land, comprising a furnished house, and the right of shooting over certain lands.

No doubt the word "demise" is used, but counsel for the defender admitted that that word is simply equivalent to "let," and it is plain that the document was a lease in the ordinary meaning of the word, because the terms "lease" and "tenant" are used throughout the deed.

Assuming that it is only a lease, it may be quite true that an English solicitor in drawing up a lease would not insert a clause to the effect that the tenant might grant a sub-lease of the subjects, because by the law of England the power to grant a sub-lease was implied, but then we have no indication of the intentions of the parties except the deed itself, and I think that must be interpreted according to our law, and if that is so, then the result is quite clear.

Upon the whole matter, I think the Lord Ordinary has come to a right conclusion, and as the deed contains no stipulation that the tenant is to have the right to grant a sub-lease, no such right can be implied.

LORD YOUNG—I think this is a Scottish lease, although it is made by a contract drawn in England. Now, in a lease of an agricultural subject, the parties may contract for whatever they please, but, if the lease does not say that the tenant is to have the power to grant a sub-lease, by our law that power is not implied; it must be contracted for. On the other hand, in the lease of an urban subject—an unfurnished house—the law is otherwise; the parties may contract for whatever they choose, but if there is nothing said in the lease about it the power to sub-let is implied.

Now, with respect to a sporting lease, there is no direct authority, but there is an *obiter dictum* by a very distinguished Judge to the effect that a sporting lease is in this matter even stronger than the analogy of an agricultural lease, and that it is not at all analogous to the lease of an urban tenement. I agree with that *dictum*. I am prepared to hold that where a sporting lease has been prepared in Scotland it will, in the absence of any stipulation on the subject, be implied that there was no power to sub-let.

The only question remaining, therefore, is, whether the rights of parties under a lease of Scots subjects, which may be a lease for profit, or for shooting, or fishing, where the profit only comes when the land has been occupied, but which has been prepared in England, are to be decided according to the rules of the English or the Scots law? I am of opinion that such a lease is a lease of Scots subjects, and that the law of Scotland as to what is implied or not implied in a lease is applicable.

I therefore apply to this lease the Scots law regarding such leases, and as I find no expression in it as to the parties' intention in regard to sub-tenants, I am of opinion that there is no implication that the tenant could sub-let the subjects, but that it is implied he could not sub-let them.

LORD RUTHERFURD CLARK—I am of the same opinion.

LORD TRAYNER—I am of opinion that this is a Scots contract, and must be construed according to Scots law, and that not only is the right to sub-let the subjects not implied, but it is not implied unless it is expressly given.

The Court adhered.

Counsel for the Pursuer—W. C. Smith—M'Clure. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Defender—Jameson—M'Lennan. Agent—Richard Lees, Solicitor.

Friday, February 1.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

BEDOUIN STEAM NAVIGATION COMPANY, LIMITED *v.* SMITH & COMPANY.

Ship—Cargo—Action for Freight—Defence of Short Delivery—Bill of Lading—Proof—Presumption.

In an action to recover the balance of freight of a parcel of jute carried from Calcutta to Dundee, brought by the shipowners against the consignee, the defender averred that the amount of jute delivered to him was twelve bales short of the amount shown by the bill of lading signed by the shipmaster to have been shipped at Calcutta, and pleaded compensation.

Held (*rev.* judgment of Lord Kyllachy) that, although the bill of lading afforded *prima facie* evidence as against the shipowners of the quantity shipped, in the circumstances, and having regard particularly (1) to the fact that the vessel on her arrival at Dundee was so fully loaded that another bale could not have been put into the hold, and (2) to the positive testimony of the ship's officers that every bale was delivered which was put on board at Calcutta, the shipowners had discharged the *onus* laid upon them, and proved delivery of the whole cargo shipped.

