undoubtedly to be of a kind suitable for guiding future procedure. Now, is there any such question in the present case? I do not think that there is. We are asked to decide whether a certain party is, within the Education Acts, one who can pay for the education of her children. That is surely a question for the local board and the Sheriff to determine, and in dealing with it we should be doing the work of the board and determining a question of fact. I think therefore that we should refuse to entertain it.

LORDS MURE and SHAND concurred.

LORD ADAM was absent on Circuit.

The Court dismissed the case as one not involving a question of law.

Counsel for Parochial Board — Guthrie. Agents—Bruce & Ker, W.S.

Counsel for School Board — Asher, Q.C. — Dickson. Agent—T. Dalgleish, S.S.C.

Wednesday, October 28.

SECOND DIVISION.

[Sheriff-Substitute of Dumfries and Galloway.

THOMSON BROTHERS *v.* THOMSON.

Sale—Sale of Balance of Previous Sale—Implement.

A sold to B a quantity of flour of a particular brand, which was described in his sale-note as the balance of a lot previously sold by him to B. When the sale was made A had not in hand any flour of that brand, but he subsequently bought in the market a quantity of the same brand of flour sufficient to cover the sale. B rejected the flour as, from a test of the previous quantity bought and delivered to him, inferior to contract quality, and refused to take delivery. In an action by A against B for loss sustained by the refusal of the latter to take delivery of the flour, *held* that A had not implemented his part of the contract, and could not enforce the contract against B.

Thomson Brothers, grain and flour merchants in Glasgow, raised this action in the Sheriff Court of Dumfries and Galloway at Kirkcudbright against David Thomson, baker, Castle-Douglas, for payment of £315.

In January 1884 the defender bought and received from the pursuers delivery of 50 small bags Danube flour. He did not use it at once. On 1st May of the same year, before he had tried it, Alexander M'Kay, the pursuers' traveller, visited Castle-Douglas and saw the defender, when the contract of sale of 200 large or 400 small bags of Danube flour founded on by the pursuers of this action was made with him by M'Kay on their behalf. Of the same date the pursuers sent to the defender from Glasgow the following sale-note—"Dear Sir—We beg to confirm sale made to you to-day by our Mr M'Kay of the balance of our 'Danube' flour, limited to five hundred (500) bags 140 lbs. each at thirty-one shillings and sixpence (31s. 6d.) per 280 lbs. Delivery in 14 days."

On 5th May the defender wrote to the pursuers as follows—"Gentlemen—I tried the 'Danube' on Saturday along with my usual mixture, and found that it reduced my quality very much. To-day I tried it by itself to put it on its own merits, and I can safely say it is the most inferior I have met for a very long time. I need not say that I'll have no more of it at any price."

On 7th May the pursuers wrote to the defender declining to cancel the contract referred to in the sale-note. On the 8th the defender replied that he would refuse to take delivery of any more flour. After some further correspondence, in the course of which the defender stated that he had not received the sale-note of 1st May when he wrote the letter of the 5th, and throughout which the parties maintained the same positions towards each other, the pursuers stored 400 small bags of flour in Glasgow in neutral custody in the defender's name. The pursuers subsequently raised the present action for the price of this stored flour.

They pleaded—"(1) The pursuers having sold to defender the balance of said parcel of a cargo of flour limited as condescended on to 400 small bags, and the defender having purchased same at the price libelled on, and pursuers having stored same in defender's name, all as condescended on, pursuers are entitled to decree as craved. (2) In any case, the pursuers having implemented their part of the contract of sale between pursuers and defender, and having stored the flour in question with a neutral storekeeper in defender's name, have suffered loss and damage to the extent of Three hundred and fifteen pounds sterling, the price thereof, and are entitled to decree for said sum with expenses."

The defender stated as a preliminary plea that the pursuers should on their own statement have re-sold the flour and brought an action for the damage they might have suffered, and therefore that their action was incompetent as laid; and, *inter alia*, on the merits—"(4) No contract of sale in the terms condescended on was entered into, or if it was, the defender repudiated it before delivery. (5) The alleged contract has been departed from by the pursuers, or at least they are not entitled to recover the price, not having implemented their part of the contract by delivering the goods sold."

On 23d January 1885 the Sheriff-Substitute (NICOLSON), on the motion of the pursuers, granted warrant to sell the 400 bags of flour in store in the defender's name, and they were sold accordingly, fetching about half-a-crown per bag less than the market price.

On 20th February following (after the flour had been sold and the price lodged in the hands of the Clerk of Court), the Sheriff-Substitute, on the authority of *Warin & Craven* v. *Forrester*, 30th Nov. 1870, 4 R. 190, *aff.* 4 R (H.L) 75, sustained the defender's preliminary pleas and dismissed the action.

The pursuers appealed to the Court of Session.

The Lords, after hearing counsel, before answer appointed a proof before Lord Rutherfurd Clark.

