impracticable or wholly inexpedient, they would not then be entitled to pronounce judgment against it upon that ground. They are in no different position in this case from what they would have been in, if they had originally prescribed this line and given notice for it. All that they do is subject to the qualifications and conditions of the Act of Parliament. They must give the required notices; they must allow parties to object; the surveyor, who is the statutory officer, is to be called on to give his certificate, and whatever judgment may be pronounced by the Commissioners, on hearing the whole matter, it will be competent to the parties interested to make it the subject of an appeal to the Sheriff. I doubt very much whether the Court of Session could deal with some of the matters indicated in the opinions of the Judges, which seem to be raised by the summons, viz. as to the merits of this particular line of sewers. I doubt whether that is a matter for the consideration of the Court of Session. I think the true question we have to deal with, and which the Lord Ordinary dealt with, is whether or not there is an executory agreement. It would not be enough to abide by the interlocutor of the Lord Ordinary, because that finds only in terms of a declarator; there are no operative words in it—nothing out of which operative words can be extracted, and, therefore, I think the best course is that which has been suggested by my noble and learned friend on the woolsack, that we should reverse the judgment of the Court of Session, and send the case back to the Court below, expressing the opinion we entertain as to the proper course to be followed. I am not without hopes that when the parties come to look at their true position, they will find it more expedient for both of them to go to their work more smoothly than they seem disposed to do at present.

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

Interlocutor appealed from reversed, and cause remitted with declaration.

Appellant's Agents, Maclachlan and Rodger, W.S.; Markby, Wilde, and Burra, Lincoln's Inn.—*Respondents' Agents*, Maitland and Lyon, W.S.; William Robertson, Westminster.

MARCH 27, 1871.

M'LEAN AND HOPE, *Appellants*, *v.* GEORGE FLEMING, and Others, *Respondents*.

Ship—Bill of Lading—Charter Party—Authority of Master of Ship—Lien for Dead Freight—*D., the master of a ship, chartered to bring a cargo of bones from certain ports in the Black Sea to Aberdeen, signed bills of lading for quantities delivered on board at each port, but expressed in Turkish dialect, which he did not understand. It turned out on arrival, that the quantities delivered were far short of those stated in the bills of lading, and amounted to a short cargo.*

HELD (affirming judgment), *That the quantities stated in the bills of lading were not binding on the shipowner, who was entitled, on explanation of the mistake, to recover freight for the quantity actually carried.*

HELD FURTHER, *That, the charter party expressly stipulating, that the captain was to have an absolute lien on the cargo for dead freight, the shipowners were entitled to the lien, and to recover for the deficiency in the full cargo, according to the rate stipulated for freight.*[1]

This was an appeal from a judgment of the Second Division. The respondent was the owner of the barque "Persian," and the appellants entered into a charter party at Constantinople, whereby it was agreed, that the ship should load a full cargo of cattle bones from certain ports named. The captain was to sign bills of lading at each port, and when the vessel was loaded, he was to proceed to a safe port in the United Kingdom. The ship went to the ports named, and the bones were delivered on board, but the bills of lading being in Turkish, the master signed them without being informed accurately as to the meaning of the quantities, or being able to test their accuracy. When he left the last port, he had misgivings as to the correctness of the quantities, and entered into a protest as to his cargo being mixed up with sand and rubbish. The total quantity shipped, according to the bills of lading in Turkish dialect, amounted to 701 tons; but on arriving at Aberdeen, only 386 tons were found and delivered, and there was a

[1] See previous report in part 5 Macph. 579: S. C. L. R. 2 Sc. Ap. 128: 9 Macph. H. L. 38; 43 Sc. Jur. 365.

deficiency of 210 tons, which the vessel could have carried beyond what were actually put on board. The charter party stated, that the master was to have an absolute lien on the cargo for all freight, dead freight, and demurrage. When the cargo arrived the master claimed from M'Lean and Hope the amount of dead freight and demurrage, as well as the freight for the bones actually carried and ready to be delivered. This being refused, M'Lean and Hope raised this action, claiming payment of the whole sum in respect of the bones represented by the bill of lading, and which they claimed to be entitled to. Thereupon Mr. Fleming, the owner, raised a cross action for the dead freight and demurrage. After evidence the Lord Ordinary held, that the owner was entitled to his freight, dead freight, and demurrage. Messrs. M'Lean and Hope thereupon appealed.

The material parts of the charter party, dated Constantinople, 17th November 1864, were as follows:—

"It is this day mutually agreed between Samuel Donaldson, of the good ship or vessel called the "Persian" of Liverpool, of the measurement of 598 tons or thereabouts, now lying in this port, whereof himself is master, on the one part, and Mr. Alexander Curmusi of this city, freighter of the said vessel, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall, with all convenient speed, after discharging her present cargo, be made ready to sail and proceed to Ounieh, Kerrasounda, in a third place of Marmora, and to fill up in a fourth place below, viz. Enos, Xhero, Orfano, Port Lagos, Salonica, Smyrna, or Scala Nuova at charterer's option, or so near thereunto as she may safely get, and there load from the agent of the said freighter a full and complete cargo of cattle bones in bulk. The captain to sign bills of lading at each port, at the option of the freighter, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provision and furniture ; and being so loaded, shall therewith proceed to a safe port in the United Kingdom, orders on signing bills of lading on the last port, or lay days, to commence and deliver the same on being paid freight as follows, viz. at the rate of say 35/, *Thirty five shillings stg. English* per ton *of bones of cwt.* 20. *Delivered in full.* The capt. to have the permission to break the bones for the sake of stowage; but is bound to receive from 20, twenty, to 25, twenty five, tons per day when alongside, being in full of all port charges and pilotage as customary. The captain or owner to have an absolute lien on the cargo for all freight, dead freight, and demurrage. The cargo to be brought to and taken from alongside at charterer's expense and risk, and the ship's boats and crew to render all customary assistance in towing the lighters. (The act of God, the Queen's enemies, restraint of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever during the said voyage, always excepted.) The freight to be paid on unloading and right delivery of the cargo, half in cash, and the remainder by approved bills on London at three months' date, or in cash, at captain's option, less three months' discount, etc."