This action was brought by the Bedouin Steam Navigation Company, Limited, the registered owners of the steamship "Emir," against Henry Smith & Company, jute spinners and manufacturers, Dundee, to recover £35, 7s. 2d. as the balance of freight alleged to be due to them for the conveyance of 500 bales of jute from Calcutta to Dundee.

In defence Henry Smith & Company stated that the full cargo of 500 bales mentioned in the bill of lading had not been delivered, but that they had obtained delivery of twelve bales less than that number.

They pleaded—"(2) The pursuers having

failed to deliver to the defenders the whole of the jute contained in the said bills of lading, and the defenders being entitled to set off the value of the short delivery against the claim for freight, the defenders ought to be assoilzied with expenses. (3) The pursuers having failed to deliver the whole bales received on board by them, and for which the said bills of lading were granted, the defenders are entitled to deduct the value of the bales short delivered from the freight."

A proof was led. The following facts were admitted or proved:—In September 1893 the "Emir" was at Calcutta, and loaded a full cargo of jute for conveyance to Dundee. The bills of lading were granted by the master for the cargo of 25483 bales, including a bill of lading for a parcel of 500 bales of jute bearing to be shipped by the Arracan Company, Limited, Calcutta, and consigned to the defenders. The ship was loaded to the full extent of her carrying capacity. The cargo was loaded in the following manner:—The barges containing the jute came alongside the vessel as she lay in the river Hooghly. The cargo was hove on board in slings of four bales by a steam-winch, the slings being attached to the derrick. Native tallymen were engaged, under the supervision of the chief officer of the ship, to take the correct tally of the bales that were taken on board. Every bale that came on deck was either at once lowered into the hold of the "Emir," or was placed on the ship's deck and then lowered into the hold. If any bale brought to the ship's side was bad or burst, the tallyman usually rejected it before it left the barge; in exceptional cases it might reach the deck of the ship, but, if so, it was at once lowered back into the barge. No bales were left on the deck of the ship at night after the day's work was finished, but it was seen that all were in the hold and the hatches battened down. The crew slept on deck. The ship's officers were all examined at the proof, but none of the tallymen or Lascar crew of the "Emir" were examined. The vessel, after she left Calcutta, called at Aden and Port Said on the way home to complete her bunkering. While she lay at these ports the hatches were kept battened down. While at sea the hutches were opened from time to time during the voyage for the purposes of ventilation. On 25th October 1893 the "Emir" arrived at Dundee and discharged her cargo. It was then found that of the 500 bales alleged to have been consigned to the defenders only 488 had been delivered. The captain and mates of the "Emir" gave evidence that every bale put on board at Calcutta had been delivered at Dundee, and evidence was led by the harbour clerks and others at Dundee, which showed that the twelve bales which were amissing could not have been stolen or carried off in error by anyone at Dundee.

On 15th December 1894 the Lord Ordinary (KYLLACHY) assoilzied the defenders from the conclusions of the action.

"*Opinion.*—The pursuers in this case sue for the freight of a parcel of jute, carried by their vessel the 'Emir' from Calcutta to Dundee. The defence is that the delivery at Dundee was twelve bales short, the number of bales shipped as per bill of lading being 500, and the number delivered at Dundee being only 488. The reply is, that the pursuers duly discharged the whole bales which they received, and that the shortage arose either from short shipment at Calcutta, or from some interference with the cargo at Dundee after discharge from the ship and before removal by the consignees.

"It is admitted that the pursuers are responsible only for the bales actually put on board, the master having no authority to sign bills of lading except for goods actually shipped. On the other hand, it is also admitted that the acknowledgment in the bill of lading is strong presumptive evidence of the quantity shipped, and that the shipowner alleging short shipment must overcome that presumption by conclusive proof. Moreover, although not admitted, it was not, I think, seriously denied that although the shipowners' responsibility terminated when the cargo was put over the ship's side, there is in this case a pretty strong presumption of short delivery from the ship, in respect that the shortage was ascertained by the shipowners' own clerk, who, having it in his power to take his tally as he pleased, was content to take it in the usual way, viz., by counting the bales forming the different parcels after they had been separated on the quay, and were in course of being delivered into the consignees' carts.

