subject to a liferent, but there is nothing to prevent it vesting immediately.

With respect to the British Linen Company stock, the term "failing" means by death of the legatee either before me or before liferentrix. I think it must be held to mean death before the testator. I think it indicates personal favour towards John, and it was he who was to be favoured if possible.

LORD ARDMILLAN—On the first of the questions which we are called on to answer I have no difficulty.

The bequest of the Commercial Bank shares is very clearly and simply expressed; and there is no room for doubt. Subject to the widow's liferent, the fee of five shares of the bank stock are bequeathed to five persons, the sons of Henry Sanderson,—"one to each." These five persons are all named in the will. There is no clause of survivorship, and no destination over. The bequest is not to a class, but to individuals named. I know of no authority, and am unable to perceive any principle, to support the plea that vesting is postponed under these circumstances. I am of opinion that this bequest of Commercial Bank stock vested in each of the sons of Mr and Mrs Henry Sanderson at the date of the truster's death.

I am also of opinion, on the second question, that the bequest of shares of the British Linen Company's stock vested in John Thom Sanderson at the date of the truster's death. This is a direct bequest of shares of bank stock, taken out from the estate, and separated from the residue; and it is given to John T. Sanderson, M.D.—one reason for the bequest being, that the testator approved of, and was gratified by the legatee's kind conduct to his brother Henry. "Failing him" (John T. Sanderson) "by death," the bequest is to his brothers, Alexander and Henry.

I am of opinion that the time of vesting of this bequest is also the date of the truster's death. Postponement of the vesting of this bequest can only be supported by an unnatural and unreasonable construction. The widow's liferent is of course not affected. This, like the other bequest, is subject to that liferent.

In the last place, I am of opinion that the residue mentioned in the third question did not vest till the death of the liferentrix.

LORD JERVISWOODE concurred.

Counsel for First Parties—The Solicitor-General (Clark) and Balfour. Agents—J. W. & J. Mackenzie, W.S.

Counsel for Second Parties—J. M'Laren. Agents—Horne, Horne, & Lyell, W.S.

Friday, October 31.

FIRST DIVISION.

FERGUSON *v.* LESLIE.

Appeal—Bankrupt—Expenses.

A Sheriff-Substitute granted interdict against a party, and his interlocutor was recalled by the Sheriff-Depute. The complainer appealed to the Court of Session, and pending the appeal, the respondent became bankrupt. Intimation was made to the trustee in the sequestration, but he did not sist himself, or appear in the action. The appellants craved that the appeal be sustained, or the respondent ordained to find caution for the expenses. *Held* that he could not be called on to find caution, as he had been brought into Court at the instance of the appellants, and was bound to defend himself.

Counsel for Appellants—J. G. Maitland. Agents—H. & A. Inglis, W.S.

Counsel for Respondent—J. A. Reid. Agents—Philip, Laing, & Munro, W.S.

Friday, October 31.

SECOND DIVISION.

[Lord Shand, Ordinary

GARRIOCK *v.* WALKER.

Affreightment—Shipmaster — Recompense — Demurrage.

Where the master of a vessel laden with whale blubber and heads, going from Shetland to Peterhead, was detained at an intermediate port by stress of weather, and, from the nature of the cargo, was obliged to incur expense in landing, preparing, and reshipping it at that port, after communication with the owner of the cargo, who refused to take any responsibility; and where the voyage was ultimately successfully prosecuted, and the cargo landed, and sold at the port of delivery;

Held, that the shipmaster exercised a sound discretion for the purpose of preserving the cargo, and that the shipowners were entitled in the circumstances to (1) the freight; (2) repayment of the expenses incurred on the cargo at the port of detention; and (3) a sum in respect of the detention.

These were cross-suits at the instance of the owners of the smack "Petrel" of Lerwick against the owner of the cargo, and *vice versa*. The cargo which consisted of whale blubber and heads, was shipped in bulk at Shetland to be conveyed to Peterhead at a slump freight. The voyage was unusually prolonged owing to stress of weather, and the captain landed the cargo at Lerwick, where it was washed and cleaned, and taken on board in casks, and so the whole cargo was conveyed to Peterhead, with the exception of a portion which was sent on by another conveyance, owing to want of room.

The shipowners sued for (1) freight of £50; (2) a sum of £113 disbursed at Lerwick; (3) £50 in respect of detention of the vessel during the operations on the cargo. The owner of the cargo claimed damages in respect of the operations performed on the cargo, and opposed the claims of the shipowners, except for freight.

