settled. If the common agent were left to get his remuneration at that period only, I don't believe that any of the heritors at present living would have to pay him anything at all.

LORDS DEAS and KINLOCH concurred.

Agents for the Complainers—Messrs Campbell & Smith, S.S.C.

Agent for the Respondent—Party.

Saturday, February 11.

PIRIE & SONS *v.* WARDEN AND OTHERS.

(*Ante*, vol. iii., p. 260.)

Bill of Lading, Master's Liability under—Indorsation after Delivery of Cargo. An action was raised upon a bill of lading by the holders against the master of a vessel for delivery of the cargo, or payment of a sum of money as its value, and as damages. Delivery had been made by the master to other parties, on the instructions and at the risk of the charterer, without waiting the presentation of the bill of lading. *Held* that this was a wrongous act upon the part of the master, and in breach of his obligation under the bill of lading, and that it was no defence to plead that the property of the cargo was really in the charterer, and not either in the shipper or the holder of the bill of lading—(1st), because the question as to the true ownership of the cargo could not be raised in such an action; and (2d) because the charterer was shown to have acted in *mala fide*.

Held, farther, that though at common law the indorsation of the bill of lading does not pass the property in the cargo after delivery, this rule is subject to the limitation that the delivery must be lawful, and consequently the onerous holder of a bill of lading may enforce his demand for delivery at any time, unless the master can show that he has lawfully delivered it to some one else.

This was an appeal from the Sheriff-court of Aberdeenshire for Messrs Alexander Pirie & Sons, paper-makers, Aberdeen, in an action at their instance against Captain John Warden, as owner, or representing the owner, and as master of the ship "Emily and Jessie," of Liverpool, which, at the date of the summons, was lying in the harbour of Aberdeen. The summons concluded for delivery to the pursuers at Aberdeen of a cargo of 140 tons of Esparto, shipped on board the said vessel "Emily and Jessie" at Aquilas in Spain, to be delivered in Aberdeen, conform to bill of lading dated 25th January 1865, signed by the said defender, and endorsed to and held by the pursuers, and which bill of lading was signed in terms of a charter party, dated at Alexandria the 22d day of Nov. 1864, between W. J. Wynands, shipbroker, Newcastle-upon-Tyne, and the said defender; or otherwise, and in the event of the said defender failing to make delivery to the pursuer of the said cargo of Esparto within such space as might be appointed, then for payment to the pursuers of the sum of £1000, as the value of the said cargo, and for loss and damage sustained by the pursuers in consequence of the non-delivery and non-implement of the said charter party and bill of lading.

The circumstances of the case, so far as disclosed in the evidence were, as follows:—

In the course of the year 1864 the pursuers, Messrs Pirie & Sons, had agreed to purchase such esparto as Messrs G. & J. A. Noble, a London firm, could ship them direct to Aberdeen, and in January 1865 an arrangement was made between the two firms, whereby Messrs Pirie agreed to take, and Messrs Noble to supply, a cargo of 150 tons regularly per month. Messrs Noble having through their agents in Spain purchased the cargo of the "Emily and Jessie," which arrived in Aberdeen on 28th February 1865, from the shipper, J. Fernandez Corredor, of Almeria, did, upon 8th March, telegraph to Messrs Pirie & Sons at Aberdeen as follows:—"'Emily and Jessie.' 140 tons Esparto arrived February 28th is for you. Bill of lading by post. 8th March 1865." And upon the same day they wrote more fully:—"We this day sent you a telegram that 'Emily and Jessie,' 140 tons Esparto, arrived February 28th, is for you. We now beg to hand you the bill of lading and charter-party. We heard from our agent, the end of January, that a very good lot was being shipped by one of our friends, and we could not conceive why we had no advice of it, but we now find that as the shipper was come to England, and expected to be here before the ship arrived, he brought the bills of lading with him for the purpose of insisting on the difference in freight, this being unusually low. He has now, we expect, incurred more than that by demurrage," &c. Upon inquiry, Messrs Pirie & Sons found that the cargo of the ship "Emily and Jessie" had been already discharged and delivered by the captain, the defender, John Warden, to another firm of paper-makers in Aberdeen, Messrs Tait & Sons, without the presentation of the bills of lading or other documents. Pirie & Sons at once acquainted Messrs Noble of what had occurred, who accordingly wrote to Tait & Sons as follows:—"London, 10th March 1865.—We have just received advice from Messrs A. Pirie & Sons that you had received a cargo of Esparto *ex* 'Emily and Jessie' destined for them; how you had possession given to you we are not aware. We telegraphed to you this day to pay no one without our authority. Messrs A. Pirie & Sons hold the bill of lading for the delivery, and should have received the grass. We shall, of course, hold the ship and yourselves responsible for the amount, with any charges that may accrue upon it, and have given Messrs Pirie, as holders of the bill of lading, authority to settle for it. Will you write us how you obtained possession?" Messrs Tait replied:—"Inverurie Mill, 11th March 1865.—We are obliged by your favour of yesterday, just received. The Esparto *per* 'Emily and Jessie' was delivered to us by orders from the owner of the vessel, and we shall now hold it till the matter is settled."

