the roll to be heard on the merits, reserving the question of competency. Being of opinion that the case is not competently before the Court, we are not in a position to consider, still less to decide, the merits. But it is right to say that my impression is not only that the appeal was unfounded, but that the only objection brought before us was so plainly unstateable that I should have been surprised had the Sheriff, if the request had been made to him, granted leave to appeal.

The question of competency depends on section 11 and section 21 (5) (6) (7) of the Rivers Pollution Act of 1876, and sections 27 (*c*) and 28 (*e*), and rules 92 and 93 of the Sheriff Court Act of 1907.

The complainers say that under the first paragraph of section 11 of the 1876 Act they got an unqualified and unconditional right to appeal such judgments as those of the Sheriff-Substitute of 29th January 1912 and of the Sheriff of 29th February 1912, by way of a special case, prepared and adjusted as this one has been. They contend that the provisions of the fourth paragraph (read along with section 21) under which "all the enactments, rules, and orders relating to proceedings in [the Sheriff Courts of Scotland] and to enforcing judgments in [Sheriff Courts] and appeals from decisions of the [Sheriffs], and to the conditions of such appeals and to the powers of the Superior Courts on such appeals, shall apply to all proceedings under this Act and to an appeal from such action in the same manner as if such action and appeal related to a matter within the ordinary jurisdiction of the Court," do not apply to or qualify or control the absolute right of appeal contained in the first paragraph of section 11.

If the complainers are wrong in this view they do not seriously dispute that before the interlocutors in question could be appealed from the Sheriff to the Court of Session leave to appeal would be required, which could be granted *ex proprio motu* or on an application for leave to appeal, in terms of section 28 (*c*). It was suggested indeed, rather than argued, that the Sheriff's signature of the present Stated Case implied or was equivalent to leave to appeal having been granted by him. But apart from the fact that the respondents have throughout kept open their objection to the competency of the Stated Case, there is no provision in the statute, if leave to appeal be necessary, for any equivalent to the regular procedure.

I cannot assent to the complainer's view. I see no reason to think it probable, and it seems to me to be in plain opposition to the terms of section 11. It is true that there are no qualifications and conditions in the first paragraph of section 11. But that paragraph is only part of a section, and the whole section must be read together. It is true also that the qualifications and conditions in the fourth paragraph of the section are prefaced by the words "subject to the provisions of this section." But it does not appear to me that these words introduce any difficulty. They would only have done so if there had been any insuperable difficulty in reading the condition in question consistently with the second paragraph of the section, or any intolerable hardship caused by so doing. I confess I see neither insuperable difficulty nor intolerable hardship, or any difficulty or hardship at all. Taking the section as a whole I read it as allowing an appeal in the form of a special case against an interlocutory judgment in a prosecution under the Act, but only on leave to appeal having been got by the ordinary statutory method.

It was said that the respondents' contention was inconsistent with the case of the *County Council of Lanark* v. *Magistrates of Airdrie*, 8 F. 802. But the point was not taken in that case.

The LORD JUSTICE-CLERK was absent.

The Court dismissed the appeal as incompetent and remitted the case to the Sheriff to proceed as accords.

Counsel for the Appellants — Wilson, K.C. — Morton. Agents — Norman M. Macpherson, S.S.C.

Counsel for the Respondents — Clyde, K.C.—Hon. W. Watson. Agents—Webster, Will, & Company, W.S.

Thursday, December 5.

SECOND DIVISION.

[Sheriff Court at Glasgow.

CHARLTON & BAGSHAW *v.* THOMAS LAW & COMPANY.

Ship—Contract—Bill of Lading—Liability for Damage to Cargo—Unseaworthiness — Latent Defect — Express Stipulation that Latent Defects should not be Considered Unseaworthiness—Provisions of Statute Imported into Bill of Lading—Exercise of Due Diligence.

