the deed cannot be determined by a reference to clauses of that kind. We must look to the provisions themselves—we must look to the whole tenor and purpose of the deed, and to the arrangement that is embodied in the leading clauses, and more particularly in that clause which it is our duty to construe.

Now, the result of the examination of the deed, to which I have listened with pleasure from both sides of the bar, has been to satisfy me that it is in reality and in substance a deed of contract between two spouses, not intended to affect and not purporting to affect the interests of third parties or to constitute any rights in favour of third parties, which might probably have been held to be testamentary in their nature. The deed comes in lieu of a previous contract between the parties, executed before marriage for the purpose of settling their rights and interests in each other's property, and in particular settling the interests which they were to take in the property of each other after the death of the first deceasor.

It has been suggested that the language in which Mrs Buchanan gives, grants, and dispones to her husband is such as might be expected in a testamentary deed. I do not doubt it. It is also language which might be naturally expected in what I venture to call a deed *inter vivos* or *mortis causa* in contradistinction to a testamentary deed. But this is not only a deed *inter vivos* with that view—it is a deed of contract. The parties bind each other, and they each make a conveyance in implement of these obligations. It was suggested that the clause of conveyance might be read thus, as giving an immediate right to Mr Buchanan to all the property, heritable and moveable, of which his wife then stood possessed, with a right to subsequent *acquirenda* of his spouse not exigible until the date of her death. There is some plausibility in that reading; but it is a little difficult to hold that it is the right construction upon comparing it with the terms in which the lady conveys all right and title to estate vested in her at the time of her death. But whichever way you read it, whether the property is to pass at her death or before her death, part of it at least is not to pass until that time; and in that view the appointment of Mr Buchanan to be her executor and universal legatory might give him a useful ancillary title for the purpose of enabling him to get in the estate which was conveyed to him.

But I do not desire to rest my decision in this case upon any of these peculiarities. I think the appellants are entitled to judgment on this broad ground, that the deed is a deed of contract—that the right which each party gets to the estate of the other is the right of a creditor and not of a legatee—that each has a right of credit which vests at once. In that view of the deed, I do not think it admits of dispute, that according to the law of Scotland, "A. and his heirs and assigns" simply means a present right of credit in A., no matter how long the enforcement of it may be delayed.

LORDS BRAMWELL and HERSCHELL were entirely of the same opinion.

Ordered, that the interlocutor of the 18th of March 1887, in so far as the same is appealed against, be reversed; and found that the second parties (the appellants), as the testamentary trustees and assignees of Mr Buchanan, are entitled to the fund in dispute; and further ordered, that the parties at the bar by their counsel consenting thereto, the costs of the appellants and respondents, in respect of this appeal, be paid out of the said fund; cause remitted to the Court of Session in Scotland to do therein as shall be just and consistent with this finding and judgment.

Counsel for the Appellants—The Lord Advocate, Q.C.—Finlay, Q.C.—A. Mitchell. Agents—Loch & Goodhart for R. R. Simpson & Lawson, W.S.

Counsel for the Respondents—Sir C. Pearson—J. Wallace. Agents—Wilkins, Blyth, & Dutton for John Rhind, S.S.C.

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*Tuesday, March 25.**

(Before Lords Herschell, Watson, and Morris.)

SUTTON & COMPANY *v.* CICERI & COMPANY.

Contract—Implement—Carrier—Goods Injured—Statuary, Meaning of—Onus.

Ciceri & Company, Edinburgh, informed Sutton & Company, London, that they had at Venice and Leghorn a large quantity of goods for shipment "consisting of wooden figures, old cases, marble and terra-cotta busts, marble columns, wood frames," &c., and requested a quotation of rates for such goods from both these ports to Glasgow by steamer. Sutton & Company, who contracted with steamship and railway companies for the carriage of goods, and charged through rates to the owners, in reply quoted "for alabaster goods, furniture, &c., but not for goods described as statuary, the rate of 1s. per cubic foot." Ciceri & Company wrote, "you seem to make a difference between marble busts and columns and alabaster. Please let us know about this." Sutton & Company stated that the quoted rates only applied to freight and did not cover insurance risks, but did not reply to the question as to the supposed difference between the classes of goods. On these terms various large terra-cotta figures, and small figures of men and animals were carried for Ciceri & Company through the agency of Sutton & Company from Leghorn to Edinburgh. The goods arrived injured, and Ciceri & Company sued Sutton & Company for damages

*Decided March 20, 1889—Reported June 21, 1889, 16 R. 814.

in respect of failure to implement their contract of carriage, The defenders maintained (1) that they had acted not as carriers for the pursuers but as their agents in contracting with the actual carriers of the goods, and that their contract of agency had been fully implemented; (2) that the damaged goods were "statuary," and thus excepted from the contract.

Held (*affirming* the judgment of the Second Division) (1) that the defenders were liable as carriers for the injury suffered by the goods, and (2) that the terra-cotta busts not being "statuary" were not excepted from the contract.

Opinion (*per* Lord Watson) that general evidence ought not to be led as to the meaning of words of contract without a distinct averment on record as to the particular words to which the proof is to be directed, and the precise technical or trade meaning which the person making the averment desires to attribute to them.

On 26th October 1887 Ciceri & Company, carvers and gilders, Edinburgh, wrote to Sutton & Company, general carriers and forwarding agents, London—"We have a large quantity of goods for shipment, both at Venice and Leghorn, consisting of wooden figures, old cases, marble and terra-cotta busts, marble columns, wood frames, &c. Will you kindly let us know your rate for such goods from both the above ports to Glasgow by steamer, and the name of your agents at both places?"

On 12th November (after some intermediate correspondence) Sutton & Company replied—"Confirming our letter of the 5th inst., we have the pleasure to quote you for alabaster goods, furniture, &c., but not for goods described as statuary, the rate of 1s. per cubic foot *plus* the usual primage for freight Leghorn to Edinburgh *via* Glasgow. . . . These rates are for freights only." . . .

On the 18th Ciceri & Company replied—"You quote 1s. per cubic foot, but if steamer's option should be by weight, what then? You seem to make a difference between marble busts and columns and alabaster, while our other quotation is for both cubic and ton weight, 1000 kils., for marble busts and columns. Please let us know about this and also what your usual primage is." . . .

On the 21st Sutton & Company replied—". . . If the goods would yield the steamship company more per 20 cwt. than per 40 cubic feet, then the charge will be 30s. per ton weight instead of per ton measurement." . . .

On the 25th Ciceri & Company replied—"Enclosed please find three orders signed on the understanding that the same are as per quotation last sent or ship's option as the case may be."

Ciceri & Company's goods were accordingly dispatched by the steamer "Zena" from Leghorn to Liverpool on a through bill of lading to Glasgow and thence per rail to Edinburgh. They consisted in all of twenty-three cases, eight of terra-cotta goods from Pisa and fifteen of alabaster goods from Florence. On their arrival in Edinburgh the terra-cotta goods were found to be more or less injured.

Ciceri & Company accordingly raised an action against Sutton & Company concluding for £54, 3s. 4d. as the value of the injured goods.

Sutton & Company defended on the grounds *a* (which need not be further considered here), that the injury was due to the improper packing of the goods; *b*, that the defenders not being common carriers were not liable for the faults of those who actually carried the goods, but only for their own fault, which they denied; *c*, that the injured goods were statuary, and so expressly excluded from the contract.

