petent jurisdiction to deal with that conviction and either sustain it or set it aside. If there had been an appeal—a resort to the Court of Justiciary or to this Court to set it aside as a nullity—the nullity appearing when we apply the rules of the statute to it and the facts proved otherwise—would the Justices still have had jurisdiction to say "Oh! it is a nullity, and it is none the less a nullity under the statutory declarator, because the Court of Session is of opinion that it is not? It is declared by the statute to be a nullity." All that illustrates the expediency in the interests of the public of attending to and observing the rules of the common law anent such matters.

With these explanations, which are perhaps superfluous, although I have thought it proper upon the whole to make them, the case being one of some general interest and importance, I am of opinion with your Lordships that this second conviction must be set aside.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

LORD JUSTICE-CLERK—Then we answer the first question put by the Quarter Sessions by saying that the conviction must be set aside by decree of a competent court, and we do not answer the other question at all.

The Court pronounced the following interlocutor:—

"Find that the conviction of 15th July 1890 is bad, in respect of the previous conviction for the same offence of 19th June 1890, which the Justices sitting on 15th July had not jurisdiction to set aside, and were not at liberty to disregard, and decern."

Counsel for the Appellant—Shaw. Agents—Douglas & Miller, W.S.

Counsel for the Respondent—Asher, Q.C.—A. J. Young. Agent—David Crole, Solicitor of Inland Revenue.

Friday, February 27.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

GILROY, SONS, & COMPANY *v.* PRICE & COMPANY.

Shipping—Bill of Lading—Default in Navigation in Course of the Voyage.

A cargo of jute was damaged by sea-water through the bales breaking a pipe which ought to have been but was not cased. The bill of lading contained the following exception, "any act, neglect, or default whatsoever of pilot, master, or crew in the navigation of the ship in the ordinary course of the voyage." . . . In an action of damages at the instance of the owners of the cargo against the owners of the ship it was *held* that the failure to case was a default or neglect on the part of the master or crew in the navigation of the ship, committed by them in the ordinary course of the voyage, and that from liability for the damage caused thereby the defenders were exempted by the terms of the bill of lading.

Messrs Gilroy, Sons, & Company, merchants, Dundee, owners of a cargo of jute carried on board the ship "Tilkhurst" from Chittagong to Dundee, as holders and onerous indorsees of the bills of lading, sued Messrs W. R. Price & Company, London, owners of the said ship, in the Sheriff Court at Glasgow for £6000 in name of damages sustained through the cargo being spoiled by sea-water.

The pursuers alleged that when the ship sailed from Chittagong upon 5th December 1888 it was in an unseaworthy condition, the water-closet pipe on the port side being cracked or otherwise faulty, and having no casing such as is usually put round such pipes and is necessary for their safety, and that the damage to said cargo was caused in consequence of the defective state of the pipe and/or the want of casing.

They pleaded—"(1) Said vessel not being in a seaworthy condition at the time of sailing, whereby pursuers' goods became injured, the defenders are liable to pay pursuers the loss so sustained by them. (2) The defenders having undertaken to deliver said goods in good order and condition at Dundee, and same being in a damaged state, they are liable to pursuers as holders and onerous endorsees of the bills of lading for the loss sustained thereby. (3) The pursuers, through defenders' breach of contract in their failing to supply a seaworthy ship, having suffered loss and damage to the amount claimed, decree should be granted, with interest and expenses as craved."

The defenders explained that the bill of lading contained the following exception—"Any act, neglect, or default whatsoever of pilot, master, or crew in the navigation of the ship in the ordinary course of the voyage, and all and every dangers and accidents of the seas and rivers, and of navigation of whatever nature and kind excepted." Further, that the pipe was in perfect order when the vessel left Chittagong, but that on the 11th, 12th, and 13th December she had encountered a severe gale with a very heavy sea, and that during the gale the force of the sea and the working, straining, and labouring of the ship, or one or other of these causes, had broken the iron portion of the said pipe at the flange on the ship's side.

They pleaded—"(1) The pursuers' averments being unfounded in fact, the defenders should be assoilzied. (3) In any view, the damage having emerged through one or other of the perils excepted from the contract, the defenders should be assoilzied."

The Sheriff-Substitute (GUTHRIE) allowed a proof from which it appeared that the ship had experienced heavy weather as alleged, that thereafter the leak and dam

age to the cargo were discovered, that such pipes as the one in question were usually and almost universally cased, and that this pipe had been originally cased but the casing had been removed, and that on this voyage it was not cased until the ship reached Galle after the storm. The bales of jute were kept off the sides of the ship by "toms" of wood, but it was not impossible for them to shift especially if any of the "toms" had dropped out of their place. The damage to the pipe was not such as was likely to be caused by the action of waves on the outside of the ship. It was more likely to have been caused by pressure from something within.

