volved in this question are of the very greatest importance. If there had been a charge given on these bills and this were a suspension of it, or if this action had been laid on the bills alone, or if the pursuers had made no admissions in regard to the defenders' statements, I am very clear that the rule of law as to writ or oath would apply, and I would enforce it, however suspicious I might be of the pursuers' case. The rule, however, does not apply under all circumstances. In the case of Burns it was held not to apply. One judge in that case said that he so held, because, if the man's oath were taken to-morrow, he would not believe one word he said. I do not consider that a sound principle. But I concur with the principle laid down by Lord Fullerton in that case—"that where a pursuer does not and cannot rest entirely on the general presumption that value was paid in cash, but states value to have been given in a particular way, the truth of these statements may competently be tested by their extrinsic consistency with each other on the admitted facts of the case." In the present action the pursuers begin by stating what the value consisted of. Indeed, it is an action for the price of goods sold and delivered, but I only consider this important on account of its being a judicial statement by the pursuers themselves of the value given. But then, in their condescendence they go farther, and state that the goods were furnished on the order of a different party from the defenders, and also delivered to that different party. The pursuers' own statements, therefore, put the case in an unusual position, calling for inquiry. There was no question here as to the constitution of the debt; the only question was as to its subsistence. The defenders say that the pursuers' statement is, that after the bills became due they accepted bills by other parties, these being the parties to whom the goods were sold and delivered, and that the second set was in lieu of their bills and superseded them. The pursuers reply that the statement they have made has this qualification, that the old bills were retained as an additional security. Now, that qualification may be disproved by any kind of evidence. I think that is the position in which this case stands. The question to be inquired into is—On what footing were the bills retained? I think the *onus* is on the defenders. I also agree with your Lordship that the fact that this action is for payment of the full sum, not giving credit for the large dividends obtained, is of itself a good reason for adhering to this interlocutor.

Lord DEAS—There is one thing as to which I have no doubt—namely, that although this summons sets forth that it is for payment of the price of goods as contained in certain bills, that does not exclude the pursuers from standing on the law of evidence applicable to bills of exchange. I think that was the right way of libelling, and indeed the only safe way, because it might turn out that the bills were not good, were not properly stamped, or were prescribed. It is a different matter altogether when you come to the pursuers' detailed statements. I think a pursuer may by his statements exclude himself from pleading the strict rules of evidence. I don't think it expedient at present to direct the attention of the parties to the vital points of this case. This proof is allowed before answer, and I see no incompetency in that; it is a matter of propriety and discretion. I think this may very probably turn out to be a case in which the parties don't really dispute about facts so as to raise this point of law. It may also turn out that this is not the right action to attain the object which the pursuers have in view. But I concur, as the proof is before answer.

Lord ARDMILLAN also concurred, observing that the pursuers had stated enough in their own case to show that this was not a question of negativing value, but one where the case was so opened as to make it safe and just that there should be a proof before answer.

Adhere, with expenses.

Agents for Pursuers—Murray, Beith, & Murray, W.S.

Agents for Defenders—Maconochie & Hare, W.S.

Wednesday, Jan. 23.

OUTER HOUSE.

(Before Lord Ormidale.)

M'CULLOCH BROTHERS AND BANNERMAN *v.* GRIEVE AND OTHERS.

Shipping—Overload—Deck Cargo—Culpa—Perils of the Sea. Circumstances in which held that, by the overload of a vessel and taking a deck cargo, a cargo of wheat had been materially damaged, and owner found liable to the shipper in respect he was in fault, and had not proved his defence of "perils of the sea" to the extent of excluding liability.

The pursuers in this action are M'Culloch Brothers, merchants in Montreal, and David Bannerman, corn factor in Glasgow, their mandatory; and the defenders are the registered owners of the ship or vessel called the Sir John Moore, of Glasgow. The summons concludes for £1286, 8s. 5d., which the pursuers say is the amount of damage done to a cargo of wheat which they shipped at Montreal in that vessel in the month of August 1864, which damage was caused by the overloading of the vessel and her carrying a deck cargo. A long trial took place before Lord Ormidale lately, and from the facts then disclosed in evidence, it appeared that the Sir John Moore, having taken a cargo of wheat at Montreal in August 1864, proceeded to Quebec, where she filled up with deals in her 'tween decks, and over and above that load took a deck cargo of deals. She left Quebec on the 29th of August. In the course of the voyage the vessel experienced unusually tempestuous weather, her quarter-galleries being carried away, and much water being made. On arrival of the vessel in Liverpool, in the end of September, it was found that out of a cargo of 19,000 bushels of wheat, 17,000 had been more or less damaged. The pursuers then brought this action against the owners of the ship, alleging that the damage had been caused by the overload of the ship and the deck cargo, which caused the ship to strain, thereby opening up the seams and covering ways, hull, and topsides, by which the water got into the hold and injured the wheat. They also said that the deals, which were put in at Quebec in the between decks, were saturated by rain, and that the planking of this deck had been left defective, which enabled the wetness from the deals to get access to the wheat. In defence the defenders pleaded the act of God and the perils of the sea. They said that their vessel was not overloaded; that a deck cargo was not an unusual, and was quite a lawful thing; and that all the damage had been caused by the stormy weather which the ship encountered on her voyage across the Atlantic. In the course of the proof, which

