Wednesday, November 17, *and Saturday, November* 20.

SECOND DIVISION.

[Lord Hunter, Ordinary.

CRAIG LINE STEAMSHIP COMPANY, LIMITED (S.S. "CRAIGFORTH") *v.* NORTH BRITISH STORAGE AND TRANSIT COMPANY, *et e contra.*

Ship — Bill of Lading — Short Delivery — Prima facie Evidence of Quantity Shipped —Proof—Onus.

A shipping company brought an action against the consignees of a parcel of barley for payment of the freight. The defenders averred that the pursuers had not delivered all the barley shipped under the bill of lading, and pleaded that they were entitled to set off their loss against the amount of the freight. The bill of lading was signed by the master of the ship, and bore immediately above his signature the words "weight, quality, quantity, and contents unknown to me." *Held* that the bill of lading was not *prima facie* evidence of the quantity of barley actually shipped, that the *onus* of proving the quantity actually shipped lay on the defenders, and that on the evidence they had failed to discharge it.

Dictum of Lord Chelmsford in *M'Lean & Hope* v. *Fleming*, 1871, 9 Macph. (H.L.) 38, 8 S.L.R. 475, *disapproved.*

Expenses—Process—Interest on Outlays.

On 5th January 1912 a shipping company brought an action against the consignees of a parcel of barley for payment of the freight. On 8th April 1913, after sundry procedure, which included the execution of a commission to Galatz to examine certain witnesses, and proof led, the Lord Ordinary granted decree and found the pursuers entitled to expenses. The defenders reclaimed, and on 17th November 1914 the Court sisted process *in hoc statu*, reserving all questions of expenses. On 17th November 1920 the Court adhered, and thereafter found the pursuers entitled to expenses since 8th April 1913, and also to interest on the outlays made in connection with the commission to Galatz at the rate of 5 per centum per annum as from 8th April 1913.

Opinion per Lord Salvesen that in the exceptional circumstances of the case interest should be allowed on the whole sum that was disbursed by way of outlays, treating the outlays like outlays in a law agent's account.

On 5th January 1912 the Craig Line Steamship Company, Limited, Edinburgh, registered owners of the steamship "Craigforth" of Leith, *pursuers*, brought an action against the North British Storage and Transit Company, Leith, *defenders*, for payment of £247, 13s. 11d., being the balance of an account for freight and dues on a parcel of barley shipped at Galatz and delivered at Leith to the defenders, the endorsees of the bill of lading.

On 5th February 1912 the North British Storage and Transit Company for themselves, and as representing the consigner of the parcel of barley for any interest he might have, *pursuers*, brought an action against the Craig Line Steamship Company, Limited, *defenders*, for £964, 11s. 6d. with interest, being the loss and damage sustained by the pursuers through the alleged short delivery and heating of the barley and its intermixture with other grain in the cargo.

The bill of lading was as follows:—"*Chamber of Shipping Black Sea—Berth Contract—Bill of Lading* 1902.—As agreed with the London Corn Trade Association and the Chamber of Shipping, 12th March 1902: Shipped, in good order and condition, by the Banca Romaneasca, in and upon the good steamship 'Craigforth,' now lying in the port of Galatz and bound for Leith, with liberty to carry a deck load, call at any intermediate port or ports for coaling and/or loading and/or discharging or other purpose whatsoever, kg. 100,000 (say one hundred thousand kilograms) of barley, being marked and numbered as per margin, and to be delivered in like good order and condition at the port of Leith unto order or to his or their assigns, he or they paying freight on the said goods on delivery at the rate of 11s. 9d. (say eleven shillings and ninepence) sterling per unit delivered, according to the 1890 Black Sea scale and charges, if any, as per margin. . . . . The shipowner is not liable for loss and damage occasioned by decay, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, or any loss or damage arising from the nature of the goods or the insufficiency of packages, nor for land damage, nor for the obliteration or absence of marks or numbers, nor for any loss or damage caused by the prolongation of the voyage. . . . . Dated in Galatz, this 7th day of November 1911. Weight, quality, quantity, and contents unknown to me.—A. NORMANDALE, *Master.*"

In the action at the instance of the Craig Line Steamship Company the pursuers *pleaded, inter alia*—"1. The pursuers having carried the parcel of barley condescended on in their steamer, and the defenders as endorsees of the bills of lading and receivers of the parcel of barley being liable for the freight thereon, decree should be pronounced in favour of the pursuers for the sum sued for, with interest and expenses. 2. The pursuers having under said bills of lading excepted the obligation to deliver any specific quantity of barley, they are not liable for any difference between the quantity marked on the bills of lading and the amount delivered. 3. *Separatim*, the pursuers having delivered to the defenders all the barley shipped under said bills of lading, the defenders are not entitled to make any claim for shortage."

The defenders pleaded—"1. The pursuers having failed to deliver to defenders all the barley shipped under said bills of lading, are liable to defenders for the shortage in

delivery. 2. The defenders' said barley having been damaged through the fault and negligence of the pursuers as condescended on, pursuers are bound to make good to defenders the loss sustained through pursuers' said fault and negligence. 3. The pursuers being due the defenders a greater sum than the sum sued for, the defenders are not due the pursuers any sum. 4. The defenders having instituted proceedings against pursuers for a greater sum than the sum sued for, and both claims having arisen out of the same transaction, the proceedings should be conjoined."

In the action at the instance of the North British Storage and Transit Company the defenders pleaded, *inter alia*—"2. The averments of the pursuers, so far as material, being unfounded in fact, the defenders ought to be assoilzied."

On 19th March 1912 the Lord Ordinary (HUNTER) conjoined the actions and allowed a proof, and on 25th May 1912 ordered the North British Storage and Transit Company to lead in the proof.

On 25th May 1912 his Lordship granted a commission for the examination of certain witnesses at Galatz.

On 8th April 1913 the Lord Ordinary after proof, the import of which sufficiently appears from his Lordship's opinion (*infra*), pronounced this interlocutor—"The Lord Ordinary having considered the conjoined actions—(1) In the action at the instance of the Craig Line Steamship Company Limited against the North British Storage and Transit Company and others, decerns against the defenders in terms of the conclusions of the summons; (2) In the action at the instance of the North British Storage and Transit Company and others against the Craig Line Steamship Company Limited, sustains the second plea-in-law for the defenders: Assoilzies them from the conclusions of the summons, and decerns: Finds the Craig Line Steamship Company Limited entitled to expenses against the North British Storage and Transit Company and others in the conjoined actions," &c.

