regular line of street to which Mr Schulze can be required to conform. There are not only parts of the street breaking the line in his immediate neighbourhood, but at some distance there is a large space of ground fronting a number of different houses now occupied as part of the public street, which destroys the uniformity of the line of buildings. On that ground I agree in thinking that the case of the appellants, the Corporation of the burgh, in the cross appeal fails.

The House affirmed the interlocutor appealed from, and dismissed the appeal, each party to bear their own costs in this House.

Counsel for the Appellants, the Magistrates of Galashiels—The Lord Advocate (Balfour, Q.C.)—Finlay, Q.C. Agents—Clayton, Sons, & Fargus, for Bruce & Kerr, W.S.

Counsel for the Appellant Schulze—Party. Agents—Holder, Roberts, Son, & Walton, for Andrew Tosh, S.S.C.

Tuesday, November 26.

(Before the Lord Chancellor (Halsbury) and Lords Watson, Shand, and Davey).

BEDOUIN STEAM NAVIGATION COMPANY, LIMITED *v.* SMITH & COMPANY.

(*Ante* vol. xxxii. p. 262, and 22 R. p. 350).

Ship—Bill of Lading—Short Delivery—Evidence—Onus.

In an action by a shipowner against consignees to recover the balance of freight of a parcel of jute carried from Calcutta to Dundee, the latter claimed that they were entitled to deduct from the freight the amount sued for, being the value of twelve bales of jute acknowledged in the bill of lading to have been shipped on their account at Calcutta, but which were not delivered at Dundee.

The evidence in the case, apart from the bill of lading and the tallies and other documents upon which it was founded, was to the effect that all the jute, including the defenders' consignment, actually shipped at Calcutta, had been delivered at Dundee, but there was no evidence led by the pursuers to account for the manner in which the alleged difference between the cargo acknowledged to have been received in the bill of lading and that actually received had arisen.

Held (*reversing* the judgment of the Second Division) that the pursuers had failed to prove a short shipment, and were liable to the defenders for the value of the bales not delivered.

The case is reported *ante*, vol. xxxii. 262, and 22 R. 350.

Smith & Company appealed.

The appellants relied on the case of *Harrowing* v. *Katz & Company*, 10 Times' Law Reports, in which an appeal was also pending.

At delivering judgment—

LORD CHANCELLOR (HALSBURY)—My Lords, in this case it appears to me that the question which your Lordships are called upon to determine is a pure question of fact. I think there are no circumstances in this case which would justify one in laying down any general proposition from which the conclusion can be deduced.

The conclusion which we ought to arrive at is one that arises from the facts in proof in this case, and I myself rather protest, when one is dealing with questions of fact, against laying down any rules that are not applicable to the particular case.

Each case in its turn differs in its circumstances, and there is no doubt that from time to time in the course of a case the burthen of proof may shift from one side to the other many times.

In this case undoubtedly there was evidence that these goods which are now in dispute had been shipped on board this vessel. When I say there was evidence, I am not certain that one gets to any more definite idea of what the position is by calling it *prima facie* evidence, or by calling it by any other name which appears to diminish the value and the cogency of the evidence itself. *Prima facie* evidence, in the ordinary sense of the words, may be very weak, or may be very strong. I think it is a proposition which is attributed to Lord Wensleydale, although I have not been able to verify it, that a man's cutting a tree in a field was *prima facie* evidence that he was seized in fee-simple of the land.

In the extreme case that Lord Wensleydale gave I suppose it would be very easy to displace that *prima facie* evidence, if it is *prima facie* evidence, by other circumstances showing that it was not in the exercise of his own right that he was cutting down the tree but in the exercise of somebody else's right. In the particular case with which your Lordships have to deal there is a receipt. I am using now popular words, because I do not think the particular form in which this question arises ought to weigh much upon one's attention; it is a receipt for goods—that is what it amounts to—given by the person who was authorised to give the receipt for the goods, for the express purpose of establishing evidence against the person who received them. Whether it is a receipt for goods, or whether it is a receipt for money, or whether it is a receipt for anything else, I suppose no one can doubt that without explanation, and without showing that there was some mistake made in the receipt, or that the receipt was given under a mistake, or that it was induced by fraud, the conclusion to which any tribunal having that question before it must necessarily come is, that unless displaced by such evidence, the ordinary result follows, that the thing which was done as an acknowledgment of the receipt must have its due effect given to it. In truth, if that were not so, it would be impossible to conduct busi-