The present action was accordingly raised by Pirie & Sons against the master of the ship "Emily and Jessie," founded upon the bill of lading and other documents in their hands.

In explanation of the circumstances of delivery, it was stated, and appeared from the evidence, that the vessel had been chartered at Alexandria on 22d November 1864 by W. J. Wynands of Newcastle, through his agent, Mr Hutchinson. The terms of the charter-party were as follows:—"It is this day mutually agreed between Captain John Warden, owner or master of the British or privileged good ship or vessel, the 'Emily and Jessie' of Liverpool, and W. J. Wynands, as agent to the freighter or freighters, as follows—viz., that the

said ship, being warranted during the present voyage as classed and of 409 registered tons or keels of coals, now in Alexandria, and ready to load, and tight, staunch, and every way fitted for the voyage, shall, after taking in about 200 tons or more of bones, with all possible despatch, sail and proceed to her loading-place at Aquilas, and on arrival there, be ready for loading, and there take on board, as directed, a full and complete cargo of Esparto, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and being so loaded shall, with all possible despatch, proceed to the port to which she gets orders to go with the bones, and there deliver the same, on being paid freight at and after the rate of, if at a port in Scotland, 20s. p. ton. . . . A brokerage of 5 per cent. on the amount of freight and primage on the quantity to be taken in, is due by the ship to W. J. Wynands, on signment of this agreement (ship lost or not lost). The vessel is to be reported by W. J. Wynands or his agent at the Custom House, the captain or owner paying the brokerage and all charges in cash, on receiving his dispatch on the vessel being loaded. The captain to sign bills of lading immediately the cargo is on board. This charter being concluded by W. J. Wynands on behalf of another party, it is mutually agreed that all liability of the charterer or his or their agents ceases as soon as the grass is shipped; and it is further agreed that the captain have and hold an absolute lien on the cargo for all freight, dead freight, demurrage, and all other claims arising from this charter-party. Penalty for non-performance of the agreement, estimated amount of freight."

In terms of this charter-party the vessel proceeded to Aquilas, in Spain, where the captain had been instructed to communicate with D. Wentura, Gris & Co., merchants there, the agents of the above mentioned Juan Fernandez Corredor of Almeria, a place inland some sixty miles distant. Upon doing so the captain obtained his cargo from D. Wentura, Gris & Co., and upon 25th January 1865 signed a bill of lading in Spanish, of which the following is a translation:—

"I, John Warden, captain in second of the English barque, which God save, named the 'Emily and Jessie,' of the port of Liverpool, of the burden of 409 tons, which is safe and anchored in this port, and ready to follow her present voyage to Aberdeen, acknowledge to have received and hold within the said vessel, delivered from the warehouse of Messrs D. Wentura, Gris & Co., for behoof and risk of whom it may belong, 4620 faggots esparto Ganvillo, with 3086 Castilean quintals, otherwise 140 tons, marked as in the margin, which I promise and oblige myself, God helping me, to good safety, with the said vessel, at the said port, to deliver for you, and in your name, to your order, on payment of the freight, according to the contract, and to complete it thus, I oblige my person and goods, and the said vessel, freight, and apparel. In faith of this I put my signature. Aquilas, 29th January 1865.

"Weight unknown.

"John Warden.

"Received on account of freight of 'Emily and Jessie,' 154 dols. Spanish.

John Warden, *Master.*"

Upon the back of this bill of lading were endorsed the words "We place on the account of Mr Juan Fernandez Corredor de Almeria the amount of these goods.—Aquilas, &c.,

"D. Wentura, Gris, & Co."

This bill of lading was blank endorsed by J. Fernandez Corredor.

Upon the same date, 25th January, Corredor invoiced the cargo to Messrs Noble, to whom he had sold the cargo through their agents in Spain, and sent along with the invoice a bill of exchange at three months for the price, which was accepted, and duly retired by Messrs Noble. He did not, however, as already stated, send them the bill of lading, but being himself about to start for England, preferred to take it with him, and deliver it in person. This he did not do until the beginning of March, as already narrated. At the same time, Wynands, who had had a series of transactions with Corredor, the nature of which did not appear from the evidence, but in the course of which he had been in the habit of making advances to Corredor upon cargoes of esparto, had advised Corredor of his having freighted the ship. What passed between them as to the cargo does not appear, but Corredor having as already described, dealt with it as his own, and as if Wynands was merely his ship-broker, with no farther interest in the vessel or cargo, and having disponed of it to Messrs Noble of London, Wynands also proceeded to deal with it as his property, and as if he had purchased it from Corredor, and shipped it on his own account at Aquilas. On this point all the information obtained was that Wynands had made considerable advances to Corredor, but none of them were appropriated to this or any other particular cargo. He, however, being under obligation to supply a cargo of like amount to Messrs Tait & Sons of Aberdeen, made use of this cargo to fulfil said contract, and also to cover his advances to Corredor. Accordingly, acting as charterer, he wrote the captain at Almeria, 30th January 1865:—"Sir,—By the present I beg to inform you that you must proceed with your cargo to Aberdeen, according to terms of charter-party, concluded with Mr Hutchinson in Alexandria in November last."