The following were the interlocutors and judgments in the conjoined actions:—"Finds that, on or about 17th November 1864, Samuel Donaldson, master of the ship 'Persian,' belonging to the defender, George Fleming, entered at Constantinople into a charter party with Alexander Curmusi of that place, the right to which charter party was afterwards transferred to the pursuers, M'Lean and Hope, by which it was agreed, that the said ship should proceed to certain ports therein specified, and should load a full and complete cargo of cattle bones in bulk, to be carried, on behalf of the charterer, to a port in the United Kingdom, freight to be paid for the same at the rate of 35*s.* per ton of 20 cwt. of bones: Finds, that the said ship proceeded, accordingly, to certain ports, and received on board a certain quantity of bones, on behalf of the said pursuers, with which she proceeded to Aberdeen, where she arrived on or about the 8th June 1865: Finds, that the quantity of bones then on board of the said ship, and of which delivery was made or tendered to the pursuers, was 386 tons 18 cwt.: Finds, that, according to the tonnage and capacity of the said ship, she could have received and carried a further quantity of 210 tons of bones, or thereby: Finds it not proved by the pursuers, that any further quantity of bones than the above mentioned 386 tons 18 cwt. was shipped on board the said ship or otherwise delivered, on behalf of the pursuers, for carriage by the said ship: Finds, that, in these circumstances, no claim of reparation, or other legal claim, lies at the instance of the pursuers against the defender in respect of an alleged non-delivery to them by the said defender of more than the foresaid quantity of bones; and therefore, in the action at the instance of the said M'Lean and Hope, assoilzies the defender from the conclusions of the action, and decerns: In the counter action at the instance of the said George Fleming against the said M'Lean and Hope, finds the said M'Lean and Hope liable to the said George Fleming in the sum of £377 1*s.* 6*d.*, being the amount of freight due on the bones carried by the said vessel, after deduction of the sum of £300 paid to account: Further, finds the said M'Lean and Hope liable to the said George Fleming, in name of dead freight, in the sum of £367 10*s.* as the amount of freight on 210 tons of bones, which would have been further yielded by the vessel, if filled with a complete cargo, in terms of the charter party aforesaid; and decerns against the defenders, M'Lean and Hope, in favour of the pursuer, George Fleming, for the foresaid sums of £377 1*s.* 6*d.* and £367 10*s.*,

with interest thereon, at 5 per cent. per annum, from 20th July 1865 till payment: *Quoad ultra*, assoilzies the said defenders, M'Lean and Hope, from the conclusions of the said counter action, and decerns: Finds the said M'Lean and Hope liable to the said George Fleming in the expenses of the said actions, both prior and subsequent to their conjunction; allows an account," etc.

"W. PENNEY."

LORD JUSTICE CLERK.—The important question of fact involved in these conjoined actions is, Whether there was delivered from the vessel of Mr. Fleming, at Aberdeen, the entire cargo of bones put on board the vessel at the ports in Turkey at which the shipment was made.

Messrs. M'Lean and Hope affirm, that the cargo actually shipped amounted to 701 tons 3 cwt. 1 quarter and 20 pounds. The quantity delivered amounted to only 386 tons 18 cwt. Their case is in so far supported by the bills of lading signed by the master, which acknowledges shipment of quantities of bones expressed in Turkish weight, which, being converted into tons, brings out the quantity to delivery of which they say they are entitled. These bills of lading, though stating each a specified quantity of kintals or cantars, contain an exception of weight, quality, and contents unknown.

Messrs. M'Lean and Hope at first pleaded, that the bills of lading were absolutely binding on the shipowner so far as the particular quantities were specified, but that plea was not maintained in the discussion. It is now fixed, that such instruments are not binding to the effect of compelling the owner to deliver the quantity specified on the face, but they no doubt afford materials to be taken into view in determining the fact. Cases may be conceived where such bills of lading may be nearly conclusive as to the fact. In other cases they may go a very short way in proving the fact. The question is, What effect is due to them here? The master who granted these bills of lading has been examined, and, if reliance can be placed upon his evidence, they cannot be of much value, for, although subscribing these bills, according to the wish of the parties interested in obtaining them, he was ignorant of the meaning of the words importing the weight, and had no knowledge from any source, except the statement of others, as to how the fact was.

The persons engaged in the loading shewed great looseness in the process of weighing. No note was kept of the weight—as in some cases the weight was only judged of by observation, not by weighing—while there is entirely absent an element of proof which might, for all that is shewn, have been recovered and adduced in support of the case of Messrs. M'Lean and Hope, had it been favourable to them. It appears that an export duty is charged by the Turkish Government on bones exported. No evidence has been brought to shew the payment made, or that such evidence could not have been obtained.

The log is referred to, and calculations are made as to the amount which may be held proved, by taking into view the number of the lighters supplying the bones, the days spent in loading, and the number of kintals in some instances mentioned. These views are deserving of consideration, but there are elements of uncertainty in the calculation, arising from the varying sizes of the lighters, as to the quantities shipped in a day—the only evidence approaching to certainty being adduced as to the shipment at Enos, the last port touched at; and as to the kintals mentioned in the log, the mate, who kept it—as ignorant as the master of Turkish weights—says that he put down the quantities stated to him on information.