Upon 18th July 1890 the Sheriff-Substitute pronounced the following interlocutor:—"Finds that the defenders in December 1888 were carriers in their ship 'Tilkhurst' of a cargo of jute from Chittagong to Dundee, under the charter-party and bills of lading in process, and that they failed to deliver the same in good order and condition: Finds, with reference to the note, that the defenders have not proved that such failure was due to any cause for which they are not responsible: Therefore finds them liable in damages, &c.

"*Note.*— . . . It is to be observed first of all that the defenders are under the usual obligation to deliver the jute in good condition at Dundee, and that as they have failed to do so it is incumbent on them to show that this is due to some cause for which they are not responsible. They are not of course liable for any extraordinary violence of the wind and waves, but although the exemptive clause which I have quoted goes further than the older clauses excluding liability for faults in navigation, it clearly does not apply (according to the construction adopted in *Steel and Craig* v. *State Line*, and similar cases) to anything that occurred before the commencement of the voyage.

"The shipowners therefore remain under their ordinary liability for seaworthiness and for negligence in stowing the cargo. The question is whether they have succeeded in proving, as they have undertaken to prove, that the pipe was broken by extraordinary action of the sea for which they are not liable. Unless they make this out satisfactorily, it is plain, as I read the evidence, that it must be attributed either to the pressure of the cargo on the iron pipe during the voyage, or to some violence done to that pipe in the process of loading the bales of jute.

"It is certain that on the 11th and 12th December the ship encountered very stormy weather in the Bay of Bengal, but one cannot help doubting whether this weather was of such extraordinary severity as to account by itself for the somewhat unusual accident which occasioned the damage in question. It is important to inquire whether there was anything in the condition of the ship or in the stowage of the cargo which contributed to the damage—in other words, whether the accident would have happened to a properly equipped vessel with a carefully stowed cargo.

"[*After examining the evidence*]—I come for these reasons to the conclusion that the defenders have left it doubtful whether the fracture was solely due to the violence of the sea. This is enough for the determination of the case, for it must be remembered that the pursuers are not in a case of this kind required to trace the damage to a specific cause. They have shown that the defenders' ship was, by the act of their servants before the voyage began, defective in a usual almost a universal precaution against accidents to the pipe in question, and it is certain that the same security is not afforded by the expedient of 'tomming' or propping the bales away from the pipe by loose pieces of dunnage wood. The pursuers have also shown that this defect of the ship's fittings might lead to the fracture in three ways, by exposing the pipe either to lateral pressure upon its flange from the jute bales moving during the voyage, or to pressure during the process of ramming or screwing in loading, or to a sudden blow from one of the bales when the native stevedores were carrying them forward. The conduct of the defenders' master himself at Galle indicates that he had what I may term a guilty consciousness with regard to the want of casing, that he himself then attributed the misfortune to this particular neglect, and upon the whole I think it is a more probable and natural way of accounting for what happened than to ascribe it to the sudden shock from without, which left no other trace of its action on that part of the ship."

Upon 22nd October the following interlocutor was pronounced—"Allows joint minute to be received: Interpones the authority of Court thereto, and in respect thereof, and of the findings in the interlocutor of 18th July last, decerns against the defenders in favour of the pursuers for the sum of £3407, 11s. 9d. with interest thereon as craved: Finds pursuers entitled to expenses, &c.

The defenders appealed to the Court of Session, and argued—1. There was no evidence of unseaworthiness. 2. They had made out a *prima facie* case of damage by the perils of the sea, which were among the exceptions in the bill of lading, and the *onus* therefore lay upon the pursuers to show that the damage was not so caused—*Williams* v. *Dobbie*, June 27, 1884, 11 R. 982. This they had failed to do. 3. Casing was not essential. Other means, such as "tomming" the cargo, were sufficient. If the "tomming" here was improperly done, that was the fault of the mate, and fell under the exception in the bill of lading of "neglect or default of the crew in the navigation of the ship in the ordinary course of the voyage" from Chittagong to Dundee, which included the time of loading at Chittagong—Scrutton on Charter-Parties, &c. (2nd ed.) 180; *Lawrie* v. *Douglas*, 1846, 15 Mees. & Wel. 746; *Good, &c.* v. *London Steamship Owners' Mutual Protecting Association*, June 23, 1871, L.R., 6 C.P. 563; *The "Warkworth,"* December 12, 1883, L.R., 9 Prob. Div. 20; *Carmichael* v. *Liverpool Sailing Shipowners' Mutual Indem-*

nity Association, May 19, 1887, L.R., 9 Q.B.D. 242 (Lopes, L.J., 251); *Canada Shipping Company* v. *British Shipowners' Mutual Protection Association*, July 30, 1889, L.R., 23 Q.B.D. 342; *Serraino & Sons* v. *Campbell*, July 1, 1890, L.R., 25 Q.B.D. 501; *Norman* v. *Binnington*, July 10, 1890, L.R., 25 Q.B.D. 475; *The "Carron Park,"* August 5, 1890, L.R., 15 Prob. Div. 203; *The "Accomac,"* August 7, 1890, L.R., 15 Prob. Div. 208.