Opinion.—"The North British Storage and Transit Company, Leith, were consignees of certain parcels of barley consigned to them by Faust Michaelis, merchant, Dresden, and shipped from Galatz to Leith on board the s.s. 'Craigforth.' In reply to a claim by the shipowners for payment of £247, 13s. 11d., being the balance of freight unpaid, the consignees pleaded that they had claims against the ship in respect of (*a*) short delivery, (*b*) deterioration of the barley, and (*c*) loss through mixture of their barley with the grain of other consignees caused by the negligence of the shipowners. To substantiate these three claims a separate action was brought, and proof led. Only the first two of the three claims which I have indicated are now insisted in.

"As regards the claim for shortage, it is undoubtedly the case that the quantity delivered was less than the quantity contained in the nineteen bills of lading granted by the master for the barley at Galatz by about 300 quarters. All the bills of lading contain a statement to the effect that the 'weight, quality, quantity, and contents' are unknown to the master. On behalf of the consignees it was contended that the above qualification did not affect the rule of law that the master's 'signature to the bills of lading is sufficient evidence of the truth of their contents to throw upon the shipowner the *onus* of falsifying them, and proving that he received a less quantity of goods to carry than is thus acknowledged by his agent'—Lord Chelmsford in *M'Lean & Hope* v. *Fleming*, L.R., 2 H.L., Sc. & Div. App. Cases, at p. 130. (See also *Smith & Company* v. *The Bedouin Steam Navigation Company*, 1896, A.C. 70.) In support of their contention the consignees refer to a passage in section 69 of Mr Carver's work on carriage by sea where it is stated that whether the bill of lading contains such words as 'weight and contents unknown' or not, the *onus* of falsifying the statement in the bill of lading is upon the shipowner. The author of that work cites Lord Chelmsford's opinion in the case of *M'Lean & Hope* to which I have referred. According to the Court of Session report of that case, 9 Macph. (H.L.) 38, at p. 44, Lord Chelmsford said—'I am not disposed to lay much stress on the words at the foot of the bills of lading, "weight and quality and contents unknown."' These words, however, do not appear in the English report of the case, and there is at the foot of p. 130 of L.R., 2 H.L., Sc. & Div. App. Cases, a note to the effect that 'Lord Chelmsford's was a written opinion, afterwards printed for revision.' It was, however, held in that case that the shipowner had proved that he had not got any more cargo than he delivered, and I think Mr Horne is right in saying that the argument did not in any way turn upon the presence in the bill of lading of the qualifying words.

"In the case of *Craig & Rose* v. *Delargy*, 1879, 6 R. 1269, a question arose as to a shipowner's responsibility for short delivery caused by leakage where the bill of lading contained a clause 'not responsible for weight, quality, breakage or leakage.' In his opinion Lord President Inglis said at p. 1276, dealing with the earlier case of *Moes, Moliere, & Tromp*, 1867, 5 Macph. 988, where the claim arose from breakage, 'But for this special exception in the bill of lading the *onus* would have lain upon the shipowners to show that the broken condition of the goods was not brought about by their fault, but in consequence of the exception the *onus* was shifted, and it lay upon the consignee of the cargo or indorsee of the bill of lading to show that the breakage was caused by the fault of the shipowners. Now I apply that doctrine here and I think it is a doctrine founded upon sound principle. I think the *onus* lies upon the pursuers of this action to show that the leaking or leaked condition of these casks at the port of discharge was brought about by the fault of the shipowners.' In the case of *Lebeau* v. *General Steam Navigation Company*, L.R., 8 C.P. 88, the effects of the words 'contents unknown' in a bill of lading fell to be considered. Mr Justice Brett

said—'It appears to me that this completely does away with the statement made by the shipper with respect to the nature of the goods, and both parties must then be taken to agree to the bill of lading in the modified form by which there is no binding statement as to the contents of the package, but the carrier undertakes in his capacity as carrier to carry the case whatever it contains.'

"In *Jessel* v. *Bath*, L.R., Ex. 267, where the ship's agents signed bills of lading describing manganese as of a certain weight, but containing in print the words 'weight, contents and value unknown,' it was held, in a question between the consignees and the charterers, that the printed words controlled the statement of weight and that the defendants were not bound by the signature of their agents to a bill of lading for a greater quantity than was actually shipped. Baron Bramwell said as regards the bill of lading, 'This document, though apparently contradictory, means this — A certain quantity of manganese has been brought on board, which is said by the shipper for the purpose of freight to amount to so much, but I do not pretend or undertake to know whether or not that statement of weight is correct. On a bill of lading so made out I think no one could be liable in such an action as the present.' Lord Salvesen in the recent case of *Tyzack & Branfoot Steamship Company, Limited* v. *Sandeman & Sons*, 1913 S.C. 19, at p. 26, approves of this statement of the law. If the presence of qualifying words has the effect of altering the *onus* in the case of leakage or breakage or quality or contents, I do not see why they should not equally have the effect of altering the *onus* where the question is one of quantity. It is said that in cases of bulk cargoes of grain shortages at the port of shipment may easily occur, and that it is a difficult thing for the master to detect the error in the bill of lading quantity. The object of the qualification in the bill of lading is to protect the owner, and I think that some effect must be given to the words introduced. If the *onus* of proof on the shipowner were as strict in such a case as in the case of a clean bill of lading, the clause so far as quantity is concerned would be practically written out of the bill of lading.

"I am not therefore prepared to take the case upon the footing that the *onus* is upon the shipowner of showing in the present case that he did not receive at Galatz the full quantity of goods mentioned in the bills of lading.

"How does the case stand upon the facts? [*His Lordship then considered the evidence.*] Looking at the case as a mere question of probability one way or the other, I think it more probable that the full amount mentioned in the bills of lading was not shipped, than that the total shipped was not delivered. I therefore hold that the consignees have failed in establishing this part of their case against the owners.