was partly taken by commission in Montreal and in Quebec, and partly before the Lord Ordinary, a great deal of evidence was led by the pursuers with the view of showing that the taking of a deck load was a reprehensible practice, and that any master who did so took it at the risk of the ship and not of the shipper. On the point of the overload of the ship, the pursuers put in evidence a certificate granted to the master of the Sir John Moore by the Port Warden of Montreal, authorising him to load up to a certain draught of water, and they said that that draught had been exceeded at Quebec after the pursuers' cargo was shipped. A more special point was raised by the defenders at the trial. On going down the St Lawrence from Montreal to Quebec, the ship, while under tow of a steamer, grounded for about two minutes, and when she was examined upon her arrival at Liverpool, it was found that the scarphs of her keel were started, the covering copper being removed, and the keel otherwise injured. The defenders maintained that the injury to the keel was the cause of the damage, the water which destroyed the wheat having found that access, and that, that being a peril of the sea, they were not liable. The pursuers replied that this was not a cause of damage disclosed upon record; that, on the contrary, it was stated that the ship left Quebec staunch and sound, and that any evidence was inadmissible to show that the ship was not in a sound condition when she left Quebec.

The defenders made the following averments on this point:—

"On the voyage from Montreal to Quebec, when opposite Cape La Roche, the ship grounded, and dragged over the ground for about two minutes, a pilot being on deck at the time, and the ship being towed by a tug-steamer. The ship indicated no appearance of being damaged, however, and she proceeded to Quebec.

"The Sir John Moore being in all respects tight, staunch, and strong, properly caulked, victualled, manned, and equipped, left Quebec on or about 26th August 1864. Nothing material occurred until Saturday, 3d September, when the ship encountered stormy weather, with a heavy sea. The vessel made and shipped much water, labouring heavily, and requiring both pumps to be kept constantly working. The next day strong winds continued, a heavy sea running, the ship plunging and rolling about greatly, requiring both pumps constantly going to keep the ship free, and difficulty was felt in preventing the water from gaining. The storm continued on the 5th of September, both pumps being kept constantly going. On 6th September the storm still continued, and at 12.30 P.M. a sea broke on board amidships, shifted the deck-load, smashed the watercask, tore the spars adrift from their lashings, washed the topmast-studding-sail overboard, and did other damage. On sounding, thirty-two inches of water were found in the well, although the pumps were only left while close-reefing, and all hands were immediately employed at them again, to endeavour to keep the ship free."

SHAND (W. A. BROWN with him), for pursuers, argued—The defenders are not entitled to plead in defence, as a cause of damage, a ground which they have not disclosed in the record. Any evidence to show that the ship was unseaworthy before she left Quebec is inadmissible in respect it is stated in the statement of facts for the defenders that on the 26th August 1864, the vessel left Quebec, "in all respects tight, staunch, and strong, properly caulked, victualled, manned, and equipped." The evidence instructs two facts. (1) That the ship, when she left Quebec, was overloaded, having exceeded the draught of water which she was allowed to draw by the Port-Warden; (2) That a deck cargo is contrary to the usage of trade, or at any rate is taken at the risk of the ship, and not of the shipper. The defenders, in consequence, being in fault at the commencement of the voyage, are not entitled to plead, in defence, perils of the sea, that defence being only available to them when not in fault. There are no *media* by which it can be ascertained how far the damage was caused by perils of the sea, and how far by the fault of the defenders. The fault of the defenders puts upon them the onus of proving their defence, and they have failed to do so. Angell on the Law of Carriers, pp. 171-172, 206-210; Addison on Contracts, p. 465-467; Maude and Pollock, pp. 47-48; Greenhouse Shipping-Law Manual, p. 104; Maclachlan on Shipping, p. 561.