A proof was allowed. From the evidence it appears that Sutton & Company, although they described themselves as "general carriers" as well as "forwarding agents," did not themselves carry goods. They had agencies in most of the business centres of the world, through whom they contracted for the carriage of goods offered to them, arranging with railway and steamship companies and other carriers, and quoting through rates. Their agents at Leghorn were Alfred Lemon & Company, through whom the contracts for the carriage of Ciceri & Company's goods were made.

On 28th October 1887 Sutton & Company wrote to Lemon & Company, enclosing Ciceri & Company's letter of the 26th October, and asking Lemon & Company to quote a rate.

Lemon & Company replied on 2d November—"We beg to inform you that the freights from this port to Liverpool and Glasgow for statuary, alabaster goods, furniture, and similar are as follows, viz.:—

To Glasgow by direct steamer (monthly)—

Statuary, 45s. and 15 per cent. } per ton
Alabaster, furniture, &c., 30s. and 15 per cent. } or 40 cft.

To Glasgow *via* Liverpool (transhipment)—

Statuary, alabaster, furniture, &c., 40s. and 15 per cent. } per ton or 40 cft.

To Liverpool—

Statuary, alabaster, furniture, &c.. 30s. and 15 per cent. } per ton or 40 cft."

Sutton & Company replied on 5th November—"Will you please look into the matter and see if you have not made a mistake as your rates should be lower rather than higher than those from Venice. You had better quote actual cost price as we understand the quantity is considerable, and Ciceri & Company are exactly the people to get the lowest possible price."

The goods were described in the bill of lading as "twenty-three packages alabaster works, terra-cotta, frames," &c., and in the waybill from Lemon & Company the eight cases were described as containing "terra-cotta." The receipt granted by Lemon & Company to Gabbanini & Ghiloni, the makers of the goods, was in these terms—"We the undersigned, received from Messrs Gabbanini & Ghiloni of Pisa, No. 8 (eight) cases of terra-cotta bronzes consigned to be forwarded to Messrs Ciceri & Company of

Edinburgh," and on the same day Lemon & Company sent this post-card to Ciceri & Company—"We beg to advise you that to-day Messrs Gabbanini & Ghiloni of Pisa have consigned to us eight cases terra-cotta which we will ship to you by first steamer."

The goods were moulded figures in terra-cotta bronzed, and were in detail—four large figures, "Summer," "Winter," "A Lady," and "A Man Drinking Wine" (of the value of £7, 10s. each); four bas reliefs, "The Poulterer," "Hurrah for the Cook," "The Professor's Spectacles," and "The Dairy"; two groups, "After Dinner," and "In the Wine Cellar"; two small figures, "A figure petting a dog" and "A figure petting a cat." The parole proof consisted mainly of the evidence of artists and of traders directed to the question whether such goods were or were not statuary. The evidence on this point was very conflicting, its general import sufficiently appears from the opinions of the Judges.

The excerpts quoted below from the publication issued by the railway clearing-house entitled "General Classification of Goods by Merchandise Trains or Railways, January 1888," and having written thereon "Foreign Department," was also put in evidence.

	Class.	Page.
"Alabaster,	4	5
Alabaster ornaments and figures, packed,	5	5
Bronze figures, packed,	5	13
Casts terra-cotta,	2	16
Casts and figures, plaster (except plaster casts, common, for ornamenting ceilings or stucco) packed,	5	16
China in boxes or cases,	4	17
Earthenware in boxes or cases, import or export, foreign, direct from or to ship,	2	24
Figures, bronze, packed,	5	25
Figures, terra-cotta, packed,	5	25
Figures and casts, plaster or stucco,	5	25
Figures and ornaments, alabaster, packed,	5	25
Frames, picture,	5	28
Furniture, packed in cases,	5	28
Marble, in cases,	3	45
Ornaments and figures, alabaster, packed,	5	50
Porcelain (as china),		55
Statuary (including terra-cotta statuary) as per agreement only.		
Terra-cotta, casts,	2	70
Figures, packed,	5	70
Statuary, as per agreement only."		

On 6th November 1888 the Lord Ordinary (TRAYNER) assoilzied the defenders.

"*Opinion.*—In October 1887 the pursuers wrote to the defenders informing them that they had a large quantity of goods for shipment both at Venice and Leghorn, 'consisting of wooden figures, old cases, marble and terra-cotta busts, marble columns, wood frames,' &c., and adding, 'Will you kindly let us know your rate for such goods from both the above ports to Glasgow by steamer?' The defenders replied on 12th November following—'We have the pleasure to quote you for alabaster goods, furniture, &c., but not for goods described as statuary, the rate of 1s. per cubic foot,' &c. Some correspondence followed, which I do not regard as very material; the contract between the parties as to the carriage of the goods is contained in the letters I have quoted. Following upon those letters, the pursuers granted orders on the sellers and holders of the goods to deliver the same to the defenders for shipment. Among other things, eight cases of goods were delivered by a firm in Pisa to the defenders' agents in Leghorn, Messrs Alfred Lemon & Co., who (under orders by or arrangement with the defenders) shipped these cases on board a steamer bound for Liverpool, where they were to be re-shipped to Glasgow. When these cases were delivered to the pursuers in Edinburgh it was found that the contents of several of them had been so seriously broken and damaged as to be practically worthless. For the loss and damage sustained by the pursuers through the breakage of their said goods they now seek decree, and they do so on the ground that the damage arose through the defenders' failure duly to implement the contract of carriage into which they had entered with the pursuers. The defenders resist the pursuers' claim on three grounds—(1) That the damage arose, or was materially contributed to, by the defective and improper manner in which the goods had been packed, which was not discoverable from an examination of the exterior of the cases; (2) that the defenders, not being common carriers, are not liable for the faults of those who actually carried the goods, but only for *culpa* on their own part, which has not been proved; and (3) that the damaged goods were statuary, a class of goods which the defenders never contracted to carry, but on the contrary, expressly excluded from their contract.

"My opinion is against the defenders on the first and second of these grounds of defence. I am prepared to hold it proved that the goods in question were packed in the ordinary way, and quite sufficiently packed for safe transit to this country if treated by the carrier with ordinary and reasonable care. Further, I am of opinion that the defenders (dealing with them not as common carriers, but as special carriers) are responsible for the fault of those who, on their employment, actually carried the goods, as being their agents. But I do not think it necessary to do more than merely state these views, because I am of opinion that the defenders have made good the third ground of defence I have referred to, and that this affords a sufficient answer to the pursuers' claim.

"The defenders did not contract to carry statuary for the pursuers—it was, indeed, expressly excluded from the contract.

"Were the goods which were damaged 'statuary?' Conflicting opinions upon this matter were expressed by the witnesses adduced by the parties respectively, but in my opinion the evidence in support of the defenders' view decidedly preponderates. The chief reason assigned by the pursuers' witnesses for their opinion that the goods

in question are not statuary is that the goods were cast or moulded, and not sculptured. That appears to me to be an inadequate reason or ground for their opinion. A plaster cast or a metal moulding may be, and is constantly, classed in art exhibitions as statuary, and the witness for the pursuers best able probably to give an opinion on this subject (Mr Hamilton) admits that such a classification is right. I find (in the best dictionaries I know) that statuary is defined as including figures which have been cast or moulded as well as sculptured. In addition to this, there is evidence to show that the goods in question are what railway and other carriers regard as 'statuary,' which they only carry on special terms. The pursuers, on the other hand, have not attempted to show that they ever got similar goods carried for them on ordinary terms as ordinary case goods, although they must frequently have had importations of the same kind of goods as those in question.