ness at all. It is true that the importance of this class of mercantile documents, which has a force and effect of its own, and involves the rights of other people, makes it more important to assert what I have been suggesting than in the case of other documents. To my mind no evidence has been given by the other side—no evidence at all—leading to any such conclusion as should upset the value or the force or the effect of the document so given. In saying that, I do not deny that everybody on board—I should not say everybody, I am overstating the case on that side, because some of them were not called, but I assume that they were called and gave the same evidence as those who were called—may have given evidence perfectly *bona fide* in the belief that their vigilance was not eluded. But what then? It is not the first time in my experience that I have heard a whole body of evidence given, from which, if you believed it, the logical conclusion would be that the goods were not lost at all, and yet, in point of fact, they were lost, and this discrepancy must be accounted for.

Now, my Lords, it appears to me that this being the merest question of fact, there is no evidence to displace the evidence of the document to which I have referred—the bill of lading. In speaking of the document, I have used, as I said, popular terms, because I quite agree that one must trace up the bill of lading to its source, the mate's receipt and the tallyman's books, but all these things ultimately concur in producing the document which is the subject-matter of the controversy. It appears to me beyond all reasonable doubt that there is evidence of a cogent character not displaced by any other evidence, nor shaken in its effect or value by what has taken place before the Courts below.

Under these circumstances it seems to me that the only logical course which your Lordships can pursue is to give the true effect to the evidence that has been given, and refuse to act on mere conjecture or guesswork as to how these goods may have been lost, if in truth they got on board. To my mind the cardinal fact is that the person properly appointed for the purpose of checking the receipt of the goods has given a receipt in which he has acknowledged, on behalf of the person by whom he was employed, that these goods were received. If that fact is once established, it becomes the duty of those who attempt to get rid of the effect of that fact to give some evidence from which your Lordships should infer that the goods never were on board at all. Under those circumstances, no such evidence having been given, I move your Lordships that this judgment be reversed, and the judgment of the Lord Ordinary be restored.

LORD WATSON—My Lords, the rule of law applicable to this case appears to me to be settled beyond dispute. The master of a ship has no authority to grant bills of lading for goods which were not put on board his vessel, but when he signs a bill acknowledging the receipt of a specific quantity of goods, the shipowner is bound to deliver the full amount specified, unless he can show that the whole or some part of it was in fact not shipped. If the owner is able to satisfy that onus by proving a short shipment, he is to that extent relieved from the obligation which would otherwise attach to him under the bill of lading even in a question with an onerous holder.

The facts of the present case which are not in controversy are that the master of the steamship "Emir," owned by the respondents, received in the river Hooghly, for conveyance to the port of Dundee, two parcels of jute, and signed two bills of lading, each for 500 bales, which were purchased by the appellants. The bales in each parcel were marked in the same way. The respondents have made delivery of 988 bales, and they allege and have led evidence with the view of proving that the remaining twelve bales were not shipped. The Lord Ordinary (Lord Kyllachy) found that they had failed to substantiate their allegation, but his decision was reversed by the learned Judges of the Second Division, who held it to be established that the twelve bales in question had not been put on board the "Emir." In these circumstances, although the issue raised is purely one of fact, your Lordships must determine which of these conflicting decisions ought to be sustained.

When evidence has been adduced for the purpose of instructing short shipment, I do not think it is of any advantage to examine critically the principle upon which his master's acknowledgment is held to bind the shipowner when it is not contradicted by proof. Whether, when it is uncontradicted, the acknowledgment ought to be regarded as affording *prima facie* evidence, or as giving rise to a presumption that the goods were actually shipped, or in any other light, is not to my mind of materiality in the circumstances of this case. After inquiry, such acknowledgment simply becomes part of the proof, its value must be tested with reference to the rest of the evidence, and the fact of shipment or non-shipment must be determined according to the import of the evidence taken as a whole. The importance of the bill of lading as an adminicle of proof is generally due to the fact that the statement of quantity which it contains, although not within the personal knowledge of the master, is made by him on the faith of information derived from his mate and from servants of the ship, who are employed for the express purpose of noting and checking the amount of cargo actually put on board. If there be no direct proof that, on the occasion when the disputed cargo was noted by the tallymen as having been shipped, there was a departure from or violation of the usual system of check followed by the ship, that circumstance is calculated to enhance the weight of the master's acknowledgment, because it tends to the reasonable inference (not necessarily conclusive) that the information conveyed to the master was correct.