The case of M'Lean and Hope is thus not entirely satisfactory, in the absence of evidence; but the evidence adduced by Mr. Fleming goes to this, that every portion of the bones shipped was delivered. He is supported in this proposition by the very clear testimony of the master, the mate, and a seaman employed on the vessel, and there is no evidence from any one as to the abstraction of a single cwt. of bones, nor a reasonable suggestion of any possible way in which so enormous a quantity as is deficient could have been abstracted, or could advantageously have been realized. A conspiracy to unship and dispose of bones actually put on board to the extent of more than 300 tons weight—if it had existed and been carried out—is a thing nearly incredible; and assuredly, if it had existed and been carried out, would have been detected. There is no shadow of suspicion thrown upon any one of the crew by any fact proved against them in the case. It is not implied, that the parties engaged in loading should have been guilty of deceit as to the amount shipped, or been themselves deceived. It seems to me in the highest degree improbable, that such a commodity, once shipped, should have been abstracted and disposed of. Perjury of three respectable men (there must have been so according to the view of M'Lean and Hope) is as little to be credited as the conspiracy to steal, and the success of such a conspiracy.

The master, before leaving the last port at which he touched, on being called upon, as he says, to leave with a deficient cargo, protested against the deficiency of cargo. We have the protest, and we find it founded on at the moment of the vessel's arrival at Aberdeen. The protest is an element in the case strongly confirmatory of the fact, that there remained a void in the ship, which was not and could not at the time be filled. The vessel leaving Turkey is not in a situation to part with any part of its cargo on the way; and if so, the case of Messrs. M'Lean and Hope not only fails, but a case is established by Mr. Fleming, complete in itself.

This disposes of the question in so far as relates to the claim for cargo carried. It also

establishes, that there was a deficiency in the cargo, giving rise to a just claim for dead freight. But Messrs. M'Lean and Hope dispute their legal liability; they plead that they were not parties to the contract of charter party, and that the parties to that contract may be liable: they, and the cargo belonging to them, are not affected.

By the charter party the cargo is made subject to a lien for dead freight. If they are in right of the charter party, it is clear, in law, that they are liable to fulfil that obligation.

The weight of evidence seems to me to be in favour of the view, that this charter party was truly held by Whitaker and Co. for them. Whitaker and Co. acquired right to the charter party by a payment of £50 premium. They charge this payment against M'Lean and Hope, and they pay Whitaker and Co. the £50. A premium is paid to the master amounting to £40, in connection with this very charter party, and it is paid by Whitaker and Co., charged against M'Lean and Hope, and paid. In a letter at the time of the purchase, Whitaker and Co. detail the transaction, and the statements in that letter are acted on by M'Lean and Hope, without any disclaimer of the act as unauthorized,—on the contrary, by fulfilling all that is suggested.

Coupled with the fact, that commission is charged and paid on purchases made by Whitaker and Co., and paid by M'Lean and Hope, I am prepared to hold, that they were the true holders of the charter party through their agents Whitaker and Co. The evidence of Mr. Hope is not, if implicitly taken, to be held as adverse to this, for he says, in one part of his evidence, "They" —that is, Whitaker and Co.—"chartered the ship, and handed over the charter party to us;" and in another, when asked "if the charter was for you?"—*i. e.* the firm of the witness—he says, that he "cannot answer the question."

But if not holders for themselves, they knew well the contents of the charter party, which was sent to them; they were mixed up with the transactions under which the shipment was made; and they could not but know that the cargo was liable to lien for dead freight, according to these terms. Under these circumstances, their plea as to freedom for the liability under the charter party is inadmissible. Their case is, that under the bills of lading reference is made to the charter party simply as regulating the rate of freight, and that, nothing appearing on the face of the bills to import the other conditions of the contract, they are unaffected by it. They plead, that they acquired right to these bills of lading for value, and they appeal to the doctrine recognized in the case of Fry and previous cases,—that onerous holders of bills of lading may take the cargo, subject only to the conditions appearing on the bills, or imported by reference on the face of the bills. The case is distinguishable from the present in the circumstance, that the freight was there due for a mere portion of the cargo, and that the holder of the bill of lading was a stranger, wholly ignorant of the terms of the charter party. Here Messrs. M'Lean and Hope knew the conditions, and could not give the first bill of lading, or take right to the other bills of lading, honestly ignoring the conditions of the shipment as appearing from the contract of charter. They state themselves, in a letter of the 1st February 1865, as under a heavy claim for demurrage in regard to the vessel. If liable in demurrage, they could be so only under the charter party, under which also this claim arises. The case seems to me to be clearly within the authority of *Kern* v. *Deslandes*, where, under similar circumstances—not stronger, but less conclusive—liability was inferred against the holder of a bill of lading.

The other Judges concurred, and the Lord Ordinary's interlocutor was accordingly adhered to.

M'Lean and Hope appealed.

The *Lord Advocate*, *Sir R. Palmer* Q.C., and *Lanyon*, for the appellants.—The judgment of the Court below was wrong. It is established by the evidence, that the master of the ship did receive bones equal in weight to the quantity stated in the bills of lading. If so, the owners of the ship are responsible for the delivery of that weight, unless they were prevented by the act of God, etc., from delivery, which is not alleged or proved. But whether or not, the bills of lading are binding on the shipowner, being signed by the master—*Lickbarrow* v. *Mason*, 2 T. R. 63; *Howard* v. *Tucker*, 1 B. & Ad. 712; 18 and 19 Vict. c. 111, §. 3. If they are not to be deemed conclusive, they are worthless as negotiable instruments. The words in the bill of lading "weight and quality unknown," are mere words of form, and cannot qualify the express statement of the amount.—*Bradley* v. *Dunipace*, 1 H. & C. 521. The cases relied upon by the respondents of *Grant* v. *Norway*, 10 C. B. 665, and *Hubbersty* v. *Ward*, 8 Exch. 330, seem to proceed on the assumption, that every negligent act of a master of a ship is beyond the scope of his authority —a proposition which cannot be maintained.