The following was the import of the evidence:—Alexander M'Kay, the pursuers' traveller, de-

poned—The sale-note of 1st May correctly represented the bargain he made with the defender. The bargain was a verbal one, made in the street. He did not remember the words that passed, but only that it was to be a good Minnesota flour of the same brand as the 50 bags sold in January, and for which he then received payment from the defender. "(Q) Did you say this to the defender, 'You cannot do better than buy the balance of the Danube; we have still about 200 bags left?'—(A) No, I cannot remember saying those words or words approaching that. I swear that I did not say we had a balance of the Danube brand we had sold him before. . . . (Q) Did you not just say, 'We have still about 200 bags left?'—(A) Yes, very likely I would. I believe something was said about his not having tried the Danube he got in January. (Q) Did you say anything about the quality of the flour?—(A) Yes, I said it was good Minnesota flour. I guaranteed the flour in question as good regular Minnesota flour. I do not think I would give it any more definite a character. I believe I showed the defender a sample in January. The lot in question might not be of the same shipment as that previous lot, but it was the same miller's flour and the same brand." He sold the flour as a "straight" flour.

The defender's account of the bargain was as follows—"He asked me if I was buying anything to-day. I said if he had a good "straight" I would buy it. His answer was, 'You can't do better than buy the balance of the Danube. We have still 200 left, and if you will clear out the left, I will give you them at a cut price of 31s. 6d.'—cut price being a term known in the trade for keen price. I replied—'Well, M'Kay, I have not tried those 50 bags I got from you. I cannot tell anything about the quality.' He said he could guarantee them a first-class straight, as good for strength or colour as anything in the market. I think these are about the words he used. (Q) Did he say anything at that time about the 50 bags?—(A) He said they were the balance of the same lot as the 50. He said he was too sure of that, as they had lost a lot of money on them, owing to their having been a long time in store. He said he thought the number in store was about 200 bags, but he could not tell the exact number."

The defender also, along with his foreman, gave evidence as to the inferior quality of the flour, which he had tested out of the 50 bags bought in January. He afterwards, when in Glasgow, went to the store where the flour was stored, along with James Paterson, flour broker, and Andrew Steven, lately manager of the Craighall Milling Company, and took a sample to Paterson's office, where they tested it by doughing it, and found it lacking in strength, and not sufficient for the purpose for which that brand of flour was sold in the market. John Thomson, a member of the pursuers' firm, deponed that when the sale was made by M'Kay they had not enough flour in store to cover the sale, and they bought enough to cover it from the sole agent for the Danube brand of flour. They did not try it by sample but by brand. The 50 bags sold to the pursuer in January were of a different shipment altogether.

At advising—

LORD JUSTICE-CLERK—This is a narrow case, but I have come to the conclusion that the pursuer cannot prevail, on the simple ground that he did not fulfil the contract which he himself alleges was made. What he alleges is, that after he had sold fifty bags to the defender in the beginning of the year, he obtained an order in May for a much larger quantity of the same consignment of flour of which the fifty bags previously sold had formed a portion, and accordingly in the invoice which he sends to the defender he says—"We beg to confirm sale made to you to-day by our Mr M'Kay of the balance of our Danube flour." Now, beyond all question, if there was any contract made by M'Kay with the defender, it was a sale of the balance of Danube flour which the pursuers then had unsold. But it turns out that no such balance existed. The sellers went into the market and bought flour, and therefore what was delivered or tendered to the defender was not what was bought, and it is clear that the defender was not bound to accept delivery of a substituted commodity. Several points have been argued to us, but I think the case may take end here, on the ground that what was offered to the defender was not the balance of the parcel of flour of which he had already bought a certain amount, but a new consignment. I am therefore of opinion that the pursuers cannot prevail, and that the defender must be assoilzied.

LORD YOUNG concurred.

LORD CRAIGHILL—I am of the same opinion. The difficulty which I at one time had has now been entirely removed by one consideration, which is this, that the article which was delivered, or which was tendered for delivery, was not the article which was sold. There is no doubt from the evidence that that which was sold was a balance of Danube flour in the hands of the pursuers. This is apparent on the face of the invoice —[*reads*]. Now, then, was that which was offered to the defender a balance of Danube flour? On the contrary, they had no such balance. They had not the quantity which they proposed to sell, and so they went into the market and bought the quantity which was required to fulfil their contract. Whether that flour was suitable for the purpose for which it was sold is not material. In his letter of 5th May the defender says that he had tried the Danube flour and would have "no more" of it. It appears to me that once we come to the conclusion that a balance was bought we must also come to the conclusion that it was a balance of the lot which the defender had by that time tested, and which he then represented as inferior in quality. If so, then the subject bought was not the subject supplied by the pursuers, and the defender must therefore be assoilzied.

LORD RUTHERFURD CLARK—I am of opinion that it is established by the proof in this case that the contract of sale related to a balance of flour then alleged to be in the hands of the pursuers, and which was the balance of the same flour which they had sold to the defender in January previous. I think that is the fair import of the evidence, and if that contract was not made then, I think no contract was made, because I think it is very plain that the defender understood by the balance for which he gave an order a balance or

quantity of a specific flour. If that was the contract made, then it is plain that the pursuers never were in a position to implement it, for they had not any of the specific flour which they were professing to sell, and they could not implement it by buying other flour in the market. If, on the other hand, there was a mistake on their part as to the balance of flour which their traveller said they had on hand, then there was no contract, and the pursuers are not entitled to enforce any contract against the defender.