I have fully considered the whole evidence in this case, both oral and documentary, with the result that I prefer the conclusion

of the Lord Ordinary to that of the Second Division. After the observations made by the Lord Chancellor, I do not think it necessary to enter into a detailed criticism of the proof. There is no evidence tending to show directly that, at the time when the two parcels of jute were loaded, there was an error committed to the extent of twelve bales in the quantities noted, whether in consequence of fraud or of any other cause. That being so, the respondent's case must fail unless the other circumstances disclosed by the evidence are sufficient to warrant the inference that such error was actually committed. In my opinion they are not sufficient for that purpose, and I therefore concur in the judgment which has been moved by the Lord Chancellor.

LORD SHAND—My Lords, I am of the same opinion. The matter in controversy is one simply of fact to be determined on the evidence, and the question to be decided is whether the respondents have proved that there was a short shipment of twelve bales of jute, that is, of twelve bales less than the captain, by the terms of the bill of lading, acknowledged to have been received. The onus is clearly on the respondents to prove the alleged short shipment, not only because of the bill of lading, but because it has been proved that the quantity of bales there acknowledged was fixed after the number and marks on the bales shipped had been carefully checked by the tallymen employed by the shipowners under the superintendence of the chief mate, and after the mate had himself granted receipts to the lighterman, representing the shippers, corresponding as to quantities with the tallymen's notes. These detailed notes, the mate's receipts, and the bills of lading, are all evidence of acts by servants of the shipowners, and form a strong and consistent body of proof that the shipment acknowledged under the captain's hand was actually made, and impose a heavy onus on the shipowner, who alleges that nevertheless there was a deficiency in the quantity of goods shipped. What is the extent of the onus? Proof must be met by counter-proof, and that counter-proof will be insufficient if it be not strong enough to displace the consistent and clear evidence of the acts of the shipowner's own servants or employees. It will not be sufficient to shew that fraud may have been committed, or to suggest that the tallymen may have made errors or mistakes, in order to meet a case of positive proof on the other side. It must be shewn that there was in point of fact a short shipment, that is, the evidence must be sufficient to lead to the inference, not merely that the goods may possibly not have been shipped, but that in point of fact they were not shipped. Any proposition short of this would appear to me to give less effect to the evidence of the shippers than that evidence ought to have, and unwarrantably to diminish the onus which that evidence has thrown on the shipowner.

Tried by this standard, I am of opinion with your Lordships that the judgment of the Lord Ordinary was right and ought not to have been disturbed. It is said that there is a body of proof, not as to fraud or error to the extent of twelve bales in regard to the particular quantities shipped and checked in detail, but generally that the whole quantities of jute (whatever these were) shipped on board at Calcutta were carried to Dundee and delivered there. For my part, I cannot at all place such reliance on general evidence of this class as on proof of detailed and careful checking of goods as they came on board, followed by the mate's receipts and the bills of lading. To do so would very much destroy the value of bills of lading, even where, as here, these are supported by proof that the materials on which the bills of lading proceeded were obtained after much care and pains taken to ensure correctness of quantities, whereas if the shipowner be held to be bound or affected by the acts of his own servants, this will only tend to make them all the more careful in the discharge of their duties, and especially careful to avoid giving bills of lading for goods not actually delivered into their custody.

It may be quite true that the fair inference from the whole evidence here is that there was no opportunity for the abstraction of bales at the ports at which the vessel called on her homeward voyage or on her arrival at Dundee, and that such cargo as was once put into the hold remained there till the end of the voyage. But proof of all this is not sufficient for the shipowner's case. The evidence does not make it quite clear that bales to the number of twelve may not have been removed from the ship's deck after being placed there, and taken away by the lighters, particularly during work carried on in the evenings after dark. The use of the steam-winch and tackle would not have been necessary for this purpose. It is said this suggestion is a speculative one only, and if the onus lay on the shippers the observation would be a very weighty one. No one can say that there is proof that such abstraction did take place, but it is for the shipowner to displace the shippers' evidence furnished by the acts of their own servants.

It appears to me they do not do so by proof which does not exclude the possibility that the bales in question might have been abstracted from the ship's deck, or which does not make this so highly improbable that such a suggestion must be entirely thrown aside, for if this might have taken place they have failed to discharge the onus which lies on them of adducing such evidence as is sufficient to satisfy the Court that there was actual short shipment.

On these grounds I concur in thinking that the judgment complained of should be reversed, and the judgment of the Lord Ordinary restored.

LORD DAVEY—My Lords, I concur with your Lordships that the bill of lading, founded on the other documents which have been brought before us, was *prima facie* evidence in favour of the appellants, which threw upon the respondents the

onus of displacing it by evidence that the full quantity of the goods was not in fact shipped, and without saying that there was no evidence, I concur with your Lordships in thinking that the burthen has not been discharged by the respondents.