A bill of lading contained a stipulation that "any latent defects in the hull and tackle (of the ship) shall not be considered unseaworthiness." The bill of lading also contained a "Clause Paramount" which declared that the bill of lading should be construed subject to all the provisions of an Australian Act. The Act provided that in every bill of lading "a warranty shall be implied that the ship shall be at the beginning of the voyage seaworthy in all respects," and . . . "(5) Where any bill of lading or document contains any clause, covenant, or agreement whereby . . . (*b*) any obligations of the owner or charterer of any ship to exercise due diligence, and to properly man, equip, and supply the ship, to make and keep the ship seaworthy, and to make and keep the ship's hold, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and

preservation, are in any wise lessened, weakened, or avoided . . . that clause, covenant, or agreement shall be illegal, null and void, and of no effect." In an action of damages by endorsees of the bill of lading against the owners of the ship for injury to the cargo the defenders pleaded that they were protected by the stipulation in the bill of lading.

The Court *sustained* the plea, *holding* (*per* Lord Dundas and Lord Guthrie) that the stipulation in the bill of lading was null and void according to the terms of the Act, and therefore the stipulation and the Act were mutually inconsistent, but that in interpreting the bill of lading the stipulation, being express, overruled the Act; *per* Lord Salvesen, that according to the terms of the Act the stipulation was not null and void.

Charlton & Bagshaw, corn brokers, Liverpool, *pursuers*, brought an action in the Sheriff Court at Glasgow against Thomas Law & Company, shipowners, Glasgow, *defenders*, "for payment by defenders to pursuers of £202, 10*s*. sterling for loss and damage sustained by pursuers on a parcel of wheat carried by the defenders in their ship 'Elginshire,' from Sydney to Liverpool, under bill of lading dated 11th April 1911, of which pursuers were endorsees and holders, which damage was caused through the defenders' failure to carry said goods safely."

The pursuers averred, *inter alia*—"(Cond. 4) Said damage was caused by the said ship being in an unseaworthy and unfit condition at the commencement of said voyage to carry said cargo safely. In particular, the planking of the starboard side of the fore deck, in the neighbourhood of the forward hatchway, was much worn and very thin, and so decayed as to be unable to withstand the ordinary wear and tear of the voyage undertaken, and of the vessel working in a seaway, with the result that during the ordinary working of the vessel during the voyage water was admitted and damaged the wheat. Further, there was not any dunnage protecting the goods on the middle stringer of the lower hold which it was necessary should have been there, and the dunnage in the neighbourhood of the foremast was quite insufficient to protect the goods from leaking through the mast coat. Further, the ceiling not being grain tight, a quantity of loose wheat was found in the bilges damaged. The defenders' statements in answer are denied. Explained that in loading wheat the ship is in practice to bleed a number of bags for stowage. The certificates are referred to for their terms, beyond which no admission is made. The certificates in no way qualify the obligations of the defenders under their contract."

The defenders averred, *inter alia*—"(Ans. 4) Denied and averred that the vessel was in every respect seaworthy and fit to carry said cargo safely. In terms of the charter-party produced herewith, and the terms of which are incorporated in the bill of lading, the vessel was examined as to her seaworthiness, both in respect of the hull and dunnage, by the surveyors of the Sydney Marine Underwriters and Salvage Association, Limited, which embraces the underwriters of the cargo in question who are believed to be the *domini litis* of this action, and the certificates of seaworthiness by said association as to hull, stowage, and dunnage, are produced herewith. These certificates bear that the vessel was approved and passed as fit for the conveyance of the cargo on the voyage described, and that the cargo was loaded under the special supervision of the surveyors of the association, and stowed in accordance with the stowage and dunnage regulations approved of by the association's committee. If any defect existed at the beginning of the voyage, which is denied, it was a latent defect, and not resulting from the want of due diligence on the part of the defenders or of the ship's husband or manager. In the course of her voyage home the vessel met with very heavy weather which caused leakage into the cargo. Any apparent lack of dunnage either at the middle stringer or in the neighbourhood of the foremast on arrival at Liverpool is accounted for by the working of the cargo during the severe weather. Explained further, with reference to the allegation regarding the ceiling, that the cargo was to be in bags, and but for the weak condition of the bags themselves no damage would have resulted through the grain leaking into the bilges."

The pursuers pleaded, *inter alia*—"(2) The defenders' statements are irrelevant."