GIFFORD (with him BALFOUR), for the defenders—Having taken an issue, in which the alleged fault is on the part of the defenders, the pursuers are precluded from pleading that liability attaches to the defender on the simple ground of the goods being discovered in a damaged condition. The pursuers have undertaken the onus of proof, and they must discharge it. The evidence does not instruct the defenders to be in fault. The ship was not overloaded, and the deck cargo did not cause the damage to the wheat. A deck cargo, although an exceptional practice, is not unlawful, and it cannot be pleaded by the pursuers to the extent in which it is insisted in the present action, unless it can be shown that the practice is exclusive. Further, the pursuers must exclude the taking of a deck cargo by special contract. The cause of damage was the state of the keel, which made the ship leak. Denholm *v.* London and Edinburgh Shipping Company, 16th May 1865.

The Lord Ordinary pronounced the following interlocutor:—

Edinburgh, 23d January 1867.—The Lord Ordinary having heard counsel for the parties on the proof and whole cause, and having considered the argument: Finds, as matters of fact (1) that in or about the month of August 1864, the pursuers, M'Culloch Brothers shipped in good order and condition in the ship Sir John Moore, of Glasgow, belonging, in whole or in part, to the defenders, then lying at Montreal and bound for Liverpool, a quantity of wheat, to the extent in all of 19,644 bushels or thereby, to be delivered in the like good order and condition at the port of Liverpool (the act of God, the Queen's enemies, fire, and all and every the dangers and accidents of the seas and navigation of whatsoever nature and kind excepted) unto order or to assigns, he or they paying freight for said goods with average accustomed, all in terms of the bills of lading Nos. 7 and 9 of process; (2) that 10,586 74-100 centals of the said wheat were damaged in the course of the voyage, and not delivered in the like good order and condition as at the time of shipment; and (3) that the damage sustained by the said wheat arose through the fault of the defenders to the extent of £1100; and finds, that in law the defenders are liable in damages to the pursuers to the extent of said sum of £1100, with interest at the rate of five per cent. per annum from 1st November 1864 till payment: therefore, decerns against the defenders for payment to the pursuers as concluded for in the summons of said sum of £1100 with interest as aforesaid: Finds the pursuers entitled to expenses; allows them to lodge an account thereof,

and remits it when lodged to the auditor to tax and report. (Signed) R. MACFARLANE.

Note.—There was no dispute between the parties in regard to the two first findings of fact in the interlocutor. Nor does the Lord Ordinary think that it admits of doubt, that the loss sustained by the pursuers amounted to the sum decerned for. Whether the defenders are liable for that loss is another matter which will be afterwards spoken to. The account, No. 14 of process, shows distinctly how the amount of loss sustained and claimed by the pursuers is made up. The only points admitting of controversy in regard to that account, are the prices at which the damaged wheat was sold, and the price at which it is estimated as undamaged, so as to bring out the loss. But in regard to both of these points, the pursuers' proof is not only clear in itself, but is uncontradicted by the defenders. They seemed to point, however, in the course of the proof to an objection to the effect that the sale did not take place by judicial authority, but this objection was scarcely attempted to be enforced in argument; and having regard to the facts established in evidence that everything was done in reference to the sale fairly and in conformity with the usage of trade in Liverpool where it took place, and that the defenders have entirely failed to prove that the price obtained for the damaged wheat, or that at which it has been estimated, supposing it had not been damaged, are in any respect objectionable, the Lord Ordinary has had no hesitation in proceeding upon the account in question as correct, subject to the deduction of £47, 14s. 4d., which has been given effect to in conformity with the admission and explanation of the pursuer, Mr Bannerman himself, in his testimony as a witness; and subject to the further deduction of £138, 14s. 1d. as the amount of damage for which the defenders cannot, on the grounds afterwards stated, be in the Lord Ordinary's opinion held liable to the pursuers.

The primary and substantial question, however, in the present case is, Whether the defenders are responsible at all for the loss sustained by the pursuers?

According to the bills of lading, the defenders, through their representative, the master of the ship the Sir John Moore, expressly acknowledge having received at Montreal, the port of shipment, the wheat in question "in good order and condition," and undertook "to deliver the same in like good order and condition at the port of Liverpool," subject to the usual qualification and exception of "the act of God, the Queen's enemies, fire, and all and every the dangers and accidents of the seas and navigation." Founding on this contract, the pursuers have brought the present action to establish liability against the defenders for the loss sustained on their wheat in the course of the voyage from Montreal to Liverpool.

