internally, I agree with the observation which was made, that it is not incumbent on them to show either how or when the damage was done." I may add, however, that, quite apart from any questions of *onus*, I could not have seen my way to differ from the view of the evidence taken by Lord Mackenzie. It appears to me that the respondents were extremely anxious for business reasons for the speedy loading of the "Corinthian," with this exceptionally large cargo of flour, and that they took weather risks, they, however, having the complete option on the documents, under "the condition that such cargo can, in the judgment of the steamer's agent (having regard to weather and other circumstances) be put on board the steamer in proper time." I do not follow the reasoning as to the weather not being exceptionally rainy for New York, or the introduction into this case of the custom of the port. If it had been necessary to fix time and cause for the damage to this cargo of flour, I think it to be fairly established that the appellants have done so, and that the responsibility rests with the shipowners.

I humbly agree in the course proposed.

Their Lordships reversed the interlocutor appealed against, with expenses.

Counsel for the Appellants—Bailhache, K.C.—Fleming. Agents—James Ness & Son, Writers, Glasgow—Gill & Pringle, W.S., Edinburgh—Woodhouse & Davidson, London.

Counsel for the Respondents—Morison, K.C.—C. H. Brown. Agents—Wilson, Caldwell, & Tait, Glasgow—Webster, Will, & Company, S.S.C., Edinburgh—Pritchard & Sons, London.

COURT OF SESSION.

Friday, November 17.

SECOND DIVISION.

[Sheriff Court at Glasgow.

ARMOUR *v.* DUFF & COMPANY.

Principal and Agent—Ship—Order by Broker—Disclosed Principal.

A. raised an action against D. & Co., steamship owners and brokers, for payment of an account for stores supplied to a vessel. He averred that D. & Co. held themselves out to him as the owners of the vessel at the time when they gave the order for the account sued on. The defenders maintained that they were merely managers for principals known to the pursuer for whom the goods were ordered. It was proved by excerpts from the register of shipping that at the date when the order was given the vessel was owned by a limited company, but was in the possession of mortgagees, by whom D.—a partner in D. & Co.—had been appointed manager.

Held that as the owners were discoverable from the register of shipping, the defenders were acting for disclosed principals, and were not themselves liable as principals.

Expenses—Successful Defender—Misleading Averment by Defender—Disallowance of Expenses.

In an action against a firm of shipbrokers for payment of an account for stores supplied to a vessel, the defenders denied liability in respect that they were not owners of the vessel. This was true, but they stated in their defences that the G. Co., Ltd., were the owners. Though the G. Co. subsequently acquired the vessel, they were not the owners at the time the order was placed, as the pursuer discovered when defences were lodged, by an examination of the register of shipping. The Sheriff-Substitute assoilzied the defenders with expenses, and the Sheriff adhered to this interlocutor. On appeal the Court affirmed the said interlocutors, except in so far as the finding for expenses was concerned, *holding* that the defenders were not entitled to expenses down to the date of the Sheriff-Substitute's interlocutor, in respect that their averments as to the ownership of the vessel were misleading and calculated to induce the pursuer to persist in the action.

Thomas W. Armour, ship store merchant, Glasgow, brought an action against T. L. Duff & Company, steamship owners and brokers, Glasgow, for payment of the sum of £228, 13s. 7d. sterling, being amount of account for goods sold and delivered.

The pursuer averred, *inter alia*—"(Cond. 1)—. . . The defenders are steamship owners and brokers, . . . and more particularly are owners of the s.s. 'Sylvia,' or in any event at the time of giving the order for the account now sued on held themselves out as owners to pursuer. (Cond. 2) The pursuer on defenders' orders and instructions sold and delivered to them on or about 24th December 1909 goods and stores for the s.s. 'Sylvia,' as detailed in the statement annexed to the initial writ, and at the prices therein charged, the total amount being £228, 13s. 7d. which is the sum sued for. The defenders' statements in answer, in so far as not coinciding herewith, are denied. . . . Further, explained and averred that said order was given by defenders as apparent owners. The pursuer never heard of any other party being owners of s.s. 'Sylvia' until defenders lodged their defences to this action. . . ."

The defenders averred in answer—"(Ans. 2) Denied, and explained that certain goods were ordered by the owners of the steamship 'Sylvia' from the pursuer and supplied to the said vessel. . . . Explained that the pursuer called for Mr T. L. Duff, the senior partner of the defenders' firm, who were brokers on behalf of the said vessel, and canvassed for the order for the stores for the said vessel. . . . Explained further that the defenders are not personally liable

for the said account, which is against the owners of the said vessel. The owners are the Grahamstown Shipping Company, Limited, . . . and the pursuer knew this, and he knew that Messrs T. L. Duff & Company were merely acting as brokers and were not personally responsible for the said account. The pursuer has in fact rendered his account against the captain and owners of said vessel. The defenders did not guarantee payment thereof. . . ."