Argued for the respondents—1. The evidence was entirely against the damage having been due to stress of weather, and pointed entirely to pressure from within. The want of casing clearly led to the damage. The ship was unseaworthy for the purpose of carrying this cargo in safety, and the owners were liable. 2. The fault of not casing was not committed before the voyage from Chittagong began, and therefore was not excepted by the bill of lading, which did not relieve the shipowner from the initial warranty that the ship was seaworthy when she sailed—*Steel & Craig* v. *State Line Steamship Company*, July 20, 1877, 4 R. (H. of L.) 103. 3. Even if the time of loading was included in the voyage, and the accident was due to bad "tomming," that was the fault of the stevedores, and was not covered by the exception in the bill of lading.

At advising—

LORD TRAYNER—The "Tilkhurst," belonging to the defenders, sailed from Chittagong for Dundee on 5th December 1888, laden with a cargo of jute. On the 11th, 12th, and 13th of December the vessel encountered a very severe gale, in the course of which, namely, on the afternoon of the 12th, it was found that the vessel had a heavy list to port, and on sounding the pumps it was ascertained that there were 12 inches of water in the well. Early on the morning of the 13th the master of the vessel, finding that the vessel was rather unmanageable in consequence of the list, opened the hatches in order to jettison part of the cargo, when he found that the forward water-closet pipe on the port side had been broken away from the flange by which it was fastened to the ship's side, and that the cargo in the vicinity of that pipe was wet. This was occasioned by water which had come in through the hole in the ship's side from which the discharge pipe already mentioned had been broken away. The hole in the ship's side was plugged by the carpenter at once, and the ship was thereafter taken to Galle, where the cargo was unloaded, and the damaged jute landed. Some of it was dried and re-packed and then re-loaded. The pursuers, who are onerous endorsees of the bill of lading under which the jute was being carried on the voyage in question, now claim from the defenders the amount of damage sustained through the cargo being wet as aforesaid, on the ground that the ship was not seaworthy when she sailed from Chittagong, the said pipe being then cracked or otherwise faulty, and not cased as was necessary for its safety. The defenders resist the pursuers' demand, on the grounds that the ship was seaworthy; that the said pipe was in perfect order when the ship left Chittagong; that the damage complained of was occasioned entirely by the perils of the sea; or otherwise was occasioned by the fault of the master or crew in the navigation of the ship in the course of the voyage, and for which, in terms of the bill of lading, the defenders are not responsible. The case can be conveniently disposed of by considering each of these grounds of defence in the order in which I have stated them, as they cover fully the grounds of action.

The only ground on which the "Tilkhurst" is said to have been unseaworthy is the faulty condition in which the discharge pipe of the forward water-closet on the port side is said to have been when the ship left Chittagong. There is no proof whatever in support of the pursuers' allegation that the pipe itself was cracked or otherwise faulty when the voyage commenced; there is nothing even in the proof to suggest to me a probability that it was so. It is, however, proved by the admission of the master and crew that the pipe in question was not cased, as such pipes invariably, or almost invariably, are, and as this pipe itself was when the ship left this country on her outward voyage. The want of this casing, however, did not constitute unseaworthiness, for the ship was quite staunch and strong, and fitted to carry her cargo safely to the port of destination without such casing. Nor would the want of casing have led to any damage being done to the cargo if (in view of the want of casing) the master and mariners had done their duty in otherwise securing and protecting the uncased pipe from undue pressure by the adjacent cargo. I think, therefore, that the pursuers' case fails on the proof, so far as the alleged unseaworthiness of the ship is concerned. The pursuers sought in argument to liken this case to the case of *Steel & Craig*. But I think the cases are essentially different. In *Steel & Craig's* case the ship sailed with an open or partially open port-hole, access to which, from the nature of the cargo, could not be had in the course of the voyage. In the present case there was no open port or hole through which the sea-water could gain admission to the cargo at the time the vessel sailed. In the one case the ship was tight when she sailed, and in the other she was not; and the defect in the ship in the present case through which the damage complained of was occasioned was one, in my opinion, which arose after the voyage had commenced, and was not only accessible but was reached and remedied while the ship was at sea. The decision, therefore, in *Steel & Craig's* case does not seem to me to have any bearing upon the present question.