The bill of lading contained, *inter alia*, the following clause—"Clause Paramount. —This bill of lading is to be read and construed as if every clause therein contained which is rendered illegal or null or void by the Sea Carriage of Goods Act 1904 had never been inserted therein or had been cancelled or eliminated therefrom prior to the execution hereof, and is issued subject to all the terms and provisions of and to all the exemptions from liability contained in such Act"; and the following "exceptions and stipulations"—". . . . Perils of the sea . . . . and other accidents of navigation excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners. But nothing herein contained shall exempt the shipowner from liability to pay for damage to cargo occasioned by bad stowage, by improper or insufficient dunnage or ventilation, or by improper opening of valves, sluices, and ports, or by causes other than those above excepted, and all the above exceptions are conditional on the vessel being seaworthy when she sails on her voyage, but any latent defects in the hull and tackle shall not be considered unseaworthiness, provided the same did not result from want of due diligence of the owner, or any of them, or of the ship's husband or manager."

The Sea Carriage of Goods Act (1904) (Australia) enacts—"5. Where any bill

of lading or document contains any clause, covenant, or agreement whereby . . . (*b*) any obligations of the owner or charterer of any ship to exercise due diligence, and to properly man, equip, and supply the ship, to make and keep the ship seaworthy, and to make and keep the ship's hold, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation are in any wise lessened, weakened, or avoided . . . that clause, covenant, or agreement shall be illegal, null and void, and of no effect. 7. The owner, charterer, master, or agent of a ship shall not—(*a*) insert in any bill of lading or document any clause, covenant, or agreement declared by this Act to be illegal; or (*b*) make, sign, or execute any bill of lading or document containing any clause, covenant, or agreement declared by this Act to be illegal. Penalty—One hundred pounds. 8. (1) In every bill of lading with respect to goods a warranty shall be implied that the ship shall be at the beginning of the voyage seaworthy in all respects and properly manned, equipped, and supplied. (2) In every bill of lading in respect to goods, unless the contrary intention appears, a clause shall be implied whereby, if the ship is at the beginning of the voyage seaworthy in all respects and properly manned, equipped, and supplied, neither the ship nor her owner, master, agent, or charterer shall be responsible for damage to or loss of the goods resulting from—(*a*) faults or errors in navigation, or (*b*) perils of the sea or navigable waters, or (*c*) acts of God or the King's enemies, or (*d*) the inherent defect, quality, or vice of the goods, or (*e*) the insufficiency of package of the goods, or (*f*) the seizure of the goods under legal process, or (*g*) any act of omission of the shipper or owner of the goods, his agent or representative, or (*h*) saving or attempting to save life or property at sea, or (*i*) any deviation in saving or attempting to save life or property at sea."

On 9th March 1912 the Sheriff-Substitute (FYFE) pronounced this interlocutor—"Sustains pursuers' second plea *quoad* the defence founded upon the following exception in the bill of lading:—'but any latent defects in the hull and tackle shall not be considered unseaworthiness provided the same did not result from want of due diligence of the owner or any of them or of the ship's husband or manager:' Finds that this exception is ruled out of the contract by the terms of the Sea Carriage of Goods Act 1904, which is incorporated in the bill of lading by the clause paramount: *Quoad ultra* repels defenders' second plea: Allows a proof."

The defenders appealed to the Sheriff (GARDINER MILLAR), who on 11th July 1912 pronounced this interlocutor—"Recals the interlocutor of 9th March 1912 in so far as it sustains the pursuers' second plea-in-law *quoad* the defence founded upon the exception in the bill of lading therein narrated, and the finding that the exception is ruled out of the contract by the Sea Carriage of Goods Act 1904, which is incorporated in the bill of lading by the clause paramount: *Quoad ultra* adheres to the said interlocutor: Allows both parties a proof of their averments; and remits the cause to the Sheriff-Substitute for further procedure."

Note.—". . . Under the common law a shipowner, apart from express stipulation, is liable in absolute warrandice of the ship as to seaworthiness; that is to say, he not only undertakes due diligence to make the ship seaworthy, but he is liable further for any latent defect in the ship which makes it unseaworthy. That absolute warrandice on the part of the shipowner may be varied by express agreement so as to limit, or even terminate, any warrandice on his part.

