the hold at Dundee was delivered,—this might have gone some length to prove or suggest the probability of numerical error in the bills of lading. We are not dealing with a case of that kind because we know that the ship was stranded near Suez, and it is common ground that 150 bales or thereby were removed from the ships and put into lighters where they lay for a whole night, and a question arises whether the full number of bales was put on board again.

Now, the witnesses who were examined on this point—the master and the ship's officers—say that they were satisfied that all the bales were put on board on the following day, and I do not doubt that in the evidence which they have given these witnesses express their honest belief as to the state of the facts on which they were examined. Still I cannot see that the evidence altogether excludes the possibility of certain bales having been lost in the process of transhipment. Theft is not the only possibility. Bales may have fallen into the sea when being loaded or unloaded, or while they were lying loose in the lighters. In short, we are necessarily in some ignorance of the history of this incident of the voyage. It is not urged on the part of the owners that they are within one of the known exceptions of a contract of carriage. If their case had been that the ship was stranded, that they used their best endeavours to take care of the cargo during the operation of lightening the ship, but that some of the bales had disappeared notwithstanding the use of proper precautions, a different question would have been raised, and one can easily see that in such a case the owner might succeed in avoiding liability on different grounds. But the owner's case as maintained by evidence and in argument is that it has been proved that all of the bales taken out of the ship at Suez were restored, and they seek to bring the case to this—that it is certain that the full quantity of goods set out in the bills of lading was not put on board. I do not think that the evidence is so conclusive on that point as to satisfy me that bales may not have disappeared in the course of the voyage. The result is that the owners have I think failed to discharge the duty which was incumbent upon them, if they wished to avoid the present claim, of establishing that the master had signed bills of lading in excess of the quantity of goods put on board, so that to the extent of the difference the owners are not bound by his act. I agree with your Lordships that the interlocutor ought in substance to be affirmed.

LORD KINNEAR—I am of the same opinion. A shipmaster has no authority to bind his owners by an acknowledgment on a bill of lading for delivery of goods which have never been taken on board, but on the other hand the master is the owner's agent to receive the goods when the ship is on general freight, and therefore his bill of lading is evidence against them that the goods which he acknowledges to have been shipped were in fact shipped. The owners may be released of the obligation which it *prima facie* imposes on them to deliver the goods in good order, if they can show that as matter of fact these goods were not put on board; but then the *onus* of falsifying their own bills of lading, or their master's bills of lading, lies on them. Therefore it appears to me that the only question we have to consider is the question of fact whether the owners have demonstrated that the bales now in question, which their master acknowledges to have received, were never in fact put on their ship. On that question my verdict is in the negative. We cannot infer the quantities shipped from the quantities delivered, because in consequence of what occurred in the Gulf of Suez the owners have failed to prove that all the goods shipped at Calcutta were carried safely to Dundee. I think they have failed to disprove the bill of lading, and therefore I agree with your Lordships that the Sheriff-Substitute's interlocutor should be in substance affirmed.

The Court adhered.

Counsel for Pursuers and Appellants—Salvesen—Younger. Agents—Lindsay & Wallace, W.S.

Counsel for Defenders and Respondents—Graham Murray, Q.C.—Dickson. Agent—J. Smith Clark, S.S.C.

Tuesday, January 23.

FIRST DIVISION.

SILVER AND OTHERS *v.* GREAT NORTH OF SCOTLAND RAILWAY COMPANY.

Process—Diligence—Recovery of Documents—Reparation — Railway — Accident to Wayman—Right to Recover Reports and Communications between Head Officials and Local Officials—Regulations of Other Railway Companies.

A wayman in the employment of a railway company having met with a fatal accident, his widow and children brought an action against the company.

Held that they were not entitled to a diligence for recovery (1) of the rules and regulations of other railway companies, or (2) of reports and communications passing between the head officials and subordinate officials of the defenders' company.

In this action, which was raised in the Sheriff Court at Aberdeen, the widow and children of William Silver sued the Great North of Scotland Railway Company for damages on account of the death of the said William Silver, who was a foreman wayman in the defenders' employment.

