fair has been established in Kilmarnock, when, it is said, a larger quantity of cheese is annually exposed for sale than at any other place in the kingdom, and which is brought from all parts of Scotland, and even from England. According to the contention of the pursuers, as admitted by their agent, the whole of it would be liable in custom whether sold or not, and whether weighed at the public weighhouse or not. It would be but shortsighted policy thus to discourage and drive away a trade which is so rapidly attaining an almost national importance, and which is calculated to confer such immense advantage on the town and district generally."

The pursuers appealed.

SCOTT for appellants.

GIFFORD and GUTHRIE for respondent.

At advising—

LORD PRESIDENT—We must deal with this case as presented on record, for there is no proposal to amend. In that state of matters, I am clear that the Sheriff-substitute and Sheriff are right, though the action should have been dismissed without the farther finding of absolvitor.

The summons is laid under the Sheriff-court Act 1853, and contains a statement of the ground of action in the conclusion. The conclusion is as follows—*(reads ut supra)*. If I understand the pursuer's counsel, he contends that that is a sufficient reference under the above Act, but I cannot agree in that. I think the Act requires the pursuer to set out the ground of action, and that cannot be done without libelling the title of the pursuers to recover. The form provided for the conclusions of petitory actions is set out in Schedule (A), and is as follows —*(reads from schedule)*. Now, in all these instances, the pursuers' title to sue appears from the schedule; and it is out of the question to say that the ground of action can be properly libelled unless the pursuers' title is set out. But in this case, suppose the summons concluded with the word "hereto," then there would clearly be no setting forth of title, and equally clearly the summons would have been bad. All that follows the word "hereto" is, "and which the pursuers are entitled to exact and levy, conform to decree of declarator of the Court of Session, dated the 16th day of November, and extracted the 21st day of December 1853, herewith produced and referred to, with interest of the said sum, at the rate of five per centum per annum, from the said 18th day of May 1868 till payment, and with expenses." The title is laid on the decree of declarator. Now, when this alone is referred to, I would certainly have expected that in the extract decree produced the title on which the decree was obtained would have been set out. But there is no such statement in the decree, and in this summons there is no mention of charter or usage,—nothing but the decree of declarator. The argument of the pursuers is that the decree is binding on the defender until set aside. The ground on which that is maintained is, that it is a declarator of a right vested in the Magistrates of a burgh to levy customs on the inhabitants of the burgh. And it is maintained—and I think rightly—that such a declarator, directed against that part of the community chiefly interested, or against a considerable number of that part, and decree pronounced in that declarator, *causa cognita*, will bind the community, and will finally establish the right of the Magistrates. I think that is sound. But what shall be said of a decree in absence directed against three or four of the persons interested? Now, I can understand that if this summons had been directed against persons actually called as defenders in that action, and against whom the decree was pronounced, it might perhaps have been necessary for them to open up the decree before they could be heard in defence. But can it be said that a party who was not called in the action, and against whom no decree was pronounced, yet requires to open up the decree, as a matter of form, to enable him to maintain his pleas? There is neither authority nor reason for that. It would be carrying the effect of a decree in absence in such a declarator a great deal too far. I think the defender is not bound by that decree at all. I do not think even the defenders in the declarator are bound beyond this, that they may require to open up the decree, but I do not think the others are bound at all. If that be so, the summons is plainly a badly libelled summons by the Sheriff-court Act of 1853, for it does not set forth any ground of action against the defender.

LORD DEAS—I do not wish to give any opinion on how this case might have stood if the pursuers had set forth that ever since the decree of declarator in 1853 they had been levying these customs without objection; but I am clearly of opinion that, without any averment of that kind, a mere decree of declarator in absence cannot entitle them to succeed in this action. It is not a mere objection to title. The case is this, that the pursuers stand on that decree of declarator as that which alone is necessary to entitle them to decree in this action, and they undertake nothing more. We must take it on the supposition that there has been no possession, even if there had not been that admission in the Sheriff-court that there was not. There is no reason why we should not take that *pro veritate*; and we are not to suppose that the Sheriff-substitute would state in his interlocutor what he did not think was plain. But I do not think that admission was necessary, for the same would result from the want of averment of possession.