The second branch of the consignees' case is that the shipowners were negligent in allowing about 1000 quarters of the barley consigned to them to be stowed in No. 3 hold of the steamer. That hold is described as the bunker hold. The complaint of the consignees is thus expressed in article 5 of the condescendence of the action at their instance—'No. 3 hold had, it is believed and averred, never been used before for carrying grain, because it is badly ventilated, and is situated next to the boilers and engine room space of the steamer, and any cargo stowed in said hold is exposed to very great heat. A large quantity also of barley, belonging to another shipper, was superimposed upon the barley of pursuers, causing the ventilation required for pursuers' barley to be even more inadequate. Pursuers' barley was in good condition when it was shipped on the "Craigforth," but in consequence of being stowed in said No. 3 hold, the whole 1000 quarters of barley, owing to want of ventilation and excessive heat, was stewed and rendered lifeless and useless for the purpose for which they were purchased.' There is no doubt that heating damages barley and prejudicially affects it for brewing purposes, although it may be used in a distillery. [*His Lordship then considered the evidence.*] Keeping in view the whole evidence, I am unable to hold that the consignees have proved that they have sustained loss and damage by heating of the barley stowed in No. 3 hold in consequence of the negligence of the shipowners or those for whom they are responsible. I shall therefore give decree for the sum sued for in the action for freight and assoilzie the shipowners in the counter action."

The Craig Line Steamship Company reclaimed in the conjoined actions.

On 17th November 1914, owing to one of the parties being an alien enemy, the Court sisted process *in hoc statu*, reserving all questions of expenses.

On 28th February 1917 an order was pronounced ordering that the Craig Line Steamship Company be wound up, and appointing Mr J. R. Fogo, C.A., to be official liquidator.

On 27th October 1920 the Court sisted Mr Fogo as a party to the actions, and restored the cases to the roll.

The cases were heard on 10th, 12th, and 16th November 1920.

Argued for the reclaimers—The bill of lading was *prima facie* evidence of the quantity shipped, and the *onus* lay on the respondents of proving it was otherwise — *M'Lean & Hope* v. *Fleming*, 1871, 9 Macph. (H.L.) 38, *per* Lord Chelmsford at p. 44 and Lord Colonsay at p. 47; Carver, Carriage of Goods at Sea (6th ed.), sec. 69; *Hogarth Shipping Company, Limited* v. *Blyth, Greene, Jourdain, & Company, Limited*, [1917] 2 K.B. 534, *per* Swinfen Eady, L.J., at p. 546. *New Chinese Antimony Company, Limited* v. *Ocean Steamship Company, Limited*, [1917], 2 K.B. 664, was wrongly decided. Lord Chelmsford's opinion in *M'Lean & Hope* v. *Fleming* had never really been displaced. Viscount Reading, C.J., in *New Chinese Antimony Company, Limited* v. *Ocean*

Steamship Company, Limited, cit., had misread *Jessel* v. *Bath*, L.R., (1867) 2 Ex. 267. Counsel also referred to *Tyzack & Branfoot Steamship Company, Limited* v. *Sandeman & Sons*, 1913 S.C. (H.L.) 84, 50 S.L.R. 869, *per* Lord Moulton at 1913 S.C. (H.L.) 92, 50 S.L.R. 873; *Bedouin Steam Navigation Company, Limited* v. *Smith & Company*, 1895, 22 R. 350, 32 S.L.R. 262, *per* Lord Trayner at 23 R. 356, 32 S.L.R. 266, 23 R. (H.L.) 1, 33 S.L.R. 96, *per* Lord Watson at 23 R. (H.L.) 4, 33 S.L.R. 97; *Craig & Rose* v. *Delargy*, 1879, 6 R. 1269, 16 S.L.R. 750, *per* Lord President (Inglis) at 6 R. 1276, 16 S.L.R. 755; *Lebeau* v. *General Steam Navigation Company*, 1872, L.R., 8 C.P. 88; *Moes, Moliere, & Tromp* v. *Leith and Amsterdam Shipping Company*, 1867, 5 Macph. 988, *per* Lord President (Inglis) at 991; Abbot, Law of Merchant Ships and Seamen (14th ed.), p. 485; Scrutton, Charter Parties and Bills of Lading (9th ed.), p. 63. On the evidence the respondents had failed to discharge the *onus* which was upon them, and if the *onus* were upon the reclaimers, the reclaimers had succeeded in discharging it.

Argued for the respondents — A bill of lading qualified in the way in which this bill of lading was qualified was not *prima facie* evidence of the quantity shipped, and the *onus* was on the reclaimers of proving short delivery — *New Chinese Antimony Company, Limited* v. *Ocean Steamship Company, Limited*; *Jessel* v. *Bath*. Lord Chelmsford's dictum in *M'Lean & Hope* v. *Fleming* had been disregarded. On the evidence the reclaimers had failed to discharge the *onus* which was upon them. If the *onus* were upon the respondents, the respondents had succeeded in discharging it.

At advising on 17th November 1920—

LORD JUSTICE-CLERK—In this case the questions are really reduced to three in number. In the first place there is a question of law upon which depends a further question of fact as to whether there was a shortage of delivery as regards at least the portion of the cargo which has been the subject of this litigation. Then secondly or thirdly, according as these two first points are dealt with, there is a question as to whether part of the cargo which was delivered to the Edinburgh United Breweries Company was damaged by heating from some cause for which the ship is responsible. The Lord Ordinary has decided the question of law in favour of the ship, and of course in that event the question as to the short delivery, in so far as it is fact, does not come to be of importance. The Lord Ordinary has decided the question of damage to cargo through heating in favour of the ship on the facts.

The question of law is undoubtedly an important one and was very fully argued, as its importance deserves. But I really have no doubt whatever as to what the law of the matter is. The bill of lading here was not a clean bill of lading. It bears to be a "Chamber of Shipping Black Sea—Berth Contract—Bill of Lading, 1902," and sets out by saying—"As agreed with the London Corn Trade Association and the Chamber of Shipping, 12th March 1902." Therefore it was what one might call an adjusted bill of lading—adjusted between commercial bodies representing the merchants and the shipowners. One is familiar with the fact that the adjustment of these bills of lading was a very difficult and delicate matter, and that every clause and every word of them was considered before the final form of the bill of lading was ultimately adjusted. This bill of lading winds up with the words "weight, quality, quantity, and contents unknown to me," and then follows the master's signature. The words "weight, quality, quantity, and contents unknown" appear in very prominent letters in the bill of lading and the words "to me" were added in manuscript by the master, I presume before signature. The question we have to consider is what is the effect of these words upon the initial statement in the bill of lading that there was shipped on board the steamship "Craigforth" a certain quantity of barley marked and numbered as per margin.