The tenor of the pursuers' averments was as follows—On the morning of January 23, 1893, William Silver was employed in seeing that a section of the defenders' railway was clear. He was examining the up-line,

and according to the usual and proper practice was walking down the said up-line, when he was overtaken and run over by a brake-down engine and van which was travelling down that line. The accident would not have happened but for the defective system and rules of the defenders' company. The despatch of the break-down engine was unnecessary, and would have been known to be so but for the defective means of telegraphic communication on the defenders' line. The proper and usual precautions for the safety of surfacemen, prescribed by the regulations of other companies, were not enforced by the defenders' regulations. The accident was also due to the negligence of certain of the head officials and local officials of the defenders' company.

The pursuers appealed to the First Division for jury trial, and thereafter lodged a specification in which, *interalia*, they craved diligence for the recovery of — 1. and 2. The rules and regulations of the defenders. 3. The rules and regulations of the Caledonian, North British, and Glasgow and South-Western Railway Companies. 4. "All written communication passing between the defenders' station-master and other officials at Buxburn station on the one hand, and the defenders' train and passenger superintendent, locomotive superintendent, inspector of permanent way, and other officials at Aberdeen, or any one or more of them, on the other hand, upon 23rd, 24th, and 25th January 1893, having reference to the break-down at Buxburn, the clearing of the line, the despatch of the break-down engine, the protection of the foreman wayman, and the death of Willian Silver; and also all books kept by or on behalf of any of said parties containing records of messages and orders, written or telephonic, passing between them or any of them, of said dates, with reference to said matters. 5. All communications passing between the defenders' train and passenger superintendent at Aberdeen, or anyone on his behalf, and (1) the defenders' locomotive superintendent, or anyone on his behalf; (2) the defenders' inspector of permanent way, or anyone on his behalf; and also between the defenders' said locomotive superintendent and inspector of permanent way, or anyone on behalf of either of them. 6. The written instructions by the defenders' train and passenger superintendent to the driver of the break-down engine" and "the reports of his journey made by the driver and by the defenders' locomotive superintendent to their official superiors." 7. The report by the stationmaster at Buxburn with reference to the breakdown, and all books kept by the stationmaster at Buxburn. "8. The report by the defenders' stationmaster or other official in charge at Woodside to his official superior in the defenders' service with reference to the death of the said William Silver upon 23rd January 1893." 9. The defenders' report to the Board of Trade. 10. The principal plan of defenders' line of railway between Kittybrewster and a point 500 yards north of Buxburn.

The defenders expressed their willingness to produce their own rules and regulations, but *quoad ultra* objected. They argued—Article 3 should not be granted, because what other companies did or required to do in different circumstances was no evidence against the defenders, and in any case should be proved by parole. This was a diligence to recover the evidence of skilled witnesses. Articles 4–9 were objectionable, because they asked for the defenders' confidential communications, and a report to a public department. The proper way to prove the facts was by parole. These reports and communications could not be evidence, and could only be desired for purposes of precognition or cross-examination. It was not the proper function of a diligence to give possession of writings for such a purpose—*Livingstone* v. *Dinwoodie*, June 28, 1860, 22 D. 1333. Diligence to recover the report of a stationmaster of an accident made at the time had been refused by Lord Low in the unreported case of *Macfarlane* v. *Great North of Scotland Railway Company*. There was no trace of such an application having ever been successful. As to article 10, the pursuer should make his own plan.

The pursuers referred to *Tannett, Walker & Company* v. *Hannay & Sons*, July 18, 1873, 11 Macph. 931.

At advising—

LORD PRESIDENT—I think the diligence should be refused altogether. It is quite possible that we might be able to pick out here and there some bit of one or other of the articles of the specification which might be made the subject of a legitimate application. But the time of the Court is not to be occupied in discussing a scheme by which the parties may weave a web of documents to obscure what is in reality a very simple issue. The case is a simple one, and as I have said, there seems here and there to be certain documents which the defenders may fairly be called upon to produce, and if the pursuers hand in a properly limited application, according to the rules of the Court, we shall consider it. At present I think we must refuse the application altogether.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM declined as being a shareholder of the defenders' company.

The Court refused the diligence craved.

Counsel for the Pursuers—Crabb Watt. Agents—Miller & Murray, S.S.C.

Counsel for the Defenders—Ferguson. Agents—T. J. Gordon & Falconer, W.S.