orders a condescendence. But I am not prepared to say that there is anything in the 3d section to prevent closing the record on summons and defences if a party improperly refused to sign the minute. I give no opinion on that, but I am clear that, in our discretion, that is not a good ground for sustaining the present suspension. So with the questions as to conjunct probation, and whether sufficient notice was given previous to the auditor taxing the account of expenses. These are matters which the Court ought, in a case like this, to disregard in a note of suspension presented without caution.

Lord Curriehill—This is entirely a question of discretion. It is a suspension of a decree for expenses. The merits are not here at all. The note is presented without caution, and it is always a matter of discretion in the Bill Chamber whether suspension of final decree shall be given without caution. I am clear in the whole circumstances that we ought not to pass this note without caution. Where we do so, that does not prevent a note of suspension being presented on caution. The complainer may also bring the merits before the Court on finding caution, although we refuse the present note; and we may be called on afterwards to consider this question on its merits; and I am not inclined to prejudge any of these questions.

Lord Deas—In such cases the Court always look to the *prima facie* grounds which are pleaded, and, if they are strong, the note may be passed. But any opinion on this stage is only an opinion of that kind—that, *prima facie*, there is not such a strong case stated as to pass the note. Taking it in that view, I agree as to the main ground of suspension, viz., that the acting had ceased to exist. If there had been good *prima facie* grounds for that objection the note might have been passed; but I think there were no good *prima facie* grounds, but all the other way. What took place here was within the six months, and the only question is, Was that a revival? As to the second point—that about closing the record without consent of parties—I am not at present inclined to go along with the complainer. I don't think there is any such probability that the Sheriff will be found to be wrong, or that that is a point so clear in favour of the suspender that we should pass the note without caution. At present I am inclined to think that the Sheriff acted within his power. As to anything touching on the merits, the suspension is incompetent certainly when presented without caution.

Lord Ardmillan concurred.

Adhere.

Agent for Complainer—James Bell, S.S.C.

Agent for Respondents—Alexander Morison, S.S.C.

Saturday, November 23.

SECOND DIVISION.

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

Shipping—Culpa—Overload—Deal Cargo—Perils of the Sea—Record—Ground of Action. Circumstances in which *held* (1) that the owners of a vessel were in fault in sailing with a deal cargo and with an overload, and owners held liable on the full amount of damage which was sustained to a cargo of wheat during the voyage; (2) that when owners are in fault at the commencement of the voyage, they must prove an alleged contributing cause of damage in addition to those relied upon to have been in actual operation, and to what precise extent; (3) that it is incompetent to set up a ground of defence which is inconsistent with the defence alleged on the record.

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 last session, 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 wet 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 was 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, aud 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.

The Lord Ordinary (ORMIDALE) 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 matter 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 the 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 was 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 inforced 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 to 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 acknowledged 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 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 npon 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 Lloyd'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 defenders, 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 the 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 special 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 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 of 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."

Both parties reclaimed.

D.-F. Moncreiff, Gifford and Balfour, for the defenders, argued:—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.

Young, Watson, and W. A. Brown, for the pursuer, answered:—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." But this special defence is really destructive of the defenders' case, for the defenders were in fault in allowing the ship to ground, and that of itself is a ground of action. The evidence instructs two facts. (1) That the ship, when she left Quebec, was over-loaded, having exceeded the draught of water which she was allowed to draw by the Port Warden: (2) That a deck cargo is contrary to 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 providing their defence, and they have failed to do so. *Davis and Garrett*, 6 Bing. Rep. 716.

At Advising—

Lord Justice-Clerk—In this case we are called upon to review a judgment in which the Lord Ordinary has found the defenders liable in a sum of £1100 as damages incurred, as is alleged, by the fault of the defenders, to a cargo of wheat shipped by the pursuers from Montreal to Liverpool, in the Sir John Moore, in August 1864. The Lord Ordinary has held it proved that the amount of damage done to the cargo amounted in all to £1238, 14s. 1d., but upon the ratio that, to the amount of £138, 14s. 1d., the damage was sustained by reason of the perils of the sea in the form of stormy weather and leakage arising from injury to the keel by the grounding of the vessel in the river St Lawrence between Montreal and Quebec, has deducted that sum from the amount of damage.