The facts of the cases are fully set forth in the following interlocutor of the Lord Ordinary:—

"*Edinburgh, 10th April* 1873.—The Lord Ordinary having considered the conjoined causes (1st) in the action at the instance of the pursuers, Peter Garriock and Others; Finds, that while the pursuers' vessel the 'Petrel,' in the course of the voyage between Uyea Sound and Peterhead, in the fullfilment of the charter-party entered into between the pursuers and the defender on 23d December 1871, was

in Lerwick Bay, and without any fault of the pursuers, the cargo, consisting of whale blubber and heads, became seriously affected by decomposition, and a large quantity of oil ran of into the hold: Finds that, in consequence, it was unsafe for the ship and cargo to proceed further with the voyage, and it became necessary to have the cargo landed and shipped in casks, instead of being carried in bulk: Finds that, in order to avert serious loss and deterioration of the cargo at this time, it was necessary and proper that it should be subjected to the operations recommended in the report by William Halcrow and John Johnstone: Finds that the cargo was with due care landed, and thereafter subjected to the operations recommended in said report, and re-shipped on board of the 'Petrel' to the full extent that she was able to carry in casks: and that the quantity so shipped was delivered by her at Peterhead, and the remainder sent on by other means of conveyance, and also delivered to the consignee, with the exception of a small quantity which had got into such an offensive condition from decomposition that it could not be sent off: Finds that the sum of £113, 0s. 7¼d. was disbursed by the captain in the landing, treatment, and re-shipment, and despatch of the cargo: Finds that, in consequence of the necessity for the landing, treatment, and re-shipment of the cargo as aforesaid, the pursuers' said vessel was detained in Lerwick Harbour from 26th January to 26th February 1872, and that the sum of £50 is a reasonable charge for such detention: Therefore repels the defences: Finds the pursuers entitled to the various sums sued for, and decerns against the defender, John Walker, in terms of the conclusions of the summons: Further, in the action at the instance of the said John Walker, against the said Peter Garriock and Others, finds that the said John Walker has failed to establish any grounds in fact which entitle him to damages as claimed: Therefore sustains the defences, assoilzies the said Peter Garriock and Others from the conclusions of the action at the said John Walker's instance, and decerns; Finds the said John Walker liable in expenses in the said conjoined actions: allows an account thereof to be given in, and remits the same, when lodged, to the auditor to tax and to report.

"*Note*—This case raises a legal question of interest and importance to persons engaged in the shipment of goods, whether as shipowners or merchants; and so far as the Lord Ordinary has been able to inform himself, either from the arguments of counsel or from his own examination into the authorities, the question is one also of novelty.

"The defender, Mr Walker, who, at the date of the shipment which has given rise to the litigation, was a merchant in Shetland, and now resides at Aberdeen, on 30th December 1871 shipped in bulk a quantity of whale blubber and heads on board of the pursuers' vessel, the 'Petrel,' in Shetland, to be conveyed to Peterhead for a slump freight of £50. In consequence of adverse wind and stormy weather, the voyage, which with fair weather may be accomplished in thirty-six hours, was prolonged for an unusual and extraordinary time; and in the course of it the captain landed the cargo at Lerwick, where, after being washed and cleaned, and otherwise operated on as afterwards explained, at considerable expense, it was again taken on board in casks, and so conveyed to Peterhead.

"The vessel which contained the cargo in bulk was unable to carry the whole in casks, and a portion was sent on by another conveyance. The shipowners now sue for—(1) the freight of £50; (2) a sum of £113, disbursed at Lerwick in landing and operating on the cargo, and reloading it; and (3) a sum of £50, in respect of the detention of the vessel during the operations on the cargo, which occupied a considerable time.

"The defender, to whom the cargo belonged, on the other hand, in the action at his instance, claims damages in respect of the operations performed on the cargo, which he alleges were productive of considerable loss to him, and he resists the pursuers' claim excepting for freight, on the ground—(1) that the operations were unnecessary and unwarranted; and (2) that if they became necessary, the costs must be paid by the pursuers, as the carriers of the goods, in respect of their undertaking to transport them for a slump freight, which he maintains is the measure of his liability.

"The pursuers justify their unusual measures in the treatment of the cargo, and in incurring the expense which was thereby caused, on the averment that an absolute necessity arose for having the cargo landed and put in casks at Lerwick in the course of the voyage, in consequence of its having become decomposed, and having run greatly to oil; and that when landed it was found to be necessary, and at all events it was obviously of the utmost importance and advantage for the owner of the cargo, that it should by treated as was done, in order to prevent serious deterioration and great depreciation in its value.