"There are thus, it appears, presumptions more or less strong against both of the explanations of the deficiency which are open to the shipowners. If they suggest short shipment at Calcutta, they are met by the bill of lading. If they suggest full delivery at Dundee, they are met by the tally there made by their own officer, a tally which that officer must be assumed to have made at a stage which, in his view, ensured correctness.

"The question therefore is, whether the pursuers have proved conclusively that they delivered from the ship all the jute that was put on board. That, it has to be noted, is the shape which their case takes. They do not say that they have proved affirmatively that there was short shipment at Calcutta, or that there was full delivery at Dundee; but they say that they have proved conclusively that they duly delivered all that was put on board.

"Now, it must be acknowledged that the pursuers have made a strong case upon the proof. They have, I think, established that it was at least highly improbable that bales of jute should have been removed from the ship after being put on board, and while the ship was in course of loading. They have also, I think, established that the cargo—so far as placed in the holds—was not disturbed during the voyage; and they have proved—so far as it is possible to prove a negative, and so far as negative testimony from their officers and men can in such a matter avail—that with the ex-

ception of one or at most two bales stored in the forecastle, the whole cargo put on board was in fact stored in the various holds. In short, if there was nothing on the other side—nothing pointing directly or by inference the other way—I should, I think, be prepared to hold that the pursuers have proved on the whole sufficiently that they discharged all the jute which they received.

"But then the pursuers' case does not stand by itself. The disappearance of the twelve bales is a fact, and has to be explained, and the pursuers' misfortune is that any explanation consistent with their (the pursuers') case involves difficulties at least equally great with the difficulty of rejecting or distrusting the testimony of their witnesses. It is no doubt unlikely that the twelve bales in question should have disappeared from the ship in process of loading or during the voyage without the knowledge of any of those in charge of the ship. But it is also, to say the least, unlikely that the captain of the ship should have signed the bill of lading for twelve bales more than he received, and should have done so after a tally conducted, so far as appears, quite carefully by tallymen employed by the ship. Nor is it less unlikely, looking at the Dundee evidence, that the cargo having been discharged at Dundee Harbour in the usual way, the bales in question should have somehow disappeared from the quay or harbour sheds before the arrival of the merchants' carts. And yet, if the pursuers are right, one or other of these things must have happened.

"In short, there are just three hypotheses—fraud on the part of the tallymen at Calcutta; fraud on the part of somebody on board the ship; fraud on the part of somebody at Dundee Docks. On the most favourable view for the pursuers, I am not, I confess, able upon the evidence to prefer any one of these hypotheses as against the others. But if that be so, there is of course an end of the case. If the evidence—considered apart from the presumptions applicable—leaves the matter in doubt, there can be no question of the result when the presumptions receive their due weight. For, as already said, the presumption is against the shipowner, and that being so, the result simply is that he has failed to displace it. The defenders are therefore, I think, entitled to my judgment."

The pursuers reclaimed, and argued—The bills of lading were no doubt *prima facie* evidence that the 500 bales had been put on board, but the proof led sufficiently overcame the *prima facie* presumption. Everyone of British extraction on board the vessel had been brought, and their evidence showed that the ship had been loaded up to the hatchway, that no bales had been stolen during loading, and that all the bales which had been placed on board at Calcutta were delivered at Dundee. The Lord Ordinary seemed to think that fraud must be proved against someone in order to overcome the *prima facie* evidence afforded by the bill of lading. This was not so. All that was required was to rebut the presumption by the best evidence obtainable in the circumstances, and this had been done—*M'Lean & Hope* v. *Fleming*, March 27, 1871, 9 R. (H.L.) 38, opinion of Lord Chancellor Hatherley, pp. 40, 41; *Owners of "Immanuel"* v. *Denholm & Company*, December 7, 1887, 15 R. 152. The case of *Horsleys* v. *J. & A. D. Grimond*, January 23, 1894, 21 R. 410, was distinguished from the present, because in the present case (1) it was not proved that the tallymen might not have made a mistake; and (2) the goods were discharged into lighters in the case of *Horsley*, and it was not proved that the bales might not then have gone amissing. The case of *Harrowing*, founded on by the other side, was also distinguished from the present, because in the former (1) a careful tally was taken by the shipowners and charterers; (2) the petroleum cases were loaded by hand, and might be more easily stolen; and (3) the captain admitted the loss and said he could not account for it.