On the arrival of the vessel at Aberdeen he wrote on 1st March to Messrs Tait & Sons as follows:—"Dear Sirs,—The owner of the 'Emily and Jessie' informs me that she has arrived at your port, and has instructed the captain to deliver the cargo to none but you, please therefore claim and land it at once. In reply to yours of the 25th ulto., the bones belong to Messrs M'Lean & Hope of Edinburgh, with whom confer. The captain signed b/l. Do not pay freight till cargo is in your possession, claim or take it legally in case of need." On the same day he again wrote them:—"Dear Sirs,—Your telegram is to hand. The owner of 'Emily and Jessie' has sent orders to-day to the captain to deliver the cargo of esparto to you only. You must take delivery at once, and will hold you harmless in consequence of your so doing without having possession of bill of lading." On 2d March he writes them:—"To-day I sent you the following telegram: 'I suppose esparto 'Emily and Jessie' will be landed to-morrow. Hurry on with the discharge.' The reason I sent you the above is on account of the shipper attempting to take a liberty with me. I trust therefore you will use the greatest despatch possible in the discharge." Then there ensued the following correspondence relative to the delivery of the cargo to Messrs Tait & Sons, which disclosed the relative position in which the parties stood:—

"*Inverurie Mills*, 2*d March* 1865.

"Mr W. J. Wynands.

"Dear Sir,—The 'Emily and Jessie' arrived in Aberdeen yesterday morning, but we got no word till afternoon, when it was too late to go to Aberdeen, so we got nothing done till to-day. The captain required an advance of freight (£100) before commencing, to get his men paid off, and as we could not get on we had no help but give it—taking an obligation for repayment if the cargo was not delivered. Our agent, whom we had asked to look after the ship, being out of town, the captain had put himself in the hand of a broker, by whose advice he was acting. He spoke of landing the cargo under warrant, &c., which would have brought on various expenses. We did not get begun till afternoon, and have got out about twenty tons. The charter you sent us is of no use—there is another and quite different one for the esparto; if you have it, please send it down.—Yours respy,

"Thomas Tait & Sons."

"*Newcastle-upon-Tyne*,
"*Queen Street*, 3*d March* 1865.

"Messrs Thomas Tait & Sons, Aberdeen.

"Dear Sirs,—My letter of yesterday brought you invoice of esparto, per 'Emily and Jessie,' amounting to £757, 17s. 6d. I desired you to make all haste with the delivery, and being to-day without your communications I take for granted that by this time the cargo is in your possession, and have consequently taken the liberty to value on your good selves for £500, three months date, to my order on account, and doubt not but my draft will meet due honour. The owner has telegraphed Captain Warden to deliver the esparto to you, but in case of need, you will please inform him that Mr J. P. Schulz, at Alexandria, chartered his vessel as my agent, that I am the principal in the business, and it was according to my instructions handed him at Aquilas that he proceeded to your port.—Yours truly,

"W. J. Wynands."

"*Inverurie Mills*, 4*th March* 1865.

"Mr W. J. Wynands.

"Dear Sir,—We have your favour of the 3d. We have used every exertion to get out the cargo, but do not expect that there will be much over half of it out yet. We cannot get the Railway Co. to supply us with trucks. We have gone every day to town pushing it on, and hope to be about through by Tuesday afternoon. With regard to the draft you advise on us, we have to point out to you that although we have got or will get the cargo, we have no security that the captain will not reclaim it from us, and he expressly declined to say yesterday that he would not do so. From your letter received yesterday with the invoice, we infer that some difficulty will be raised or claim made. And besides, we have seen no original charter or any paper whatever connecting you with the cargo. As the bill will be coming forward, to save time and further correspondence we have written our friend Mr John Douglas, corn-factor, to see you, and arrange such a letter of guarantee from you to us as will save us from all trouble, and on receipt of this and his seeing the papers we shall honour the draft. Not being on the spot ourselves, Mr J. W. Barclay, merchant, Aberdeen, is taking care of the ship's matters for us.—Yours respectfully,

"Thomas Tait & Sons."

"*Newcastle-upon-Tyne*,
"*Queen Street*, 4*th March* 1865.

"Messrs Thomas Tait & Sons, Aberdeen.

