Wednesday, March 12.

SECOND DIVISION.

[Sheriff of Lanarkshire.

MERROW & FELL *v.* HUTCHISON & BROWN.

Ship—Deck Cargo—Damage—Liability.

Circumstances in which it was *held* that the charterers of a vessel were in the knowledge of, and had consented to, an agreement that cargo should be carried on deck, and that they were not entitled to relief against the owners for damage sustained by the said cargo.

This was an appeal by Messrs Merrow & Fell, shipbrokers, Glasgow, against the interlocutor of the Sheriff-Principal (GLASSFORD BELL). Messrs Hutchison & Brown, the pursuers in the action, chartered the ship "Abdul Medjid" from the defenders, the owners thereof, for a voyage from the Clyde to Port Natal, the charter-party being as follows:—"It is this day mutually agreed between Merrow & Fell, for owners of the good ship or vessel called the 'Abdul Medjid,' of Glasgow, A1, measuring per register 400 tons or thereabouts, now at Liverpool, whereof Reddie is master, on the one part, and Hutchison & Brown of Glasgow, merchants and freighters, of the other part—the said ship being tight, staunch, and strong, and every way fitted for the voyage, shall, with all convenient speed, after discharge of her present cargo, proceed to the Broomielaw, Glasgow, or so near thereunto as she can safely get, and there load from the factors of the said merchants a cargo of lawful merchandise, which cargo the said merchants hereby engage to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and, being so loaded, shall therewith proceed to Port Natal, or so near thereunto as she can safely get, and deliver the same to the said freighters or their assigns, freight for the same being paid at and after the rate of a lump sum of fourteen hundred pounds sterling for the full and entire reach of the said vessel's hold—any freight she makes above that to be equally divided between owners and charterers; passengers in cabin to be for owner's benefit; rates of freight on last voyage of 'Criterion' to be taken as a basis. (The act of God, restraints of princes and rulers, the Queen's enemies, fire, and all and every other dangers, accidents of the seas, rivers, and navigation, of whatever nature and kind soever, during the said voyage all excepted.) The freight to be paid, not exceeding £200, in Natal, without special consent of the owners, and the balance in Glasgow one month after sailing, when collected from shippers. The ship to be despatched not later than 10th September. For loading at Glasgow, and clause to be stamped on bills of lading requiring goods to be taken delivery of within ten days after the goods are ready for delivery at Natal. And any days on demurrage, over and above the said lying days, at fourpence per register ton per day, to be paid day by day as the same shall become due, it being agreed that for the security and payment of all freight, dead freight, demurrage, and other charges, the said master or owners shall have an absolute lien and charge on the said cargo or goods laden on board.

"Cargo to be brought to and taken from alongside at merchants' risk and expense. The ship to be consigned to the chief shipper's house at Natal on usual terms, advertising and other charges usually incurred by vessels loading on the berth to be paid by owners.

"The brokerage of 5 per cent. on freight and passage money on this charter is due to Hutchison & Brown, on signature of this agreement, ship lost or not lost. Penalty for non-performance of this agreement, estimated amount of freight."

Thereafter Merrow & Fell agreed with Couper, Blackwood, & Co. to carry *inter alia* on the voyage a certain quantity of red pine boards and deals. This wood was duly shipped, and a bill of lading granted for it on 23d September 1864, but as part of it had been loaded on deck, it was injured by exposure to the great heat of the climate. Couper, Blackwood, & Co. claimed damages against Hutchison & Brown, and raised an action against them for £171, 3s. 3d., for which sum decree was granted. The judgment of the Court was acquiesced in, and Messrs Hutchison & Brown now sought relief from Messrs Merrow & Fell for this amount, and in addition for £45, 7s. 5d., being expenses incurred in defending the above-mentioned action.

The pursuers averred that the defenders were bound to carry the timber according to the usages of maritime carriage, and to deliver it in as good order as it was shipped, and that by allowing the timber to be loaded on deck they had failed to fulfil these obligations.

The defenders averred that they had consented that the timber should be partly loaded on deck at the express request of the pursuers, and in order to exempt them from claims for short shipment.

In answer to this allegation, the pursuers pleaded that proof of any such arrangement was incompetent in face of the provisions of the charter-party.

The Sheriff-Substitute (DICKSON) on 11th April 1872 pronounced the following interlocutor and note:—"Having heard parties' procurators fully on the cause, and made avizandum *quoad* the preliminary defences, finds that at the dates after-mentioned the defenders had the beneficial interest in the ship 'Abdul Medjid,' and that as for the owners of the said ship they entered into the charter-party thereof after narrated; therefore, and in respect the defenders' procurator did not insist in the said defences at the debate, repels the same on the merits; finds that by charter-party (No. 10/1 of process), dated 18th July 1864, the defenders chartered the said ship to the pursuers for the voyage from Glasgow to Port Natal; finds that *inter alia* it was stipulated in the said charter-party that the pursuers should ship cargo in the vessel, not exceeding what she could reasonably stow and carry over and above her tackle, apparel, provisions, and furniture — that the vessel when so loaded should proceed to Port Natal, or as near thereunto as she could safely get, and deliver the cargo to the pursuers or their assigns—that the freight therefor should be paid at the rate of 'a lump sum of £1400 for the full and entire reach of the said vessel's hold, any freight she should make over and above that to be equally divided between owners and charterers, passengers in cabin to be for owners' benefit,'—that for security and payment of all freight, dead freight, demurrage, and other charges, the master or owners should have an absolute lien and charge on the said cargo, and that

