

What is sued for is payment of a balance of freight. The full freight, according to the rate and measurement specified in the bill of lading, with £2 added as stipulated gratuity to the master, was £66, 14s. 6d., from which, however, must be deducted a sum of £1, 7s., being ship's proportion of Custom-house measurer's dues for measuring the cargo, leaving £65, 7s. 6d. as the nett sum chargeable by the ship. There has been paid £28, 13s., leaving unpaid, as the pursuers say, the sum of £36, 14s. The defenders do not dispute that the account thus stated is correct, but they bring forward a counter claim amounting to £28, 16s. 9d., which they contend they are entitled to deduct, to compensate them for the value of cargo covered by the bill of lading, but undelivered; and the question between the parties really is, whether or not judgment ought to be given in favour of this counter claim? The Sheriff has found in the negative, and I concur in his judgment.

Several questions of greater or less importance were raised during the discussion affecting the law of the case, and upon one of those questions in particular the defenders have ably insisted—the question, namely, whether the bill of lading must not be held to be conclusive of the quantity of cargo put on board the "Immanuel?" That is said to be the law of Denmark, which is the home of the ship in question, but it is not the law of Scotland or of England, nor is it the ordinary maritime law of Europe. But however that may be, the question thus raised does not call for decision on the present occasion. For it seems to me the defenders have no case except upon the assumption that they are the onerous holders of the bill of lading for the full quantity specified in that document, which they are not. They have received all that was put on board. They bought and they paid only for what they received. That is according to my reading of the evidence, and particularly the evidence of the defenders' cashier, Mr Welsh, and of the defender himself, who concurs with his cashier. There is certainly no evidence to the contrary. The defenders got the bill of lading only to cover the cargo actually shipped. This was their contract with the Napiers, by whom the bill of lading was indorsed to them. They have received all to which they acquired right, and they have no claim to anything beyond. The consequence is that they have suffered no loss on account of short delivery. This seems to me to be conclusive of the case. There being no damage, there is no ground for withholding payment of the balance of the freight, and for that balance therefore the decree given by the Sheriff must be sustained.

Though it is unnecessary as a ground of judgment, I think it right to add that the contention maintained by the defenders as to the effect of the bill of lading on the obligation of the owners and the master appears to me to be unsound. The question is one of evidence, and therefore is one of procedure. Even on the assumption that the bill of lading would be conclusive as to the quantity taken on board, in a court subject to the law and practice of Denmark—taking these to be as alleged by the defender—there is no rule of the kind to which the defenders can appeal in Scotland. Procedure is governed by the rules of the tribunal appealed to, and a bill of lading, even

when held for value, not being conclusive on the question whether the quantity acknowledged to have been received was actually put on board, this Court may receive such evidence as is offered or may be thought necessary for the determination of this controversy. *Tota re perspecta*, the true conclusion is that the quantity delivered at Bo'ness was the full quantity shipped, and indeed this was not really disputed at the debate.

On the whole matter, my opinion is that the appeal ought to be dismissed and the judgment of the Sheriff sustained.

LORD RUTHERFURD CLARK—Your Lordships are of opinion that the defender acquired right to the cargo which was actually on board ship, and that he was indorsee of the bill of lading to that extent, and to that extent only. I am willing to decide the question on that footing. On the questions of international law which were argued before us, I desire to reserve my opinion.

The Court pronounced this interlocutor:—

"Find in fact that the goods delivered by the pursuers to the defenders at Bo'ness comprised the entire cargo shipped on board the 'Immanuel' at Poderaa Bight by the charterers; and find in law that the defenders, as holders of the bill of lading, are not entitled to claim more: Therefore dismiss the appeal, and affirm the judgment of the Sheriff appealed against: Of new ordain the defenders to make payment to the pursuers of the sum of £36, 2s. 5d. sterling, with interest thereon at the rate of five pounds per centum per annum from the date of citation to this action till paid: Find the pursuers entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for the Appellants—Salvesen. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Respondents—Balfour, Q.C.—Dickson. Agents—J. & A. Peddie & Ivory, W.S.

Wednesday, December 7.

FIRST DIVISION.

MUIR, PETITIONER.

Trust—Nobile Officium—Allowance to Parent for Education of Children.

A trust-estate was held by testamentary trustees for the purpose of paying the half of the income to the truster's son and accumulating the other half for his children. The income of the estate was £4623, and the son had eight children. In a petition presented by him, the Court authorised the trustees to make payment to the petitioner, out of the income of the trust-estate other than that portion of the income which was payable to him, of an amount equal to one-half of the sum expended by him in each year on the education of his children, not exceeding the sum of £500 in any one year.