The defenders pleaded, *inter alia*—"(2) The defenders being merely managers for principals known to the pursuer for whom the goods were ordered, decree of absolvitor should be pronounced, with expenses."

Proof was allowed and led. At the proof excerpts from the register of shipping were produced, which showed (1) that on 22nd December 1909 the owners of the s.s. "Sylvia" were the Sylvia Steamship Company, Limited, and that the vessel was in possession of mortgagees, by whom T. L. Duff had been appointed manager, and (2) that on 21st January 1910 the "Sylvia" was sold by the mortgagees to the Grahamstown Shipping Company, Limited.

On 14th October 1910 the Sheriff-Substitute (FYFE) pronounced this interlocutor—"Finds (1) that the order for the goods, the price of which is sued for, given by the letter dated 22nd December 1909, . . . was an order by known shipbrokers to a ship store merchant, to supply goods to the disclosed steamship 'Sylvia'; (2) that the defenders are not and never were the owners of the s.s. 'Sylvia': Finds that the defenders having acted as agents for a disclosed principal, are not liable for the sum sued for: Therefore assoilzies the defenders, and finds them entitled to expenses. . . ."

On 19th January 1911 the Sheriff (GARDNER MILLAR) adhered to the Sheriff-Substitute's interlocutor, and found the appellant (pursuer) liable in the expenses of the appeal.

The pursuer appealed to the Court of Session, and argued—It was settled that liability to pay for supplies furnished to a ship depended on the contract to pay for them and not upon ownership of the vessel—*Mitcheson* v. *Oliver*, 1855, 5 E. & B. 419 (Parke, B., at 443). The intention of the parties determined whether the principal or agent was to be liable on the contract—Bell's Prin., 224A. Here the defenders had accepted liability by holding themselves out as principals. They had interposed their personal credit, for they described themselves as shipowners, and gave the order without any explanation that they were acting as agents. (2) In any event the pursuer was entitled to the whole expenses of the action. These had been incurred solely through the defenders' false and misleading statements as to the ownership of the "Sylvia."

Argued for the defenders—They were not liable for this account as brokers. The owners (in this case the mortgagees in possession) of a ship were liable for the stores supplied to it. The owners could be discovered from the register, and were therefore disclosed principals. The defenders being merely agents were under no liability. It was of no consequence that the defenders did not sign the order expressly as agents—*Albert Hall Corporation* v. *Winchilsea and Another*, 1891, 7 T.L.R. 362 (Lindley (L.J.) at 364).

LORD GUTHRIE—The question which was opened by the pursuer and appellant before us related to the merits of the judgments of the Sheriff-Substitute and the Sheriff. A question subsequently arose on the suggestion of the Court as to what should be done in any case with the expenses of the action, but that was not opened upon by the appellant and does not seem to have been separately argued before the Sheriff-Substitute or the Sheriff. With regard to the merits of the case I am of opinion that the Sheriff-Substitute and the Sheriff have come to a right conclusion. The case may be looked at in two ways—either on the documents alone or on the documents taken along with the evidence which has been led.

If one takes the documents alone, one has to consider the original order, given by Duff & Company, along with the account which was subsequently rendered to them and also along with the title by which the defenders are known, that is to say "steamship owners and brokers." It is said by the pursuer that he was entitled when he went to Duff & Company—and it must be observed that they did not go to him, but that he went to them—to assume that they were owners of the steamship "Sylvia." In defence of that view he does not found on any surrounding circumstances, and he has to fall back on what he says is a general rule. It appears to me that we must consider what was the position of parties when the order was given. The position of parties was that Duff & Company held themselves out in two capacities—as steamship owners no doubt, but also as brokers. It is quite certain that brokers are in the habit of acting as managers for steamships belonging to others. That being so I am of opinion that the pursuer was not entitled, simply because he found that T. L. Duff & Company were willing to give him an order, to assume that they were owners of the ship. Indeed when one looks at the proof it is fair to say that the pursuer does not take up any such position. That has been put forward by his counsel as his position now, but his true position is quite clear, namely, that he proceeded on certain information which he had got from a friend, Mr Dunlop. Mr Dunlop had told him, as he says, that Duff & Company were the owners of the "Sylvia." I think the effect of Mr Duff not being examined is not to throw discredit on Mr Armour's credibility, but to lead to the inference that he must have mistaken what Mr Dunlop said—honestly mistaken no doubt. But that being his position he says quite frankly—"Supposing I had had no previous communication with Mr Dunlop at all, and had never heard of the 'Sylvia,' I would have called upon

Mr Duff and I would have asked who was responsible for this . . . I took it from Mr Dunlop that T. L. Duff & Company were the owners of the ship, and for that reason I hold them responsible."