Argued for the defenders—The *onus* was on the pursuers to show that they had not received the bales on board. They had failed to discharge that *onus*. The only person who took a general supervision of the loading of the cargo was the mate. The tallymen had not been examined. These men were employed and selected by the shipowners, and should have been called as witnesses if their action was to be insisted in. They now wished it to be held that these tallymen were dishonest or careless. The evidence showed that all the space usually occupied by cargo was occupied in this case, but it was quite easy to surmise that a sound bale might have been put on board, and then by reason of fraud among the crew and bargees thrust back over the side as a bad bale. The case of *M'Lean* was different from the present, as there the cargo was one in bulk, and the captain protested that the full cargo was not on board. The case of the "*Immanuel*" was also distinguished from the present, as in that case it was admitted that the quantity delivered at Bo'ness was the full quantity shipped. In *Horsley* the evidence was the same as in the present, and that case ruled the present. The shipowner could only discharge the burden of proof which lay on him to upset his own bill of lading by showing with certainty that it was impossible that the goods could have been extracted subsequently—*Harrowing* v. *Katz & Company*, November 28, 1893, 10 Times L.R., 115, *aff.* by Court of Appeal, April 11, 1894, 10 Times L.R. 400. The argument of the pursuers was—"There is a shortage, therefore there must be fraud;" their argument must be—"There has been fraud, therefore there is a shortage."

At advising—

LORD TRAYNER—This is an action for the recovery of a balance of freight, and the defence is that there was a short delivery of cargo of the value of the sum sued for. It

appears that the pursuers' vessel, the "Emir," loaded at Calcutta a full cargo of jute, consisting of about 25,000 bales, 1000 of which were consigned to the defenders. For this 1000 bales the master of the "Emir" signed bills of lading in the usual way, acknowledging that they had been shipped in good order and condition. On the ship's arrival in Dundee it is said that twelve of the defenders' bales were not delivered. The question is, whether the pursuers, the owners of the "Emir," are liable for the value of the short-delivered bales.

There is no doubt as to the law applicable to such a case. The master who signs the bills of lading is personally responsible if he has signed bills of lading for goods which he has not received. Against him the bills of lading are in the general case conclusive evidence of the shipment. It is different with the owner, whose only liability is for the due delivery of the goods actually shipped, and against whom the bills of lading only afford *prima facie* evidence of shipment. In this case we are concerned with the responsibility of the owner alone, and have therefore only to determine on the proof before us whether there has been a failure to deliver any part of the cargo shipped. That proof is very distinct, and exceptionally free from any discrepancy which would tend to throw doubt upon the trustworthiness of any of the witnesses examined. I should say no such doubt was suggested in the course of the argument.