"In the bill of lading, which is the basis of the contract in the present case, the following exception is introduced among the others narrated in it:—'but any latent defects in the hull or tackle shall not be considered unseaworthiness provided the same did not result from want of due diligence of the owner or any of them or of the ship's husband or manager.' The reply of the pursuers is that this clause is struck at by the Sea Carriage of Goods Act 1904, passed by the Parliament of the Commonwealth of Australia. This statute is introduced into the contract by the clause paramount, printed in red ink at the top of the bill of lading, which says—'This bill of lading is to be read and construed as if every clause therein contained which is rendered illegal or null or void by the Sea Carriage of Goods Act 1904 had never been inserted therein or had been cancelled or eliminated therefrom prior to the execution hereof, and is issued subject to all the terms and provisions of, and to all the exemptions from, liability contained in such Act.' The effect of that is that the words of the Sea Carriage of Goods Act are introduced into the bill of lading and must be 'construed simply as words occurring in this bill of lading.' (Lord Esher in *Dobell & Company* v. *The Steamship Rossmore Company*, [1895] 2 Q.B. 408.) Excerpts from the Sea Carriage of Goods Act 1904 have been produced, and the terms of the Act so far as relating to this point are given in Carver's Carriage of Goods by Sea, 5th ed. at p. 998. The section upon which both parties relied, although other sections were quoted by way of illustration, was section 5 (*b*)—'Where any bill of lading or document contains any clause, covenant, or agreement whereby any obligations of the owner or charterer of any ship to exercise due diligence, and to properly man, equip, and supply the ship, to make and keep the ship seaworthy, and to make and keep the ship's hold . . . fit and safe . . . are in any wise lessened, weakened, or avoided, that clause, covenant, or agreement shall be illegal, null and void, and of no effect.' It seems to me that the first part of that section expresses the nature of the obligation on the owner or charterer, and the second part the purpose for which that

obligation is to be enforced. The obligation on the owner or charterer is to exercise due diligence and to properly man, equip, and supply the ship, and the purpose is to make and keep the ship seaworthy, and to make and keep the ship's hold, &c., fit and safe. In other words the owner or charterer is to exercise due diligence and to properly man, &c., so as to make the ship seaworthy and to make and keep the ship's hold, &c., fit and safe. The part of the clause as to properly manning, equipping, and supplying the ship does not apply to the exception in the bill of lading in question, and therefore we are left with the words 'any obligation of the owner or charterer to exercise due diligence, to make and keep the ship seaworthy and to make and keep the ship's hold, &c., fit and safe.' The result of that examination of the clause is that section 5 declares that where any bill of lading or document contains any clause, covenant, or agreement whereby any obligations of the owner or charterer of any ship to exercise due diligence, to make and keep the ship seaworthy, and to make and keep the ship's hold, &c., fit and safe, that clause, covenant, or agreement shall be illegal, null and void, and of no effect. Now if the clause only refers to exercising due diligence, that does not apply to a clause which exempts the owner from liability for a latent defect of which he had no knowledge and therefore could not have avoided by any diligence on his part. The clause in the bill of lading in question is one which does deal with latent defect, and therefore I do not think that the Sea Carriage of Goods Act declares it illegal, null and void, and of no effect.

"The question may be illustrated by the effect given in the American Courts to the Harter Act, which has a similar clause to that in the Sea Carriage of Goods Act, although not exactly in the same terms. The Harter Act is set out on page 144 of Carver on Carriage by Sea above referred to, and the section is section 2 of the Act. At section 103 (*c*) of his book, p. 147, he says —'On the other hand there seems to be no prohibition of clauses framed to relieve shipowners of the absolute warranty of seaworthiness of the ship on sailing, which, under United States law as well as English law, is implied in the absence of express agreement . . . thus an exception of latent defect in the hull or machinery has been held to be valid,' and he quotes two cases that have been decided in the United States to that effect. That opinion in Carver's book supports the view which I have ventured to take. Accordingly I think the interlocutor must be recalled in so far as it sustains the pursuers' second plea, and that a proof should be allowed to both parties of their averments."