As to the claim for dead freight, that is stated only in the charter party, but the appellants are not assignees of the charter party. They are merely assignees of the bills of lading, and are only bound to pay freight for the goods according to the charter party rate per ton. As no more goods than 386 tons have been delivered, there is no obligation on the appellants to pay for more. Besides, dead freight being an unliquidated sum, it is impossible to say what it amounts to, and a lien for such an indefinite sum has never yet been held good—*Pearson* v. *Goschen*, 17 C. B., N. S. 352; *Kirchner* v. *Venus*, 12 Moore P. C., 361; *Thomas* v. *Clark*, 2 Stark. Rep. 450; *Phillips* v. *Rodie*, 15 East, 547.

Jessell Q.C., and *Sir G. Honeyman* Q.C., and *J. S. Will*, for respondents.—The respondents

are entitled to the freight on the bones actually carried, and the evidence shews, that all that was put on board was delivered at Aberdeen. The words "weight and quantity unknown" on the bills of lading, are sufficient to protect the shipowner from liability—Abbott on Shipping, 279 (11 ed.); *Haddow* v. *Parry*, 3 Taunt. 303. A master of a ship has no implied authority to sign bills of lading except for goods actually put on board, and the indorsee of a bill of lading can demand nothing more than delivery of the goods so actually carried. The Act 18 and 19 Vict. c. 111, § 3, does not make a bill of lading conclusive against any one but the master or the wrongdoer. The fraudulent or negligent acts of the master do not bind the shipowner—*Grant* v. *Norway*, 10 C. B. 665; *Hubbersty* v. *Ward*, 8 Exch. 330; *M'Lean* v. *Munck*, 5 Macph. 893. The appellants were bound by the charter party either as entering into it through their agents or at least as having notice of its terms—*Kern* v. *Deslandes*, 10 C. B., N. S. 205; *Small* v. *Moates*, 2 Moore & Sc. 674; *Gledstanes* v. *Allen*, 12 C. B. 202. If so, then the obligation to pay for dead freight is part of the contract. There is no difficulty, at least in this case, of ascertaining the sum due for dead freight, for the cargo was to be one of bones, and the difference between the quantity actually carried and the quantity which might have been carried represents the amount due for dead freight.

Cur. adv. vult.

LORD CHANCELLOR HATHERLEY.—My Lords, in this case there were two actions, an action and a cross action, in relation to a controversy between the parties, Messrs. M'Lean and Hope, the appellants, and Mr. Fleming, who is a shipowner. It appears, that M'Lean and Hope, by means of their agents, under a certain arrangement and a certain charter party to which I shall more particularly refer, caused a cargo of bones to be brought from the Levant, from Constantinople, and other parts in the neighbourhood, to Aberdeen. The first action was brought by the appellants in respect of the non-delivery of a certain quantity, which it was alleged had existed as the original cargo, and ought to have been delivered to Messrs. M'Lean and Hope; and the cross action was brought by Mr. Fleming, the charterer, on the ground, that the vessel ought to have been laden, pursuant to the provisions of the charter party, to its full extent, that it was not laden to its full extent, and that there was a particular provision in the charter party, that he was to have a lien on the cargo for, amongst other things, "dead freight," whatever that may mean, as well as demurrage, and he claimed a lien for the deficiency in the cargo according to a rate analogous to the rate payable in respect of freight for the actual cargo placed on board. The result of the action was this, that the respondent was assoilzied in the action against him for the non-delivery of the alleged quantity, and the appellants were found to be liable to him in respect of the lien which he claimed for dead freight in a certain amount of money, which is not material, but which was founded upon the ratio of the rate payable in respect of the goods actually placed on board.

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

The charter party was this: It was agreed between Donaldson, the captain of the ship "Persian," a vessel of the measurement of 598 tons, or thereabouts, and Curmusi, the freighter, that the ship being fitted for her voyage, should with all convenient speed, after discharging her then cargo, be made ready to sail and proceed to Ounieh, Kerrasounda, and a third place of Marmora, and to fill up in a fourth place below, namely, Enos, and several other places therein named. Ultimately Enos was the place determined upon. Then the captain was to "sign bills of lading at each port, at the option of the freighter, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provision, and furniture;" and then he was to deliver the goods at a safe port of the United Kingdom on being paid freight, as follows, viz. "at the rate of say 35*s*. sterling English per ton of bones of cwt. 20, delivered in full." The captain was to have the permission to break the bones for the sake of stowage, but is bound to receive from 20 to 25 tons a day when alongside. Then there was this provision as to freight: "The freight to be paid on unloading, and right delivery of the cargo, half in cash, and the remainder by approved bills." Then there were directions what the bills should be, and then the ship was to be in every respect ready to receive her cargo at a certain time, and then there were ten days' demurrage. Then it was provided, "cash for ship's ordinary disbursements to be advanced at port of loading by the charterer's agents free of interest and commission," and several other

provisions of that kind. Then the penalty for non-performance of this agreement is to be the amount of freight, and then the charterers bind themselves to "ship at Ounieh and Kerrasounda from 170 to 200 tons of said bones. Out of said £300 advanced, £200 payable here before sailing, and remainder at the ship's return to this place." Then it is understood, that the ship is to be loaded in four of the above places. There was also a provision as to the lien of the captain or owner, which I omitted to read: "The captain or owner to have an absolute lien on the cargo for all freight, dead freight, and demurrage."