On the one hand it is contended by the merchants that the initial statement that so much cargo was shipped binds the shipowners at anyrate to this effect, that unless they show that less cargo was shipped than was set out in the initial part of the bill of lading to which I have referred, they are bound to deliver the whole quantity which is there stated to have been shipped, or to pay damage in so far as there is a shortage. On the other hand it is argued by the shipowners that the words "weight, quality, quantity, and contents unknown to me" introduce a qualification which really makes the bill of lading mean no more than this—You (the shippers) represent to us that you have put on board so much barley. We do not know anything about it, and accordingly we give fair notice to everybody that your statement about quantity shipped is not known to us and is not accepted by us.

The legal argument turned principally upon the consideration of a very few cases. There was the case of *M'Lean & Hope* v. *Fleming* ((1871) L.R., 2 H.L. Sc. 128, 9 Macph. (H.L.) 38), which was decided in this Court over fifty years ago, and was also made subject of decision in the House of Lords. That was founded on by the merchants mainly because of an observation which Lord Chelmsford, as reported in the Scottish report of the case (9 Macph. (H.L.) 44), made in his judgment. That passage was not a ground of judgment but merely an *obiter dictum*, which certainly was entitled to great respect coming from the source it did. But even starting as an *obiter dictum*, it was not retained in the final report of the case as it appears in the English reports. This is explained by the Lord Ordinary in his opinion, and it seems to me that his Lordship's statement is quite accurate in every respect.

On the other hand there were two cases, one of them prior to *M'Lean*, founded on by the ship here—the case of *Jessel* v. *Bath* ((1867) L.R., 2 Exch. 267), and the case of *Lebeau* v. *The General Steam Navigation*

Company ((1872) L.R., 8 C.P. 88) — which were said to have, though not so authoritative as a House of Lords judgment, yet an authoritative effect on the interpretation of this form of the bill of lading in favour of the shipowner. There have also been two cases decided since the Lord Ordinary's judgment was given, viz., the case of *Hogarth Shipping Company* v. *Blyth, Greene, Jourdain, & Company* ([1917] 2 K.B. 534), and the *New Chinese Antimony Company* v. *Ocean Steamship Company* ([1917] 2 K.B. 664), both decided in 1917.

I confess it came as a novelty to me to hear that the qualifying words in the bill of lading (as I understand the argument) had practically no effect upon the construction of the bill of lading, for I agree with what the Lord Ordinary says in his opinion, viz., that the object of the qualification in the bill of lading is to protect "the owner, and I think that some effect must be given to the words introduced. If the *onus* of proof on the shipowner were as strict in such a case as in the case of a clean bill of lading, the clause so far as quantity is concerned would be practically written out of the bill of lading." That, I think, is the correct statement of the result of applying the argument founded upon Lord Chelmsford's dictum, as the merchants in this case contend should be done. I had always understood when I was at the Bar that these qualifying words were important, that their significance was recognised by those interested in these matters, and that they introduced a most material qualification into the obligations as to the merchandise which was shipped and, *inter alia*, as to the quantity to be delivered. Moreover, I cannot see any principle whatever, and I know no law except the dictum of Lord Chelmsford (in so far as it was to that effect) why these words appearing in the bill of lading, adjusted in the way I have indicated, should not receive full effect. I think business men quite appreciate that when they put these words into a bill of lading they put them in for some effect, and in my judgment a most material effect.

It was said that the judgment in the case of *Hogarth* was to be taken as having materially qualified the statement of the law which appears in the decision in the *New Chinese* case. Indeed, as I understood it, it was suggested by the merchants in this case that the two decisions were incompatible, and that *Hogarth* was the better judgment, and reliance was especially placed on Lord Justice Swinfen Eady's judgment. When the cases are studied I do not think that there is any incompatibility between them. They are quite consistent, and indeed the judgment in the *Hogarth* case seems to me to proceed upon exactly the same lines of reasoning as that in the *New Chinese* case, and to support the result arrived at therein. It would be curious indeed if there was any contradiction or conflict between these two decisions, because the former (so far as I can see from the report) was decided on 11th June 1917, and the latter case was decided in the same month; the Judges who took part in the former decision were Lord Justice Swinfen Eady, Lord Justice Scrutton, and Mr Justice Bray, and in the latter the Lord Chief-Justice, Viscount Reading, Lord Justice Pickford, and Lord Justice Scrutton. Indeed in the latter it was apparently Lord Justice Scrutton who referred in the course of the argument to the case of *Lebeau* ((1872) L.R., 8 C.P. 88), which I have already mentioned, and to the case of *Hogarth*. It is inconceivable to my mind that a Judge of such experience, particularly in shipping cases, should in the same month have delivered two inconsistent judgments, especially when in delivering the later judgment he was obviously in full knowledge of the earlier judgment, for he himself brought it to notice in the discussion in the later case. Accordingly I am constrained to come to this conclusion, that no such inconsistency exists. Reading the judgments as I have done very carefully, I have failed to find any incompatibility, inconsistency, or divergence between the judgments in the two cases. In both cases *Jessel* v. *Bath* ((1867) L.R., 2 Exch. 267) was referred to, and also the case of *Lebeau*, as being authoritative judgments (though not of the House of Lords) entitled to be accepted, and which had been accepted, as sound.

