terlocutors complained of are well founded. This is an action at the instance of the advocator Robertson against two defenders, Douglas and Heiton, and concludes against them, conjunctly and severally, for £82, 4s. 10d. [*reads conclusions*]. In the condescendence in the Inferior Court the pursuer alleges that, there being some difficulty in his mind as to the solvency of Douglas, he applied to Heiton, and informed him that he would not supply lime except on his order and responsibility along with that of Douglas. That the defender, the said Andrew Heiton, then ordered the pursuer to supply to the said John Douglas whatever lime he might require for the erection of the said house, and stated that he would pay the pursuer for the same, and repay himself out of the money which the said John Douglas was to receive for performing the said mason-work, &c. The pursuer accordingly supplied to the said John Douglas the lime particularly specified in the account annexed to the summons. Then, farther, in the third article he alleges [*quotes*]. The pursuer, in these articles, alleges employment by Heiton, a promise by Heiton to pay, the postponement of the fulfilment of this promise, and—these being all denied—he renounced probation, and cast himself entirely on the letter of 8th December, and he proposes to extract from that a guarantee that Heiton will in all events see him paid his account. I can hardly conceive a party in a more unfortunate position for extracting such a guarantee from such a document. From the document itself, it is plain that Heiton's intention was merely to assure Robertson that, in the event of money payable to Douglas coming into his hands, he would deduct his account for lime. The document cannot be carried farther, and therefore the pursuer entirely fails. The claim of Robertson as against Douglas' other creditors may be a very delicate question, but we have nothing to do with that here.

The other judges concurred.

Agent for Advocator—J. Galletly, S.S.C.

Agents for Respondent—Henry & Shiress, S.S.C.

Thursday, June 18.

POTJER *v.* M'WILLIAM & GIBSON.

Ship—Demurrage—Bill of Lading—Proof. In an action by a shipmaster against consignees for demurrage—he alleging that he had received no information before sailing as to the names of the consignees, and that they had for several days failed to instruct him, on reaching the port of call in this country, where to proceed to for discharge—*held*, (1) on construction of the shipping documents, that there was no liability on the consignees except for payment of the freight; and, (2) on the proof, that it was more probable, on the whole evidence, that the pursuer had been told the names of the consignees.

The pursuer, master and owner of the vessel "Geertruida Jacoba," entered into a charter-party at Buenos Ayres with Mr Hall, a merchant there, the vessel to proceed to Parana and receive a cargo of bone ash and bones, and then to "proceed to Queenstown or Falmouth for orders, to discharge in one safe port in the United Kingdom (said orders to be given by return post after master's report of his arrival at port of call, or lay days to count), or so near thereto as she may get, and deliver the same agreeably to bills of lading," &c.; the charterers binding themselves to load the vessel and receive the same at the port of delivery. The cargo was loaded and bills of lading signed, bearing that the vessel was "bound for Queenstown or Falmouth for orders," and that a cargo had been shipped by Hall to be delivered in good condition at port of discharge "unto order or to his assigns, he or they paying freight." The bills of lading were transferred by indorsation to the defenders. The vessel proceeded to Queenstown. The master now claimed from the defenders damages on account of detention at Queenstown, the port of call, in consequence of the alleged fault of the defenders in not timeously forwarding instructions to him there as to the port to which he was to proceed for delivery of the cargo; alleging that when he left Parana he received no information as to the port to which his vessel was to proceed after reaching Queenstown or Falmouth; that he asked Mr Hall, who gave him no information; and that he was not aware of the names of the parties to whom the cargo was consigned. He stated that, after reaching Queenstown on the 19th July 1864, he advertised his arrival in the *Shipping Gazette* and other papers, but did not hear from the defenders until 2d August.

The defenders alleged that the pursuer was informed by Hall, before leaving Buenos Ayres on his homeward voyage, that the defenders were consignees, and received from him a letter addressed to the defenders for the purpose of its being sent them by the pursuer immediately on his arrival at Queenstown or Falmouth.

An issue was given in for trial by jury, but a proof was afterwards taken by commission, and thereafter the Lord Ordinary (ORMIDALE) found that the pursuer had failed to establish his case, and assoilzied the defenders.

The pursuer reclaimed.

BURNET, for him, argued that the bill of lading having informed the defenders that the vessel was to call at Queenstown for orders, the defenders ought to have had orders there awaiting the arrival of the vessel. The Bills of Lading Act, 18 & 19 Vict., c. 111, imposed this obligation on the defenders. Further, at common law it was the duty of the defenders, as consignees, to watch the arrival of the vessel at the port of call; 1 Bell's Com. pp. 577-8. The defender's statement, that the pursuer had been furnished with a letter to the consignees, was not proved, and the *onus probandi* lay on them.

THOMSON, for the defenders, replied. He argued that consignees were not liable for demurrage, unless it was so stipulated in the bill of lading; Smith on Mercantile Law, 7th ed., p. 324; *Wegener* v. *Smith*, 24 L. J. (C. B.) 25; *Chappell* v. *Comfort*, 10 C. B. (N. S.) 802. Farther, the pursuer was himself in fault, not having forwarded to the consignees the letter which it was proved he had received.