"Dear Sirs,—I had this pleasure yesterday, and in receipt of your favour of the 2d inst., this morning I sent you telegram as at foot, and fully calculate that the grass by this time is lodged on your premises. The fact is that I had agreed to advance the shipper a certain amount on grass against which he neglected to send bill of lading. He now owes me money, and I am compelled to protect myself. I have made him however a very reasonable proposition, and expect to terminate this business shortly and satisfactorily to all parties. I see that you have paid £100 on account of freight, what with £30 already paid in Alexandria, will represent the full amount due, therefore refer the captain to Messrs M'Lean & Hope if he wants more money. I enclose copy of the grass charter original in my possession; my clerk sent by mistake the bone charter. Pray use every despatch, and send me a telegram on Monday to say that the grass is out.—Yours truly,

"W. J. Wynands."

(*Copy of telegram therein referred to.*)

"Wynands.

"Tait & Sons, Aberdeen.

"The esparto must be landed at once—work day and night."

"*Newcastle-upon-Tyne*,
"*Queen Street*, 6*th March* 1865.

"Messrs Thomas Tait & Sons, Aberdeen.

"Dear Sirs,—In reply to yours of the 4th inst., I had a call of Mr Douglas, to whose inspection I submitted original charter for esparto per 'Emily and Jessie,' of which you hold copy. The owner has already my guarantee with respect to the delivery in the absence of a bill of lading. The shipper is shaky; and because I would not give him an additional credit for about £600, withheld the bill of lading, but I am still in hopes of obtaining it shortly. Meanwhile, pray push the railway on, convert the grass into paper, and I shall take all the consequences on my shoulders.

"W. J. Wynands."

The cargo was all delivered before Messrs Pirie & Sons received the bill of lading, and took the steps above mentioned. In consequence of the circumstances under which the delivery was made, and the guarantee which the above correspondence contains, Mr Wynands found it necessary to sist himself in the action, and became the real defender.

The Sheriff-Substitute (Comrie Thomson) pronounced the following interlocutor:—

"*Aberdeen*, 27*th May* 1870.—Having resumed consideration of the cause, Finds, as matter of fact that the ship of which the defender Warden was master, was chartered by the defender Wynands: That it was ordered to load Esparto on his behoof at Aquilas: That the Esparto in question was delivered on board on account, as the property and at the risk of the defender Wynands: That he effected insurances upon it: That he sold it to Thomas Tait & Sons, Inverurie: That on its arrival at Aberdeen it was demanded by and delivered to Messrs Tait: That after delivery had been completed, a bill of lading for the cargo was sent by Messrs G. & J. A. Noble, of London, to the pursuers, endorsed to them: Finds, as matter of law, that the property of the cargo had not passed to the pursuers: That they are not entitled to insist in this action: Therefore dismisses the action, and

decerns: Finds the defender entitled to expenses of process: Allows an account thereof to be given in, and remits the same when lodged to the auditor of Court to tax and report.

"*Note.*—There does not appear to be much difficulty about the facts of this case. The defender chartered a vessel to bring Esparto to this port, insured the cargo, sold it to Messrs Tait, and when it arrived these gentlemen got delivery of it. The bill of lading was signed deliverable to order. It was indorsed by the shippers Wentura, Gris, & Co., to Corredor, the defenders' agent in Spain, the latter indorsed it blank and it came into the possession of Messrs Noble of London, who again handed it to the pursuers. It does not appear from the process what value was given by Messrs Noble for the bill of lading, and no value had been given by the pursuers.

"It is thought that where a cargo has arrived before the bill of lading and is delivered to the buyer and consignee, such delivery is good against all except endorsees of the bill of lading for value; such is the law as explained in our best authorities. It may be that Messrs Noble have a good ground of action against the defenders. They seem to think so themselves, as they have instituted proceedings in the English common law courts; but the Sheriff-Substitute is of opinion that the pursuers here have not succeeded in establishing a sufficient title to sue. The true owner of the cargo sold it to Messrs Tait. They had got delivery, and paid for it before the pursuers acquired the bill of lading, and the latter do not aver that they held it for value. The Messrs Noble are in a different position, of which apparently they have availed themselves in their own country."

The Sheriff (JAMESON) adhered on appeal.

The pursuers accordingly appealed to the First Division of the Court of Session.

LORD ADVOCATE (YOUNG) and LANCASTER, for them, contended that an onerous indorsee is entitled to communicate a bill of lading gratuitously if he pleases. If he does so gratuitously the document is liable to any latent defect which might be pleaded against the indorser, but not so if the indorsation be onerous and not gratuitous. They farther disputed the proposition that the indorsation of a bill of lading after delivery of the cargo is inoperative—it may be so after lawful delivery to the right person when other badges and symbols of possession must be resorted to, but that is not the case here—and they submitted that they were entitled to take their stand upon the bill of lading alone, without entering into any of the questions which might arise between other parties connected with the ship and cargo.—Abbott's Law of Shipping, 11th ed., p. 284 *et seq.*