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

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

The bills of lading signed by the captain were from time to time sent over to Messrs. M'Lean and Hope; and they put their case in this way. They say: We have here bills of lading signed by the captain, upon which we had a right to rely. We made payments in respect of the cargo. Some attempt was made to say, (I do not think it appeared clearly to be so,) that the bills of lading misled them in this respect. But in fact many payments were made before the bills of lading were actually placed in their hands. Then they say further, that the signature of the captain is conclusive with reference to the amount to be stowed in the vessel. And then they say further, that the Court below ought to have taken as being established, and they ask us to take it as being established, that there was originally on board this vessel a full cargo of bones, according to the terms of the charter party, and that the owner of the vessel is now liable for the full cargo not having been delivered; for when the vessel arrived at Aberdeen it was found, that the cargo was short of the amount required to the extent of 200 tons of bones; and that is the occasion of the first action. Here, they say, is your acknowledgment by which you are bound, and we are entitled to recover to the full extent of this acknowledgment.

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

Now, in the first place, as regards the matter of fact, I think it is proved to demonstration, that the cargo never was on board. The signature of the captain, however it might affect him under the Statute, which renders the signature of the captain to a bill of lading conclusive against him, has not that effect as against the owner of the vessel. It is evidence no doubt, and evidence in one respect of a very important character; because unless the captain was strongly supported by extraneous facts, it would throw great discredit upon his own testimony if we had to rely upon his testimony alone as to whether or not the bones were put on board. It was undoubtedly his duty, in signing the bills of lading, if he did not know what the terms in the document which he signed meant, to have informed himself, as he could easily have done, at the place where the cargo was placed on board, and certainly not to have signed documents with the meaning of which he was unacquainted. But as regards the actual fact, we have no evidence given of there ever having been that actual quantity of bones on board. Some attempt was made to produce evidence upon that subject, but I do not go into that, for I agree entirely with the Court in Scotland, that there is nothing which can lead to any sound conclusion that that quantity of bones was ever put on board. We ought to have had that primary fact from the agents of the Messrs. Whitaker, or some person employed by them. They should have given us very distinct evidence of what the quantity was that was put on board; but some of those who profess to give evidence

say, that they were not present during the whole time of loading the ship, and none of them profess distinctly to have ever seen on board the quantity specified in the different bills of lading to have been put on board at the various places mentioned. On the contrary, we have it clearly proved, by the protest made at the last port by the captain, that at that time the full quantity was not placed on board as it ought to have been; and the captain is supported by two other officers of the ship, who state the same things; and not a single man is produced from on board the ship or from any other quarter who professes to give the slightest account of this very disagreeable discrepancy (as it is justly called) between the different statements as to the loading of the ship, or in any way to account for it. It is quite impossible, if the bones were once on board, being articles of considerable bulk, and requiring some trouble in stowage, that they could have been removed without anybody knowing it; or that, if they could have been so removed by any conspiracy between the captain and all on board, the secret could have been preserved, and that no trace should remain of their having been placed in the vessel. I think, therefore, it is beyond dispute, as a matter of fact, that the bones never were on board.

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

Now, as regards dead freight itself, it has been observed by several authorities that the term is not a very accurate term. It is probably the poverty of our language that has prevented a more precise and definite expression being used, but it is intelligible enough. An engagement is made that a full cargo shall be provided. If the engagement is to provide a full cargo, and the ship is obliged to sail with a partial cargo, of course that is a great loss of freight to the owner. Now, dead freight has been defined by Lord Ellenborough in the case of *Phillips* v. *Rodie* as being unliquidated compensation for loss of freight by way of remuneration in respect of that loss. That is an explicit and intelligible proposition enough. There is clearly a loss, wherever a contract has been made for the supply of a full cargo, and a full cargo is not supplied. And there is a claim in respect of the freight which might have been earned if the full cargo had been supplied. The question of unliquidated damages may therefore be a question of proof between the parties as to whether there is any engagement for a lien or not.

If there be, there is no difficulty in ascertaining what the engagement was in this particular case. The cargo was of a uniform description. It does not appear to me, that there is any difficulty, or anything to induce us to suppose that there was any misunderstanding between the parties as to what the real contract was. So much per ton has been agreed to be paid for a full cargo of a uniform description of goods. A full supply of a uniform description of goods has been agreed to be supplied, and there is no difficulty in ascertaining either the quantity of the cargo agreed for, or the amount agreed to be paid per ton for the cargo. The payment is to be at the same rate in respect of the goods not supplied as for the goods supplied. Of course there may always be some difficulty in liquidating the damages, because it may be that the captain may have had it in his power to fill up the cargo; he may have had an offer from other parties to fill up the deficiency; he may have had an offer from the very parties who entered into the agreement to secure him in respect of dead freight. All that will have to be considered if the case occurs. There is nothing to shew that the captain was guilty of any negligence in not filling up the freight. As the contracting parties neglected to fulfil their engagement, there does not appear to have been any difficulty when the ship arrived in ascertaining at once what the amount of dead freight was, and the lien would consequently have its full effect.

Another case which was cited was *Pearson* v. *Goschen*, on which some observations were made by the learned Judges who heard the case, as to the effect of the lien for dead freight being a lien in the form of general words in the charter party. The remark was made upon that particular charter party, that there were printed formal words which had been introduced into the print as general ordinary words without sufficient consideration as to what they would be applicable to; and in that particular case it was held dead freight was to be struck out as having been inserted heedlessly, as meaning nothing, but as being only general words having no applicability to the actual contract entered into between the parties, or to the words in the charter party. That case, we understand, is under appeal, and is likely to be brought before the House, and therefore it is

better to say no more upon the subject. It is enough to say, that the circumstances existing in that case are extremely different from the circumstances existing here, where we find a clear case of an omission to supply a full cargo as contracted for, and a clear case, therefore, for applying the definition given by Lord Ellenborough as to what dead freight is, a definition exactly agreeing with that which is given by Mr. Bell in his Commentaries. Then the remaining question is, how far the plaintiffs, Messrs. M'Lean and Hope, are bound by this charter party. They say: We are not tied to the terms of the charter party in respect of dead freight; we entered into no contract in respect of dead freight and lien; apart from that, we have a right conferred upon us by the bills of lading, which specify the quantity of bones to be delivered on the arrival of the ships.