"The defenders not having contracted to carry statuary, it appears to me that they are not liable for the value of the statuary which was damaged."

The pursuers reclaimed, and argued—Statuary was sculptured work. It might have a wider signification, which would include the goods in question, but this would also include all terra-cotta work except bricks and chimney-cans, and it was out of the question to suppose that the pursuers, whose trade was known to the defenders, were contracting for the carriage of bricks and chimney-cans from Italy. Neither in an artistic nor in a trade sense were the goods in question statuary. At all events, the correspondence made it perfectly plain that the defenders were fully informed as to the class of goods which the pursuers wished to have carried. The railway clearing-house list did not treat terra-cotta work as being necessarily statuary, though it might be. The defenders were common carriers; at anyrate, they had contracted with the pursuers to carry the goods in question, and were liable as such in a question with the pursuers for loss *in transitu*.

Argued for the defenders—They were not common carriers, or carriers of any sort. Their contract with the pursuers was not that of carriage but of agency. They were the agents of the pursuers in contracting for the carriage of the goods by the various steamship and railway companies. They had committed no breach of the contract of agency; that at least was not the ground of action; they therefore were not liable. The goods in question were statuary, and so exempted from the contract. That was the fair result of the evidence.

At advising—

LORD JUSTICE-CLERK—The pursuers in this case, Messrs Ciceri, sue a firm of the name of Sutton & Company in respect of injury done to goods in transit from the Continent to Edinburgh. Messrs Sutton & Company undertook as agents to have the goods delivered to their agents abroad transmitted to this country at a certain rate, and they took delivery of the goods without objection, as being in good condition, at a particular place abroad to which they had been carted. After considering the evidence, I think there is no ground for holding that any objection could be made on their part with success on the allegation that the goods were not delivered to them properly packed. They seem to have been packed in the ordinary way suitable for such goods. On the arrival of the goods in Edinburgh, and on their being put down in front of the pursuers' premises, a certain number of cases were found to have received violent injury upon the outside. It is now disputed by the witnesses from the railway company, which had them last in their custody, that they were damaged while in their hands; but I think the evidence is conclusive upon that matter. Both the pursuer and his manager say that when they were delivered one of them was badly injured at the corner, and that some of them had the end smashed in. I think it is not in the mouth of the railway company's servants to say that this was not the case, because we find that their own inspector reported to his superiors—"I find the cases in which the figures were packed all broken at ends, having evidently been roughly handled." Now he says himself in his evidence that that was the state of the boxes he saw himself at the door of Mr Ciceri's shop. He desired to alter his report upon that matter afterwards, because he thought he had been misinformed, but it is brought out conclusively in the evidence that he himself saw them in that state, and he states, in answer to a question put to him, that the report which he gave in was a true report. What the defenders endeavoured to make out at the proof was that he had been merely told by the pursuer that they were broken; but he himself admits in his evidence that he saw them broken there. It is put against this that the carters say they were not broken, but we know what evidence of that kind is worth. Carters, by their own account of themselves, always handle cases carefully. Whether they actually looked to see if the damage took place before they were delivered or not, it is not remarkable that they should deny having noticed any damage outside to the boxes. But it is sworn conclusively that they were injured, and it is unlikely that the ends of five or six boxes should have been smashed at Mr Ciceri's door if they were in perfectly sound condition when they arrived there. And as regards what was inside the cases, as I said before, I think it is conclusively proved that they were packed in the proper and ordinary manner. Well, the cases are opened, and Mr Ciceri very properly sends for Mr Bell, the representative of Messrs Sutton & Company in Edinburgh, in order that delivery may be taken of the goods when they are unpacked and taken out of their cases. When they are unpacked several lots of terra-cotta goods are found to be so seriously damaged that their value

is practically reduced to a mere fraction of what it was originally.

The next thing which we have to consider is, what is the contract between the parties; because, in ordinary circumstances, if a carrier smashes goods in transit which he had received properly packed, there can be no question whatever about the liability for the damage. And therefore we must now go back to see what was the footing upon which these cases were in the hands of Sutton & Company and those whom they employed between the time that they got them at Leghorn and the time they were opened at Mr Ciceri's door.

It appears that Mr Ciceri, who is described in one of the letters as just the person to get the lowest possible price, had been endeavouring to get a quotation from different persons who undertook carrying for the purpose of taking what was the lowest rate at which he could have his goods conveyed, and accordingly he asks for a quotation from the defenders. He asks for their quotation for wooden figures, old cases, marble and terra-cotta busts, marble columns, wood frames, &c., and the answer that he gets is—"Confirming our letter"—they had written previously to 12th November — "of 5th inst., we have the pleasure to quote you for alabaster goods, furniture, &c., but not for goods described as statuary, the rate of 1s. per cubic foot." Now Ciceri in reply to that writes—"You seem"—and whether he is right in his judgment of what they seem to be doing does not matter—"You seem to make a difference between marble busts and columns and alabaster." Now, taking the two letters together I think they can only be read as meaning—"You seem to make a difference between marble busts and marble columns on the one hand, and alabaster goods upon the other," "while our other quotation"—that is to say, the quotation from other people—"is for both cubic and ton weight, 1000 kils., for marble busts and columns. Please let us know about this." Now, it is quite plain from that letter that Ciceri wished to know what the difference was between goods described as marble busts and columns and other goods; and apparently in this view, that in addition to any question about safety of transit of such more expensive articles, marble being necessarily much heavier than either terra-cotta or alabaster, he wished to know what was to be their rate, because shippers of such goods have a right either to charge per ton measurement or per ton weight, according to the different classes of goods. Now, Sutton & Company in their reply made no allusion whatever to the difference. They answer only as regards the difference of rate in respect of goods which, whatever they consist of, the shipper is entitled to charge according to a tonnage weight charge instead of a tonnage measurement charge; for they say—"If the goods would yield the steamship company more per 20 cwt. than per 40 cubic feet, then the charge will be 30s. per ton weight instead of per ton measurement;" but they give no answer to the question which he had asked about the difference between marble busts and columns and alabaster in any other respect than that. Therefore I think, as regards all that had passed up to that time, there was no particularisation by either party to indicate clearly what fell under one rate or another as regards the quality of the goods as distinguished from the weight. Well, what happens is this—The goods are handed to the defenders distinctly described by the agent who delivers them to their representatives in Leghorn as eight cases of terra-cotta bronzes, and those eight cases of terra-cotta bronzes are received by the representatives of Sutton & Company in the knowledge of what they contain. Then the post-card which the defenders' representatives in Leghorn sent to the pursuers is to the same effect—"We beg to advise you that to-day Messrs Gabbanini & Ghiloni, of Pisa, have consigned to us eight cases terra-cotta." And the bill of lading lumps the whole which were sent to Ciceri together, there being some from Pisa, which were terra-cotta, and some from Florence, which were alabaster. They are lumped together in the bill of lading with this general description, "Twenty-three packages alabaster works, terra-cotta, frames, &c." Therefore, Messrs Sutton & Company are distinctly informed that there are terra-cotta bronzes in the cases coming from Pisa. Intimation is distinctly given that the eight cases contain terra-cotta, and the bill of lading makes no distinction of class whatever. And again in the way-bill from Leghorn the contents of these eight cases are stated as being terra-cotta.

