first action decern against the defenders Craig & Rose conform to the conclusions of the libel; in the second action, at the instance of Craig & Rose, sustain the third and fourth pleas-in-law stated for the defenders: Assoilzie them from the conclusions of the action, and decern: Find Craig & Rose liable in expenses in the conjoined actions, subject to modification," &c.

Counsel for Pursuers (Reclaimers)—Trayner—Balfour—Jameson. Agents—Boyd, Macdonald, & Co., S.S.C.

Counsel for Defenders (Respondents)—Asher—Thorburn. Agents—Foster & Clark, S.S.C.

Tuesday, July 15.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

M'ADAM *v.* M'ADAM AND HIS CURATOR AD LITEM.

Entail—Bond of Annuity—Apparent Heir—Conveyancing Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 9—*Validity of Bond of Annuity by Heir of Entail who had not made up Titles.*

The Conveyancing Act of 1874, sec. 9, provided that "A personal right to every estate in land descendible to heirs shall, without service or other procedure, vest or be held to have vested in the heir entitled to succeed thereto by his survivance of the person to whom he is entitled to succeed, whether such person shall have died before or after the commencement of this Act, provided the heir shall be alive at the date of the commencement of this Act, if such person shall have died before that date; and such personal right shall, subject to the provisions of this Act, be of the like nature and be attended with the like consequence, and be transmissible in the same manner, as a personal right to land under an unfeudalised conveyance, according to the existing law and practice." *Held* that under this enact-