The cargo, however, having been shipped in good order and condition, as is certified by the bill of lading, and having thereafter been damaged, the defenders will be liable for that damage unless they can show that the damage was occasioned by some

cause for which they are not responsible. Accordingly, the defenders maintain that the damage in question was occasioned by perils of the sea. This of course the defenders must establish, and in the ordinary case this does not impose a very heavy *onus* on the shipowner. I agree with the law laid down upon that subject in the case of *Williams* v. *Dobbie*. If the shipowner can show that the damage to cargo has been occasioned by sea-water, and that the weather encountered on the voyage and the condition of the ship are such as to account for sea-water getting at the cargo of a ship which was seaworthy when the voyage commenced, he will in my opinion sufficiently discharge the *onus* laid upon him. Of course circumstances will vary indefinitely, and each case will depend more or less upon its own particular circumstances. But in illustration of what I mean, let me instance the case of a shipowner who accounts for damage done to cargo by sea-water by showing that the ship had met with such severe weather as to strain the ship so as to admit sea-water through its seams, or that heavy seas had injured the hatches, and so admitted sea-water to the hold before the hatches could be repaired or re-secured. In such a case the presumption would be that the damage to the cargo arose from perils of the sea—a presumption which could doubtless be rebutted, but would need to be rebutted by very distinct evidence before the shipowner could be held liable.

In the present case I am of opinion that the defenders have failed to discharge the *onus* laid upon them by showing, even *prima facie*, that the damage done to the pipe and consequent damage to the cargo was occasioned entirely by the perils of the seas. The cause of the damage as averred by the defenders is this: They say—"On investigation it was discovered that during the gale the force of the sea, and the working, straining, and labouring of the ship, or one or other of these causes, had broken the iron portion of the port water-closet discharge-pipe at the flange on the ship's side." In support of this averment several witnesses are adduced, who gave it as their opinion that a heavy sea or heavy seas striking the side of the ship, would or might have broken away the pipe from the flange. None of these witnesses ever knew of such a thing actually happening—they speak merely to opinion of what might happen, without knowledge or experience of any such thing having happened. On the other hand, the pursuers have adduced a considerable body of evidence to the opposite effect; their witnesses (of great nautical experience) are of opinion that the force of the sea striking the ship could not have broken the pipe as it was broken, but that if such a result had followed from the force of the sea, the effects of such force on the ship would have been evidenced by signs of great straining throughout the ship. It is proved conclusively that there were no such signs, and there is absolutely no evidence of any such straining or labouring of the ship as is averred by the defenders. In addition to this, there is evidence adduced on the part of the pursuers to show that the pipe in question was broken by pressure from within the ship, which, although to a large extent mere evidence of opinion, is supported by the real evidence derived from the ascertained facts as to the place and character of the break, and the condition of the pipe when it was discovered broken. On this part of the case, therefore, I have come to the conclusion that the great preponderance of the evidence is against the defenders, and that they have failed to show that the damage in question was occasioned by the perils of the seas.

It remains now only to be considered whether the defenders can claim exemption from liability for the damage now sued for in respect of the clause in the bill of lading which provides that they are not to be responsible "for any act, neglect, or default of the master or crew in the navigation of the ship in the ordinary course of the voyage." Now, before considering the legal effect of that clause, I think it right to state what in my view are the ascertained facts of the case to which that clause in its legal effect has to be applied. How, in point of fact, and through what fault, did the damage arise which is here in question? It is suggested by some parts of the evidence, and it was put to us in argument, although it is not averred upon record, that the damage may have arisen from bad stowage. If that had been proved I think the defenders could not have pleaded the clause in the bill of lading as exempting them from liability. The cargo was stowed by a stevedore and his men, and they are not among the persons for whose fault or neglect the defenders are exempt from liability by the bill of lading. But I think that this is not proved, and therefore I dismiss that matter from further consideration. It appears to me to be established by the evidence, including the real evidence afforded by the character of the break, and the state of the pipe when the break was discovered (by which I refer specially to the bend in the upper or lead part of the pipe, and the displacement of the flanges connecting the upper and lower or iron part of the pipe), that the pipe was broken by pressure of the cargo. I think it is the result of the evidence that there was a certain but limited movement of the cargo to the side and aft when the ship was rolling in a heavy sea, and that in and by such movement the cargo pressed upon the pipe so as to bend and break it, which result would not have followed had the pipe been duly and properly cased according to the usual if not invariable custom. It was the want of this casing which exposed the pipe to the risk of breakage—it was this want which directly led to its being broken. If I am correct in this view of the facts, it cannot be doubted that the damage arose through the fault or neglect of the "master and crew" of the ship. It was the duty of the carpenter on board (who had removed the original casing) to have cased the pipe; it was the duty of the master to have seen