"Cases in which the question of the liability of the owner of goods for expenses laid out on them at an intermediate port after the goods had been damaged by the perils of the sea have arisen for decision. It has been held in a recent and important case on that subject in England, decided on appeal in the Exchequer Chambers, *Notava*, &c., v. *Henderson* (1872), 7 Law Reports (Queen's Bench) 225, that the shipmaster, the carrier of goods which had been injured by sea-water, was not only entitled, but bound, when the vessel put into a port for repairs on her way to her place of destination, to take measures for having the goods preserved, by having them unshipped, removed to a warehouse, and then dried, so as to arrest loss or deterioration, and thereafter re-shipped; and in that case the shipowner was held liable for a large sum of damages for his failure to fulfil this obligation. There, however, the damage to the goods was the result of a collision, and the bill of lading was subject to the exception of loss or damage arising from the collision. In the other cases in which similar questions have arisen for determination, either in the United Kingdom or in America, so far as the Lord Ordinary is aware, the occasion for landing, treatment, and re-shipment of goods has arisen from causes also excepted in the carrier's undertaking contained in the bill of lading, and have not, as in the present case, arisen from a quality necessarily inherent in the cargo itself; and the defender maintains that, in a case like the present, even where such operations are required in order to preserve the cargo, the expense must be defrayed, not by the owner of the goods, but by the ship-owner or other person who contracted to carry them on terms agreed on.

"From the statements of the parties on the Record, as well as the examinations of the witnesses throughout the Proof, which lasted the greater

part of two days, it was apparent that the parties differed materially as to the facts; and especially as to the alleged necessity for the landing, treatment, and re-shipment of the cargo. The defender further alleged that if such necessity really did arise, it was the result of undue delay on the part of those in charge of the vessel in proceeding with the voyage, for the consequences of which, therefore, the shipowner was responsible. At the close of the case, however, and when the defenders' counsel addressed the Lord Ordinary on the evidence, many of the points which had been contested throughout were not pressed; and the Lord Ordinary may say that, so far as his judgment is concerned, he has no difficulty in forming his conclusions on the evidence as to the matters of fact involved; and that, but for the question of law in the case, which is certainly of importance, he would have been prepared to give his decision at the close of the argument.

"The facts of the case, which, in the opinion of the Lord Ordinary, have been established by the evidence, may be shortly stated. Some days before the 23d of December, a number of whales had been cast ashore or driven on the coast of Shetland, at Uyea Sound. The defender, Mr Walker, became the purchaser of them at a price of about £470; and, in the belief that they were bottle-nosed whales, other two gentlemen in Peterhead joined with him in the speculation,—their purpose being to have the blubber and whale heads transported to Peterhead, to be there treated and boiled down for the purpose of manufacturing oil. The defender afterwards found that the whales were not of the description he had supposed, and the arrangement between him and the two gentlemen, above referred to, came, therefore, to an end. After the whales were stranded, but some days before the defender arranged to have them transported from Peterhead, while lying on the beach, and partly on an open field or fields adjoining the beach, they had been flenched,—that is, the flesh had been to a considerable extent separated from the blubber, and the heads had been separated from the bodies. The heads, however, had not been flenched, and it was intended they should undergo that operation at Peterhead.

"In this state of matters, the defender arranged for the carriage of the blubber and heads, in terms of the contract or charter-party, dated 23d December 1871, entered into by Mr Scott, acting for him, and with his knowledge and authority, and Mr Garriock, one of the pursuers, and the leading owner of the 'Petrel,' a fishing smack or vessel of 51 tons register, and which carries about 62 tons. By the contract Mr Garriock agreed to charter the vessel 'to proceed to Uyea Sound; and, after discharging the coals at present on board, load the whole blubber and heads there belonging to the said Mr Walker, not exceeding what the vessel can reasonably stow and carry, and proceed therewith to Peterhead, or as near thereto as she can safely come, and discharge the same, for a slump freight of £50 sterling.'

"In order to aid in procuring despatch, Mr Walker purchased about twenty tons of a cargo of coals which then remained on board of the vessel, and which served as ballast for the voyage from Lerwick to Uyea Sound, which is accomplished, under favourable circumstance, in about six hours. The vessel afterwards proceeded to Uyea Sound, and the coals were there unloaded and delivered to the defender's agent; and the whale blubber, which was lying in pieces in its flenched state on the shore and adjoining ground, and whale heads, were put on board by the defender, being taken out in open boats, after having been partly drawn along the beach.

"At the time of loading the captain signed and delivered to the defender's agent at Uyea Sound a bill of lading in ordinary terms, acknowledging delivery of 32 tons 19 cwt. of blubber, and 213 whale heads. The vessel having thereafter sailed on 31st December 1871, was compelled by an adverse wind to take shelter in Dousie Voe, where she was detained until the 3d of January 1872. On that day she sailed in further prosecution of her voyage, but was obliged to take shelter in Bressay Sound or Lerwick harbour, to which it was proper that she should proceed in any view for the purpose of being cleared at the Custom-house before going further south.