There is no moral blame upon Mr Armour in the matter, but it is clear that had he not had what he supposed was this information from Mr Dunlop he would have asked Mr Duff, and there is no reason to doubt that Mr Duff would have told him how the matter of the ownership stood, or he would have gone to the register to ascertain that for himself. It seems to me that that was his duty in any case. I do not say what might have happened if the matter had been reversed and if Duff & Company had gone to him and without telling him anything had simply given him an order. But in the circumstances of his going to Duff & Company it seems to me his clear duty was either to ask them how the matter stood or to ascertain for himself from the register what the position of matters was.

Now it so happens that there would have been no difficulty in ascertaining from the register how things stood, because the excerpt which has been lodged shows that not only does the register contain full information as to the owners of the ship, but it shows that the ship was subject to a mortgage, it tells who the mortgagees were, and it shows that these mortgagees were in possession. In these circumstances I think the Sheriffs were right in holding, without in the least impugning Mr Armour's *bona fides* in the matter, that he had no right to raise this action against Duff & Company, either on the footing, which is now abandoned, that they were the true owners, or on the footing, which is still maintained, that although not the true owners they held themselves out as the true owners. I do not agree with the Sheriff-Substitute in the statement he has made in his note, which was quite unnecessary for the decision of the case, when he says—"I think the evidence is sufficient to show that the pursuer quite well knew that he was transacting with agents."

If that be the sound view the question still remains as to the conduct of the defenders in the defences which they put forward. As I read the evidence it seems quite clear that they have made several statements which are not only inaccurate in themselves but which might quite well have misled and probably did mislead the pursuer. It may be that some of these statements, if the sentences are read by themselves, are on the face of them literally accurate; but the result certainly is so misleading as this, that ordinarily read and taking the context along with the individual sentences the statement is distinctly made that while the defenders are not liable for the account, the people who are liable and the owners of this vessel are the Grahamstown Shipping Company, Limited, and further, that the pursuer knew that that was the fact.

It is common ground that that is a totally inaccurate statement, because the interest, as owners, of the Grahamstown Company Limited did not arise until after the contract had been entered into. It is quite true, as appears from the proof and from the evidence of Mr Armour himself, that he came to be aware of how the register stood and what information it contained at a very early date, because he says that when the defences were lodged he then got the information by going to the Custom House and getting a copy of the register. And therefore I do not think that this is a case where one can say either that the pursuer would be entitled to his expenses, or that the defenders should have their expenses entirely disallowed. In such cases you cannot say absolutely whether, if the pursuer had not been misled by the defenders, he would have gone on with his action or not, but you can certainly say that under the advice of his legal advisers he might not have gone on with his action.

I should suggest for your Lordships' consideration that a just result would be to hold that down to the date of the Sheriff-Substitute's interlocutor no expenses should be allowed to either party, and that the defenders should get their expenses subsequent to that date. I think that result would mark the sense of the Court that when defenders are brought into Court it is their duty to make a full disclosure of their position, and in any event it is their duty not to do as the defenders here did—to make a statement which, if they had chosen to consider the information within their own knowledge, is entirely misleading, and not only misleading but calculated to induce the pursuer to go on with an action with which he might otherwise not have proceeded.

LORD SALVESEN—I am entirely of the same opinion. I think this is a very unfortunate action, because if the pursuer had acted with a little less precipitation and the defender had treated the case with more candour it would have been obvious to the parties at a very early stage that there was nothing to fight about. The account was substantially admitted, and each of the three parties who might be suggested as being liable for it was perfectly solvent and able to meet it. Yet we have had a dispute going into three Courts as to whether the particular party who is sued was the person who ought to have been sued in the first instance.

On the merits of this case, such as they are, I think the Sheriffs have reached a sound conclusion. The Sheriff expresses his view in a single sentence. He says—"The order is in these terms—'Please supply the s.s. "Sylvia" with the following stores.' If a firm of brokers gives an order in these terms it seems to me that they are acting on behalf of the owners of the ship, and, as these can be discovered, the principals of the broker are disclosed." I think that is a substantially accurate statement of the law applicable to a contract of this kind, with this qualification, that the

owners of the ship are not bound unless the firm of brokers who gave the order had their authority to place it. In this case it is perfectly evident that the defenders had a mandate from the legal owners of the ship for the time being—that is, the mortgagees in possession. This was disclosed upon the face of the register, and it was on their behalf that they gave the order.