SOLICITOR-GENERAL (A. R. CLARK) and M'LAREN, for the respondents and defenders, referred to the case of *Schmoltz* v. *Airry*, 16 Q. B. 655, and Smith's Leading Cases, 6th ed., vol. 2, 356, on the question whether, looking to the clause at the end of the charter party, Wynands could still represent himself as principal, which they contended he could. They then submitted—(1) That the indorsee of a bill of lading is subject to latent defects arising out of the title and authority of the indorser, a bill of lading being on a different footing from a bill of exchange; and (2) that a bill of lading is only of use while a vessel is at sea, and cannot transfer the cargo after it has arrived. On these points, they referred to 18 and 19 Vict. c. 111, sec. 1; Smith's Mercantile Law, 7th ed. p. 306; *Gurney*, 23 Law Jour., Q. B. 265; *Barber*, L. R. Eng. and Ir. Ap. 4, 317. They farther submitted that the use of a bill of lading is to enable the holder to vindicate the property of the cargo, which is his by another right and title; that it was not the case, as the pursuers argued, that the right of property was transferred by the simple indorsation of the bill of lading. That in the present case the cargo was not in a general ship, where the bill of lading certainly is the ruling document, but in a ship specially chartered by Wynands; that here the charter is the leading document, subject indeed to be overruled in some circumstances by the bill of lading, but not to the same extent as in a general ship. That the master was in this case the servant of the charterer, and his primary obligation was under the charter party, and that this obligation could only under certain circumstances be displaced by the bill of lading. They then went into the evidence of the nature of the transaction between Wynands and Corredor, to show that the real right of property was in Wynands; that there had been fraudulent conduct on the part of Corredor, which could not affect this real right of property, and they agreed that Messrs Pirie & Sons could only sue under this bill of lading if by its indorsation the property had been passed, which was not the case in consequence of their fraudulent proceedings, which amounted to latent defects, such as a bill of lading is subject to.

At advising—

LORD PRESIDENT—This case depends upon certain very important principles of our mercantile law, which we have had argued before us at considerable length; but before attempting to apply them it seems to me, in the first place, most necessary to ascertain what are the real facts of the case as laid before us. There are a great many elements in the proof with which I conceive that we have nothing to do; they are entirely outwith the case, and have no bearing upon it, and our first duty therefore is to extricate the case from these redundant facts.

The action is one raised by the holders of a bill of lading against the master of the ship "Emily and Jessie," of Liverpool, and concludes, first, for delivery of 140 tons Esparto grass shipped at Aquilas in Spain, to be delivered in Aberdeen, conform to bill of lading, dated 25th January 1865, signed by the said master, and indorsed to the pursuers Messrs Pirie & Sons; and secondly, failing such delivery, for payment of a sum of £1000 in name of damages, &c., for non-implement of the said bill of lading, and the charter party of the ship. Now, the defences set up against this action resolve themselves naturally into two. It is said, in the first place, that the cargo belonged to a person different from the present holders of the bill of lading, and different also from the original consignee of the cargo, and that that party had obtained delivery of the cargo before the bill of lading was presented by the pursuers, and had received delivery in good faith. It is maintained, in the second place, that the pursuers have no good title to sue the present action, in respect that the bill of lading, on which they found, was not indorsed to them until after delivery had been made, when it could no longer carry the property of the cargo.

Now, these two defences must be considered separately. And, first, let us examine the position of the party who comes forward and says that he