"Unfortunately for the parties, a tack of very bad weather, which had begun in the end of December, continued until the 26th of January. Several vessels, lying in Lerwick harbour for shelter, were detained during that time before the weather admitted of their proceeding south. In the meantime, the cargo on board of the 'Petrel' had undergone a serious change. Decomposition and even putrefaction had set in, and a large quantity of oil had run off the blubber, so that a great portion of the cargo was in a liquid state. In this state of matters it would have been a most dangerous and unjustifiable proceeding on the part of the captain to put to sea with the cargo on board in bulk. It became necessary, for the safety both of the ship and cargo, that the cargo should be landed and put in casks. One necessary result of this operation was, that the vessel could no longer carry or contain the whole cargo.

"When it became apparent to the shipmaster and to Mr Garriock, the owner, who resided at Lerwick, that the vessel could not proceed with her cargo, communications were made to the defender, Mr Walker, and his agent, Mr Scott, in order that arrangements should be made as to the best means to be adopted for carrying on the cargo. The defender at once, and indeed voluntarily, and before the full extent of the evil became apparent, furnished a number of casks for the purpose of receiving the drainage of the oil pumped up from the bottom of the vessel. He afterwards telegraphed to Peterhead, and, after the lapse of a considerable time, got a number of casks from that place, which he supplied, and which were used for the oil and blubber, and for the portions of the whales' heads which were, in the meantime, flenched.

"At an early period in the communications between the parties, viz., on 16th January 1872, the defender also wrote an important letter to the pursuer, Mr Garriock, in which he referred to a proposal which had been made by Mr Scott, his agent, 'to get the vessel to a quay, and put cargo into vats,' as a course which seemed to meet his approval, and stated, 'I am willing to pay for flenching the blubber, and putting it properly into the casks when they come, but will not relieve you of any liability you are under in the bill of lading. Throughout the correspondence, however, as a whole, while it is true that the defender furnished the casks, and never indicated that in his view the shipowner was bound to do so, he repeatedly

declined to take any responsibility, intimating generally that he held the pursuers liable to deliver the cargo at Peterhead, in terms of the bill of lading. A question might be raised whether the letter of 16th January, above referred to, did not entitle the pursuers to perform the operations complained of at the defender's expense; but, in the view which the Lord Ordinary takes of the case, he has not thought it necessary to decide that question, which indeed was not the question argued by the parties.

"Whether Mr Garriock, as the carrier of the goods, be in law ultimately liable for the expense incurred, without having a right of relief against the defender or not, in the opinion of the Lord Ordinary he acted a careful and prudent part in his whole proceedings in regard to the cargo, and did the best that the circumstances admitted of in the interest of the owner of the cargo. He was not himself possessed of the information or skill to determine what should be done with the cargo, so as to enable it to be carried to the best advantage to its destination. But having obtained a survey and reports by shipmasters as to the necessity for landing and reshipping it in its altered state in casks, in place of in bulk, he had a further examination made by persons of large experience in the manufacturing of oil from whale blubber and heads, and acted entirely on the recommendations of these parties.

"The cargo was accordingly landed and treated as they directed, and the claim for disbursements, for which the pursuers now sue, arose in this way. The vessel was, at the same time, detained from the 26th of January to 26th of February by the operations on the cargo, and this detention is the ground of a claim by the pursuers of £50. The cargo was afterwards delivered at Peterhead. A few casks which the 'Petrel' could not carry were sent on by conveyance otherwise, and a part of the heads, for which no casks could be got, became so offensive as to be a nuisance, and at a public sale were disposed of for manure at 10s.

"The defender, Mr Walker, in his defences, as well as in the counter action of damages at his instance, has maintained that the pursuers were to blame for the state into which the cargo got, in consequence of undue delay to proceed with the voyage to Peterhead, but the Lord Ordinary is quite satisfied that this defence is unfounded. The master is not only entitled, but bound, to avoid sailing in a dangerous gale, and a claim for oss will arise from his misconduct if he neglect this precaution' (1 Bell's Com. 7th edition, p. 602). And the Lord Ordinary is of opinion that the master was not entitled to sail further than he did in the state of the weather, at any time between the time of the loading at Uyea Sound and the 26th of January, by which time the cargo was in the course of being landed at Lerwick. He is further of opinion that there was no undue delay up to the time of loading, and that the vessel was in her proper course in coming to Lerwick to be cleared at the custom-house.

"The defender further sought to impose responsibility on the pursuers on the averment that the vessel was not provided with shifting boards, for the purpose of steadying the cargo, and that this in a great measure produced the state of the cargo. But although there was a partial conflict of evidence on this subject, the Lord Ordinary is satisfied that this requirement was sufficiently attended to.