In support of their argument, and to show that the obligation of shipowners, as well as of carriers generally, is of a very rigid character, the pursuers referred amongst other authorities to Stair 1, 13, 3; Erskine 3, 1, 28; 1 "Bell's Commentaries," 446, note 4; and "Addison on Contracts," pp. 463, 4, 5, and 6. It was also contended on the part of the pursuers, as the Lord Ordinary understood their counsel, that all they had to do was to show that while the wheat was received by the defenders in good order and condition, it was not so delivered, and that it lay on the defender to exonerate themselves from fault. On the other hand, the defenders, while they did not dispute the principles of law applicable generally to shipowners and other carriers, as stated in the authorities cited for the pursuers, maintained that the *onus* of proving fault was entirely on them; and in support of this view they, besides founding on the terms of the issue in question sent to probation in the present instance, referred to the case of Denholm *v.* the London and Edinburgh Shipping Co., May 16, 1865, as reported in the "Jurist," vol. 37, p. 421. In reference to this matter the Lord Ordinary deems it sufficient to remark that the *onus*, in the view he takes of the evidence, may not be of essential importance, but that, having regard to the relative position of the parties, and the terms of the question sent to probation, which it is believed is in conformity with the practice of the Court in similar discussions, he is not prepared to say that the pursuers, in order to make out liability against the defenders, had nothing more to do than to show that the wheat which was shipped by them at Montreal in good order and condition, was not delivered at Liverpool in the like good order and condition. That no doubt may go a long way, and with little more, may be enough to shift the *onus* over upon the defenders. But as the pursuers, according to their averments and the terms of the question sent to probation, have offered and undertaken to prove fault on the part of the defenders, the question is, on the proof, have they done so?

There are some things of more or less importance entitled to attention in the consideration of this question, which appear to the Lord Ordinary to be placed by the evidence beyond all reasonable doubt. It has been shown that wheat is a heavy cargo, a bushel of it being about double the weight of Archangel oats (evidence of defenders' witness Blaikie); and it has been also shown that it is not only a perishable cargo, but one peculiarly liable to be damaged, and therefore that it requires more than ordinary care and attention in its storage and conveyance. It has been also proved that the Sir John Moore, the defenders' ship, in which the wheat was carried, was originally, when built, intended not for goods but passengers; that she was accordingly somewhat crank, and had a poop and topgallant forecastle of more than ordinary length; and in reference to these features of her construction, it has been shown that as a ship for goods she was not so much to be relied upon as if she had been built for the carrying trade. All this appears to be made out by the evidence of Rogerson, the builder of the ship, Stewart, one of Llyod's surveyors, and others. It is also proved by numerous witnesses that a voyage from Montreal to Liverpool in the fall of the year, including the month of September—being the period during which the voyage in question was made—is more hazardous and more exposed to danger from stormy weather than a voyage in the summer season, and that consequently greater care and precaution became necessary in the loading and navigation of the ship.

It is with reference to such a cargo, such a ship, and such a voyage, that the pursuers have maintained that their wheat sustained the damage for which the present claim is made, through the fault of the defenders, in respect of their having taken a deck-load of deals on board of the Sir John Moore at Quebec, on her passage from Montreal to Liverpool, and in respect also of their having loaded her to a greater depth than what was proper or safe in the circumstances. In support of their argument as founded on these grounds of liability against the de-

fenders, and especially showing that a deck-load is objectionable, the pursuers referred to "Greenhow on Shipping," p. 104; "Maude and Pollock on Shipping," p. 325; and "M'Lauchlan on Shipping," p. 561.

In the opinion of the Lord Ordinary both of the grounds of liability relied on by the pursuers have been sufficiently established.