LORD ARDMILLAN and LORD KINLOCH concurred.

Agents for Appellant—Wotherspoon & Mack, S.S.C.

Agent for Respondent—T. Dowie, S.S.C.

Friday, February 19.

KENNETH *v.* DE CAEN.

Ship—Freight—Short-shipment—Carrying Capacity —Proof. Circumstances in which *held* that a charterer had failed to prove an alleged short-shipment, in respect of which he claimed a deduction from the stipulated freight.

De Caen, owner of the ship "Prince of the Seas," chartered her, in December 1864, to Kenneth, a ship broker in Glasgow, for a voyage from Glasgow to Buenos Ayres, guaranteeing the ship to carry 550 tons dead weight. The voyage having been completed, the owner claimed the stipulated freight, and certain extra payments on account of demurrage and otherwise. The freighter claimed, *inter alia*, a deduction on account of an alleged short-shipment of 70 tons.

After a proof, the Sheriff-substitute (DICKSON) pronounced this interlocutor:—"Finds—(1) with regard to the first item in the account appended to the summons, that the pursuers chartered to the defender the ship 'Prince of the Seas' to perform a voyage from Glasgow to Buenos Ayres, in January 1865, for a slump sum of £1050, the pursuer

guaranteeing the said ship to carry 550 tons dead weight: Finds that the voyage was completed, and that the pursuer claims the said sum, but allows deduction of £16, 10s. 9d. on account of the freight of certain crates short-shipped; and that the defender claims deduction therefrom of £133, 12s. 9d. on account of 70 tons of goods which he alleges were short-shipped on account of the vessel having carried only 479 tons 9 cwt: Finds that the defender has not proved the said short-shipment of 70 tons, and that the pursuer, on the other hand, has proved that the vessel carried a full cargo of 550 tons: Accordingly sustains the pursuer's claim to £1050, under deduction of the £16, 10. 9d. above mentioned. (2) With regard to the pursuer's claim of £49 for demurrage, finds that by the charter-party it was agreed that 35 running days were to be allowed the freighters for loading, and that the parties afterwards agreed that the said days should commence to run from 12th December 1864: Finds that the said loading was completed on the afternoon of the 14th of the following month of January, being within the period so afterwards agreed upon, but that the vessel did not go to sea on her said voyage till the 19th of the said month: Finds that it is not proved that the delay till that time was occasioned by the fault of the defender; accordingly assoilzies him from the conclusions so far as regards the said claim. (3) With regard to the pursuer's claim of £4, 7s. 6d. for watching the defender's goods when on the quay, finds that the said sum was expended by him for the said purpose, but that it is not proved that it was so expended with the defender's authority, or that the said watching was necessary for the safe keeping of the said goods, or that it is the practice of the port for the owner or master of a vessel when loading cargo to appoint watchmen at the freighter's expense over the cargo remaining on the quay: Finds, further, that the said cargo, while on the quay, was at the defender's risk, and that it lay with him, not for the pursuer, to determine whether a watchman should be put over it at his expense: Accordingly assoilzies the defender in so far as regards the said claim. (4) With regard to the claim of £5 for shifting the ship, finds that the pursuer has not proved the same; and farther, that his procurator abandoned the same at the debate: Accordingly assoilzies the defender from the conclusions in relation thereto: Farther, with regard to the defender's counter-claim, finds—(1) that he has proved that he paid £31, 4s. 6d. to the stevedore for loading the cargo, and that the said sum falls to be repaid to him by the pursuer in terms of the charter-party: Accordingly sustains the same as a counter-claim for the defender in this case; (2) Finds that the defender has not proved that he is entitled to £15, 15s. 2d. on account of commission on the charter-party, and accordingly refuses to sustain the claim therefor; (3) Finds that in the account appended to the summons the pursuer gives the defender credit for the other items in the defender's counter-account, No. 75 of process, with the exception that the pursuer allows £3, 5s. in name of discount, instead of £4 as stated in the said counter-account: Finds that the defender has not proved that he is entitled to the larger of these sums, and accordingly refuses to sustain his claim thereto; sustains the same to the said extent of £3, 5s.: Finds that the accounts between the parties having been adjusted on the footing hereinbefore set forth, and after giving the defender credit for the sum of £7, 2s. 4d. consigned by him, there remains due by the defender to the pursuer the sum of £133, 2s. 5d.: Accordingly finds the defender liable to the pursuer in the sum last mentioned, with interest as libelled: Finds the pursuer entitled to expenses, but subject to a modification of one-third of the taxed amount thereof: Appoints an account to be lodged, and remits the same to the Auditor to tax and report, and decerns."