If we take that view of the cases, the result is that we find Lord Justice Scrutton in the *New Chinese* case dealing with this very question as to how far the qualifying words affect the *onus* or the legal responsibilities of the shipowner in regard to quantity of cargo, quality of cargo, contents of packages, or anything else mentioned in the qualifying words. The bill of lading there was a qualified bill of lading. The cargo was antimony oxide, and the bill of lading stated that 937 tons had been shipped on board. In the margin was a typewritten clause—"No mark, a quantity said to be nine hundred and thirty-seven tons," and in the body of the bill of lading was printed in ordinary type the words "weight, measurement, contents, and value (except for the purpose of estimating freight) unknown," and therefore while the circumstances were different the legal question was exactly the same as that now before us. Lord Justice Scrutton begins by saying (at p. 672)—"I have come to the same conclusion"—that is to say, the conclusion which Lord Chief-Justice Reading and Lord Justice Pickford had already reached—"and as I am differing from the learned Judge in the Court below, I think it well to give shortly the reasons of my opinion. I should be very slow to differ from a learned Judge who on a pure question of fact had arrived at a conclusion merely because I should myself have arrived at a different one." Further on he says (at p. 673)—"If the statements," as to the quantity of cargo shipped, "are not conclusive, they may at anyrate be *prima facie* evidence against the shipowner. But in my view this particular bill of lading is not *prima facie* evidence of any weight at all. Suppose a box, described as a 'box of jewels,' were deposited for safe custody at a bank, and a receipt was given for it in the words 'Received, contents unknown,

there would be no evidence of the receipt of any jewellery. The learned Judge (Sankey, J.) starts with the assumption that the bill of lading is *prima facie* evidence of the shipment of 937 tons; I start with the assumption that it is no *prima facie* evidence of it. It is pressed upon us that our view is very inconvenient to shippers, but the answer is that some nations have by statute provided for such a state of things." He then refers to the Harter Act, which so far as American shipping is concerned has been in force for some time. I agree entirely with that. Even if I had been inclined to differ I should have been slow to differ from a judgment given by judges of such experience as Lord Reading, Lord Justice Pickford, and Lord Justice Scrutton, for if there is one man on either side of the Border who has long experience in dealing with shipping matters it is Lord Justice Scrutton, and I would require to be very strong in my opinion before I should have the courage to differ. I do not differ in the least. I think that statement of the law is absolutely accurate so far as my experience goes. Since I came to the Bar it has been acted on, and so far as case law is concerned, except Lord Chelmsford's *obiter dictum*, I know of nothing to the contrary.

The *Hogarth* case related to sugar in bags. There was a charter-party and a bill of lading. The bill of lading contained a clause similar to the clause in the present case. A clause in the charter-party provided—"The captain to sign Eastern trade bills of lading, which are to be deemed conclusive proof of cargo shipped, and their conditions to form part of this charter-party." The rubric of case states that "The captain signed a bill of lading for a specified number of bags of sugar, one of the exceptions and conditions of the bill of lading being 'weight, measure, quality, contents, and value unknown'; the bill of lading also contained the clause—'Freight and all other conditions and exceptions as per charter-party." There was a shortage in the number of bags when the cargo came to be discharged, and the question arose whether the clause in the charter-party that the bill of lading was to be conclusive proof of the cargo carried had been incorporated into the bill of lading. The Court decided that it was not, and we have no concern with that here. But Mr Justice Lush decided that the bill of lading was conclusive only as to the number of bags in the sense of skins or receptacles and not as to their contents. It was held by the Court of Appeal "that the conclusive evidence clause of the charter-party was not incorporated in the bill of lading, and that the shipowners were not estopped from showing that all the bags of sugar shipped on board had been in fact delivered," and they accordingly refused the appeal from Mr Justice Lush's judgment, which had given £4, 2s. 5d. as the value of bags (receptacles) not delivered, the clause in the charter-party not including the word "number," the qualifying words of the bill of lading being "weight, measure, quality, contents, and value unknown."

Now the result, therefore is that in my opinion the Lord Ordinary was quite right, following *Jessel* and *Lebeau* and the other cases to which he refers, in deciding that these qualifying words are of importance, that they must receive effect, and that the effect of them is simply this, that the statement of the weight, quality, quantity, or contents of the cargo in the bill of lading is not conclusive against the ship where the master has qualified the bill of lading, as has been done in this case.

In the case of *Lebeau* the Court also was a very strong one. It consisted of Chief-Justice Bovill, Mr Justice Brett, and Mr Justice Grove. They proceeded upon the view that had been given effect to in *Jessel's* case. Chief-Justice Bovill (at p. 93) said this—"It appears to me that the effect of that document"—the bill of lading—"was that though the plaintiffs"—the plaintiffs were the merchants or shippers—"represented that the package in question contained linen goods, the defendants by their agent refused to contract upon the footing that the contents of the case were to be taken absolutely to be of the description that the shippers stated. By the printed memorandum, in my opinion, they repudiated all knowledge of the contents of the case and all intention of contracting with regard thereto, and contracted to carry the package whatever its contents might be. That was the view taken in the case of *Jessel* v. *Bath*, and that seems to me the correct view of such a contract. It therefore lies on the defendants to get rid of their liability under the contract, and this they seek to do by reason of the statement made by the plaintiffs as to the nature of the goods. But this statement must be taken as having been made innocently and without fraudulent intention."

The result therefore is that on the construction of this bill of lading I think, to use the language of Lord Justice Scrutton, that there is no statement by the ship as to the nature or quantity or contents of the cargo shipped; that it merely comes to this, that the shipper says to the shipowner that he has loaded a cargo of such a quality and quantity. To which the shipowner replies by the bill of lading—"I do not know anything about it, and accordingly I sign this bill of lading on this footing—I do not accept your statement as accurate, and I do not accept any responsibility as to its being accurate." If that is so, then the conduct of the proof in this case seems to me to have been quite explicable. Both parties seem to have taken up their position on the legal question—Where does the *onus* rest of establishing liability or freedom from liability? The consignee said—"You (the shipowner) have undertaken to deliver such a quantity of goods and you are bound by that"; and the shipowner said—"Our master guarded himself against all such responsibility, and it falls on you to prove your case that we got these goods and failed to deliver." If that is the true view, then there is an end to the case of short delivery. [*His Lordship then dealt with the evidence as to what was delivered to the ship and what was discharged by her, and came to the conclusion*

that the merchants had not proved what was delivered to the ship or that she had made short delivery. His Lordship also dealt with a question of damage by heating which is not reported.]

The result therefore is that I see no reason to differ from the Lord Ordinary, and I think his judgment in all its heads ought to be affirmed.