Now I do not read the letters relating to this subject, because they have been so recently before us that they must be in the memory of the House.

The letters which passed between Whitaker and Co. and M'Lean and Co. with reference to the chartering of the vessel, and with reference to the transfer of the charter party from Curmusi to Whitaker and Co., and the handing over the charter party by Whitaker and Co. to M'Lean and Co. as their employers, establish clearly that whatever lien was conferred by the charter party must attach to those who availed themselves of it. Now the charterers of this ship availed themselves of the provisions of the charter party of this ship for the purpose of bringing that cargo from the ports where it was shipped to Aberdeen. I apprehend, therefore, if you once get at the principle that a lien for dead freight may exist by a specific contract, there never could be a case in which the meaning of those words could be more easily ascertained than in the present instance, and never a case in which it could be clearer that the parties who accepted the services of the ship were bound to submit to the conditions of the charter party.

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

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

The ship "Persian" proceeded to Ounieh and Kerrasounda, and shipped a quantity of bones for which the captain afterwards signed a bill of lading. Further quantities of bones were afterwards shipped at the Golden Horn, at Rodosto, and at Enos, for which bills of lading were respectively signed by the captain. The total quantity of bones stated in the bills of lading to have been shipped amounted to 701 tons and a fraction. The actual quantity in the ship on her arrival at Aberdeen was 386 tons, which was 210 tons short of a full and complete cargo. When the ship arrived at Aberdeen, the appellants, the owners of the bones, demanded the delivery to them of the quantity of bones mentioned in the bills of lading of which they were the holders. In reply to this demand the master, claiming a lien upon the cargo, offered to deliver the actual cargo on board, on the appellants satisfying the claim for freight, dead freight, and demurrage. After some discussion between the parties upon the subject of their respective claims, cross actions were brought, that of the appellants claiming damages to the amount of the sums paid by the appellants for the bones, on account of the alleged wrongful failure and refusal of the respondents to deliver to them the entire quantity of 701 tons, and the action of the respondents being for the freight upon the quantity of bones brought to Aberdeen, and for dead freight upon the quantity of the cargo deficient, and demurrage. The Lord Ordinary conjoined the two actions, and after hearing evidence on both sides, pronounced an interlocutor in which he found, that the quantity of bones of which delivery was tendered was 386 tons 18 cwt.; that according to the capacity of the ship she could have received 210 tons more; that the appellants had not proved that any further quantity of bones than the 386 tons 18 cwt. was shipped or delivered to be carried, and he assoilzied the respondents from the conclusions of the action. In the counter action the Lord Ordinary found, that the appellants were liable to the respondents in the sum of £376 1*s.* 6*d.* for freight on the bones actually carried by the ship after deducting £300 paid to account; and in the name of dead freight, in the sum of £367 17*s.* as the amount of freight on 210 tons of bones which would have been further yielded by the ship if filled with a complete cargo. The case was carried by a reclaiming note to the Second Division of the Court of Session, and that Court having adhered to the interlocutor, the present appeal was brought.

The first question to be considered is, whether there was evidence that the cargo shipped was to the extent only for the quantity found to be in the ship on her arrival at Aberdeen. On this

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

I am not disposed to lay much stress on the words at the foot of the bills of lading, "weight, and quality, and contents unknown," nor upon the evidence of the captain that he had no knowledge what was the weight of a kintal, because the bills of lading state that the cargo was cattle bones, which would inform the captain of the contents and quality, and if he was ignorant of what a kintal meant, he should not have signed without asking for information.

If the action had been against the captain himself under the 18 and 19 Vict. c. 111, his signature to the bills of lading would have been conclusive evidence of the quantity of the bones represented to have been shipped, and his ignorance, not induced by any fraud of the shippers, would have furnished no excuse. But it being admitted that it lay upon the shipowner to rebut the *primâ facie* evidence arising from the bills of lading, he appears to me to have satisfactorily shewn, that the quantities stated to have been shipped cannot be correct. How the large deficiency of 210 tons arose must be matter of speculation. But if the evidence of the captain is to be believed (and there seems no reason to doubt it) it is impossible that this additional quantity of bones could at any time have been on board the vessel. In the course of his evidence the captain said: "I brought to Aberdeen the whole of the cargo that was shipped. No part of it was put away either by myself or any one else. No part of the cargo was interfered with from the time it was put on board till it was landed at Aberdeen;" and he states, that his notion of the weight of the cargo, which he judged of from the ship's draught of water, was, that it would be somewhere about 400 tons, a conjecture which proved to be not very wide of the mark. It is no slight confirmation of the evidence that there was not a full and complete cargo when the ship sailed from Enos, the last place of loading; that the quantity of bones delivered on the 3d of April 1865 having exhausted all that were there for delivery, the captain, on the following day, the 4th April, went before the vice consul at Enos, and in a formal document stated, that he had informed the agent of Whitaker and Co., in the presence of the vice consul, (who must have known whether the statement was correct,) that not having received a full cargo he reserved his right to protest against any one liable for the failure, and by the same document he formally protested against the freighter. The appellants were not able to meet this evidence by proof that the quantities mentioned in the bill of lading, or any more than the 386 tons, were actually shipped. And this question was therefore properly determined by the Lord Ordinary and by the Court of the Second Division in favour of the respondent.