It is established beyond all room for question that when the "Emir" left Calcutta she was loaded to the full extent of her carrying capacity, that the cargo was not interfered with on the voyage, that on her arrival in Dundee (her port of discharge) she was found to be loaded "full up to the combings," and that every bale in the ship on her arrival was delivered over the ship's side. There were, however, twelve bales of the defenders' consignment short of the bill of lading quantity, which the defenders have not received, and for these they seek to make the shipowners liable. In view of what I have already said, it is plain that the discrepancy between the bills of lading and the quantity received by the defenders can only be accounted for in one or other of three ways—(1) that the twelve bales were never shipped; (2) that if shipped, they were abstracted from the vessel at Calcutta before she sailed; or (3) that they were taken away at Dundee after being delivered by the ship by someone not entitled to them. I dismiss the last of these three suggestions at once, because I regard the proof as sufficient to establish that the twelve bales were not stolen or carried off in error by anyone at Dundee, and indeed that the twelve bales were not delivered at Dundee. They were not in the ship to deliver. Then, were they shipped at Calcutta? Of this there is on the one hand only the *prima facie* evidence of the bill of lading, while on the other hand it has been established that when the "Emir" left Calcutta her whole carrying space was loaded with jute, stowed in such a way that there was not room for another bale, that the vessel arrived in that condition at Dundee, where every bale in the ship was discharged; and hence it would appear that every bale was delivered which had been shipped—shipped, that is to say (being the sense in which that term is generally used), in the vessel's hold for safe carriage. But bales might have been shipped in another sense so as to charge the shipowner with responsibility for them. If they were put on the ship's deck, they were in this sense shipped, and if they were abstracted from the ship, after they had been once delivered there to the shipowners' servants for loading, the owner must answer for them if they disappear. This leads me to consider the remaining suggestion, that the twelve bales in question may have been abstracted from the vessel in the course of her loading and before she sailed from Calcutta. In reference to this suggestion I observe, first, that it is a mere speculation. There is not only no evidence of any such abstraction of cargo, but nothing in the proof to give rise to the suggestion or to support its probability. As against it, however, there is proof that there was a very careful supervision of the loading and stowing of the cargo; every bale that came on deck from the lighters alongside was either directly lowered into the ship's hold, or put on the ship's deck and immediately thereafter lowered into the hold; that no bales were left on deck at night, after the day's work was finished, but all were seen to be in the hold and the hatches put on, and that during the night no bale could have been abstracted from the hold, (1) as this could only have been done by steam-power, and (2) because the crew were for the most part sleeping upon deck, and would have known if such steam-power had been used. In addition to this, there is the distinct testimony of the master and three mates of the "Emir," that every bale put on board at Calcutta was delivered at Dundee. It was suggested by the defenders' counsel that bales of jute might have been hoisted out of the barges on to the ship's deck, and then returned to the barges, and that in this way cargo was abstracted from the ship, either with or without the connivance of the tallyman. Again, I say, this is the merest speculation, and to my mind very improbable. It could scarcely have happened without its being seen and checked by the officers and crew on duty if they were honest, and it is not suggested that they were not so, or that they were in any way parties to a scheme to steal the cargo. The bales of jute were too large to be concealed or handed about in stealth, and therefore to take bales of jute off the deck and return them to the barge, and to employ (as would have been necessary) the ship's steam-winches for the purpose, was a proceeding so likely to be observed, that the bargemen and tallymen would scarcely risk a mode of possessing themselves of this jute which was almost certain of detection. If the bargemen and tallymen were acting in concert to steal the jute, it would have been easier, I should suppose, to land what they wanted to take

somewhere between the place where the barge was loaded and the ship's side; much easier to steal the jute before it reached the ship's deck than after, and being easier, more likely to be adopted.