LORD DUNDAS—I agree on all points with the opinion just delivered and shall add only a few words.

Upon the question of law which was argued to us I think the reclaimers are wrong. In the Lord Ordinary's judgment this passage occurs, with which I agree—"The object of the qualification in the bill of lading is to protect the owner, and I think that some effect must be given to the words introduced. If the *onus* of proof on the shipowner were as strict in such a case as in the case of a clean bill of lading, the clause so far as quantity is concerned would be practically written out of the bill of lading." I think that would be the result of the reclaimers' argument, and it is a result I am not prepared to accede to. The law of the matter is, in my judgment, correctly stated in the 9th edition, published in 1919, of "Scrutton on Charter-Parties and Bills of Lading," where the learned writer, after pointing out that an ordinary clean bill of lading is *prima facie* evidence that the goods were shipped, and the burden of disproving that lies on the shipowner, goes on to say, at the top of page 63—"But where the statement of the amount or quantity of the goods in the bill of lading is qualified by such words as 'weight or quantity unknown,' the bill of lading is not even *prima facie* evidence against the shipowner of the amount or quantity shipped, and the *onus* is on the cargo-owner of proving what in fact was shipped." The authority for the passage I have quoted is given in the note thus—*New Chinese Company* v. *Ocean S.S. Company*, [1917] 2 K.B. 664, following *Jessel* v. *Bath*, (1867) L.R., 2 Exch. 267, and disregarding the dictum of Lord Chelmsford in *M'Lean* v. *Fleming*, (1871) L.R., 2 H.L.Sc., at p. 130." It is worthy of note, as your Lordship has pointed out, that Lord Justice Scrutton was one of the judges in the *New Chinese Company's* case, as he was also in the *Hogarth* case ([1917] 2 K.B. 534), and on the title page and in the last edition of his book the learned Lord Justice appears as joint editor along with Mr Mackinnon.

If the view on this point which along with your Lordship I entertain be correct, the claim under the head of shortage must fail. Indeed I understood it to be frankly conceded by Mr Aitken that that part of his claim must stand or fall with his argument on *onus probandi*. [*His Lordship then dealt with the question of damage by heating.*]

I am not going further into the matter but merely express my adherence to the Lord Ordinary's views and my concurrence with the additional observations made by your Lordship in the chair.

LORD SALVESEN—Although this action is in the name of a British company it was conceded that it was in reality at the instance of the shipper of these parcels of barley to which the action relates. The case for the shipper is laid upon the view that a qualified bill of lading such as we have here imposes an obligation upon the ship to prove that the quantity mentioned in the bill of lading was delivered, or if less was delivered to prove that she had delivered all that she had received. We are quite familiar with the obligations imposed upon a ship by a clean bill of lading. A clean bill of lading is a document by which the master of the vessel acknowledges without qualification that he has received a certain weight or number of goods and undertakes to deliver the same weight or number of goods. If at the discharge of the vessel it turns out that the weight or number specified in the bill of lading is not forthcoming, the ship is not answerable because of the discrepancy merely, but the *onus* is cast upon the shipowner to prove that the fact that he has delivered less than is stated in the bill of lading is not due to any failure upon his part to fulfil his duty. Accordingly, if he is able to prove that the whole of the goods which he in fact received had been delivered he is exonered from all responsibility, because the master of a ship has no authority to bind the shipowner for a larger quantity than he has received. The *onus* is a very heavy one, as was apparent in the case of the "*Bedouin*," 1895, 23 R. (H.L.) 1. In this Court it was held in that case that the *onus* had been discharged. But the House of Lords took a different view and held that notwithstanding that everything in the case pointed to there having been thefts at Calcutta before the bales were actually put on board the ship, nevertheless the shipowner had not excluded the possibility of the bales having been put on deck and thereafter removed from the deck by some person who was not authorised to do so.

The present bill of lading, however, is not a clean bill of lading, and I think it has always been recognised, since the case of *Jessel* v. *Bath*, 1867, L.R., 2 Exch. 267, that there is a vital distinction between a clean bill of lading and a qualified bill of lading. I need not go through the authorities which your Lordship in the chair has so fully dealt with. The latest pronouncement on the subject by Lord Justice Scrutton is in accordance with the view with which I have been familiar since I joined the Bar—that a qualified bill of lading such as we have here is not *prima facie* evidence binding upon the shipowner. It is simply a statement by the shipper of the quantity which he says he has put on board, a statement which is not accepted by the captain, and for which the captain impliedly states that he takes no responsibility. Mr Aitken said it would be very inconvenient if such a doctrine were established because cargoes of this kind were constantly being dealt with before the vessel arrives, and that an onerous consignee into whose hands such a

bill of lading falls is put to a great disadvantage if he has afterwards to prove by evidence at the port of shipment that more was put on board the ship than the ship has delivered. That does not appear to me to be an important consideration and for this reason—the bill of lading, though it be only the statement of the shipper, will be accepted according to the credit that the shipper has in the home market. If his credit or responsibility is good his bill of lading will pass like current coin. If, on the other hand, he is an unknown shipper then he will probably experience difficulty in disposing of his bills of lading, and will have, as in the present case, to sell the goods on arrival. He is without the unqualified acknowledgment of the ship as to the quantity of goods received, and therefore the bill of lading is to that extent of less value. A merchant who buys a bill of lading on the faith of the representation of the shipper has, of course, recourse against the shipper if he finds a shortage as compared with the quantity stated in the bill of lading. We have not, however, to consider general considerations of that kind, but only the effect of the contract contained in the bill of lading, and I find here that that imposes no *prima facie* duty upon the shipowner to account for the particular weight of goods specified in the bill of lading which his master has refused to accept as correct.