The pursuers appealed to the Second Division of the Court of Session.

Argued for the appellants—The clause in the bill of lading which purported to relieve the defenders of liability for latent defect was overridden by the provisions of the Sea Carriage of Goods Act 1894 (Australia), which was incorporated by the bill of lading. By section 8 (1) of that Act a warranty of seaworthiness "in all respects" was implied in every bill of lading, and such a warranty involved a liability for latent defects. Further, section 5 (*b*) of the Act declared null and void any clause in a bill of lading which lessened or weakened the liability of the owner "to make and keep the ship seaworthy." The words "to exercise due diligence" occurring in the same sub-section referred to another and a different duty, which of itself constituted a distinct obligation. So also the words "to properly man, equip, and supply the ship" constituted another distinct obligation, and had no qualifying effect on the obligation "to keep the ship seaworthy"—Carver's Carriage by Sea (5th ed.), p. 20 *et seq.*; "*Maori King*" (*Owners of*) v. *Hughes*, [1895] 2 Q.B. 550, *per* Kay (L.J.) at p. 558. The decisions on the Act of Congress known as the Harter Act (see Carver's Carriage by Sea, 5th ed., p. 144) had no bearing on the question in the present case, because that Act permitted an owner to stipulate that he should be free from liability for unseaworthiness provided he should have used due diligence.

Argued for the respondents—The clause in the bill of lading which relieved the defenders of liability for latent defects was not overridden by the provisions of the Sea Carriage of Goods Act 1894 (Australia). Section 8 (1) was merely declaratory of the common law warranty, which might be, and in the present case had been, contracted out of. The analogous Harter Act permitted such contracting out—Carver's Carriage by Sea (5th ed.), p. 147; "*The Carib Prince*," (1898) 170 U.S. 655; *Macfadden* v. *Blue Star Line*, [1905] 1 K.B. 697, *per* Channell (J.) at p. 707. Section 5 (*b*) did not annul the clause in the bill of lading which relieved the owner from liability for latent defects. It struck at any attempt to relieve the owner of liability for "due diligence to make and keep the ship seaworthy," but these words did not apply to a latent defect, because a latent defect *eo ipso* could not be provided against by the exercise of diligence however great. The words "to exercise due diligence" must be read along with the words "to make and keep the ship seaworthy," because "the exercise of due diligence" was too vague and meaningless an expression to constitute an obligation by itself. Similarly, the intervening words "to properly man, equip, and supply the ship" fell to be read along with the words "to make and keep the ship seaworthy." They then constituted a second intelligible obligation, viz., "to man, equip, and supply the ship (so as) to make and keep the ship seaworthy." The seaworthiness of the ship depended on its being properly manned, equipped, and supplied—*Rowson* v. *Atlantic Transport Company*, [1903] 1 K.B. 114, *per* Kennedy (J.) at p. 116, *affd.* 2 K.B. 666. In any event, the clause in the bill of lading relieving the owner from liability should

override any contrary provision in the Act, because the clause in the bill of lading was express, and further, the provisions of the Act should be construed in favour of the defenders, since it was a penal Act (section 7).

At advising—

LORD DUNDAS—The pursuers, a firm of cornbrokers in Liverpool, sue the defenders, who are shipowners in Glasgow, for £202, 10s., being loss and damage alleged to have been sustained by them on a parcel of wheat carried by the defenders' ship "Elginshire" from Sydney to Liverpool, under a bill of lading of which the pursuers are endorsees and holders. The defenders on record tender £125. The sum here at stake is therefore not a large one, but a difficult and important question of construction is raised. If the case is to be fought out there must admittedly be proof, but the pursuers seek at this stage to exclude from probation a certain portion of the defenders' averments. The Sheriff-Substitute decided this point in the pursuers' favour, but the Sheriff took an opposite view, and the pursuers have appealed.