It is therefore very surprising that the defenders when they came to state defences did not take up the true position, but say that they ordered the goods as agents for the Grahamstown Shipping Company, who were the owners at the date of the proof, but were not the owners of the ship at the time when the order was placed. That was a very misleading statement, and was calculated, as Lord Guthrie has indicated, to induce the pursuer to go on with his action, because he felt that he was able to refute the only defence that had been put forward. I think we ought to penalise the conduct of the defenders in the way that Lord Guthrie has suggested—by refusing them their expenses before the Sheriff-Substitute. I think it would be going too far if we carried that refusal beyond the Sheriff-Substitute's Court, especially as the pursuer never seems to have really ascertained what his true legal position was, and came before the Sheriff and before us maintaining that upon the proof and documents he had established personal liability against the defenders.

LORD JUSTICE-CLERK—I agree with what your Lordships propose. I will say for myself that if I had been deciding this case alone I should have been a little more drastic in dealing with the defenders' expenses. I think this case is—shall I call it—a model of what ought not to be. I never have seen such a defence as that stated here. It is absolutely misleading. Your Lordships have dealt with it by proposing that expenses should not be allowed up to the date of the Sheriff-Substitute's interlocutor. While I concur in that, I repeat what I said at the beginning, that I would have taken a more drastic course had I been left to myself.

LORD ARDWALL was absent and LORD DUNDAS was sitting in the Extra Division.

The Court pronounced this interlocutor—

"... Dismiss the appeal and affirm the said interlocutors appealed against, except in so far as the finding for expenses in the said interlocutors is concerned, which are hereby recalled. . . . Find the defenders entitled to expenses in this and in the Inferior Court from 14th October 1910. . . ."

Counsel for Pursuer (Appellant)—Constable, K.C.—Lippe. Agents—Balfour & Manson, S.S.C.

Counsel for Defenders (Respondents)—Horne, K.C.—Aitchison. Agents—Whigham & MacLeod, S.S.C.

Saturday, November 18.

EXTRA DIVISION.

[Lord Skerrington, Ordinary.

BRITISH LINEN BANK *v.* CITY OF EDINBURGH.

Loan—Burgh—Statute—Municipal Borrowing—Redeemable Stock—Construction—Edinburgh Corporation Stock Act 1894 (*57 and 58 Vict. c. lvi*), *sec.* 5—*Edinburgh Improvement and Tramways Act* 1896 (*59 and 60 Vict. cap. ccxxiv*), *sec.* 83.

The Edinburgh Corporation Stock Act 1894 empowered the Corporation to create stock "redeemable at the option of the Corporation at par after the expiration of a period to be fixed by . . . resolution not exceeding sixty years from the first creation of the stock." The Edinburgh Improvement and Tramways Act 1896 provided for the issue of a new class of stock similarly redeemable "at one and the same period to be fixed by the Corporation, but not exceeding sixty years from the first issue of such stock." In pursuance of these powers the Corporation on 7th April 1897 passed a resolution for the creation of £750,000 two and a half per cent. stock "redeemable at par after the expiration of a period of thirty years from 15th May 1897," and issued a certificate providing that such stock should be redeemable at par after Whitsunday 1927. In an action of declarator at the instance of the British Linen Bank as holders of a certain amount of such stock against the Corporation, *held*, on a sound construction of the statutes, resolution, and certificate, that the Corporation were bound to redeem the stock immediately on the expiry of 15th May 1927 on the application of the holders thereof.

The Edinburgh Corporation Stock Act 1894 (57 and 58 Vict. cap. lvi) provides—"... Whereas it is expedient that the Corporation should be authorised to exercise their statutory borrowing powers for the time being by means of the creation and issue of Corporation stock as in this Act provided . . . Be it enacted . . . section 5 (1) Where the Corporation have for the time being any statutory borrowing power, then subject and according to the provisions of this Act the Corporation may from time to time by resolution exercise the power by creation of redeemable stock to be from time to time issued for such amount within the limit of the power at such price to bear such half-yearly or other dividends and to be so transferable . . . as the Corporation by the resolution for the first creation of Corporation stock direct: Provided that all Corporation stock at any time and from time to time so created shall be created on and subject to such terms and conditions as that the same shall form one and the same class of stock bearing one and the same rate of dividend, and shall become