Now, the next question is, under which class does terra-cotta fall, because if terra-cotta, as such, falls into the broad class which requires to be notified in a particular way, then of course that would have a material bearing upon the question. And in regard to that we have some very extraordinary evidence indeed. In the first place, of course, we have the evidence of skilled persons upon the question of what is statuary, and we are referred back to the first letter of Messrs Sutton & Company, in which in quoting their rate they say, "Not for goods described as statuary." Now, the word "described" rather suggests that it must be described definitely in some carrying list regulating such matters in the business of carrying, because there cannot be the slightest doubt—and the evidence in this case has proved most conclusively—that you can get the most divergent descriptions of statuary from different people, and can get the most divergent descriptions of statuary from the same person within five minutes in the course of his examination. One gentleman tells us that all work in terra-cotta is statuary practically, except chimney-pots and things of that kind. Another gentleman tells us that there is no statuary unless you have an entire figure life size. Some people say that statuary must always be sculptured with the hand. Other people maintain that although it is moulded it is still statuary. Some people say that statuary must be in the solid—a representative

of the figure in the solid—and others, that bas-reliefs are statuary. Others think that either a plaque or a medallion which represents anything human is statuary also. I think it was even suggested in the debate that representations of leaves or branches of trees might be statuary. Ultimately it was confined to this, that any representation in any material of man, woman, beast, or animal of any kind was statuary. I am unable to accept any of these statements, because if I accept any of them I necessarily come into conflict with others. If you give an abstract literal definition of statuary, it is a thing standing by itself. A column, a simple marble column, or a marble column for the purpose of carrying a bust, is in that sense a statue. But when we come to examine the matter a little more closely we find that in the trade of carrying there is a distinction drawn between statuary made of different materials; and I think if we get to an understanding of what is generally understood in the trade upon that matter, we get at a means of solving this difficult question. I do not think it is a question at all for artists like Mr M'Bride or Mr Hamilton. It is a question of what carriers class as statuary as distinguished from other goods which they will carry at ordinary rates, and not at a special rate.

Now, in looking at this evidence, I think the most practical thing I can go to for the purpose of testing what is the truth in this case, is the best publication I can find upon the subject, issued by the largest carrying establishment I suppose in the world; it is not indeed a carrying establishment in itself, but an establishment which issues a publication for the general guidance of the vast numbers of carriers with whom it has to do—the railway clearing-house in London. Now the railway clearing-house publication—upon which, be it observed, the defenders themselves found—I think gives us a practical solution of this matter. It first gives a number of articles and classes of material for which it gives certain specified and fixed rates, and then, after having given all these materials and classes of articles at certain fixed rates, it states this —"Statuary (including terra-cotta statuary) as per agreement only." I think it is perfectly plain that "statuary" there does not mean every article that is made of the material of which statues are made. It would be a ridiculous interpretation of "statuary" to say that every manufactured article made of marble was statuary. In the same way, I am quite clear that it would be a ridiculous interpretation of the word "terra-cotta statuary" to hold that it meant every article that is made of terra-cotta. That cannot be the meaning of it, even if there were nothing else than that. The word "statuary" must have some meaning attached to it to distinguish a material converted into statuary from other articles made of the same material. It is perfectly plain, I think, that "statuary (including terra-cotta statuary) as per agreement only" applies to some special work, either in marble or in terra-cotta, or in any other material, out of which, according to certain conditions, statuary can be made. And therefore we must now look at the rest of the list to see whether it gives us any aid. What I gather from the rest of the list is this, that ordinary figures in terra-cotta are not statuary. I find that "bronze figures packed" are classified in practically the same class as "terra-cotta figures packed," "figures and casts, plaster or stucco," and "figures and ornaments in alabaster packed," and that "casts and figures, plaster (except plaster casts)," are in the same class, and that "alabaster ornaments and figures packed" are in the same class—the same classification as regards carriage price. Now, what are figures in terra-cotta? According to the defenders' contention through their witnesses of skill, figures in terra-cotta must mean earthenware pots and chimney-pots, and things of that kind. Surely upon the face of it this description would never apply. Whatever may be the meaning of "statuary," the meaning of the word "figure" is well understood. A "figure" necessarily appplies to a representation of some living creature or creature that has had life. It may represent dead figures, human or animal, but still it represents a creature which had animal life when alive. Now, where am I to draw the line between terra-cotta statuary and terra-cotta figures? The natural line to draw is that terra-cotta statuary, like marble statuary, is statuary upon which the hand of the skilled workman or artist has been put to produce the kind of figure and the artistic effect which is desired; an original production as distinguished from a mere moulded copy. Such are to be conveyed at a higher rate than others. And here it is to be observed that the case of statuary is a very different case from the case of pictures as regards reproduction by copies. It is rather curious that in the bill of lading of the "Zena," shippers are not allowed to make a claim for greater value than £50 per package—"paintings, pictures, or statuary." In the case of pictures, if you wish to have a copy of a picture you cannot take the picture and spread it over another piece of canvas, and so make a copy. You are obliged to have another artist's hand to make a copy, and therefore a copy of a picture may have a very high value as compared with a copy of a statue, for a cast copy of a statue is a mere mechanical production. Nobody doubts that these terra-cotta figures sent to Mr Ciceri, and which arrived broken, were all of them mere copies of the original work of an artist, produced by the mechanical means of moulding only. They were not in themselves works of art, and the only claim they had to represent art was that they bore the same relation to a work of art as a photograph does to a picture. I think the reasonable interpretation of the clearing-house publication, upon which the defenders themselves found, is that "statuary, including terra-cotta statuary," means real works of art. A marble statue that can only be made by another hand is a work of art, although it be a replica only, because it requires the finishing touch of

an artist's hand to produce the artistic effect which cannot be produced in marble without an artistic hand being applied. Of course, if a statue cut in marble is sent by an agent or carrier, and that statue becomes damaged, it is a far greater loss, even though it be only a copy of an original, than if it were merely a plaster cast. It is a greater loss, both in the material of which the statue is made, and also in the artistic finish which is given by the chisel of the artist. Now, I am unable to see what terra-cotta articles of the nature of figures could be intended in class five in that publication of the railway clearing-house if these which were sent to the pursuers are not. The tables making an express distinction between "terra-cotta statuary" and "terra-cotta figures," I am unable to see any ground for holding that the articles to which this case relates, being as they were articles of an inferior kind, can be held to be included in the former definition rather than in the latter.

The conclusion I have come to on the whole matter is this—These articles are simply terra-cotta bronzes and terra-cotta figures, as described in the railway clearing-house list to be carried at the lower rates; and the pursuers having had their goods injured in transit, the carriers are liable for the loss. I am therefore for altering the interlocutor of the Lord Ordinary, and decerning in favour of the pursuers.