"After the evidence, it could not seriously be contended that, assuming the delay to have been inevitable or justifiable, the vessel could safely have provided to sea with her cargo in bulk. It is quite clear that it was absolutely necessary that it should be put into casks. In reference to this proceeding, however, the defender maintained that it should have been done on deck, or at all events, on the quay alongside which the ship was brought, and that the course taken of removing the cargo to Messrs Hay's premises caused a considerable waste of oil. It was further maintained that, even if the removal was expedient and proper, the cargo should not have been subjected to the treatment which it underwent, and the pursuer's claims are objected to on that account.

"The Lord Ordinary is of opinion that all the defences are unfounded. In the first place, Mr Garriock resorted to the best advice he could obtain, and it seems to be clear that he was wise in doing so, and fully entitled to act in this way, when the defender, though on the spot, threw the responsibility on him. But, in the next place, the Lord Ordinary is of opinion, on the evidence, that everything was done that prudence dictated in regard to the cargo. There were no means of loading it into casks on deck. When it was landed, the weather was severe, bitterly cold, and windy, and it is proved that men could not have been got to work with such a cargo in an exposed situation, and that, even had they done so, there might still have been a loss of oil. Then, after the cargo had been removed to Messrs Hay's premises, it became apparent that it would be extremely detrimental, if not destructive of it, to put it into casks in the state in which it then was, without having it cleaned, skinned, cranned, or further flenched and washed. The heads of the whales, which had been in the bottom of the vessel, were in a state of advanced decomposition, and to have put them either into casks or into the hold again without having them flenched or cranned, would have caused loss of oil, and greatly reduce the value of that part of the cargo, and would have subjected the parties at least to the risk of having to unload again, as the oil escaped into the hold. In regard to the other parts of the cargo, the decomposing matter had to be cut away, so as to avoid mixing it with the oil, which it would have destroyed; and as the flenching had been only roughly done on the shore, it became advisable to have that work completed, and the whole cleaned and washed before being put into casks. It was said by the defender that the washing took place in order to get rid of coal-dust attaching to the cargo owing to the state of the hold, but the evidence shows that this was not so. Again, it was said that the blubber had been unnecessarily cut up into small pieces; but the evidence shows that this was already for the most part in stripes which were not too thick to admit of their being passed into the casks through the bung-holes, which is the usual way of loading into casks, and that only the thick ends of such of these strips as presented an obstruction were cut somewhat smaller. It was suggested by the defender, who has not failed to state every possible objection to the pursuer's actings, that the tops of the casks should have been taken out altogether, but it is clearly proved that such a practice is never followed, and that great waste would have been the result.

"Finally, the defender has a theory that the

skin of such whales might be preserved, and is of value, and on this ground, also, he complains of what was done. But it is enough to say that if the skin be valuable, it yet remains for some one to show—first, how it can be preserved, and then to what use it can be put.

"On the whole, therefore, the Lord Ordinary is satisfied on the evidence that, as it was necessary that the cargo should be put into casks, the captain, in the treatment of it, acted prudently, and adopted the best course for the interest of the owner of it.

"Even if the persons employed had erred, the captain and shipowner would, in the opinion of the Lord Ordinary, have been free from responsibility; for, plainly the best thing they could do was to act on the opinion of others of experience and skill in such matters, rather than on their own views. But, on the grounds now stated, the Lord Ordinary thinks that those who did take charge of the unloading and re-shipment of the cargo acted wisely, for if it had not been treated as it was, but had been re-shipped in casks, without being cleaned or cranned, it would have arrived at its destination in a very deteriorated condition, and reduced in value to an extent greatly beyond the cost of the operations on it, and, indeed, might again have required to be unloaded. The evidence of the witness James Milne, by whom the cargo was received at Peterhead, strongly corroborates the pursuers' witnesses as to this, for if any objection could have been stated to the way in which the cargo had been treated, his experience would have enabled him to do so.

"Of the general duty of the master to take measures to preserve the cargo from such deterioration as was going on in this case, and to take advantage of the vessel being at an intermediate port where operations useful to the cargo admit of being performed, even though it may be at considerable expense, there can be no doubt. Whoever may be the person ultimately liable for such expense under the contract of carriage, it is plainly the duty of the master to take such measures as are in his power to prevent the destruction of the cargo.

"The case of *Notava*, already noticed, proceeds on that principle, and the position of the captain is perhaps nowhere better stated than in the judgment in the case of the '*Gratitudine*,' 3 Robinson, 257. 'Though, in the ordinary state of things, he (the master) is a stranger to the cargo beyond the purposes of safe custody and conveyance, yet in cases of instant and unforeseen and unprovided necessity, the character of agent and supercargo is forced upon him—not by the immediate act and appointment of the owner, but by the general policy of the law. Unless the law can be supposed to mean that valuable property in his hand is to be left without protection and care, it must unavoidably be admitted that in some cases he must exercise the discretion of an authorised agent over the cargo—as well in the prosecution of the voyage at sea as in intermediate ports into which he may be compelled to enter.' Reference may further be made to Lord Tenterden's work on Shipping (11 ed.), pp. 325 and 326, and to Parson's work of authority on the Law of Shipping, vol. ii, pp. 21 and 22, where a reference is given to certain American decisions in which the principle received effect.