It would, of course, have been quite open for the shipper in this case to have proved that the bill of lading quantity was the true quantity. He made the attempt to do so. He proved by evidence at Galatz that the cargo was carefully weighed before it was put on board, and that the weights were recorded in what was known as "daily reports." Unfortunately he was unable to produce the reports which contained the only evidence as to the weight of the stuff put on board. These reports had been forwarded to the shipper, and I cannot understand why they should not have been sent to his agents here, as they form the only evidence for the shipper of the total quantity shipped. But in the absence of these "daily reports" there is not a scrap of evidence to show that the weight stated in the bill of lading was actually shipped. Again he might have shown that the bill of lading quantity was correct if he had been able to prove that the consignees of the other portions had received substantially more than the amount contained in their bills of lading, and he made a very positive averment to that effect. If it had been found that the missing three per cent. was amply accounted for by over-deliveries to other consignees, that would have been a strong element of proof that part of his consignment had been delivered to these consignees. But here again he made no attempt to support his statement that such over-deliveries had in fact been made.

Accordingly he had to rest his case entirely upon the representation in the bill of lading, which is his own representation merely and imposes no responsibility *per se* upon the owners of the vessel. [*His Lordship then dealt with the question of heating.*]

Upon the whole matter I am quite satisfied with the judgment of the Lord Ordinary and I think it ought to be affirmed.

LORD ORMIDALE—Had the bill of lading in question here been a clean bill of lading, then it is not disputed that the bill of lading would have been *prima facie* evidence of the quantity of barley shipped on the "Craigforth," and that an *onus* would have been thrown on the shipowners to prove that in point of fact and contrary to the terms of the bill of lading no more barley had been loaded in the ship than was delivered in Leith. But the bill of lading contained a qualifying clause above the captain's signature, in the following terms—"weight, quality, quantity, and contents unknown to me." These words, the shipowners say, discharge them of any such *onus*, and that it rests with the shippers to establish that the quantity of barley delivered was less than the quantity loaded. The shippers on the other hand contend, as I understand the argument, that the clause does not affect the liability of the shipowners at all, and that the bill of lading is still *prima facie* evidence of the quantity of barley loaded, although it may be more easily upset and displaced than in the case of a clean bill of lading. The shippers found their contention in the main upon a dictum, as to the import and bearing of such a qualifying clause, to be found in the opinion of Lord Chelmsford in the case of *M'Lean & Hope* v. *Fleming*, (1871), L.R., 2 H.L. Sc. 128, 9 Macph. (H.L.) 38. But there appears to be some dubiety as to what the noble Lord did finally say, and further, the meaning and effect of the clause does not appear to have been the subject of discussion or in any way to have affected the consideration of the proof adduced.

No other case, in my opinion, supports the shippers' contention. I agree with the Lord Ordinary that to give effect to it would be to write the clause out of the bill of lading. It seems to me impossible to do this, and the Courts in England in the cases to which your Lordships have already referred have declined to do so. The most recent of these is the case of *New Chinese Antimony Company*, [1917] 2 K.B. 664, the rubric or headnote of which discloses a proposition in law (conclusive against the shippers' contention) which appears to me to be well warranted by the opinions of the Chief-Justice and Lord Justice Scrutton. I respectfully agree with what they say as to the effect of such a qualifying clause, and I note that Viscount Reading had in mind and referred in his opinion to the case of *M'Lean & Hope* v. *Fleming*.

I think, therefore, that while a clean bill of lading gives rise to a presumption that the goods referred to in it were actually shipped, a qualified bill of lading has not this effect, and if the shippers in the latter case maintain that there has been a short out-turn, it is for them to prove that more goods were loaded than were in fact delivered.

On the questions of fact I concur with

what your Lordship has said as to the conclusions to be drawn from the evidence in the case, and have nothing to add.

The Court adhered.

Counsel for the respondents having subsequently obtained decree of expenses, moved for interest from the date of the Lord Ordinary's judgment on the outlays which were included in the award, and which amounted to about £460. (Of this sum about £80 represented the outlay on the commission to Galatz.)

Argued for the respondents—The respondents were entitled to all outlays which would bear interest. The delay in getting the case disposed of was due to the war, and the underlying principle for innovating on the ordinary rule of not giving interest was the occurrence of some extraordinary cause, *e.g.*, the war. Counsel referred to *Whitehead & Morton* v. *Cullen*, 1861, 24 D. 86, *per* Lord Justice-Clerk (Inglis) at 88; *Barclay* v. *Barclay*, 1850, 22 S.J. 354; *M'Dowall* v. *M'Dowall*, 1821, 1 S. (N.S.) 188, *per* Lord Ordinary (Pitmilly) at 189, 1821, 1 S. (N.E.) 219, 1825, 1 W. & S. 22; *Groat* v. *Sinclair*, F.C., 15th May 1819; M'Laren, Expenses, p. 507; Treaty of Peace Order 1919; Statutory Rules and Orders, No. 1517, Schedule, section 3—Debts, Article 296, Annex 22; *Fried Krupp Actien-Gesellschaft, In re*, [1917] 2 Ch. 188.

Argued for the reclaimers—The motion should be refused. The loss must rest where it fell. The Lord Ordinary had only found the respondents entitled to expenses. If the Lord Ordinary had decerned for the amount of the expenses that would have vested the right thereto in the respondents, but there had been no decerniture. There was not a single case which supported the respondents' contention. Counsel referred to *Blair's Trustees* v. *Payne*, 1884, 12 R. 104, 22 S.L.R. 54, *per* Lord Fraser at 12 R. 109, 22 S.L.R. 56; *Pearse* v. *Macdonell*, 1825, 3 S. (N.E.) 424; and *Barclay* v. *Barclay*. In *M'Dowall* v. *M'Dowall* the expenses were ascertained and decerned for in the Court below. That was the ground of the judgment. Moreover, in that case it was said that the decision was not to form a precedent. *Groat* v. *Sinclair* was a case of the taxation of accounts where in special circumstances interest was allowed from the date of outlay. In that case judicial charges were excluded.