is the true owner, and that he obtained delivery rightfully and in good faith. His allegations that the cargo belonged to him depend upon facts of which we have no knowledge, and upon questions which we could not try in this process. They depend upon the state of accounts between Mr Wynands of Newcastle, the charterer of the vessel, who has sisted himself as a defender in the action, and Juan Fernandez Corredor of Almeria, the real shipper of the goods. It is alleged that Corredor should have shipped to and for behoof of Wynands in consequence of the advances which Wynands had made in respect of the cargo. But all that Wynands can say in evidence is, that he "made general advances to Corredor on account of Esparto, but not a specific advance on the cargo *per* 'Emily and Jessie.'" The question between Wynands and Corredor as to whether the cargo ought or ought not to have been shipped as the property of Wynands and on his behalf, depends, as I have said, upon facts of which we have no knowledge; even if we had information it would only be *ex parte*, for Corredor is not here, and has no interest in this case. But Mr Wynands goes on to say that, being at all events in the belief that the cargo was his, and had been shipped on his account, he took steps to have it delivered, and that in so doing he was acting in *bona fides*. That accordingly the cargo was discharged and delivered to Messrs Tait & Sons, to whom it had been disposed of, but before the bill of lading was presented. Now, the manner in which this was done appears very clearly from the letters which passed between Wynands and the Messrs Tait, and I think it right to advert to the terms of some of these. On 1st March, Mr Wynands writes—"The owner of the 'Emily and Jessie' has instructed the captain to deliver the cargo to none but you, please therefore claim and land it at once." On the same day he writes again; in reply to a telegram from Messrs Tait—"You must take delivery at once, and (I) will hold you harmless in consequence of your so doing without having possession of the bill of lading." Again, on the 2d March, he telegraphs—"Hurry on with the discharge;" and writes—"The reason I sent you the above is on account of the shipper attempting to take a liberty with me." On the following day he writes—"I take for granted that by this time the cargo is in your possession, and have consequently taken the liberty to value on your goodselves for £500, three months' date, to my order on account, and doubt not but my draft will meet due honour." Messrs Tait declined, however, to accept the draft, saying 'we have no security that the captain will not reclaim the cargo from us. We infer that some difficulty will be raised or claim made. And, besides, we have seen no original charter or any paper whatever connecting you with the cargo." On the 4th, Mr Wynands writes—"The fact is that I had agreed to advance the shipper a certain amount on grass, against which he neglected to send bill of lading. He now owes me money, and I am compelled to protect myself." And lastly, on March 6th, he writes—"The owner has already my guarantee with respect to the delivery in the absence of a bill of lading. The shipper is shaky; and because I would not give him an additional credit for about £600, withheld the bill of lading, but I am still in hopes of obtaining it shortly. Meanwhile pray push the railway on, convert the grass into paper, and I shall take all the consequences on my shoulders." Now, in consequence of these letters the cargo was discharged, and taken possession of by the Messrs Tait, and Mr Wynands having thus guaranteed the master against any consequences of this delivery, takes the master's place in this action. That does not, however, change the nature of the case one bit, the action remains just the same as if the master were sole defender, and the scope is not at all extended by the introduction of Wynands.

The first defence, as I have stated, is that of *bona fide* and rightful delivery so far as the master is concerned. Now, it appears to me from the correspondence which I have just read, and from the other evidence, that there was no *bona fides* whatever in the transaction; that, on the contrary, it was a clear breach of the contract contained in the bill of lading. No doubt it is said, and truly said, that the bill of lading was somewhat long of making its appearance. But that is no justification of what the captain did. He had a very ready and well-known remedy at hand. In default of the due arrival of the bill of lading and instructions he might have landed the cargo, and warehoused it, subject to his own claim for freight and all other expenses, and there he might have left it till properly claimed. But most certainly the mere non-arrival of the owner, or his bill of lading, will never justify the captain in delivering to another person. I am therefore decidedly of opinion that the delivery of this cargo to the Messrs Tait was a wrongful act on the part of the captain, and in breach of his obligation under the bill of lading.

But, then, the question remains, are the pursuers in a position to sue this action, founded upon the bill of lading, looking to the circumstances under which they acquired it. It is said, first, that they gave no value for it; but this allegation is, I think, disproved by the evidence. I think that it is clearly proved that Nobles purchased the bill of lading from Corredor, and that the Messrs Pirie purchased it from the Nobles. In some of the pleadings it is suggested that the Nobles were merely acting as the Piries' agents. Even if they were, I do not think that that would make any difference. However, I am satisfied, from the correspondence which I have read, but which is not printed, that the Nobles and the Piries were in the relative position of merchant and customer; so that, as far as these parties are concerned, I think both were onerous indorsees for full value. But, then, in the second place, the bill of lading must be looked to in order to see whether it gives a full title to the cargo. Now, it bears that the captain acknowledges to have received on board, from the warehouse of D. Wentura, Gris, & Co., for behoof and risk of whom it may belong, a cargo of Esparto, which he bound himself to deliver for them, and in their name, to their order on payment of the freight, &c. Upon the back of the bill of lading was written this order or endorsement:—"We place on the account of Mr Juan Fernandez Corredor, of Almeria, the amount of these goods.—Aquilas, &c. (Signed) D. Wentura, Gris, & Co." Now, it may be said, and said quite truly in one view, that the actual shippers were Wentura, Gris, & Co. And, in that view, Corredor had the bill of lading specially endorsed to him. In another view, it may be said that Corredor was the real shipper, and Wentura, Gris, & Co. merely his agents. That is what he was, I think, in reality, if not in legal form. But it matters little which view is taken. What, then, happens next?

Corredor comes to this country, bringing the bill bill of lading with him (for it appears from the evidence, I think, that there never was more than one signed—that there was not the usual duplicate or set). This bill he endorses to the Nobles. Now, if that bill of lading had been handed to the Messrs Pirie, and by them presented to the master of the vessel before discharge of the cargo, I hold that there is no doubt but that the master must have delivered to the holders, never mind what questions might afterwards arise among other parties. But, then, it is said that before the Piries acquired the bill of lading, and even before the Nobles themselves acquired it, the cargo had been already delivered. The evidence on this point as to the Nobles is not entirely clear; as to the Piries, I take it that the fact was, that they did acquire the bill after the cargo was delivered. The question then is, does that deprive the assignee of his right to sue upon a bill of lading? This is the most important point of law in the case. At first sight there appears to be a good technical objection—viz., that when the goods have once been delivered, the indorsation of the bill of lading does not, at common law, pass the right of property in the cargo. That is perfectly true, but with this important limitation—namely, that the cargo must be lawfully delivered. It is quite otherwise, I think, when the cargo has been, as here, unlawfully delivered. Of course, there are several cases in which the cargo might have been lawfully delivered, as, for instance, upon presentation of a duplicate bill of lading, and the consequence of such delivery would have been the immediate passing of the cargo; but that is not the case here.