With regard to the first—viz., the fault of the defenders in shipping a deck-load of deals at Quebec—and it may be enough by itself to subject the defenders in liability to the pursuers—the Lord Ordinary has been unable to see any reasonable ground for doubt. The witnesses who speak to it are so numerous as to render it unnecessary to particularise them. They consist of grain merchants, of shipmasters and other mariners, of shipping agents, of marine insurance agents, and of Lloyd's and other surveyors—persons of great experience—and judging by their appearance and manner when examined, of unquestionable respectability and intelligence. These witnesses completely establish the fact, in the Lord Ordinary's opinion, that it is contrary to the custom and usage of trade and the rules of nautical practice to take a deck-load of deals over a cargo of wheat in the hold from Montreal to Liverpool, and that to do so, especially in the fall of the year, was to expose the ship and cargo to great risk and danger. The way in which a deck cargo of deals so operates is fully explained in the proof; and the evidence of Captain Grange, the port-warden of Montreal, when the Sir John Moore loaded there; of Captain Doane, who, with Captain Calhoun, examined the ship on her arrival at Liverpool, is, on this point, worthy of especial notice. These witnesses also, as well as many others, speak very distinctly to the deck-load having been the main, if not the sole, cause of the damage to the pursuers' wheat. There is no doubt some counter evidence for the defenders, but the Lord Ordinary has found it impossible to arrive at the conclusion that it is sufficient to obviate the effect of that adduced for the pursuers. In regard, indeed, to the question whether, by the custom or usage of trade, a deck-load of deals above a cargo of wheat in the hold was justifiable or not, the Lord Ordinary cannot help thinking that the defenders' evidence, as compared with that of the pursuers, is most meagre and unsatisfactory. And the few instances of vessels bringing grain from Canada, with a deck-load of deals, spoken to by some of the defenders' witnesses, appear to the Lord Ordinary, when the special circumstances attending them are kept in view, rather to support the general rule, as contended for by the pursuers, than to disprove it.

As to the overloading of the Sir John Moore, the evidence adduced for the pursuers greatly outweighs, in the Lord Ordinary's opinion, that for the defenders. On this point he has in particular to refer to the evidence of Captain Grange, and the statement in the certificate given by him as port-warden of Montreal, at the time the Sir John Moore took in her cargo there. And with a deck-load of deals, a very little overloading was evidently calculated seriously to aggravate the risk and danger to which the ship and cargo were exposed on a voyage across the Atlantic in the fall of the year.

At the same time, the Lord Ordinary having regard to the whole evidence as to the stormy weather encountered by the Sir John Moore on her voyage from Montreal, as shown by the log-book, and spoken to by some of the witnesses; and having regard also to the leakage at her keel, as described by the defenders' witness, John Robinson, and attributed by him and others to the grounding of the vessel in the St Lawrence on her passage down from Montreal, has felt himself unable to resist the impression that to some extent the damage sustained by the wheat in question is attributable to the perils of the sea and navigation, for the results of which the defenders are not, under the contract of carriage in question, responsible. Even the pursuers' witnesses, Captains Doane and Calhoun, do not negative this view, for in their report or certificate, No. 127 of process, they merely say that the deck-load would "contribute very materially to the damage," and several witnesses speak to the frequency of grain cargoes suffering damage, more or less from causes, as the Lord Ordinary understood the evidence, irrespective of fault on the part of the shipowners. It is no doubt difficult, or rather impossible, to ascertain with exactness the amount of damage sustained by the wheat independently of the fault of the defenders; and all the Lord Ordinary can say in regard to this is, that acting on a careful consideration of the whole proof bearing on the subject, he thinks the deduction he has made of £138, 14s. 1d. from the gross amount of damage is calculated to meet the justice of the case.

In concluding, the Lord Ordinary has to state that it was with much hesitation and reluctance, and only on the repeated and most urgent solicitation of both parties, that he consented to the case, in place of being tried by a jury, being dealt with under and in terms of the recent statute. What chiefly influenced the Lord Ordinary in at length yielding in this respect to the wishes of the parties was the statement, amounting almost to an assurance, made by them both, to the effect that the only serious contention would relate to the question of liability at all, and not to the amount of damage, and that the evidence, with little exception, would consist of depositions of witnesses who were unable to attend to be examined personally. That statement, however, although doubtless made in good faith at the time, has turned out to be very erroneous; and if the Lord Ordinary had known how matters really stood, he should certainly have sent the case to trial by a jury. (Intd.) R. M.

Agent for Pursuers—John Leishman, W.S.
Agents for Defenders—G. & H. Cairns, W.S.

Thursday, Jan. 24.

SECOND DIVISION.

FITZWILLIAM'S EXECUTORS *v.* FREELAND AND LANCASTER.

Process—Proof—Evidence Act. When the Court remit to a Lord Ordinary to take proof under the Evidence Act he has no power, unless specially authorised, to grant diligence for the recovery of documents, or commission to take the depositions of aged witnesses or witnesses going abroad.

The Court remitted in this case to the Lord Ordinary, under the third section of the recent Evidence Act, to take a proof. When the case came before his Lordship, one of the parties lodged a specification of documents, to recover which he craved the Lord Ordinary to grant a commission and diligence. The Lord Ordinary expressed doubt as to his power to do so, because, although