LORD JUSTICE-CLERK—This is, so far as my experience goes, a perfectly novel motion, but Mr Sandeman has satisfied me that there are authorities which afford grounds for granting it within limits. I confess that I have not been able to find anything of principle in any of the cases that were cited. It seemed to me that Mr Maclaren was probably right when he said in his book on Expenses, at page 507—"The foregoing review of the cases shows that the present rule of law is that interest on an account of judicial expenses will only be allowed from the date of decree therefor, except in very special circumstances, and that the latter will only be taken into consideration in dealing with charges for outlay and not with charges for professional work." But even that seems to me to be subject to a further limitation, which was expressed in the latest case on the subject, which was as far back as 1850. I say the latest case, for although Lord Fraser in *Blair's* case made some observations on interest on expenses, that was only a dispute between agent and client and had nothing whatever to do with expenses between party and party. In the case of *Barclay* the Lord Justice-General said—"No doubt the Court has power to give interest, but a special case must be made out. We refused interest the other day in the case of *Duffus*. This case however seems different, and I think this party has made out his case. The outlay here was very heavy, and was applicable to proofs taken on the Continent. The case too, is of a very peculiar nature." He then refers to the circumstances. Lord Cunninghame concurred except as to the interest on expenses of printing. He said—"The printing here is no doubt very heavy, but I have always understood that printing is just one of the usual outlays in an account, and therefore I would deduct the interest on the printer's account." Judgment was given in accordance with Lord Cunninghame's opinion.

If there is a principle to be extracted from these cases I think it is to be found in that opinion of Lord Cunninghame, that interest is not to be allowed on what are usual outlays. Accordingly the best result I have been able to arrive at is that we ought to allow interest on the outlays connected with the commission to Galatz but nothing more.

LORD DUNDAS—The motion made by Mr Sandeman is certainly an unusual one. Some of the cases he cited I confess came to me as something of a surprise. I do not think I knew of their existence. But it does appear that now and again under very peculiar circumstances the Court has granted motions of this kind. Some of the cases as reported are exceedingly obscure, and none of them are recent. My own impression is that there is nothing here to justify us in departing to any extent from the general rule. But your Lordship thinks that interest on the cost of the commission may be allowed, and as your Lordship so thinks—and there seems to be precedent for such a course—I am not prepared to differ in regard to that.

LORD SALVESEN—I go further than either of your Lordships. If the matter had been left in my hands I should have allowed interest on the whole sum that was disbursed by way of outlays, treating the outlays like outlays in a law-agent's account, upon which, as was decided in *Blair's* case, the law-agent is entitled to charge interest against his client. I think it has been settled by cases going back further than a hundred years that in exceptional cases interest on outlays will be held as part of the expenses of the process. We have made a general rule of practice that in ordinary circumstances

interest will not be allowed The reason is, that according to the despatch which is generally given in this Court, interest may be regarded as comparatively negligible, and therefore not a matter with which it is necessary for us to deal. But here we have the exceptional circumstance of a great war occurring which has suspended the right of this creditor to recover his debt for a period of seven years, and the result of your Lordships' judgment is that practically the bulk of the sum at stake will be swallowed up by extrajudicial expenses. I think if there is one thing worse than another, it is that a man who has constituted an undoubted claim in this Court should at the end of the day find that while he nominally gets the expenses to which he has been put in constituting that claim, there is excluded from those expenses so much that he would have been better not to have sought to constitute his claim at all in the law courts, or, in other words, to have submitted to injustice, because the cost of obtaining justice was so excessive that he would have been better to lie down under injustice. I cannot imagine anything worse than that the administration of justice in Scotland should be interfered with by such a state of matters. In England the matter is avoided because they have a different rule. We give facilities for appealing from a Lord Ordinary or a Sheriff, for we do not exact security for payment of costs as a condition of appeal. In England the litigant gets his expenses paid from the date of the judgment although if he is ultimately found to be wrong he has to repay these with the interest that has accrued. In our different practice I think it is unfortunate that we should not follow what I think is an established rule, to which expression was given by Lord Pitmilly in the case of *M'Dowall*, of awarding as part of the expenses interest on necessary outlays which the client, as in a question with his agent, has to bear. The principle that is invoked is that the loss must fall where it lights. But that principle has no application, for there is no loss. On the contrary, the unsuccessful litigant has had for several years the use of the money now in question, for he has not until now been bound to part with it. I think it is quite against common justice that a litigant who has been found to be wrong should benefit from extraneous circumstances such as a great war, and from the delay which has necessarily occurred in dealing with his case. Accordingly I should have been prepared to sustain the claim to its full extent. I am not moved by the consideration founded on by Lord Cunninghame, because we all know that the agent—certainly under the old practice—received a very substantial commission upon printing accounts, which was held to compensate him for any interest there might be upon the actual disbursement which he made.

LORD ORMIDALE—The judgment which your Lordship proposes we should pronounce is to allow interest upon the outlays connected with the commission. I am not prepared to dissent. But I concur with some difficulty, because I am unable to see that the cases which have been cited by Mr Sandeman in support of his motion disclose any principle whatever. They were each and every one of them decided in the light of the circumstances of the cases, which are referred to as "very special." What these "very special" circumstances were does not very clearly appear from the report of the cases. The special circumstance in this case upon which Mr Sandeman founded was the delay that followed between the presenting of the reclaiming note and its final disposal. That delay has been brought about by a very extraordinary cause which the reclaimer could neither anticipate nor prevent, but even applying the principle referred to by Lord Pitmilly—*M'Dowall* v. *M'Dowall*, 1. S. 200—I at first felt that the delay here was not so extraordinary as to warrant the Court departing from its well-known practice of refusing to allow interest upon the expenses prior to decree. I think the principle referred to by Lord Pitmilly is itself somewhat arbitrary, being dependent upon the elapse of a considerable number of years. Here my inclination would have been to hold that a sufficient number of years had not elapsed to warrant us in holding that interest on outlays had become part of the expenses of the process. But as the judgment is to be limited to interest on the outlays connected with the commission I am not prepared to dissent.

The Court pronounced this interlocutor—

"Find the parties, the Craig Line Steamship Company, Limited, and liquidator entitled to expenses against the parties the N.B. Storage and Transit Company and others, the reclaimers, since said 8th April 1913: Find them further entitled to interest on the outlays made in connection with the commission to Galatz at the rate of five per centum per annum, the same to run as from said 8th April 1913 to this date: Remit the account when lodged to the Auditor to tax and to report, with instructions to him to allow a charge for interest on said outlays as above mentioned."

Counsel for Reclaimers—Aitken, K.C.—Jamieson. Agents — Wallace & Pennell, S.S.C.

Counsel for Respondents — Sandeman, K.C.—J. G. Jameson. Agents—Boyd, Jameson, & Young, W.S.