But, then, it is said that this delivery of the goods before the indorsation deprives the holder of the benefit of the Act 18 and 19 Vict., c. 111, § 1, because that Act gives to the endorsee all rights of suit only in the case where the property has passed. That would be, I think, too strict an interpretation of the statute. We must apply to the question a combination both of law and equity; and, I think under that statute an onerous holder of a bill of lading is entitled to the benefit of both of these, and may enforce his demand for delivery unless the ship-master can show that he has delivered lawfully to some one else. It is no answer for the master to that demand, that he has wrongfully delivered, and that is, I think, in this case, the only answer that he can make. That the master cannot found upon his own wrong is not a doctrine peculiar to mercantile law.

On these grounds, I am of opinion that the pursuers have a good title to sue this action, and I am glad to find that my decision in this difficult case is supported by the judgment of the English Court of Common Pleas in a late case in circumstances very much similar to the present. I refer to the case of *Short* v. *Simpson*, 35 Law Journal, C. P., p. 47. I am therefore led to differ from the interlocutor of the Sheriff. Of course, the pursuers cannot now obtain delivery of the cargo, but, under their alternative conclusion they are entitled to succeed. It would appear, however, that the question of damages has not yet been discussed. That will now have to be done, and it must be settled either by agreement or proof, or, still better, if the parties will agree to it, by a reference to some one on the spot.

Lord Deas—I have no doubt that if this cargo was not all delivered before the endorsation of the bill of lading to Pirie & Sons, it was, at any rate, almost all delivered, and the probability is that the whole of it was so. The difficulty of the case accordingly is, whether we are in a position to hold that the delivery was wrongfully made by the master or not? I am not quite satisfied that the only thing that could have prevented the delivery from being wrongfully made would have been the presentation of a duplicate bill of lading. If we had had laid before us evidence of the transactions of the parties, and especially of those between Wynands and Corredor, and if it were proved that Wynands had given full value for the cargo, it would have been very difficult to say that the delivery would have been wrongful. We all felt the great difficulty imported into the case for want of evidence on these and other matters, and the question was, whether we should require more information before deciding the case or not. But I am satisfied that the true state of the case between Wynands and Corredor cannot be ascertained except in a question with Corredor, who is not here. If Mr Wynands could have established the true state of their transactions by documentary evidence, he ought to have done so. But he has not, and we are not in a position to go into that matter now, nor have we that case to deal with; and, that being so, I have come to the same opinion as your Lordship, and, to the able state of the law which your Lordship has delivered I will not seek to add anything.

Lord Ardmillan—The facts of this interesting and important case have been fully and correctly stated by your Lordship in the chair. It would be needless and unbecoming for me to repeat an explanation so clearly and ably given. We are agreed on the facts, and indeed there is little room for difference of opinion on the facts.

The question in point of law is, whether Messrs Pirie, the pursuers, are, as holders of the bill of lading, entitled to maintain and prevail in this action against the shipmaster?

I am of opinion that the shipmaster could not, in terms of the ship's documents now before us, legally deliver the cargo to any person not being either Wentura, Gris, & Co., the shippers of the cargo, or Corredor, the holder of the bill of lading under special indorsation, or some indorsee of Corredor. The shipmaster has produced, and could produce, no authority whatever from any of these parties entitling him to deliver the cargo to Messrs Tait & Sons. I cannot avoid the conclusion that he delivered without authority.

Now, this action is not against Tait, but against the shipmaster, who was bound to carry the goods, and to deliver the same to order of Wentura, Gris, & Co., the shippers of the cargo. The bill of lading represented the cargo. It was specially indorsed by the shippers to Corredor. Till he again indorsed it no one else was in right of the cargo; no one could legally authorise the shipmaster to dispose of it. Corredor could have prevented any such interference. When he did indorse it the indorsee, holding the bill of lading, was in the right of the indorser, and thus in the right of the shippers, and entitled to direct the disposal of the cargo. Supposing that the cargo had been previously parted with by the shipmaster without authority, I am of opinion that Corredor, the indorsee of Wentura, Gris, & Co., or the indorsee of

Corredor, is entitled, as holding the bill of lading, to demand the cargo from the shipmaster if he has parted with it improperly.