The pursuers aver (Cond. 4) that "said damage was caused by the said ship being in an unseaworthy and unfit condition at the commencement of said voyage to carry said cargo safely." The defenders (Ans. 4) deny this, and aver "that the vessel was in every respect seaworthy and fit to carry said cargo safely"; but they further say that "if any defect existed at the beginning of the voyage, which is denied, it was a latent defect and not resulting from the want of due diligence on the part of the defenders or of the ship's husband or manager." The defenders accordingly found upon the express exception in the bill of lading that "any latent defects in the hull and tackle shall not be considered unseaworthiness provided the same did not result from want of due diligence of the owner (*sic*), or any of them, or of the ship's husband or manager." The pursuers retort by referring to the terms of the clause paramount, which I need not quote. They say that the exception about latent defects and due diligence is "illegal, null and void, and of no effect," because it is, in the language of section 5 (*b*) of the Australian Act of 1904, a clause or covenant whereby the obligations of the owner "to exercise due diligence, and to properly man, equip, and supply the ship, to make and keep the ship seaworthy," &c., is "lessened, weakened, or avoided." The learned Sheriff has decided the point against the pursuers. I have come to the same result, but by a somewhat different line of reasoning.

The Sheriff has expressed in a careful note his view of the construction to be put upon section 5 (*b*) of the Act of 1904. The construction is a feasible one; but I confess I should have great difficulty in adopting it as being what the Legislature meant in 1904, mainly owing to the terms of section 8 (1) of the Act, which, by the way, are equally imported into the contract by the concluding words of the clause paramount. Section 8 (1) enacts, apparently as a matter of public policy, that in every bill of lading a warranty shall be implied that the ship shall be at the commencement of the voyage seaworthy in all respects, and properly manned, equipped, and supplied. Sub-section 2 deals with certain presumptions (in favour of the shipowner) which shall also be implied, unless the contrary intention appears. It rather seems to me that the scheme of the Act is that the absolute warranty of sub-section 1 is not to be capable of avoidance or qualification, though the exceptions of sub-section 2 might be waived by consent. It is true that the warranty of seaworthiness under sub-section 1 is no more than what the common law recognises, and that such common-law warrandice may be varied or excluded by agreement of parties. But it seems to me that the terms of sub-section 1, in marked contrast to those of sub-section 2, are absolute, and not merely "unless the contrary intention appears." I am disposed therefore to think that section 8 (1) presents a serious difficulty in the way of adopting the Sheriff's construction of section 5 (*b*), because its warranty of seaworthiness being, as I think, absolute and indefeasible, any clause in the contract which bears to lessen or avoid the owner's obligation inherent in that warranty is by section 5 (*b*) null and void.

After all, however—and this to my mind lies at the root of the whole matter—we are not here considering the effect of an Act of Parliament having the force of public law, in limiting or annulling the agreement of private parties. The question is as to what the parties to this particular instrument, most unhappily framed as it is, intended to agree to by their contract. They have incorporated the Act, but have put their own interpretation on it, as they were entitled to do, in interpreting the word "unseaworthiness." The parties say and agree that it shall not include latent defects not arising from want of due diligence. So viewing the question, I think one must conclude, looking to the express and unambiguous terms of the clause in the bill of lading, that the parties cannot have intended its effect to be overridden by the incorporation in quite general terms of the whole provisions of the Act of 1904. I must say, however, that I do not admire the form of contract here resorted to. The bill of lading contains express clauses and stipulations, but it is prefaced (truly rather by way of postscript) by the clause paramount, which imports into the contract all the terms and provisions of an Act of Parliament *per aversionem*, and declares that the bill of lading is to be construed as if every clause in it which is rendered illegal, null, and void by that Act had never been inserted in it or had been cancelled from it. It would surely have been simpler and more rational to adjust the bill of lading so as to show plainly on the face of its own language what it means, and what its stipulations and exemptions

are meant to be. The mode in which this instrument is patched together seems to me to be in the highest degree complicated and clumsy, and calculated to give rise (as it has done) to dispute and litigation. It is to me surprising that it should be adopted or tolerated in the mercantile world.

I have said nothing about the Harter Act or the decisions pronounced upon it. Its language is not the same as that of the Australian Act of 1904; its second clause is not identical with section 5 of the latter Act; and it does not seem to contain any clause corresponding to section 8 of the Act of 1904. It appears to me that it might be rash to proceed upon supposed analogies derivable from a different Act or from decisions as to its language. I prefer to base my judgment upon a construction of the particular instrument before us.