The shipowner, in a case like the present, is not bound to account for the manner in which the difference between the cargo acknowledged in the bill of lading and the cargo actually delivered has arisen. He must show that he delivered all that was shipped, and such evidence must be sufficient to overcome the *prima facie* evidence against him which the bill of lading presents. He has no other *onus*. Looking to the whole circumstances of the case, but having regard particularly (1) to the fact that the vessel on arrival at her port of discharge was so fully loaded that another bale could not have been got into the hold, and that therefore she had carried and delivered all that could have been shipped in the ordinary sense of that term, and (2) to the positive testimony of the master and mates of the "Emir," that every bale was delivered which was put on board at Calcutta, I am of opinion that the pursuers have discharged the whole *onus* laid upon them. I venture to think that the discrepancy between the bills of lading and the quantity delivered might reasonably be accounted for, were that necessary, by the occurrence of mere mistake or negligence on the part of the tallymen. I should not be surprised if on the loading of 25,000 bales as this cargo was loaded—many at four hatches at the same time—some mistake occurred in noting down the exact number received, or that a tallyman should (if he found his own figures to differ from the bargeman's note) accept the latter as correct. Such a mode of accounting for the difference would be more readily accepted by me than the unsupported suggestion of theft committed from the ship's deck, in itself very improbable, considering the difficulties attending the perpetration of that crime, and the great probability of its detection. I am therefore for recalling the interlocutor of the Lord Ordinary, and finding the pursuers entitled to decree for £32, 4s. 2d., being the sum sued for under deduction (as the pursuers admit should be made) of £3, 3s., being the freight effeiring to the twelve bales not delivered, because not shipped nor carried.

LORD JUSTICE-CLERK—That is the opinion of the Court.

The Court recalled the Lord Ordinary's interlocutor, and gave decree in favour of pursuers for £29, 1s. 2d.

Counsel for the Pursuers—Ure—Salvesen. Agents—Lindsay & Wallace, W.S.

Counsel for the Defenders—C. S. Dickson—Aitken. Agents—Boyd, Jameson, & Kelly, W.S.

Saturday, February 2.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

LORD ADVOCATE *v.* M'CULLOCH.

Revenue—Succession Duty—Entail—"Predecessor"—Succession Duty Acts, 1853 (16 *and* 17 *Vict. cap.* 51), *secs.* 2 *and* 10, 1888 (51 *Vict. cap.* 8), *sec.* 21 (1).

An entailer destined an estate in 1752 to himself and to D, his only son, and the heirs-male of D's body, and the heirs-male of their bodies, which failing to the heirs-female of D's body. W, the last of D's heirs-male, died without issue in 1892, and the estate then passed to his niece J, who was the great-granddaughter of D, and the heir-female of his body.

Held that in the sense of the Succession Duty Acts J did not take from her uncle W as her predecessor by devolution of law (in which case the succession-duty payable would have been $4\frac{1}{2}$ per cent. on the value of the succession), but succeeded by disposition from her lineal ascendant, the maker of the entail, and was liable to pay duty only at the rate of $1\frac{1}{2}$ per cent.

By deed of entail dated 23rd November 1752, Edward M'Culloch of Ardwall, Kirkcudbright, destined the lands and estate of Ardwall as follows—"To myself, and to David M'Culloch, my only lawfull son, and the heirs-male of his body, and the heirs-male of their bodys, which failing to the heirs-female of his body and the heirs-male of their bodys, which failing to Elizabeth M'Culloch, my eldest lawfull daughter, and the heirs-male of her body, and the heirs-male of their bodys, which failing to Jannet M'Culloch, my second lawfull daughter, and the heirs-male of her body, and the heirs-male of their bodys, which failing to the heirs-female to be procreate of the bodys of my heirs-female foresaid, and the heirs-male of their bodys, the eldest heir-female always succeeding without division, and excluding all heirs-portioners, which failing" in favour of the other heirs mentioned.

Walter M'Culloch, the grandson of David M'Culloch, died in March 1892 without issue. On his death the heirs-male of the body of David M'Culloch were exhausted, and the succession opened to Walter M'Culloch's niece, Mrs Christian Jameson M'Culloch, the great-granddaughter of David M'Culloch, as eldest and nearest heir-female of his body. Mrs M'Culloch duly completed her title under the deed of entail on 20th June 1892.

The Crown claimed succession-duty from Mrs M'Culloch at the rate of $4\frac{1}{2}$ per cent. on the capitalised value of her succession, and on 10th July 1894 raised an action against her for payment of £547, 19s. 4d., as the instalments already due of the total sum of £1461, 5s., alleged to be payable by her.

The pursuer averred that the defender's