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

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

It must be admitted, that the term "dead freight" is an inaccurate expression of the thing signified by it. It is, as Lord Ellenborough said in *Phillips* v. *Rodie*, 15 East, 554, not freight, but an unliquidated compensation for the loss of freight recoverable in the absence and place of freight. The learned counsel for the appellants, in support of their argument that no dead freight properly so called was agreed to be paid by the charter party in question, cited the cases of *Kirchner* v. *Venus*, 12 Moore (P.C.) 361, and *Pearson* v. *Goschen* and Others, 17 C. B. (N.S.) 352.

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

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

It was argued for the appellants, that even if a claim for damages for breach of a covenant in a charter party to furnish a full lading to a ship may be correctly called "dead freight," yet that no lien can exist where the damages are unliquidated. But I understand the case of *Phillips* v. *Rodie* not to have denied, that though the damages were unliquidated there might have been a lien upon the cargo for them if the contract of the parties had stipulated for it, which it had not. And in the case of *Besley* v. *Gladstone*, 3 M. & Sc. 216, cited by the counsel for the appellants, there was no actual decision upon the question of lien for dead freight, but it was held, that a clause mutually binding the shipowner, and the ship, and the freighter, and the cargo in a penalty, could not be considered as intended to give the shipowner a lien for the non-performance of the covenant in the charter party to load a full cargo. It may be observed, that even where there is an express stipulation to pay full freight as if the goods had been actually loaded on board, and that the master shall have the same lien upon the goods actually on board as if the ship had been fully laden, the case may be one of unliquidated damages, for the master may have filled the vacant space with the goods of other persons, and the freighter would be entitled to have an allowance for the profit thus made. In construing the charter party it must be assumed, that the parties understood the meaning of the terms they employed, and that, amongst others, the term "dead freight" meant (according to Lord Ellenborough's definition) "an unliquidated compensation for the loss of freight." The freighter, with this understanding, agrees to load on board the respondent's ship a full and complete cargo of cattle bones, and to pay freight at the rate of 35*s.* sterling English, per ton. He knows that if he failed to perform his covenant to load a full and complete cargo he will be liable to the shipowner in damages under the name of dead freight, and he agrees to give the captain or shipowner an absolute lien on the cargo for all freight, dead freight, and demurrage. Why should not his agreement have its intended effect?

This case can hardly be considered to be one of unliquidated damages, because the captain not having brought home any other goods than those of the appellants, the proper measure of the shipowner's claim appears to be the amount of the agreed freight which he would have earned upon the deficient quantity of 210 tons of bones. But whether the amount of his damages is to be regarded as ascertained or not, I am of opinion, that the charter party gives him a lien for his claim on account of the deficient cargo. Was this lien then available against the appellants? I quite agree that if they were merely holders of the bills of lading for valuable consideration, the shipowner would not have been entitled to a lien upon the cargo on board the ship for anything more than the freight upon the quantity actually shipped and brought home, the appellants being only liable to pay freight for the goods as per charter party. But it appears to me that there is evidence to shew, that the charter party was entered into by their agents on their behalf. The charter party is dated 17th November 1864. On the 24th September 1864 the appellants sent to Whitaker and Company a purchase note of 300 tons of cattle bones, in which it is provided, that shipment is to take place by vessel, to be taken up by M'Lean and Hope, which is to be loaded with Newcastle steam coal, and despatched to Gallipoli on the Dardanelles. The respondent's ship the "Persian," having been despatched by the appellants for the purpose of receiving the bones which they had purchased, the charter party was entered into for the carriage of these bones by Mr. Curmusi as the freighter. There can be no doubt that Curmusi was acting for Whitaker and Co. Curmusi gave the captain of the "Persian" £40, and also advanced him £200 against his freight. On the 22d of November 1864 Curmusi transferred his right and interest in the charter party to Whitaker and Co. and received from them the sum of £50, and on the following day, the 23d November, Whitaker and Co. wrote to the appellants advising them of the charter or re-charter of the "Persian," and sent them the charter party debiting them with the £50 paid to Curmusi, the £40 to the captain, and the £200 advanced upon freight, and charging them with 5 per cent. commission, which they state includes brokerage. This evidence appears to me to prove that the appellants were really the charterers of the respondent's ship through their agents Whitaker and Co., and, therefore, although as indorsees of the bills of lading merely, they would not be bound by the stipulation as to lien in the charter party, yet, as the real charterers, it is binding upon them.

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

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

Two questions were argued at the bar: First, what is the meaning of the word "dead freight," as contained in the charter party, in respect of the remedy which it gives the shipowner? does it entitle the shipowner to say, that the deficient quantity shall be paid for at the rate assigned per ton in the charter party?

I think that that would be a very unreasonable interpretation; for undoubtedly, if the full

freight had been furnished to the captain, the expenses of loading and the other expenses attendant upon the additional 210 tons which were wanting would have occasioned some expenditure to the shipowner. I cannot, therefore, agree that the stipulation for payment of dead freight, without more, entitles the shipowner to have the deficient quantity assessed at the price per ton stipulated to be paid for the cargo that is put on board. The result, therefore, is, that in a charter party giving no specific sum as the amount to be recovered by way of compensation for dead freight, the shipowner becomes entitled only to a reasonable sum, which is another word for unliquidated damages.