At advising—

LORD PRESIDENT—The charter-party in this case was entered into between the pursuer, as owner and master of the vessel Geertruida, and Mr Hall of Buenos Ayres. The pursuer undertook by it to load a cargo of bones at Parana, and carry them to this country, proceeding to Queenstown or Falmouth [*reads from charter-party, ut supra*]. Under that charter-party Mr Hall, the shipper, shipped his cargo, and then sold it to Francis Younger, who appears to have been agent for the defenders at Buenos Ayres, and then it was transferred by indorsation to the defenders. Now the bill of lad-

ing bears that the cargo was shipped [*reads*]. The obligation on the consignees is, that they shall pay "freight for the goods according to the charter-party, with per cent. primage and average accustomed." The reference to the charter-party in this bill of lading is only for the amount of the freight. But I think it is a well settled principle of our law that a reference of that kind is to be read as importing into the bill of lading only what is expressed, as, in the present instance, the amount of the freight. Therefore there is not here a transference to the bill of lading of anything except the obligation of payment of freight, and therefore, on the face of these documents, there is not in law any liability against the consignees but for the money. It is quite true that, notwithstanding, a consignee may become liable for demurrage. He may incur liability through his own fault or negligence. It is difficult to define under what circumstances such fault will be established, but it was a safe rule laid down in the case of *Wegener*, that such a question, when not solved by the terms of the shipping documents, was a question for a jury; in short, that when a shipmaster claims demurrage against a consignee, he must show that he has a case in fact. It lies on the pursuer, in the first instance, to show that he has such a claim; and, looking at this proof, I see no such claim made out. The case is peculiar. It seems to turn very much on whether a certain letter was given to the shipmaster before sailing from the foreign port by the shipper, to be delivered or posted to the consignee on arrival here. If that letter was given, the fault lies with the shipmaster. If not, then an inquiry would arise, In what state of knowledge or information were the consignees? The proof is not satisfactory either one way or another, and that is not a case in which the pursuer of such an action is entitled to prevail. But, further, if we are compelled to decide it as matter of fact, the balance of evidence—that is, of so many words which we have written down before us—is in favour of the defender, for two witnesses swear as to such a letter being delivered, and the only evidence to put against that is the evidence of the master himself. Therefore, on the whole matter, I am inclined to adhere.

Lords Deas and Ardmillan concurred.

Lord Curriehill absent.

Agent for Pursuer—Wm. Mason, S.S.C.

Agents for Defenders—J. & R. D. Ross, W.S.

Friday, June 19.

MACKENZIE *v.* DRUMMOND'S EXECUTORS.

(*Ante*, iv, 231.)

Jurisdiction—Foreign—Executor—Action of Transference—Litiscontestation. Held that the possession of a heritable estate in Scotland by one of two foreign executors, on his own account, did not found jurisdiction against them *qua* executors, either (1) in an original action, or (2) in an action of transference, whether there was litiscontestation or not.

Mackenzie of Seaforth brought an action of damages against Henry Dundas Drummond of Devonshire Place, Portland Place, London; and, on 22d July 1867, obtained a verdict in which the damages were assessed at £300. On 25th July Drummond died—Mrs Drummond, his widow, residing in London, and Thomas Dempster Gordon of Balmaghee in Kirkcudbrightshire, but also resident in London, being appointed his executors. Mackenzie now brought this action of transference against these executors, but they pleaded that they were not subject to the jurisdiction of the Court.

The Lord Ordinary (Jerviswoode) pronounced this interlocutor:—"Finds that the defender, Mr Gordon, is personally subject to the jurisdiction of this Court, but that the other defender, Mrs Drummond, is not so: Finds that the defenders, as the executors of the deceased Henry Dundas Drummond, have obtained probate in the Court of Probate in England, and that administration of his estate has been granted to them accordingly: Finds that the object of the present action is to transfer against the defenders an action which was in dependence in this Court at the date of his death, against the deceased; therefore decerns in terms of the conclusions of the summons," &c.

The defenders reclaimed.

Fraser and Clark for reclaimers.

Young and Shand for respondent.

At advising—

Lord President—This reclaiming note raises questions of very considerable importance, and I regret that the Lord Ordinary has not more fully explained the grounds on which he has arrived at the result of sustaining the jurisdiction of the Court, for, after the fullest consideration, I am unable to arrive at the same conclusion.

The original action was raised by the pursuer of this transference against Henry Dundas Drummond, a gentleman then residing in Scotland, and in that action he obtained a verdict, on 22d July 1867, for £300. But before that verdict could be applied, that is, before the next session of the Court, the defender died, and he is represented by Mrs Sophia Jane Drummond, his widow, and Mr Thomas Dempster Gordon, a gentleman who is resident and domiciled in England, as Mrs Drummond also is; but Gordon is owner of a landed estate in Scotland, on which however he is not resident, though he occasionally visits it. In these circumstances, it is proposed to transfer the original action *in statu quo* against these two persons as executors of the deceased defender in the original action, the effect of which would be to enable the pursuer to go on and obtain decree for the sum in the verdict, and to enforce it against the executors and the executry estate. The question is, whether this Court has jurisdiction against the two defenders called in the transference? It is said, in the first place, that there must be jurisdiction, because one of the two, Mr Gordon, has a heritable estate in Scotland. There can be no doubt that if this action was directed against him for an individual debt, the possession of that heritable estate would be sufficient to found jurisdiction. But it is not said that Mrs Drummond has any heritable estate in Scotland, or that she is subject to the jurisdiction of the Court in any ordinary way. The question on this first point is, whether the possession of a heritable estate in Scotland by one of two foreign executors on his own account, is sufficient to give this Court jurisdiction against the executors? I am humbly of opinion that it is not, and that on principle there is no foundation for such jurisdiction at all. If decree were obtained against the defenders, that decree could not be enforced against that heritable estate, and that probably is a conclusive test of the matter.

But then, it is said farther, that there is a pecu-