The defenders maintain that the interlocutor is wrong, inasmuch as it attributes any portion of the damage to any cause for which they are responsible; while the pursuers object to deduction being made from the amount of damages by reason of any contributing causes of damage. The pursuers say that they have established that the defenders improperly carried a deck load in the vessel, that the vessel was overloaded, and that the damage was clearly traceable to this source. They maintain that the fact of the vessel having encountered severe weather is not a ground for any diminution of damages; and, in so far as relates to the injury of the keel, they contend that it was excluded by the defenders' statements on record, and unproved as a separate and substantive cause of damage. It is further said that the defenders would be responsible on their own showing, because the vessel

sailed from Quebec (if it sailed with a damaged keel) when unseaworthy, and that the defenders, in failing to get the keel examined when the fact of grounding appeared in the log-book, were culpable.

The first question to be considered is, Whether, as the Lord Ordinary has found, material damage is proved to have been occasioned to the cargo by the fault of the defenders. The faults imputed are the loading of a part of the cargo on deck, and the sailing with a cargo which depressed the vessel unduly.

It appears to me that the pursuers have succeeded in proving that, in the taking of a deck cargo on board their vessel above the pursuers' grain, the defenders acted improperly; that, under such circumstances, the taking of a deck cargo at Quebec was contrary to the general usage and understanding of the trade, and was in itself, from the nature of the thing, a cause of peril to the cargo. It is not necessary to go over the various witnesses who gave their testimony as to the practice and understanding of the trade. It will be sufficient to say, that while occasional deviations have been proved from the rule forbidding deck cargoes above grain, they are either exceptional—as, for example, in the case of cargoes of oats in the Archangel trade—or cases in which risk has been run by parties departing from the ordinary and proper rule for the sake of unduly adding to their profits as carriers.

The objections to deck loads are plain enough from the nature of the thing. In this case the deck cargo consisted of about 800 deals placed partly in the poop and partly on the open deck. The portion on the deck piled up to about three feet in height near the stauncheons, and not lashed to the deck, but kept in their places by wedges. Such a deck cargo occupying and encumbering a portion of the vessel not fitted up for the reception of cargo at all, tend to prevent the vessel from being freely and properly worked; they displace the gravity in the vessel; they strain the water ways and staunchions, and tend to open the seams; they retain the water which should freely flow off, and, being liable to shifting and rolling in heavy weather, they necessarily tend otherwise to injure the ship. It is proved that such evils must have been especially felt in the case of the Sir John Moore, which was a vessel originally built for passengers, and of a construction more adapted to carry passengers than cargo. Moreover, and in reference to the construction of its deck, which was strengthened for cargo, the pressure of any load upon it would tend to press the timbers outwards and to open the seams so as to admit salt water.

The second point made out, I think satisfactorily by the pursuers, is, That the presence of the deck cargo did, in point of fact, cause damage to the wheat, and that to a material extent. M'Crimmen, one of the crew examined for the pursuers, proves the evils of the deck load to have been actually experienced in the working of the vessel on its voyage, and the protest against wind and weather, which was prepared from the log, and subscribed by the master's mate, confirms his statement. On one important point, particularly, the evidence afforded by the log confirms his statement as to the constant shifting of the deck-load which is thus so far in direct contradiction to the evidence of the mate, and throws doubt upon his testimony. It seems impossible to consider the evidence as to the condition of the vessel on its arrival at Liverpool without coming to that conclusion. Doane, who made a survey, which is produced, says "that he saw the rain finding its way through the water-ways, covering-board seams, and staunchion seams, and had wet the ceiling. The water on the ceiling had made its appearance from the seams down to the ceiling. It was found that, in the lower hold, saltwater had been running down that part of the ship to a considerable extent from the foremast to the mizenmast—this had been most at mid-ships." The appearances were precisely such, he says, as a deck cargo in severe weather would occasion. Paterson, who saw the vessel while a part of the cargo was there, describes the appearances as proving that the water had come from the decks, and saw evidence of it "in several lines of discolouration of the wheat from the top downwards." He negatives the suggestion that the discolouration was in the skin of the ship. Nolan, who assisted in discharging the cargo, corroborates that a large portion of water had come into the lower hold from spaces parallel to the hatchway, from which planks of the lower deck had been removed but not properly replaced—a fact quite in accordance with the admission of the water from above, and inconsistent with the suggestion that the water may have come from the air-ports being thrown upwards from the bottom of the vessel.