The House reversed the judgment appealed from, and restored the judgment of the Lord Ordinary, with costs against the respondents both in the House and in the Court below.

Counsel for the Appellants—Cohen, Q.C. —Aitken—Alexander Robertson. Agents—Downing, Holman, & Co., for Boyd, Jameson, & Kelly, W.S.

Counsel for the Respondents—Bingham, Q.C.—Boyd. Agents—W. A. Crump & Son, for Lindsay & Wallace, W.S.

Friday, November 8.

OUTER HOUSE.

[Lord Moncreiff.

HUMPHREY *v.* HUMPHREY'S TRUSTEES.

Husband and Wife—Divorce—Foreign—Jurisdiction—Domicile—Recognition of Foreign Decree—Lex fori.

A decree of divorce duly obtained in the courts of the country in which the spouses are domiciled at the time, is valid elsewhere, and is entitled to recognition in this country, even although the causes for which it was granted may not be such as would entitle spouses domiciled in Scotland to obtain decree of divorce in the Scottish courts.

Where spouses, whose domicile of origin was Scottish, afterwards acquired, *bona fide*, and without collusion, a domicile in an American State, by the laws of which divorce *a vinculo matrimonii* was permitted on the ground of cruelty alone, and where the wife (who had accompanied and had resided with her husband) appealed to the courts of the State to dissolve the marriage on the ground of her husband's cruelty, and obtained decree in absence against him—*held* that the marriage had been validly dissolved by the foreign decree.

Observed that the application of the *lex fori* will be admitted and receive effect in other states so far as not repugnant to the public policy and standard of morality of such states.

In 1881 Miss Sarah Humphrey, daughter of the late Thomas Humphrey, spirit merchant, Kilmarnock, was married to David Neal Boyle, who at that time resided in Kilmarnock. Both parties were domiciled in Scotland. In 1887 Boyle and his wife, who had previously resided there for three years (from 1882 to 1885), went to America, with the intention of settling permanently there. On 26th October 1888 Boyle executed an oath and filed a declaration of his intention to become a citizen of the United States. From 1887 till the beginning of the present year the parties, with short intervals, resided in the United States, and in particular in the State of Illinois.

Thomas Humphrey died on 6th August 1894, leaving a trust-settlement and codicil. By the settlement he directed his trustees to divide the free proceeds among his children, share and share alike. By the codicil he provided as follows—"But in regard to the share therein provided to my daughter Mrs Sarah Humphrey or Boyle, wife of David Boyle, therein designed, I do hereby declare, whether I may have sold said Cross property or not, that in the event of her surviving me, the said share falling to her shall be held and retained by my said trustees during her lifetime, or at least so long as she remains married to the said David Boyle, and the free income or proceeds arising therefrom shall be paid over to her during that period, but not the principal sum; and upon her death, or the dissolution of her said marriage (whichever of these events shall first happen), the said principal sum shall be paid over and divided equally among her children, share and share alike, should she have died, or to herself should the said marriage have been otherwise dissolved."

In the beginning of 1895 Miss Humphrey (Mrs Boyle) called upon the defenders to pay her personally her share of her father's estate, in respect that her marriage with the said David Neal Boyle had been dissolved, decree of divorce in absence having been granted on 19th January 1895 in the Chancery Court of the State of Illinois, in a suit at her instance against her husband on the ground of cruelty.

The trustees resisted payment of this claim, and this action was thereafter raised by Miss Humphrey (Mrs Boyle) against the trustees for an accounting and for payment of the principal sum of the provision in her favour.

The defenders' pleas were as follows—"(1) The decree founded upon being pronounced in absence, and proceeding upon the ground of cruelty alone, is not entitled to recognition in Scotland as a divorce *a vinculo matrimonii*, and does not, on a sound construction of the said trust-disposition and settlement and codicil, constitute a dissolution of the pursuer's marriage within the meaning thereof. (2) The spouses having retained their domicile of origin at the date of the decree of divorce libelled, the said decree is not validly pronounced and is not entitled to recognition in Scotland. (3) The spouses having raised the action and obtained the decree of divorce libelled in concert with one another, and for the purpose of evading the restriction in the codicil libelled, the defenders are entitled to have the validity of these proceedings judicially ascertained before parting with the trust-estate. (4) The dissolution of the pursuer's marriage, contemplated by the testator in his said trust-disposition and settlement and codicil, being a dissolution thereof according to the