"On the facts as above stated, the Lord Ordinary is of opinion, in the first place, that there is no ground for the defender's claim of damages. That claim is maintained on the assumption that the cargo was improperly treated, but the Lord Ordinary thinks that the best was done for the cargo which the circumstances admitted of; and whatever may be said as to the pursuers' claim for reimbursement, it is extremely difficult to see how a claim of damages on this ground can be maintained after the defender's letter of 16th January 1872 above mentioned, combined with the fact that the defender himself furnished the casks. Even if there had been such a claim, the evidence as to its amount is altogether insufficient and unsatisfactory. There are no materials on which the Court could rely as leading to a sound result on that subject.

"Then as to the claim for freight, the goods having been carried to their destination, so far as it was possible to do so, the pursuers are entitled to the amount of £50 for which they stipulated.

"There remains the pursuers' claim for their disbursements, and for damages or recompense on account of the detention of the vessel, as to which the legal question is raised, Whether, assuming that it was necessary to put the cargo into casks, and that it was a proper and prudent proceeding in the course of doing so to subject it to the operations above mentioned, Were the pursuers bound to do this at their own expense, or have they a claim for reimbursement and recompense against the defender? The Lord Ordinary is of opinion that the pursuers are entitled also to succeed in their claims on this account.

"The defender's contention on this subject is, that by the terms of the charter-party and bill of lading the pursuers undertook an absolute obligation to convey the cargo to Peterhead, and deliver it there in the like good order and condition as that in which they received it, for the stipulated freight, subject only to certain specified exceptions, being generally of the nature of the perils of the sea; and that whatever expense became necessary in order to enable the pursuers to fulfil that obligation, or however long the vessel might unfortunately be detained in the course of the voyage, such expense and loss of other employment of the vessel must be borne by the shipowner. The defender, in support of his argument, referred to the case, the *Anderston Foundry Co.* v. *Law*, 28th May 1869, and particularly to the opinion of the Lord President, in which his Lordship states (p. 843), "It seems to me that in an action on a bill of lading, the allegation of loss of cargo by perils which do not fall within the known or expressed exceptions of the contract, must, as a general rule, be irrelevant as a defence for the master and owner, by the contract of affreightment, undertake to insure against all risks except those specified. Even the wrongful act of a third party, unconnected either with owners or shippers, by which cargo is lost, leaves the liability on the owners. Thus, in *Spence* v. *Chadwick* it was held by the Queen's Bench, in Lord Denman's time, without hesitation, that the illegal seizure and confiscation of cargo, as being contraband, by the Custom-house officers of a friendly power, in the course of a voyage, there being no fault on the part either of owners or shippers, was not one of the perils within the exception of the bill of lading; and the shippers prevailed against the owners in an action on the contract of affreightment for the value of the cargo (16 L. J. Q. B. 313).' The

case of *Spence* v. *Chadwick*, noticed by his Lordship, was also strongly founded on, and it was urged that the authority of the case of *Notava* was inapplicable to a case like the present, where the state of the cargo, which gave rise to the expense and delay on the voyage, arose from inherent causes, and not from the perils of the sea; and it was maintained, in short, that, unless the carrier can bring the case within one of the exceptions in the bill of lading, and show that the expense was the result of some cause included in these exceptions, he must bear such expense himself. In the particular case it was maintained that the shipowner was quite able to judge as to the nature of the cargo at the time of making the contract; and that, as it was a cargo subject to decomposition, he took all the risk of it by his undertaking to carry it for a fixed sum, without making any exception on account of its special nature.