It appears to be made out that the vessel was not only loaded in an improper manner, but overloaded. When the vessel left Quebec she was drawing 19 feet 4 inches of water aft. This is shown by the certificate of the master. The difference of the line of depth in salt and fresh water is proved, in reference to pilotage by the witness for the defenders, Charles Robertson, who had navigated the ship for years, to have been 5 inches; evidence otherwise supported. The vessel, therefore, must be held to have drawn 18 feet 11 inches aft on its reaching the sea. The vessel, when it arrived in Liverpool, by which time it had been lightened by throwing of cargo overboard, was drawing, aft and fore, 19 feet of water. Its condition, as described at the time, shows that such a depth was too great. Owens describes the waves as washing over the deck-load, and states in one part of his examination that the vessel was very low in the water, and that he had "never seen a vessel of her construction so deep in the water." It is manifest that such a vessel, starting with a depth so nearly the same to navigate the Atlantic, was too deep to encounter the perils of the sea.

The case of the pursuers being so far made out, and fault in these essential matters established, is the Lord Ordinary right in withholding from the pursuers the total damage proved to have been occasioned to the cargo? His Lordship says that, having regard "to the evidence of the stormy weather encountered by the Sir John Moore," and "to the grounding of the vessel in the St Lawrence," he has felt himself unable to resist the impression that to some extent the damage is attributable to perils of the sea and navigation, and therefore—but professing his inability to find any correct data for estimating the amount—he deducts the sum of £138, 14s. 1d. In so far as this finding proceeds upon the fact of the vessel having encountered stormy weather in its passage across the Atlantic, it seems plainly wrong. The anticipation of stormy weather is precisely the thing which

forms the objection to deck cargoes and too heavy loading. It is a storm which brings up the evils of these into operation; and if a vessel so improperly and unduly loaded could escape from any portion of liability by showing that the vessel encountered stormy weather on the voyage, it would introduce, as it appears to me, a novel source of partial immunity from the consequences of a very grave fault. If the vessel is improperly subjected to a cause of injury which must operate in storms, the damage which has occurred must be charged against the wrongdoer. As to the alleged effect of the leakage from the injury done to the keel in the St Lawrence, it stands in this very peculiar situation, that the imputation of damage to that source, made by the defenders, is in direct contradiction to their statement in the record. The record represents the vessel as having left Quebec tight, staunch, and strong, on her homeward voyage. If the vessel was in the state now represented, she was not seaworthy, not tight or staunch, but directly the reverse. The consideration of the state of the vessel in reference to this alleged injury can scarcely be excluded, as the pursuers contend, as it arises on the pursuer's proved survey of the vessel and the evidence of Doane, who made the survey; but it is undoubtedly a circumstance going very far to detract from the weight of the case of the defenders, as it is now made, that they deliberately put on record when in the knowledge of all the facts of the case—and in particular, of the appearance of the keel at Liverpool—a statement which implied not only the absence of evil from that source, but the perfect soundness of the vessel in that part. It does appear that the vessel, when in the St Lawrence, dragged for a very short bit through sand and gravel, and that the copper sheathing was found twisted; it further appears that the scarving of the timbers of the keel was, on the arrival of the vessel, loosened. In the survey of Doane and Calhoun they say [reads]. I see no reason to doubt this view, as the defenders in their record must have adopted it; if so, the water admitted might have been enormous. If water were to be held as admitted to a somewhat larger extent than it is said by these surveyors, it may be observed that it is impossible to say that it would have been so but for the presence of the evils of deck load and heavy loading, by which any such injury fell to be aggravated, though it may not have occasioned it. It might have proved perfectly innocuous for all that is shown. In the absence of a deck load and overloading, which occasioned the shipment of large quantities of water, the amount admitted by the injury in the keel might have been of no consequence whatever. If so, and if an active cause of evil, even in connection with such an injury, was present, the defenders cannot be entitled to benefit by mere conjecture. The proposition that it did cause any portion of injury is merely a speculation, while damage done by the fault of the defenders is certain. The defenders being clearly in fault, and their fault having as clearly materially led to the damage of the grain, I think that every presumption is against them, and that the clearest possible evidence would be required to redargue it.