On the whole matter, I am of opinion, though not without some difficulty and hesitation, that we ought to affirm the interlocutor of the learned Sheriff and send the case back to the Court below for proof.

LORD SALVESEN—In this case I am of the same opinion as the Sheriff. The only point in controversy turns upon the construction of certain clauses in the Sea Carriage of Goods Act 1904 passed by the Parliament of the Commonwealth of Australia. The apparent object of that Act was to prevent shipowners in charter-parties or bills of lading stipulating that they should be exempt from liability for loss or damage to cargo carried in their vessels where it appeared to the Legislature of the Commonwealth that such exemptions were unreasonable or inequitable or contrary to public policy. In its general scheme the Act is therefore similar to the Harter Act—an Act of the Congress of the United States which came into force in 1893, and which has been the subject of construction in several cases both in the United States and in England. It was justly observed, however, in the course of the argument that the decisions with regard to the Harter Act have no proper application to the Act with which we are now concerned, as its language, although in some respects similar, is by no means the same. It is, however, permissible to observe that in the view of the framers of the Harter Act it was not deemed unreasonable that a shipowner should protect himself from liability in respect of the unseaworthiness of his vessel where due diligence had been used to properly equip, man, provision, and outfit the vessel, and to make her seaworthy and capable of performing her intended voyage. Accordingly a bill of lading which, as in the present case, stipulates that any latent defects in the hull and tackle shall not be considered unseaworthiness, provided the same did not result from want of due diligence of the owners or any of them or of the ship's husband or master, is not struck at as an illegal stipulation under the Harter Act.

With these general observations I proceed to consider whether the stipulation to which I have just referred is rendered illegal by the Sea Carriage of Goods Act 1904, which by what is called the "clause paramount" is incorporated in the bill of lading, and is declared to govern the construction of the whole clauses therein contained. The two sections of the Act chiefly relied on were section 5 (*b*) and 8 (1). I do not attach any importance to the latter, because it is merely expressive of the common law of this country, and I presume also of Australia. Now our common law, although it implies a warranty of the seaworthiness of a vessel in every contract of carriage, does not prevent a shipowner from making an agreement with the shipper of goods for qualifying this warranty. There is no provision in section 8 (1) that any stipulation which qualifies the absolute warranty is to be treated as null or void; and I take it that the section is merely declaratory of the obligations of the shipowner with regard to the seaworthiness of his ship at the commencement of the voyage where parties have not expressly contracted with regard to this matter.

Section 5, however, deals with the case of a bill of lading, and provides that any clauses whereby "(*b*) any obligations of the owner or charterer of any ship to exercise due diligence and to properly man, equip, and supply the ship, to make and keep the ship seaworthy, and to make and keep the ship's hold, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation, are in anywise lessened, weakened, or avoided, ... shall be illegal, null and void, and of no effect." The argument for the appellants was that this section is to be construed as dealing with obligations of four different classes—to wit, obligations (first) to use due diligence; (second) to properly man, equip, and supply the ship; (third) to make and keep the ship seaworthy; and (fourth) to make and keep the ship's hold, &c., fit and safe for the reception, carriage, and preservation of cargo. On this reading it is admittedly impossible to account for the "and" which connects the first two clauses, and difficult to explain why so vague a clause as "to exercise due diligence" should stand by itself, more especially as any breach of the Act by inserting in any bill of lading any clause, covenant, or agreement declared by the Act to be illegal is a penal offence. The Sheriff has accordingly rejected this interpretation, and holds that the particle "to" in front of the clause "make and keep the ship seaworthy," &c., is to be construed as equivalent to "so as to." In my opinion that is the proper, as it is a perfectly natural, interpretation. The due diligence which the shipowner is called upon to exercise is diligence "to make and keep the ship seaworthy, and to make and keep the ship's hold fit and safe for cargo"; and the same applies to the immediately succeeding clause, "and to