LORD YOUNG—I arrive at the same conclusion. The question is upon a contract of carriage—as to the liability of the carriers for damage done to goods in transit. It is pointedly put before us in the record, and we had a good deal of argument upon the subject, that the defenders are not common carriers; that they are not owners of steamships or other means of conveyance, and only undertake to act as agents for those who apply to them to make contracts as agents for behoof of their customers as principals, not common carriers for the carriage of goods. I cannot accept that view of the case. I think it is of no interest to inquire whether the word "common" is applicable to the defenders or not. They are certainly not common carriers with reference to this incident, that they shall be compelled to take any goods that are offered to them if they have room in their vehicles. They have no vehicles, and therefore that incident does not apply to them. It is probably practically the most uninteresting of all incidents touching the common carrier, for I suppose incidents are rare of carriers with room in their vehicles refusing to carry goods at the ordinary rates. The incident, however—of no practical importance—is not applicable to the defenders. Whether the edict *nautæ, caupones, stabularii* is applicable or not, I think is equally uninteresting. They are carriers, whether common carriers or not, and I shall give them the benefit, if they think it any, of saying that they are not common carriers but only carriers. They design themselves "general carriers," which I suppose means that they are open to contract with the public for the carriage of goods, not between specified places only, but generally between all places between which goods are carried, or the convenience of the public requires that goods should be carried. They enter into contracts for the carriage of goods, not performing these services with their own vehicles, steamships, or horses, but by others who have vehicles and motive power, and who render their services to them upon terms agreed on. They contract for the carriage of goods, and make their own arrangements for fulfilling their undertaking by that contract.

Now, when anyone undertakes by contract to carry goods between two places, he is bound, as a common incident of the contract, if there be no stipulation to the contrary—for parties may lawfully bargain as they please—to carry them safely, and if he receives them in good order and condition, to deliver them in good order and condition at the place that he has contracted to carry them to, and if he fails in that he is liable under his contract for the consequences. If a man who has never carried goods before, or contracted to carry goods before, contracts with me to carry my goods from this to London or anywhere else, he receiving them in good order and condition, he is bound by that contract to deliver them at the place of destination in the like good order and condition, unless he has guarded himself against that by a special contract.

Now, I think it is proved that there was a contract between the pursuers and the defenders to carry certain goods from Italy (to be exported at Leghorn) to Edinburgh. I shall attend to the question raised immediately whether that contract excluded all or any of the goods which were damaged in transit. The defenders knew very well of the kind of goods which the pursuers imported from Italy. We find that before making the contract with them the defenders made inquiries as to what the carriage of such goods would cost themselves, for the profit of their business is just the charge which they make to their customers for carrying their goods beyond what it will cost them to have the goods carried. That is their profit on their business. And it appears from the documents before us that they made inquiry as to what it would cost them to carry just such goods as the pursuers here import from Italy. By no means exhausting the evidence in the matter, you will find that Lemon & Company write to them, in answer to their inquiries, on 2nd November, just before their final answer to the pursuers as to their rates, sending their terms for statuary, alabaster, furniture, &c., and then, in asking a question to see whether the rates could not be reduced, the defenders say—"Will you please look into the matter and see if you have not made a mistake, as your rates should be lower rather than higher than those from Venice. You had better quote actual cost price, as we understand the quantity is considerable"—that is, of such goods as the pursuers are going to import, "and Ciceri & Company are exactly the people to get the

lowest possible price"—that is to say, "if your terms are not the lowest, Ciceri & Company are exactly the people to find out the lowest and to go elsewhere, and therefore you had better be as low as possible as the quantity is considerable," Well, having got that information, they write to the pursuer on the 12th November—"We have the pleasure to quote you for alabaster goods, furniture, &c., but not for goods described as statuary, the rate of 1s. per cubic foot, *plus*" so and so. "These rates are for freight only." Of course they were for freight only. There is no insurance. There is only the ordinary liability of carriers who undertake to carry goods without any express stipulation upon the subject. They would not be answerable for "perils of the sea, the act of God, and the Queen's enimies"—carriers undertaking to carry in safety are not responsible for these consequences. You must resort to insurance in order to cover such risks. The contract was completed upon that footing. They got an answer on the 25th November—"Enclosed please find three orders, signed on the understanding that the same are as per quotation last sent or at ship's option, as the case may be."

It is upon this that the goods are sent—twenty-three cases, including the ten particular articles which were damaged on the way, an inconsiderable part of the whole. Twenty-three cases were shipped, and these twenty-three cases were carried by the defenders, not in vehicles of their own or ships of their own, but they were carried by them under their contract and upon their responsibility. They made such contracts as they saw fit with other people to perform the actual conveyance, but they were the contractors to the pursuers to convey them. And they did carry these twenty-three cases, and charged for the carriage of them. They sent in their bill as the carriers. They charge £39, 14s. 8d. for carrying these goods, and then they say they never contracted to carry them at all. They were sent to them in good order and condition, properly packed, for I agree with the Lord Ordinary in that, and were carried by them, and the account for the carriage was sent in, and they say—"We were not carriers at all, we never contracted to carry them." I quite understand the contention that under the contract which was made the pursuers were not at liberty to include in the packages these particular goods which were damaged, these being described as statuary, and that in including these in any of the boxes they were guilty of deception, and did not merely render themselves liable to the higher charge, but acted in such a manner that if the goods were smashed they were the wrongdoers anent them, and have no claim against the party who carried them and who charged for carrying them. I quite understand that statuary goods properly described as statuary are carried at a higher rate, because they require in the carriage more care and attention and involve greater liability, there being more damage to pay if anything occurs for which the carrier is liable on the journey.

I have looked in vain in the evidence here for anything to suggest the notion that if these goods, with a full description of them such as we have in this record and in the evidence, had been delivered for carriage, the packages containing them would have been dealt with in any other way than they were. There is no case therefore, I think, of this kind—"We were misled into not taking the care which we should have done if we had known the nature of the goods, and you who so misled us shall not be entitled to compensation for the damage done." But I think upon the evidence before us, and I must of course judge upon that, that the pursuers were in perfect good faith in including these goods in the packages. They might quite reasonably, although it might be matter for controversy, take the view that they were not statuary. The pursuer, examined as a witness, swears that in his opinion they were not of that character, and he is in the trade. Of course that might have been contradicted conclusively by other evidence, but I think it is not. I think it is doing him no more than justice to say that he caused these goods to be delivered well packed and in good order to the defenders as carriers, in the belief that they were under the contract for carriage at the specified rate, and that they were not to be properly described as statuary. The Lord Ordinary says in his note what is quite true—"Conflicting opinions upon this matter were expressed by the witnesses adduced by the parties respectively." His Lordship is of opinion that the evidence that the goods are statuary preponderates. Now, let me take the view, which I think is perhaps the moderate and reasonable view to take here, that the question whether they are statuary, properly described as such or not, is a question upon which there might reasonably be a difference of opinion, upon which conflicting opinions may reasonably exist. Even in a question—which I am assuming this to be—where there may be an honest and reasonable conflict of opinion, there will be a preponderance one way or the other. The Lord Ordinary thinks that there is a preponderance in favour of the view that they are statuary. Your Lordship thinks that the preponderance is the other way. I incline to agree with your Lordship. Let us put it as a doubtful matter, what then is to be the result of that? No want of good faith on the part of the pursuer; no deception practised by him in order to get the goods carried at a cheaper rate than they would have been had he made a full disclosure; no suggestion that if any further information had been given the goods would have been treated in a different way in transit. The pursuer honestly believes that the goods are shipped under the contract to carry them in the like good order in which they were received in Italy, and to be delivered in the like good order in Edinburgh. What is the result of their being damaged? According to the defenders, it is that the carriage is to be paid for, but there is no responsibility in respect of them. I am not able to assent to that view. I think if

there had been no damage done to them, and the only question before us was whether the carriers were entitled to a higher rate in respect of these goods, I should have thought the question doubtful, but to contend that a carrier was under no liability for their safety at all is in my opinion not maintainable.