I do not enter into the question as to how far responsibility would attach to the defenders upon the other grounds indicated. Questions of considerable nicety would arise if it were necessary to go into them; but in the view which I take of the case the solution of these questions is unnecessary.

The result is, that the interlocutor of the Lord Ordinary should be affirmed in so far as relates to the finding favourable to the pursuers, but recalled as to the point decided against them.

In the course of the discussion something was said as to the expense and delay incurred in this case. The action, it is said by the pursuers' counsel, was brought in December 1864, and it is only now finally decided.

The action was raised on the 1st December 1864. The record was closed on the 28th February 1865, and issues adjusted on the 2d March of that year. From that 2d March 1865 down to the 5th December, not of the year 1865, but of 1866, the parties were engaged in examination of witnesses abroad and execution of diligences for recovery of writings. I observe that the pursuers, having the power of applying for a diligence to examine witnesses at Montreal and Quebec on the 2d March 1865, and actually obtained one on the 16th, did not commence the examination at Montreal till the 24th, nor terminate the process there until the 26th December of that year—resuming, at Quebec, on the 29th May 1866, and not closing the commission there until the 28th June. The pursuers should have have had no difficulty in understanding why the action should have been in Court so long. I may further say that the accumulation of witnesses on the mere general points in this case appears to me to have been quite excessive, and I wish it to be understood for the future that in cases where the Court have occasion to master the evidence, as they have on reviews of such judgments, they will be prepared to listen, in the question of expenses, to objection against excessive and unnecessary accumulation of evidence.

The other Judges concurred.

The following interlocutor was pronounced:—

"*Edinburgh, 23d November* 1867.—The Lords having heard counsel on the reclaiming notes against Lord Ormidale's interlocutor of 23d January last, adhere to the interlocutor complained of in so far as it finds for the pursuers; but recal and alter the same in so far as it does not find that the damage sustained by the wheat in question arose through the fault of the defenders to the extent of the full sum of £1286, 8s. 5d., under deduction of the sum of £47, 14s. 4d: Find that the damage of £1286, 8s. 5d. was sustained through the fault of the defenders, and that the pursuers are entitled to the sum and interest concluded for, under deduction of the sum of £47, 14s. 4d., and decerns for payment of the balance of £1238, 14s. 1d., with interest as concluded for upon said sum of £1238, 14s. 1d.; and Find the pursuers entitled to additional expenses as well as the expenses found due by the Lord Ordinary; and remit to the auditor to tax the same and to report.

(Signed) "GEORGE PATTON, *I.P.D.*"

Agent for Pursuers—W. B. Glen, S.S.C.

Agents for Defenders—G. & H. Cairns, W.S.

COURT OF JUSTICIARY.

(Full Bench.)

Monday, November 25.

WALKER *v.* LANG.

Suspension—Jurisdiction—Glasgow Police Act 1866 *—Appeal—High Court of Justiciary—Circuit*