But further, I am very strongly inclined to think that the flour which was sold was sold for a particular purpose, and that the pursuers knew the purpose for which it was wanted, and represented it as sufficient for that purpose. Now, I am also satisfied that if it was not sufficient for that purpose, that it was not a "straight" flour.

The Court pronounced the following interlocutor:—

"Find that the contract of sale libelled had reference to a balance represented by the pursuers as remaining in their hands of a lot of flour, part of which had been bought from them by the defender in the month of January preceding: Find that at the date of the said contract no such balance existed: Therefore dismiss the appeal, of new assoilzie the defender from the conclusions of the action," &c.

Counsel for Pursuers (Appellants) — Ure — Craigie. Agents—Ker & Smith, W.S.

Counsel for Defender (Respondent)—Gloag—Low. Agents—Ronald & Ritchie, S.S.C.

Wednesday, October 28.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

SALVESEN & COMPANY *v.* GUY & COMPANY.

Shipping Law — Charter-Party — Proviso for Charterer's Liability to Cease on Loading of Cargo—Lien—Demurrage.

A charter-party provided — "charterer's liability to cease as soon as the cargo is shipped in terms of this charter, captain having an absolute lien on the cargo for all freight, dead freight, and demurrage." The ship arrived and delivered her cargo. *Held* that this clause of the charter excluded a claim against the charterer for demurrage and detention at the port of loading, since it imported that all liability should "cease" to be enforceable after the cargo was shipped, in respect of the counter stipulation for a lien.

By charter-party, dated 4th December 1880, between the pursuers Salvesen & Co. and the defenders Guy & Co., it was mutually agreed that the good ship or vessel called the "Matador," then in Rotterdam, should proceed to Mobile Bay in ballast, and there load, from the factors of the defenders, a full and complete cargo of square hewn $\frac{\text{and}}{\text{or}}$ sawn pitch pine timber, and being so loaded, should proceed to a safe port in the United Kingdom as ordered. Freight was to be payable at certain times stipulated by the charter-party. "Twenty working days are to be allowed the merchants (if the ship be not sooner despatched) for loading, and the cargo to be unloaded as customary at port of discharge in not exceeding sixteen like days, and ten days on demurrage, over and above the said laying days, at nine pounds per day. . . . Charterers' liability to cease as soon as the cargo is shipped in terms of this charter, captain having an absolute lien on the cargo for all freight, dead freight, and demurrage." The ship was ordered to Limerick, and the cargo was delivered to the defenders' orders.

This action was thereafter brought by Salvesen & Co. to recover £108, as due for twelve days' delay at £9 a day, ten of the days being the demurrage days and two being additional days, for which damage at the same rate was asked.

The pursuers alleged that the lay-days began on 22d March and ended on 14th April, and that the loading was not completed till 26th April, or twelve days beyond the lay-days.

The defenders besides other defences which did not require to be disposed of relied on the terms of the charter-party, and pleaded, *inter alia*—"(2) The pursuers having contracted that the defenders' liability should cease as soon as the cargo was shipped in terms of the charter-party, the defenders are entitled to absolvitor."

By interlocutor of 26th May the Lord Ordinary (KINNEAR) sustained the second plea-in-law for the defenders, and assoilzied them from the conclusions of the action.

"*Opinion.*—This action is brought upon a charter-party in which 'twenty working days are allowed . . . for loading, and the cargo to be unloaded as customary at the port of discharge, in not exceeding sixteen like days, and ten days on demurrage, over and above the said laying days,' at a certain fixed rate. The pursuers aver that the loading was not completed until the twelfth day after the lapse of the specified loading days, and the action is brought for demurrage, and for damages at the same rate for detention for two days beyond the demurrage days properly so called. The question is, whether the defenders are not relieved of liability by a stipulation in these terms—'Charterer's liability to cease as soon as the cargo is shipped in terms of this charter-party, captain having an absolute lien on the cargo for all freight, dead freight, and demurrage.'

"If I had to decide this question for the first time, and independently of authority, I should have thought it one of difficulty, since there is apparent force in the pursuers' argument that the stipulation is meant to exempt the charterer from such liability alone as may have accrued after the cargo has been shipped. But clauses of this description have been judicially construed in numerous cases in England, where it has been decided that in such cases the charterer cannot be sued for delay in loading a cargo, the words 'liability to cease' being construed to mean cease to be enforced, and not cease to accrue, and an equivalent advantage being given to the shipowner by the stipulation for a lien over cargo for demurrage, which he would not have but for the agreement. The principle is stated by Mr Baron Bramwell in *Francesco* v. *Massey*, L.R., 8 Exch. 106—'The charter contained a clause that on load-