that this was done. Well then, was this a fault or neglect of the master or crew "in the navigation of the ship?" I think it was. Neglect or default in navigation is the same thing as improper navigation, and that has been well and correctly described as including "every case where something is omitted to be done before the departure of the ship in order to enable the ship to carry the cargo safely from the port of departure to the port of arrival, and where that omission leads to the cargo not being safely and properly so carried"—*per* Fry, L.-J., in *Carmichael*, L.R., 19 Q.B.D. 249; see also *Good*, L.R., 6 C.P. 563. Navigation means more than the transit of the ship across the sea. It includes the management of the ship with a view to her crossing the sea—there may be navigation "without any voyage at all"—*Carmichael, supra* (p. 248). There remains, however, another question, was this fault or neglect on the part of the master or crew in the navigation of the ship, committed "in the ordinary course of the voyage." If the voyage here referred to had been the charter-party voyage, there could have been no doubt, on the authorities, that any fault or neglect committed while the ship was in port at Chittagong, was committed in the course of the voyage. But the charter-party is not set out in the record as part of the contract of affreightment with which the pursuers have any concern. It is only mentioned incidentally by the Sheriff-Substitute, and the defenders' counsel stated at the bar that they could not plead the charter-party against the pursuers. The voyage therefore with which we have alone to do is the voyage from Chittagong to Dundee. Was the fault, then, which led to the damage, committed in the course of that voyage? Here again my answer must be affirmative. The fault itself, as we have seen, was the failure duly to case the pipe. It was a fault no doubt to omit the casing of the pipe while the ship lay at Chittagong before the cargo was loaded. But that fault or neglect was committed every day so long as the neglect continued. It was therefore committed every day on the voyage from the time the ship left Chittagong until the damage occurred. The fault or neglect could have been remedied between the 5th of December, when the vessel sailed, and the 11th of December when she encountered the gale in the course of which the damage was done—not easily remedied perhaps but certainly possible. It could have been remedied by the partial removal of the cargo so as to admit of a casing being put on; or the discharge-hole could have been plugged up (as was done during the gale) to prevent damage by the entrance there of sea-water in the event of the pipe being broken in consequence of the want of casing. The neglect or default in question was a continuing one, and although committed in part was not the less committed after the voyage to Dundee began.

I am therefore of opinion that the damage in question was occasioned by the neglect or default of the master or crew in the navigation of the ship in the ordinary course of her voyage, and that for the consequences of such neglect or default the defenders are exempted by the express condition of the bill of lading under which the cargo was carried.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"Recal the interlocutor appealed against: Find in fact (1) that the defenders were carriers in their ship the 'Tilkhurst' of a cargo of jute from Chittagong to Dundee under the bill of lading No. 20 A of process, of which bill of lading the pursuers are the onerous endorsees; (2) that the said cargo was damaged in the course of said voyage by sea-water, which obtained access to said cargo by means of a hole in the side of the ship to which was attached or connected the discharge-pipe of the forward water-closet on the port side, which pipe was broken in the course of the voyage; (3) that said pipe was broken by pressure of the cargo thereon; (4) that said pipe was not cased as it should have been to prevent the pressure of cargo on said pipe, and that the want of casing as aforesaid led to the breaking of said pipe and consequent damage of the cargo; (5) that the failure to case said pipe was a default or neglect on the part of the master or crew of said ship in the navigation of the ship committed by them in the ordinary course of said voyage: And find in law that the defenders are not liable for said damage, it being damage for which they are exempted from liability by the terms of said bill of lading: Therefore assoilzie the defenders from the conclusions of the action: Find no expenses due to or by either party, and decern."

Counsel for Pursuers and Respondents—Asher, Q.C.—Dickson. Agents—J. & J. Ross, W.S.

Counsel for Defenders and Appellants—D.-F. Balfour, Q.C.—Aitken. Agents—Forrester & Davidson, W.S.

Saturday, February 28.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

TAIT *v.* JOHNSTON.

Sheriff Court—Union of Counties into One Sheriffdom—Act 33 and 34 Vict. c. 86, sec. 12—Jurisdiction—Citation.

Held that where two or more counties are united into one sheriffdom, a person is bound to answer a citation to the principal court of the united counties although resident in another of the counties.