William Campbell Muir of Inistrynich presented this petition, which prayed the Court to authorise

and ordain the trustees acting under his father's trust-disposition and settlement to make payment to the petitioner, for the suitable maintenance and education of his children, out of the free annual income of the trust-estate under their charge, other than that portion of the income which was payable to the petitioner, of the sum of £650 yearly.

The purposes for which the respondents held the trust-estate had been determined by an agreement entered into between them and the petitioner as the settlement of a litigation. Under that agreement the trustees were to pay the petitioner yearly one-half of the nett revenue derivable from the trust-funds, and the remainder of the revenue was to be accumulated by the trustees for behoof of the petitioner's children until they reached the age of twenty-five, or, in the case of daughters, until they attained that age or were married.

At the date of the petition the petitioner had eight children, seven of whom were being educated. He averred that the income derived from the trust-estate had seriously diminished; that his family had been increasing and growing up, and that the expenses connected with their education had become a serious item in his expenditure; that accordingly he found it necessary, in order that he might maintain and educate his children in a manner suitable to their future prospects, to have at his disposal a larger income than he could command. He further averred that the nett income of the trust-estate for the year ending 30th May was £4623, 12s. 4d., and that the trustees were thus accumulating income on behalf of the children to the extent of more than £2300 a-year.

The trustees lodged answers, in which they "expressed themselves willing, if authorised by the Court, to meet the petitioner's wishes to the extent of defraying one-half of the expense of the education of the children."

At advising—

LORD PRESIDENT—In all such cases as the present the first consideration always is, what arrangement is most beneficial to the children, and what I look at here is the entire income of the estate and the proportion thereof enjoyed by the petitioner. The total amount of the income of the trust-estate is £4623. Of that the petitioner is getting a sum of £2323 per annum, and the trustees are accumulating for the children the balance of £2300. The first question in this case is, whether it will be for the advantage of the children that any part of the accumulated income should be applied for the education of the children? In determining that question, of course we take into consideration the fact that the petitioner is in receipt of an income from the estate, and I am not prepared to advise that he should be relieved entirely from the duty of educating his children. On the other hand, although he has a good income—it might be called a handsome income—from the estate, still, if he desires for his children a superior education, it is a fair subject for consideration whether it is just to lay upon him the whole burden, while the remaining part of the income from the estate is being accumulated for the children. It appears to me that the trustees made a very fair proposal when they suggested that they should

pay a half of the required amount, and that the petitioner should pay the other half. The principle of our judgment is, that the petitioner and the trustees should each contribute one-half of any sum which may be necessary to give the children a first-rate education.

LORD MURE and **LORD ADAM** concurred

LORD SEAND was absent from illness.

The Court pronounced the following interlocutor:—

"The Lords authorise and ordain the respondents, the trustees of the late William Muir of Inistrynich, to make payment to the petitioner, at the 31st of January and the 31st July of each year, of an amount equal to one-half of the sum expended by the petitioner in each year on the education of his children, whether mentioned in the petition or not, including board when from home and travelling expenses, as the same shall be vouched to the satisfaction of the said trustees, said amount payable by the said trustees not to exceed the sum of £500 in any one year, beginning the first half-year's payment of said amount at 31st January 1888 for the half-year preceding that date, and the next half-year's payment at 31st July 1888, and so forth half-yearly thereafter during the education of the said children, and until they become respectively entitled to their shares of the said trust-estate: Authorise and direct the said trustees to make said payment, and also payment of the expenses incurred by the petitioner and respondents in this application, as the same may be taxed by the Auditor of Court as between agent and client, out of the share of the revenue of the said trust-estate pertaining to the children of the petitioner, and to charge the same as a general payment against the said income account, declaring that the present arrangement shall take effect till the further orders of the Court; and decern."

Counsel for the Petitioner—Sol.-Gen. Robertson—Omond. Agents—Murray, Beith, & Murray, W.S.

Counsel for the Respondents—Jameson. Agents—Boyd, Jameson, & Kelly, W.S.

Wednesday, December 7.

FIRST DIVISION.

[Lord M'Laren, Ordinary.]

STEVENSON V. PONTIFEX & WOOD.

Contract—Breach of Contract—Damages—Second Action Proceeding upon Same Breach of Contract.

A single act amounting either to a delict or a breach of contract cannot be made the ground of two or more actions for the purpose of recovering damages arising within different periods, but caused by the same act.