properly man, equip, and supply the ship." Unless the sub-section is so read there is no standard of what constitutes "proper manning, equipment," and so on. The obligation in that case is an absolute one, and rightly so, because there is no difficulty in the shipowner ascertaining what is the proper crew to man his ship, or the equipment and supplies which are required that she may be seaworthy for the contemplated voyage. The other obligation is merely one of due diligence, for a defect constituting unseaworthiness may be latent and not capable of being discovered by ordinary care and vigilance. So read, the sub-section as a whole is perfectly reasonable and is in a line with the Harter Act, on which no doubt it was largely modelled. On the other view there would be an absolute obligation imposed upon the shipowner of keeping the ship seaworthy even when she had been injured on a voyage and could not be repaired while the voyage lasted, and any qualification of this absolute obligation in the bill of lading would be a penal offence. The common law obligation in such a case is just what is expressed in the clause, namely, that due diligence must be exercised to keep the ship seaworthy, but the common law is not so unreasonable as to exact performance of what may be impossible. On these grounds I have reached the same conclusion as the Sheriff, and I think we should adhere to the interlocutor appealed from.

LORD GUTHRIE—I concur with your Lordship in the chair.

The LORD JUSTICE-CLERK was absent.

The Court affirmed the interlocutor of the Sheriff.

Counsel for the Pursuers and Appellants —Clyde, K.C.—Hon. W. Watson. Agents —J. & J. Ross, W.S.

Counsel for the Defenders and Respondents—Constable, K.C—Stevenson. Agent —Campbell Faill, S.S.C.

Saturday, December 7.

SECOND DIVISION.

(SINGLE BILLS.)

[Sheriff Court at Perth.

DOUGALL *v.* CALEDONIAN RAILWAY COMPANY.

Process—Record—Amendment—Failure to Pay Opponent's Expenses—Absolvitor.

In an action of damages for personal injury brought in the Sheriff Court at Perth and remitted to the Court of Session for jury trial under section 30 of the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), the Court on 15th November 1912 allowed the pursuer to amend his record, found the defenders entitled to the expenses connected with the amendment, and allowed the pursuer "to proceed in the cause only on payment" of the expenses found due. The pursuer having subsequently intimated that he did not intend to pay the expenses and proceed in the cause, the defenders moved for absolvitor. The pursuer maintained that the appropriate decree was one of dismissal.

On 7th December 1912 the Court, without opinions, pronounced this interlocutor— "In respect that the order as to expenses contained in the interlocutor of 15th November last has not been obtempered, assoilzie the defenders from the conclusions of the summons and decern."

Counsel for the Pursuer—D. Anderson. Agents—J. Miller Thomson & Company, W.S.

Counsel for the Defenders — Wark. Agents—Hope, Todd, & Kirk, W.S.

Saturday, December 7.

FIRST DIVISION.

[Sheriff Court at Glasgow.

M'MILLAN *v.* THE SINGER SEWING MACHINE COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII cap.* 58), *sec.* 1 —"*Accident*"—*Chill Followed by Pleurisy —Averments—Relevancy.*

In an application under the Workmen's Compensation Act 1906 the claimant, a collector and canvasser, averred that while collecting accounts in certain tenements he over-exerted himself climbing stairs and became sweated, with the result that he contracted a chill which developed into pleurisy, thereby sustaining an accident within the meaning of the Act. The arbiter having dismissed the application as irrelevant, a case for appeal was stated.

Held that the arbiter was right and appeal *dismissed.*

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) between William M'Millan, canvasser, Glasgow, *appellant*, and the Singer Sewing Machine Company, Limited, *respondents*, the Sheriff-Substitute (GLEGG) dismissed the application as irrelevant, and at the claimant's request stated a Case for appeal.

The Case stated—"At the calling of this case the appellant was appointed to lodge a condescendence, and the respondents' answers and said papers were duly lodged in process. The condescendence lodged by the appellant is in the following terms:— '1. The pursuer is a collector and canvasser, and resides at 44 Phœnix Park Terrace, off Garscube Road, Glasgow. The defenders are a limited liability company, and carry on business at 58 Bothwell Street, Glasgow. 2. The pursuer entered the defenders' employment as a collector and canvasser on or about the 15th day of February 1912, at a salary of 10s. per week and commission,