"The Lord Ordinary is of opinion that the argument of the defender now stated is unsound. In the first place, it appears to him that the defender attaches too much importance to the particular terms of the bill of lading. The contract between the parties was constituted apart from that document by the charter-party. 'It is usual for the master to sign and give bills of lading in like manner as if there were no charter-party, but, nevertheless, as far as the charterer is concerned, they are little more than evidence of the delivery and receipt and shipping of the merchandise, for the charter-party is the controlling contract as to all the terms or provisions which it expresses,' Parsons, I. 286 and 287; and the law is similarly stated in Bell's Com. I. 590. 'Bills of lading are made use of both in combination with a charter-party and for a engagement of freight in a general ship. But the bill of lading is commonly the sole evidence of the contract in the latter case, while in the former it is only collateral; its chief use being to fix the goods on the master in fulfilment of that part of the contract charter-party;' and in Lord Tenterden, p. 235. In the present case, therefore, the bill of lading is to be regarded as merely a receipt or acknowledgment that the quantity of cargo therein mentioned was shipped on board, and being in the hands of the defender, with whom the charter-party was made, the pursuers' obligations are not thereby enlarged. The question then is, What obligation did the pursuers undertake? And in considering that question, the Court is entitled to ascertain the surrounding circumstances, and particularly to take into view the nature and position of the cargo about to be shipped. When this is taken into consideration, it appears to the Lord Ordinary that the contract into which both parties entered was one for the conveyance of the cargo *in bulk*. This appears to be beyond question, when it is borne in mind that the blubber and whale heads were lying on the beach, cut in pieces, unsuitable for carriage in any other way. If the shipowner had proposed to have the blubber put into casks on the shore, or on board, it is evident that the cargo must have previously undergone operations of importance, and causing expense and loss of oil; and there appears to be no doubt that, if the shipowner had proposed to interfere with the cargo in this way, he might have been prevented by the defender, and would have rendered himself liable in damages had he persisted in doing so. That the agreement of parties was that the cargo should be carried in bulk is farther apparent from the fact that the charter-party is silent as to the owner of the ship providing the casks. This certainly would have been expressed if it had been a part of the bargain, for it is the duty of the shipper to put his goods in the packages which are required for their carriage. It is important, on this point, also to observe that the expense of providing such casks would have obviously made the stipulated freight much too small to leave the prospect of any profit whatever, and that immediately when the necessity for casks arose, the defender at once, and indeed voluntarily, supplied them. In his evidence he stated that a very high freight was given, because, in his view, the pursuers took the whole risk of the cargo. But the Lord Ordinary does not think the evidence for the defender on this subject is of any importance. Mr Garriock explains that, although Mr Walker thought the freight high, he could not modify it, as the vessel required to be cleaned out afterwards, and he was afraid the cargo might injure her for the special purpose for which he held her, viz., the fishing. The farther elements in his view in fixing the freight were, that he expected to have to pay higher wages owing to the nature of the cargo, and that he did not anticipate that he would have any return cargo from Peterhead.

"As it was really, therefore, in view of the parties that the pursuers should carry the cargo *in bulk* to Peterhead, and they were not entitled in the first instance to carry it otherwise, it cannot, in the view of the Lord Ordinary, be represented to have been part of their undertaking that if the cargo should undergo an unlooked-for change, even though arising from inherent causes which rendered it impossible to carry it to its destination in bulk, and made its discharge and shipment in casks necessary, then the pursuers should undertake this. It appears to the Lord Ordinary that the rights of parties must be settled on the footing that the defender warranted the cargo as one which could be carried on to its destination in bulk; that it was accepted on that footing; and if, from its inherent quality, combined with the extraordinary length of the voyage, owing to causes beyond the control of the parties, it could not be carried on in this way, the defender must bear the expense. If the defender's argument be sound, it necessarily follows that the shipowner, when at Lerwick, was bound to supply the casks. It is difficult, however, to see how he could also be bound under his contract to take on the whole of the cargo in this case, for the vessel was unable to carry it except in bulk.

"It cannot, as it appears to the Lord Ordinary, be laid down as a general principle that where unusual operations causing expense are required in the treatment of a cargo in the course of a voyage, and particularly at intermediate ports, the shipowner shall be liable to bear the expense unless the operations have been produced by causes expressly excepted in the bill of lading or contract. The shipowner, as a carrier, is bound to use all ordinary care, and give all usual services for preserving the cargo and preventing damage; but the Lord Ordinary apprehends that, when unusual and extraordinary services and expenses are occasioned, the owner of the goods must be liable. Thus, the case of a cargo of hides or furs, shipped apparently in a perfectly sound condition, but really having vermin amongst them, which the shipmaster or those receiving the cargo could not be expected to detect at shipment, while it would certainly be the