Supposing then that the claim for dead freight without any specific sum assigned results only in a claim for unliquidated damages, the question arises whether considerations of convenience would prevent the shipowner from having a lien upon the cargo on board in respect of unliquidated damages, seeing that he would become entitled to retain the cargo during the time occupied by the ascertainment of the amount of the unliquidated damages. There may be some inconvenience in that, but that ought to have been considered by the parties when they entered into that express stipulation. There having been a clear stipulation that the lien shall enure for dead freight which will make it enure for the sum to be assigned as the proper compensation for the dead freight, I think it is impossible to set up any consideration of inconvenience in answer to the clear terms of the contract which has been entered into. There remains but one further question to be considered, and that is, whether the shipowner has a right, in respect of dead freight and the damage pertaining to it, as against an indorsee of the bill of lading for valuable consideration. Now that has been examined specially by my noble and learned friend who has just sat down, and I agree with him, that substantially the present appellants are not only indorsees of the bill of lading, but in reality they were bound, as the persons who originally authorized the chartering of the ship, and who remained entitled to the benefit of that charter party, and were therefore subject to the obligations contained in it. The result is, that their title to the bill of lading is controlled by their liability under the charter party.

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

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

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

That brings us to the consideration of the claim of the shipowner. Now, in respect to the claim of the shipowner for the freight of the 386 tons, it was never disputed that he is entitled to that. But there still remains the important question, whether or not the shipowner was entitled to dead freight? Upon that point an argument was maintained in the Court below to the effect, in the first place, that no payment for dead freight was due, because the cargo had been fully put on board. But that is displaced by evidence of the fact. Then it was maintained, that the appellants were not liable for dead freight, inasmuch as they were not the charterers of the vessel. The Court decided against them upon that point. When the case came up here certain other pleas were pleaded. It was maintained here, (as I understood the argument of the Lord Advocate,) that under the charter party there could be no such thing as a claim for dead freight; that there was no stipulation for dead freight, and that therefore there could be no claim for dead freight; and further, that even supposing there could be a claim for dead freight, there was no lien for dead freight.

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

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

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

Interlocutors affirmed, and appeal dismissed with costs.

Appellants' Agents, Millar, Allardice, and Robson, W.S.; Simson and Wakeford, Westminster. —*Respondents' Agents*, Henry and Shiress, S.S.C.; W. & H. P. Shairp, London.

MAY 9, 1871.

FREDERICK H. CARTER, *Appellant*, *v.* DAVID M'LAREN and Co., *Respondents.*

Bankruptcy—Secret and Collusive Preference—Forfeiture of Claim—19 and 20 Vict. c. 79, § 150—*M., a creditor in a sequestration, on condition of receiving an addition of 1s. 9d. per pound to a dividend of 7s. 3d., to which latter sum the other creditors had agreed, and on the understanding that the addition was not to come out of the pockets of the other creditors, agreed to withdraw all opposition to the acceptance of the offer of composition made by the bankrupts. M. did not conceal this arrangement from the other creditors, and on being informed that it was illegal refunded the additional dividend, and informed all the creditors of that fact.*

HELD (reversing judgment), *That M. had incurred the forfeiture under the 150th clause of the Act 19 and 20 Vict. c. 79, and that proof of his ignorance of the law and* bona fides *did not amount to "shewing cause to the contrary" so as to exempt him from the penalty, and that the Court had no power to mitigate the penalty.*[1]

This was an appeal from a decision of the First Division. The appellant had presented a petition against the respondents, praying to have it found, that the respondents had, contrary to the Bankruptcy (Scotland) Act, 1856, entered into an agreement with the view of obtaining, and under which they had obtained, a preference over the other creditors of Messrs. J. and G. Pendreigh, grain merchants, in Edinburgh, on whose sequestrated estates the respondents claimed to be ranked as creditors, and that the respondents should be amerced in the penalties attached by the Statute to such an agreement, as being secret and collusive on the part of a creditor for facilitating a bankrupt's discharge. The Lord Ordinary, after proof, found, that the respondents had not forfeited the debt claimed by them on the sequestrated estate, but had shewn good cause to the contrary. On reclaiming petition the First Division adhered. The petitioner thereupon brought the present appeal.

Sir R. Palmer Q.C., *H. Lloyd* Q.C., and *Trayner*, for the appellant.—The judgment of the Court was wrong. This agreement was within the letter and spirit of the 150th section, and the offence was committed. The Court had no discretion to remit the penalty or to dispense with the enactment. No cause was shewn to the Court in the sense intended by the Act. Ignorance of the law cannot be set up, for every man must be presumed to know the statutory enactment, and to intend the natural consequences of his acts. Nor can it be urged, that the offer was in itself illegal and void, for the offence was committed nevertheless; nor that the money was repaid, for nothing done *ex post facto* could alter the character of the act. The Judges misapprehended the meaning of the words "if no cause be shewn to the contrary." Those words can only mean, that the party may shew that he had not obtained a preference at all, or that it was not obtained during the sequestration, or that it was not obtained for facilitating the discharge, etc. The Judges seemed to think it a sufficient cause, that there was no moral blame.

The Lord Advocate (Young), *Jessell* Q.C., and *Rolland*, for the respondents.—The judgment was right. The essence of the offence is its secret and collusive nature, and here it was proved that there was neither secrecy nor collusion. This was a preference not in the course of sequestration, but by way of private arrangement between all the creditors to avoid a regular sequestration. It was therefore not a case within the 150th section of the Act. But even if it be deemed a contravention of the Act, and the thing done is null and void, then, in the circumstances of the present case, the penalty prescribed should not be enforced, because the money was refunded, there was no moral blame, no secrecy, no evil has resulted. The cause shewn was therefore sufficient to justify the Court in not enforcing the penalty.

LORD CHANCELLOR HATHERLEY.—My Lords, in this case the appellant is trustee under a sequestration issued against two firms of the name of Pendreigh and Co., and the trustee complains of an interlocutor of the Lord Ordinary upon a certain petition presented by him under the Act 19 and 20 Vict. c. 79, with reference to matters of this character, and of the order of the Court

---

[1] See previous report 8 Macph. 64; 41 Sc. Jur. 33. S. C. L. R. 2 Sc. Ap. 120; 9 Macph. H. L. 49; 43 Sc. Jur. 381.