I shall not pursue this matter further. I think I have substantially exhausted all I desire to say. I may however notice the bill of lading which was granted by the master, I shall take it really of the defenders' ship, for the ship was the agency employed by them to perform their contract, and they are responsible for it. It is that these twenty-three cases were shipped in good order and condition, and they are described as "twenty-three packages alabaster works, terra-cotta, frames, &c." I think that is an extremely applicable description of the very goods we have here in question. If the evidence were all one way, I might be bound to proceed upon it; but it is so contrary to common understanding and language that with the conflict of evidence I cannot accept that which goes to the result that bas-reliefs are statuary, that stucco busts are statuary, that all terra-cotta goods are statuary, unless they are in the form of bricks or chimney-pots. It is extravagant to suggest that the pursuers here, whose trade was known to the defenders, were importing terra-cotta bricks and chimney-pots, and that that was what was meant by terra-cotta figures. They deal in this cheap sort of ornamentation, imitation bronze goods, which are imitation bronze busts, and figures of dogs and cats. A cast or moulding in terra-cotta is bronzed over to be so like bronze, that except by lifting it and feeling its weight, or breaking it and seeing the material, one would hardly know the difference. These are the kind of goods in which they deal—alabaster ornaments too, just such as fall within the description in this bill of lading given to the defenders' own agents at Leghorn, upon the shipment of the goods.

My opinion upon the whole is in conformity with that which your Lordship has delivered, that there is liability here for not delivering these goods in Edinburgh, which the defenders received well packed and in good order and condition, in the like good order and condition, but in the broken state which is described. Then there is the question of damages. We are told that the cost price of the goods was £38, the goods in their broken state being worth, the evidence varies, from £2 to £6. I should be disposed here—they are very common-place goods indeed, and can be got I suppose, in any quantity—to give no more in the way of damages than the cost price, that is, £38; the defenders, if they will have them, getting the broken goods, which are said to be worth from £2 to £6.

LORD LEE—The claim in this case is for the loss of certain goods which it is said the defenders undertook to carry at the rate of 1s. per cubic foot from Leghorn to Edinburgh, *via* Glasgow; and the first question is whether they ever undertook to carry any such goods at that rate; and the other question, and that which the Lord Ordinary has decided, is whether the goods in question were within the description of goods which they so undertook to carry. My opinion is that they were not within the description of goods which the defenders undertook to carry at 1s. per foot, and that they cannot be responsible for the loss of them, whether the pursuer was in good faith or not. I am rather disposed to assume that both parties may be in good faith; but one thing is perfectly clear to my mind, that unless these goods were within the description of goods which they contracted to receive in Leghorn and deliver in Glasgow, they cannot be responsible for the loss of them. Now the description of goods is contained in the evidence of Mr Ghiloni, Pisa, where the goods were furnished. They consisted of four large busts—"Summer," "Winter," a "Lady," a "Man drinking Wine," and various smaller articles, not very small, but certainly they were to a great extent large busts of the kinds described. Now let us see for a moment what was the position of the contract. I must say I have difficulty in seeing that the carriers were made aware that when this contract was accepted there was anything of the nature of statutory—anything that could be described as statutory among them. The letter asks prices to be quoted for "marble and terra cotta busts." Now, if good faith is to be gone into, we must see the defence of Sutton & Company. Their letters to Lemon & Company are conclusive to my mind as to their understanding as to what was included in their offer of 1s. per cubic foot, because although the letter of the pursuers specially mentions marble and terra cotta busts—when the defenders come to inquire of Lemon & Company their rates, they deal with both marble and terra cotta busts as statuary:—"Please see enclosed" (*i.e.*, Ciceri's letter of inquiry), "and let us know the rates;" and the answer is, "We beg to inform you that the freights from this port to Liverpool and Glasgow, for statuary, alabaster goods, furniture, and similar, are," &c.—the word "statuary" there being plainly used as including terra cotta busts. There are separate rates for statuary—45s. and 15 per cent. per ton or 40 cubic feet, and for alabaster, furniture, &c., 30s. and 15 per cent. per ton or 40 cubic feet; accordingly, when the defenders quote 1s. per cubic foot for alabaster goods, they add, "but not for goods described as statuary." Now I agree with the Lord Ordinary that under this contract Messrs Sutton & Company did not undertake for 1s. per cubic foot to carry anything that fell fairly within the description of statuary. The question is whether the goods which are contained in the description are statuary or not.

There is undoubtedly a conflict of evidence upon that matter. I agree that it is not to be settled as a question of skill by artists; but as artists' evidence has been

referred to, I think it may possibly be not improper to notice that the pursuers' artist, Mr Hamilton, expressly said that a plaster cast of a human figure is statuary as much as if it were cut out of marble. I rather agree with your Lordship that it is not a question for artists. The question is, what was the meaning of this contract as between a trader in such goods and a carrier? Here again I think the evidence is in favour of the Lord Ordinary's view. I think that even the clearing-house classification which your Lordship referred to is in favour of the Lord Ordinary's view. It distinctly mentions terra cotta as a subject of separate classification. It divides terra cotta into three heads—cast, figures, and statuary; and statuary has no class, it is carried only per special agreement. The evidence of the pursuer upon the subject, I must say, is not very distinct, because it varies. Anybody who will read it will see that it is not by any means distinct. But his witness Wands, who is a man who speaks in a carrier sense, says—"We would call them statuary." Palmer says—"I would consider such goods statuary, but not in a literal sense," but "in a general sense," which I take to mean in a carrier's sense, and not in a trader's sense. The witness Bell says—"I call the broken goods in question statuary." The artist M'Bride, if the defenders' artist is to be considered at all, says—"I would describe the goods as terra cotta statuary"—that is, as falling within class 3 of the terra cotta class of the railway clearing-house classification. There is a man Alfred James who also is interested in the carrying trade. He says, "I have seen the articles damaged, they are unquestionably statuary." I must say I think the weight of the evidence—and in dealing with the weight of the evidence I have in view the letters of the parties, the list of the goods, and the evidence both of the skilled witnesses of the pursuer and of the trading witnesses—is that these four life size terra cotta busts can only be regarded as terra cotta statuary within the meaning of this contract,

What is the result? It has been suggested that as the goods were carried they must be paid for. I cannot agree with that. They were put into the defenders' custody as ordinary case goods falling under the class payable at the rate of 1s. per cubic foot. They were not ordinary case goods. The result in my opinion is that no liability can attach to the carrier, for there was no contract. I think the carriers, in that view, if they were statuary ought to have had the opportunity of rejecting them, and I think it would have been prudent on the part of Ciceri & Company to give them an opportunity of rejecting them. I do not suggest that there is any want of good faith on the part of Ciceri & Company. I do not say they intended to cheat, but it was for them to show that they made a contract of carriage with regard to these articles under which they can recover if the articles were broken. I think they have failed in that, and therefore, although I admit that there is a good deal of conflict, I think the weight of the evidence is in support of the Lord Ordinary's view of the proof, and also of the question of fact—were the goods injured "statuary" or not? I state my opinion with great diffidence. Your Lordships have decided otherwise. I entirely agree with the Lord Ordinary and your Lordship upon the other question upon which he has given an opinion, that the damage is not proved to have arisen from defective packing. I agree that the defenders are liable as carriers for injury under a contract of carriage with regard to goods of the class payable at 1s. per cubic foot.