The case must be carefully distinguished from an action brought by the holder of the bill of lading against *bona fide* purchasers under such circumstances as are here disclosed. This is an action against the shipmaster for breach of his obligation to deliver the cargo according to the charter-party and the bill of lading. The shipmaster must defend his act, and he can only defend himself by instructing some sufficient authority to deliver the cargo. But he has not done so. There is no question here with Messrs Tait, and no question here between Wynands and Corredor. It is possible that, as between Wynands and Corredor, other obligations may have been incurred, and other questions may yet arise. But with these we have nothing to do at present. The pursuers, Messrs Pirie, holding the bill of lading duly indorsed, and being the only party entitled to the bill of lading, now demand the cargo from the shipmaster. Why shall they not succeed? Nothing but a right better than theirs can exclude them. I see no such right.

There is not here any duplicate or triplicate bill of lading. There is no competing writing, and no competing indorsation — there is no conflicting authority—no intervention by the shippers, and no complication arising from any supposed relations between Wynands and Corredor.

Wynands, having no papers, directs the master to give delivery of the cargo to Tait—directs him to hasten that delivery — and now supports the master in defending that delivery. But Wynands can have no other defence than what the master could plead, and the master has, in my opinion, no good defence against the holder of the bill of lading, unless he can instruct authority to part with the cargo. I think he has not done so. If Corredor had himself appeared and presented the bill of lading to the master, and demanded delivery of the cargo, the master could not have refused delivery to him.

But Messrs Pirie, or Noble, from whom Messrs Pirie purchased—and I agree with your Lordship in not holding Noble to be a mere agent—became the indorsees of Corredor, and the holders of the only written authority to claim the cargo.

I assume the indorsation to have been received by Messrs Pirie after delivery of the cargo. If the cargo was lawfully parted with by the master before receipt of the indorsement of the bill of lading, then the indorsement did not transfer the property of the cargo. That is, I think, settled. But if, as was the case here, the master parted with the cargo with no authority from the shippers or from the holder of the bill of lading, then I am of opinion that the master has not justified the act of delivery, and the indorsed bill of lading must receive effect.

The delivery was therefore wrongful; and wrongful delivery does not bar indorsement of the bill of lading, or relieve the shipmaster from responsibility.

Lord Kinloch concurred.

Agents for the Pursuers and Appellants—Millar, Allardice, & Robson, W.S.

Agents for the Defenders and Respondents—Stuart & Cheyne, W.S.

Saturday, February 11.

SECOND DIVISION.

NORTH BRITISH INSURANCE CO. *v.* STEWART. *et e contra.*

Essential Error—Policy of Insurance—Restitutio in integrum. A policy of insurance on the life of a party was paid by the Insurance Company in the belief that he had died. *Held*, in an action at the instance of the policy-holder, that upon repayment of the sum paid and arrears of premiums, the policy must be revived. There had been essential error on which no one was to blame, and there must be *restitutio in integrum.*

These were two conjoined actions; the one, at the instance of the North British and Mercantile Insurance Company, claiming repetition of the sum of £1207, 7s. 4d. paid by them to Mr Robert Stewart in respect of a policy of insurance on the life of James Macdonald; the other, at the instance of Robert Stewart, claimed declarator that upon the pursuer's payment of £1316, 8s. 2d. to the Insurance Company, they should deliver up the policy of insurance effected upon said life to him. It appeared that in 1848 a policy of insurance for £999, 19s. was effected on the life of James Macdonald of Dundee by Mrs Miller with the United Kingdom Life Assurance Company. In 1857 this policy was assigned to Stewart, and thereafter the United Kingdom Insurance Company was amalgamated with the North British Insurance Company. Macdonald went to New Zealand, and in 1868 Mr Stewart produced evidence to the Insurance Company which induced them to believe that he was dead, and accordingly they paid over the amount on the policy, with bonus additions, to Mr Stewart. From subsequent information, it appeared that Macdonald was still alive, and also that Mr Stewart had acted in good faith in reporting his death. The question now before the Court was in what way the mistake could be remedied, and the parties restored to their original positions. Stewart claimed on repayment of the sum paid to him by mistake, and all future premiums, to receive another policy for £999, 19s. on the same life, in place of the one which had been discharged. This the Company refused to agree to, and contended that the policy had lapsed.

On 28th July 1870 the Lord Ordinary (Ormidale) pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties in these conjoined processes, and having considered the argument and whole proceedings, including the proof—Finds that the sum of £1207, 7s. 4d., repetition of which is concluded for in the action at the instance of the Insurance Company, was paid by them and received by Mr Stewart as the amount due on a policy of insurance held by the latter on the life of James M'Donald, with some relative sums, on the 19th of December 1868, when under the mistaken belief that the said James M'Donald was then dead; but that it has been since ascertained, and was admitted by both parties at the debate, that the said James Macdonald is still alive: Finds that, in this state of matters, both parties are entitled to have matters restored as near as may be to the state in which they were before said sum was so paid and received; and appoints the case to be enrolled, in order that these findings may be applied, and