duty of the master, at an intermediate port in the course of the voyage, to have the goods taken out and carefully attended to, if he became aware of the existence of an evil which was destroying them, it seems to be clear that the shipowner would not be liable to bear the expense, but the owner of the goods would be bound to reimburse him. See Parsons, *ut supra*, vol. ii. p. 22. Such a case, or the case of any defect or quality of the goods which renders treatment and expense necessary, but which is latent, or even not obvious and to be reasonably anticipated as likely to cause expense at the time of shipment, falls within the principle stated in the judgment in the case of the *Gratitudine*' above quoted, where the master becomes, 'by the policy of the law, acting on the necessity of the circumstances in which he is placed, the agent for the owner of the goods.' The present case appears to the Lord Ordinary to fall within the same general principle. The cargo was given by the shipper as one which could safely be carried in bulk to its destination, and as such it was accepted. The shipowner could not be expected to have such knowledge of the nature and inherent qualities of the cargo as to make him aware of the risk there was—(1) that it might require to be unloaded and re-shipped in a different form altogether; and (2) that, in order to save great deterioration it might require to have considerable expense laid out on it. So far as he was concerned, the inherent quality which caused the expense must, by the nature of the contract, be regarded as latent, or, at least, as not obvious and such as should lead him to anticipate what actually occurred. It is different, however, with the merchant to whom the goods belonged. He is bound to inform himself of the inherent qualities of the goods he ships, and at least must take the risk of these. Moreover, it appears to the Lord Ordinary that, even if the owner of the goods could throw on the carrier the expense of discharging and re-shipment, there is no possible ground for imposing on him the expense of the operations necessary to prevent the serious deterioration of the cargo. That part of the expense is in no view within the contract of carriage, so as to be covered by the freight. For the freight the carrier undertakes to carry and deliver the goods; but if extraordinary expense is required to save the goods from great deterioration, it seems to be clear that this must be paid by the party to whom the goods belong, and for whose behoof the expense is incurred.

"If these views be sound, it appears to the Lord Ordinary that the pursuers are entitled to succeed in their claims of £50 for detention of the vessel. That detention did not arise from a cause ordinarily incident to the voyage, or within the contemplation of the parties when the charter-party was entered into. It is a fair part of the expense caused by the treatment which the cargo required. It was much more for the advantage of the defender that the vessel should remain, giving time for the operations on the cargo, than that the cargo should be taken on board in a condition in which it might have been very seriously deteriorated. The amount charged appears to the Lord Ordinary to be reasonable.

"A charge by the pursuer, Mr Garriock, of £10, 10s. for commission, agency, and trouble, in the whole matter, was objected to, but the Lord Ordinary does not see any sufficient reason to disallow this. The captain might fairly have applied to a shipping agent or merchant to undertake the duty which Mr Garriock did, and the charge appears to be reasonable."

The owner of the cargo reclaimed against this interlocutor.

Authorities cited—1 Bell's Com., 7th ed. 602, 590; *Anderson*, 7 Macph. 836; *Spence* v. *Chadwick*, 6 L. J. 2 B. 313; *Gratitudine*, 3 Robinson, 257; Tenterden on Shipping, 11th ed. 325, 326; Parson on the Law of Shipping, 218; Abbot, 11th ed., 380, 325; *Notava* v. *Henderson*, 5 L. R. 2 B. 346, 2 B. 225.

The Court adhered, and added a finding that the voyage was successfully accomplished, and was beneficial to the owner of the cargo.

Counsel for Reclaimers — Keir and Miller. Agents—Andrew & Wilson, W.S.

Counsel for Respondent—Burnet and Pattison. Agent—W. Mason, S.S.C.

Friday, October 31.

SECOND DIVISION.

[Sheriff of Edinburgh.

BAIRD AND OTHERS *v.* STRATTON.

Road Trustees—General Turnpike Act, 1 *and* 2 *Will. IV., c.* 43*—Surface Water—Dam.*

The tenants of certain quarries having erected a dam to prevent the surface-water from a turnpike road being discharged into the workings—*Held* that the road trustees were entitled to remove this dam, and that it was *ultra vires* of the adjacent proprietor and tenants to act as they had done in erecting it.

This was an appeal, which came up from the Edinburgh Sheriff-court, against an interlocutor of the Sheriff (DAVIDSON), affirming one of his Substitute (HALLARD). The origin of the case is set forth in the petition presented in the Sheriff-court, of which the narrative is as follows:—"That the petitioner, Sir David Baird, is proprietor of the lands of Newbyth and barony of Gilmerton and others, lying within the parish of Liberton and sheriffdom of Edinburgh. The other petitioners are mineral tenants of the said lands under the said Sir David Baird, conform to lease, dated 15th and 16th May, 20th June, and 1st and 13th July, all in the year 1872. That the boundary of the mineral field embraced in the said lease is a parish or statute-labour road leading from the Edinburgh and Dalkeith turnpike road near Greenend, and again joining the Edinburgh and Dalkeith road about a quarter of a mile to the north of the village of Gilmerton. There is close by this road an old limestone quarry to which access is had from the road. For a number of years past the surface water has been directed from the road into the old quarry, and thence it finds its way to the mineral workings, to the great detriment of the workings and the increase of the expense of pumping. The petitioners, the Glasgow Iron Company, recently closed the channel by which the water finds its way from the road into the quarry by damming it with turf close to the roadside, but on the property of the petitioner Sir David Baird. Towards the end of October last, or in the present month of November, the respondent reopened the channel into the