LORD RUTHERFURD CLARK was absent.

The Court pronounced this interlocutor:—

"Recal the said interlocutor: Ordain the defenders to make payment to the pursuers of the sum of £38, declaring, with reference to the proportion of freight claimed by the pursuers as effeiring to damaged goods, that said proportion forms a proper deduction from the defenders' account for carriage: Find the pursuers entitled to expenses; remit," &c.

Counsel for the Pursuers—Asher, Q.C.—Young. Agents—Gordon, Petrie, & Shand, S.S.C.

Counsel for the Defenders—R. V. Campbell—Ure. Agents—Wylie & Robertson, W.S.

The defenders appealed.

Counsel for the respondents were not called for.

At delivering judgment—

LORD HERSCHELL—[His Lordship having stated the facts as above, and that it was to be regretted their Lordships' time had been occupied upon a question involving so trifling a pecuniary amount raising no question of principle, continued:—]

My Lords, apart from the question of liability, with which I will deal presently, whether it be as common carriers or for negligence only, and dealing for the moment with the exception contained in the letter of the 12th of November, the burden clearly rests upon the appellants of showing on this part of the case that these goods which were damaged fall within the language of their letter as "goods described as statuary."

Upon the question whether they would be, or ought to be, or could be so described, there was a considerable amount of evidence given—evidence of three kinds; of dealers in such works, artistic evidence, and the evidence of those connected with the carriage of goods. I cannot think that any of that evidence is material except the evidence of the sense in which that word would be understood by those engaged in the carriage of goods. Indeed, it may be said, strictly speaking, that the proposition would need to be limited still further, and that it would only be the evidence of those engaged in the carriage of goods from

abroad to this country that would be material.

It seems to me that we have nothing to do with the artistic definition of "statuary." If we had, I think we should have very considerable difficulty in arriving at any exhaustive definition from the materials afforded from the evidence before us of what is comprised within the term "statuary," because the artists seem to use the word in different senses—that is to say, some as more extensive and some as less extensive.

It is quite clear that there are certain things which all mankind agree come within the description of "statuary." A marble bust chiselled by an artist, or a marble full-length figure, I do not suppose anybody could possibly doubt is within the term "statuary." The difficulty arises as to whether certain other things fall within it or not; and if the appellants have left it doubtful whether these particular goods come within that which is described or can properly be described as "statuary," they have failed to bring the case within the exception upon which they rely.

Now, certainly there is no common agreement amongst the artists which would show that these terra-cotta busts are articles described as "statuary;" nor can it be said that there is any such common agreement among the dealers in such goods. When I come to those who speak of the word in relation to the contract of carriage, I think that the same statement must be made. The first witness who was called for the appellants, who is a dealer in artistic goods and works, said that in a general sense he would consider these goods as statuary, but not in a literal sense—that is to say, that the word "statuary" is sometimes used in the one sense and sometimes in the other; sometimes it would be used as including such goods, and sometimes such goods would not be included within the use of it. But when he comes to deal with the carrier's sense of the word (and he is a person evidently in the habit of having such goods carried and dealing with them in the way of carriage), he says that "statuary in the literal sense"—that is, in the sense which does not include these goods—he "always understood to be charged at high rates by public carriers, but not statuary in the general sense"—that is to say, this is statuary in the general sense, but that general sense is not the sense in which "statuary" is used, according to his experience, by carriers when speaking of goods which they carry. Now that is the appellants' own witness. Therefore there is distinctly that piece of evidence, that in the carrying trade, the terms of which would be known to a person dealing in these works, there being two senses, within one of which these goods would come, and within the other of which they would not come, the word "statuary" is used in the sense within which they would not come.

Now, how does the matter stand as regards the other carrying evidence? It is said that statuary is specially dealt with by railway companies at higher rates of charge. Is this "statuary" within the railway sense? It appears to me very doubtful whether the word "statuary" alone is considered in railway carrying language as sufficient to cover these articles, because in the railway rates (Railway Clearing House Classification of Goods for January 1888, p. 66), which are put in and relied upon on behalf of the appellants, "statuary" is in terms stated to include terra-cotta statuary. That, to my mind, implies that "statuary" alone, without that definition which extends it to terra-cotta, would not be commonly understood as covering it. Therefore I own I am unable to find upon the evidence which has been adduced on behalf of the appellants that they have established that, in any sense in which that word can properly be understood as having been used in this contract, these articles are statuary within the meaning of it.

But when we come to look at the correspondence, it seems to me that it is very difficult for the appellants to contend that they are not bound by the interpretation given by the respondents to the language used and not repudiated by the appellants. The quotation having been "for alabaster goods, furniture, &c., but not for goods described as statuary," on the 18th November the respondents write—"You seem to make a difference between marble busts and columns and alabaster, while our other quotation is for both cubic and ton weight, 1000 kils., for marble busts and columns. Please let us know about this."

To that letter the answer is sent on the 21st of November—[*His Lordship read it as above*]. But no allusion is made to the question which is put in the letter of the 18th of November—"You seem to make a difference between marble busts and columns and alabaster, while our other quotation" includes both, as I understand, at the same rate.

Now, what was the meaning which naturally, as I should have thought, would have been attributed to it by the person receiving that letter? The contrast had been drawn in the letter of the 12th of November between "alabaster goods, furniture, &c.," and "goods described as statuary." It is only, so far as I can see, to that distinction that the letter of the 18th could refer where it said—"You seem to make a difference between marble busts and columns and alabaster;" and certainly I should have thought that would have conveyed to the mind of the person receiving the letter this information—"I, Ciceri, asked you for a quotation for marble busts and columns and terra-cotta busts" (because they were all specifically mentioned in the letter of the 26th of October)—"you have made a difference between marble busts and columns and alabaster—you have made that difference by differentiating from alabaster articles goods described as statuary. I understand you to mean by 'goods described as statuary' the marble busts and columns to which I have referred, but I do not understand you to mean by it the terra-cotta busts." That seems to me as much implied as if it had been expressed—

at all events that is the interpretation which ought reasonably to have been put upon the letter by the person receiving it. But no reference is made to this question, no answer is given to it, there is no repudiation of the distinction which, as it seems to me, the writer of it draws, and the point to which he addresses his attention, namely, that a distinction is made as amongst the articles which he has mentioned and specified between marble busts and columns and alabaster.

Under these circumstances, especially considering that "goods described as statuary" is a vague term, not capable as the result has proved, of any very nice definition, it is very difficult for the appellants now to take up the position that having received that letter, and having left unnoticed that sentence in it, they understood and have a right to treat the terra-cotta busts as being statuary, as much included in that expression as the marble busts, and as much distinguished by them from alabaster as marble busts. Therefore, my Lords, I have no hesitation in suggesting that your Lordships ought to affirm on this point the judgment of the Court below.