The Sheriff (BELL) adhered.

The defender appealed.

CLARK and LANCASTER for appellant.

SHAND and BALFOUR for respondent.

At advising—

LORD PRESIDENT—This is a pure question of fact, and I cannot say that the evidence is so satisfactory as it might have been. Our judgment must depend a good deal on where the responsibility of that unsatisfactory state of the evidence is found to rest.

The question is, whether this vessel was of the carrying capacity of which she was guaranteed to be by the charter party? The allegation of the defender is that she fell short of that by 70 tons, and that he shipped as much cargo as the owner and master would receive, and that the amount of that was less by 70 tons than was guaranteed. In the first instance, it may be fairly said that it lies with the owner to prove the real tonnage. He did assume that onus, and I think that in the first instance he discharges it pretty fairly. He had been owner of the vessel for a good many years, and so also the master had held his post for some time. They must have known her carrying capacity, and what weight of cargo she had on board when drawing the amount of water she ought to draw. They are both distinct on this point, that the tonnage was 550 tons. I cannot say there is any serious attempt to shake the evidence. As far as direct evidence is concerned, the carrying capacity of the vessel is not proved to be less. But there is another support to the pursuer's evidence. The new measurement of the vessel is 380 tons, and it is a general, though a rough rule, that about a half more represents the actual carrying capacity. That no doubt depends on the build of the vessel, but it is not proved that this was a vessel of such a build that the rule could not apply, or that the proportion of carrying capacity to the measurement would be smaller in this than in the average case. There is evidence in the other way, for one of the skilled witnesses not only gives his evidence as to the ordinary rules, but also speaks as well acquainted with the vessel as one to which that rule applies. That is quite sufficient for the pursuer's case in the first instance, and throws the burden of proof on the defender.

Now, what is the defender's evidence? It appears to consist very much in this—an appeal to the weighing of the cargo for payment of tonnage dues in the Clyde, the result of which was to show by the receipt for the dues, the cargo to be 479 tons, 9 cwt. But I think it is proved that that is not a trustworthy piece of evidence, and that, as to the coal, there was a very serious error, and that throws a good deal of discredit on this document. Besides, I do not think this weight has been proved. An extract from the books is not in itself good evidence. You must bring the parties who weighed the cargo, and ascertain from them whether they weighed it according to the ordinary rules, and so on. As to the existence of any space

in the vessel beyond that occupied by the cargo, that necessarily depends on the weight of the cargo. The cargo may not half fill a vessel though sufficient for the carrying power, and there is no doubt that a considerable part of this cargo consisted of heavy goods. Upwards of 300 tons was iron or coal in some shape. This therefore was plainly a heavy cargo, and the existence of empty space proves nothing for the defender. But I attach more importance to what is wanting in the defender's evidence, and which might have been supplied. It must be kept in view that the dispute arose as to the weight of the cargo before the vessel sailed from the Clyde, the master maintaining that the vessel was fully loaded, while the shipper maintained the contrary. This was a sailing vessel. There was one course open to the shipper which would have enabled him to prove his weight, and that was to write to his correspondent at the port of discharge to have the cargo weighed. But that he did not do, and I think it was his duty to procure that information as necessary evidence in support of his defence to the action for freight. I therefore adopt the findings of the Sheriff-substitute, which I think very well express the result of the evidence.

The other Judges concurred.

Agents for Appellant—Stuart & Cheyne, W.S.

Agents for Respondent—J. W. & J. Mackenzie, W.S.