One other point is made; it is said that in the letter of the 21st of November the appellants point out that the rate quoted does not cover any insurance risks, but simply freight, and it is suggested that the appellants were therefore under none of the liabilities of common carriers—indeed, as far as I understand it, under no liability at all for anything which happened in the course of the transit, inasmuch as that was to be regarded as an insurance risk which they had not undertaken. It seems to me upon this contract, which contains no specific limitation of liability, and into which is not imported, as far as I can see, any previous contract, or the terms of any previous contract, or any such general course of dealing as to form part of the contract, impossible to contend that the liability of the appellants was so limited as has been urged before us, especially by Mr Campbell this morning. They seem to have taken upon themselves all the ordinary liability of a carrier, though no doubt they did not undertake the risks which would commonly fall within the description of "insurance risks." Where insurance risks are thus spoken of in contradistinction to freight, that expression cannot have the wide and extensive meaning which is contended for on the part of the appellants. Of course if it has the more limited meaning only, the contention is wholly immaterial to the point which your Lordships are considering.

On these grounds, I move your Lordships that the interlocutor appealed from be affirmed and the appeal dismissed with costs.

LORD WATSON—My Lords, I am of the same opinion. The present case appears to me to illustrate the impropriety of permitting general evidence to be led as to the meaning of words of contract without a distinct averment on record as to the particular words to which the proof is to be directed, and the precise technical or trade meaning which the person making the averment desires to attribute to them. The consequence of disregarding that rule is, that the bulk of the evidence in this case, whilst it might be of some use to a person about to compile a dictionary, is not of the slightest use in construing the contract of the parties. I speak with reference to that part of the evidence which consists of the testimony of Associates of the Royal Academy, professional sculptors, and so forth. I think there are some parts of it which have a bearing, namely, the evidence of those witnesses who are connected with the carrying trade either as carriers or as employers of those who carry. There is very little of that evidence relevant—the greater part of it consisting of individual opinion and not of testimony as to the understanding in the trade of the scope and meaning of the word "statuary," and the custom of the trade in carrying and paying for articles carried under that descriptive name. So far as relates to that part of the evidence, I entirely agree with the noble and learned Lord who has just spoken, that the appellants have failed to show that these articles, the value of which is now in controversy, are included in the word "statuary" as understood in the carrying trade.

Then upon the construction of the contract I also agree with his Lordship. The appellants' letter of the 12th of November 1887 is exceedingly vague in its terms—"not for goods described as statuary." No goods had been described as statuary; but it may have been, and I suppose it was, intended to convey the meaning—"Such goods as in the course of our trade and yours would be described on the present occasion as statuary." Upon two points the respondents ask information in their reply to that letter of the 12th of November. The first of these points is with regard to "steamer's option," and it is answered in their letter of the 21st by the appellants. The second point relates to "marble busts and columns and alabaster," and the respondents ask an explanation why a distinction is made between these two things as to the prices for carriage. That letter plainly suggests that the respondents understood the expression "goods described as statuary" as referring to the two articles mentioned in their letter of the 26th of October, "marble busts" and "marble columns," and to those only. But whilst an answer is given to the first point upon which information is required, no answer is given to the last. So stood the matter upon this correspondence when these terra-cotta bronzes were sent for carriage; and it humbly appears to me that a failure to give such an explanation in a mercantile correspondence must be assumed as equivalent to an admission that the person who asks the information is quite right in the assumption which he has made, and is entitled to act upon it; and I should be sorry that any such reticence on the part of the person to whom the inquiry is addressed should be otherwise construed.

There is only one other point in the case—and I must say there is very little in it—namely, that these appellants were not carrying as common carriers. It appears to me that, looking at the subject-matter of the contract, they must be held to have undertaken the duties and the obligations of common carriers, except in so far as they saved themselves by the exception of maritime risks.

I therefore concur with your Lordship that this appeal should be dismissed with costs.

LORD MORRIS—My Lords, I concur in the judgment which has been pronounced by the noble and learned Lords who have preceded me. The main question appears to be a very narrow one, namely, as to the liability of the appellants to pay for the damage sustained by the goods of the respondents. A preliminary, although it has been dealt with as a secondary defence, has been set up at the bar of your Lordships' House, which would go to the root of the action altogether, namely, that the appellants are not bound by the liabilities of a common carrier. I do not think that in the judgment which I am about to pronounce it is necessary to inquire into that question, because there is ample evidence to sustain their liability as carriers in consequence of negligence. There has been a finding by the Court of Session in Scotland, in which I entirely concur as a juror, that the goods were properly packed and placed in their custody, and that they arrived at Edinburgh in an improper state, smashed and broken, and apparently without any cause except the negligence of the appellants or their agents. Upon that ground, in my opinion there must be a clear liability upon them independently of the question which, as I have said, I think it is unnecessary to decide, as to whether they would not be also liable as common carriers, and, incidental to that liability, to have safely and securely carried the goods.

The main question appears to me to turn altogether upon four letters. The first letter is that of the 26th of October, from Ciceri & Co., in which they apprise Sutton & Co., and apprise them correctly, in detail, of the goods which they are going to send, namely, "wooden figures, old cases, marble and terra-cotta busts, marble columns and wood frames." In that letter Sutton & Co., therefore, had the goods properly described to them. They by their letter of the 12th of November mentioned that they quoted "for alabaster goods, furniture, &c., but not for goods described as statuary." In my opinion the word "described" there is of some signification. In carrying language, goods might be put under the description of "statuary" which in artistic language would not be so properly described. The words would appear to me to imply that there are a class of goods which would travel in carrying language under the name of "statuary," although possibly not coming within the ordinary or the artistic meaning of that word. They then give a rate and conclude. In reply to that, the letter of the 18th of November, which has been referred to already by the noble and learned Lords who have preceded me, states—"You seem to make a difference between marble busts and columns and alabaster, while our other quotation is for both cubic and ton weight, 1000 kils., for marble busts and columns." That evidently refers to some quotation which they have had from other carriers. In that letter, as it appears to me, they complain that while their other quotation would include marble busts and columns at the same price, Sutton & Co. are drawing some distinction between marble busts and columns and the other things which they were about to send. That appears to me to be the real point of that letter.

The reply given upon the 21st of November is merely a statement that the rates the appellants have given are very low, and that being quoted on the basis of the rates of the steamship companies, they do not cover insurance risks, but are simply for freight. They pass by entirely the distinction which Ciceri & Co. pointed to in their letter between marble busts and the other articles which they were about to send, excluding from that distinction the terra-cotta busts which were referred to by name in the letter of the 26th of October. That evidently to my mind leads to this conclusion, that Ciceri & Co. thought that Sutton & Co. might be raising some question about marble busts, and if damage took place to the marble busts there might possibly arise some other consideration. Upon that I say nothing; but they drop the terra-cotta busts altogether—Ciceri & Co. do not allude to terra-cotta busts, and merely distinguish between marble busts and alabaster. That is accepted, in my opinion, by Sutton & Co.; they accept Ciceri & Co.'s statement in that letter of the 18th of November by silence and by passing it over. It would be a most dangerous and unfair mode of dealing with Ciceri & Co. for the appellants to accept the goods which were properly described in Ciceri's letter of the 26th of October, and to which attention was again drawn by the reference to a distinction in their letter of the 18th of November, and then to have been guilty of negligence in the carriage of them.

Therefore I am of opinion that the judgment of the Court of Session should be affirmed.

Interlocutor appealed from affirmed, and the appeal dismissed with costs.

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