COURT OF JUSTICIARY.

Saturday, February 20.

HIGH COURT.

(Full Bench.)

VERT *v.* RICHARDSON.

Police and Improvement Act (Scotland) 1862—*Removal of dung in uncovered cart—Burgh—Jurisdiction—Railway Station.* Section 145 of the Police Act of 1862 relates only to removal of offensive matter from places within a burgh, and therefore a conviction by burgh Magistrates, as under the section, of a person who, in removing manure from one place outwith the burgh to another place outwith the burgh, passed along one of the streets of the burgh with an uncovered cart, *suspended* as an excess of jurisdiction.

In August 1868 there was presented to the Magistrates of the burgh of North Berwick a complaint under the Summary Procedure Act 1864, setting forth that the complainer, a farm-servant at North Berwick Mains, "had contravened 'The General Police and Improvement (Scotland) Act 1862,' clause 145th, in so far as on the 6th day of August 1868 years, or about that time, the said complainer did, in, along, or upon the street or road in the burgh of North Berwick, leading from or near the Gas Works to Kay's Wind, and in, along, or upon said Kay's Wind in said burgh, use a cart drawn by one or more horses for the removal or conveyance of dung, slaughter-house offal, or other offensive matter with which said cart was filled or loaded, without having a covering proper for preventing the escape of the stench of the dung, slaughter-house offal, or other offensive matter in said cart."

After trial the complainer was convicted. He now suspended, and set forth the following as the facts in the case:—"(1) That the complainer was a servant to John Wallace, farmer at said North Berwick Mains, a farm adjoining the burgh of North Berwick, and that on the day mentioned in the complaint he, with other servants, acting under the orders and by the directions of his master, the said John Wallace, went to the North British Railway Station at North Berwick, which is in the county of Haddington, but beyond the boundary both of the royal and parliamentary burgh of North Berwick, at which station the complainer and the other servants of said John Wallace loaded carts of dung, consisting partly of slaughter-house, stable, and other dung, and the carts so loaded, after reaching the parliamentary boundary of North Berwick, travelled partly along that boundary, thereafter partly within the royalty of the burgh, and thereafter in the county outwith said burgh, until they reached North Berwick Mains; (2) That no dung or other manure was lifted in or from any premises within the jurisdiction of the magistrates or magistrates of police of North Berwick, and there was no intention to remove such from or within the same, the only act carried out being the removal of manure from one part of the county of Haddington to another part of it, both outwith the said jurisdiction, although in the course of the journey the carts passed for a short part of the way on a road partly within the said jurisdiction."

The complainer pleaded, *inter alia*,—"(4) The complainer not having been engaged, on the occasion libelled, in the removal of dung from any premises within said jurisdiction, but merely in passing through a part of said jurisdiction from the railway station, which is outside of it, to the farm of North Berwick Mains, also outside of it, no offence was committed under the section libelled; and the magistrates, under said section, had no jurisdiction over him, and the whole proceedings were incompetent."

After argument, the Court ordered minutes of debate.

Minutes were lodged and parties heard thereon.

Scott for complainer.

Gifford for respondent.

At advising—

Lord Justice-Clerk—The conviction in this case is sought to be suspended on two grounds; the first is, that the magistrates exceeded their jurisdiction by inflicting a penalty for an offence not within the statute, and the second, that, assuming that such an offence as formed the ground of conviction was of a nature to infer a penalty, the case was ill-laid against the complainer, and a proof, essential to bring him within the operation of the Act, awanting.

The first question is one of some general importance as affecting the construction of a statute which has been brought into operation in many burghs and populous places in Scotland, and is raised on the face of the complaint. The complaint sets out—(*reads ut supra*). The statute is directed against the case of a "*removal*" of dung or offensive matter along a street of the burgh; the charge is that the complainer "*removed or conveyed*" offensive matter on the occasion libelled in an uncovered cart. If "removal" and "conveyance" are terms having the same meaning upon a proper construction of the word removal in the Act, the complaint is rightly laid; if removal in the Act has a different meaning from conveyance, the convic-