advertising and other charges usually incurred by vessels loading on the berth were to be paid by the owners: Finds that the defenders paid the master and crew for the voyage, and employed and paid the stevedores for loading the vessel therefor; Finds that the vessel was navigated on the voyage by the master and crew as the defenders' servants; finds that the pursuers, as charterers of the ship, agreed with Messrs Couper, Blackwood, & Company of Glasgow, to carry therein on the said voyage 563 boards and 85 deals respectively of red pine, being then in good order and well 'conditioned,' and to deliver them in the like good order at Natal, the usual risks of the sea, the act of God, and the Queen's enemies, excepted; finds that the said wood having been taken on board by the master and others as the defenders' servants, was conveyed to Natal, but that on delivery there a large proportion of it was found to be much damaged in consequence of having been carried on deck throughout the voyage, and been thereby injured by the weather and heat; finds that Messrs Couper, Blackwood, & Company accordingly raised action in this Court against the present pursuers for reparation of the loss thereby occasioned to them, in which action, after a lengthened proof and inquiry, they obtained decree against the present pursuers for £88, 4s. 6d. of principal, with interest from 12th April 1865, and £59, 19s. 4d. of costs: Finds that the pursuers, on 22d June 1870, paid Messrs Couper, Blackwood, & Company the sums, with £22, 15s. 11d. as interest, in terms of the decree, and that the pursuers have raised the present action in order to recover the said sums and accruing interest (to which the conclusions have been restricted) from the defenders, as liable therefor under the said charter-party; finds that the parties are agreed, and also finds, in point of law, that the defenders are liable to the pursuers in the said sums and interest unless it shall have been proved that the pursuers by special agreement undertook the risk incident to said wood having been carried on deck, in which case the defenders are not liable in any of the said sums; finds, in point of fact, that the wood was so carried with the pursuers' knowledge and consent, and under an agreement between the parties by which the pursuers undertook the said risk; therefore sustains the defences on the merits in so far as founded on the said agreement, and assoilzies the defenders; finds the pursuers liable in expenses; allows an account thereof to be given in, and remits the same, when lodged, to the Auditor of Court to tax and report.

"*Note.*—At the adjourned debate the defenders' procurator, having regard to the amendment of the summons under the interlocutor of 3d February 1871, gave up the preliminary defences.

"On the merits there was no dispute that the damage to the timber was occasioned by its having been carried on deck.

"The pursuers' procurator contended, and the defenders admitted at the adjourned debate, that although the master represented the charterers in signing the bills of lading (these being in execution of contracts between the charterers and the shippers), yet under the charter party the defenders continued in possession of the vessel, and the master and crew remained their servants. This followed from the owners having paid all their wages and allowances, taken charge of the loading, had right to all the passengers' freight, as well as to a share of freight over the £1400, and had a lien over all the cargo for freight—See *Christie* v. *Lewis*, 2 Broderip and Bingham, 410, and *Fenton* v. *City of Dublin Steam Company*, 8 Adolphus and Ellis, 835. See also Abbot on Shipping, 11th edition, 241; M'Lachlan on Shipping, 313-5. It follows, as the defenders' procurator admitted, that they were responsible for the proper stowage and conveyance of the wood, and for any loss occasioned by failure therein, unless the special agreement mentioned in the interlocutor be proved. The pursuers contended that parole evidence, which alone the defenders adduce upon this agreement, is inadmissible, being in contradiction of the written contract under the charter party. This point is not without difficulty. No doubt parole would be inadmissible to prove the naked fact of a change in some of the conditions in the charter party—*e.g.*, that the parties agreed to a reduction in the freight, or an abandonment of the lien—to a change in the port of destination, or in the conditions as to demurrage, and many others. But here the whole case proceeds on the fact that the carriage of the wood was inconsistent with the legal meaning and effect of the charter party. The defenders aver that this was done, not only with the pursuers' knowledge and consent, but at their request, and under a special agreement, consequent on there not being room for the wood in the hold. Such an agreement is not a naked verbal fact, but a stipulation followed by *rei interventus*, and mutual actings on the faith of it. It is thought that the rule which excludes parole evidence of arrangements modifying written contracts suffers exception in such a case.

"Several older decisions to that effect are collected in the Sheriff-Substitute's work on the Law of Evidence, sec. 163-5, to which he takes leave to refer for a full note of them.

"The questions involved were fully considered by the House of Lords in the recent case of *Wark* v. *Bargaddie Coal Company*, 1859, 3 Macq. 467, the decision in which (reversing that of the Court of Session) supports the same exceptional rule. The action was founded on an alleged violation of a lease of minerals. All the minerals in the lands of Bargaddie were let by a written lease, but the tenants engaged to leave a barrier between the Bargaddie and the adjoining mineral fields. The tenant worked out at certain places the barrier between Bargaddie and the adjoining mineral field of Bredisholme, and the action (raised by the proprietor of Bargaddie) was founded on this violation of the lease. The tenant stated in defence that the landlord had verbally agreed to waive the stipulation about the barrier, and that he, the tenant, had removed it accordingly, in the knowledge and with the acquiescence of the landlord. The Court of Session held that these averments could not be proved by parole. The House of Lords altered that judgment, and remitted to the Court with the declaration that an issue should have been allowed, 'Whether the barrier coal was worked and removed with the consent of the pursuer.' Some passages of the Lord Chancellor's speech in delivering judgment suggested that the admissibility of parole was carried in that case farther than in any previous authority in the law of Scotland. The present Lord President, however, observed in a subsequent case—'The rule of law, as standing on that judgment, I take to be, that where there are averments of acquiescence in operations inconsistent with the terms of the writ-

ten contract, they may be admitted to proof, and, if it appear that the acquiescence was the consequence of a previous arrangement, that it is then competent to prove that arrangement.' Per Inglis (Justice-Clerk) in *Sutherland* v. *Montrose Shipping Company*, 1860, 22 D. 665.

"It is thought that the principles thus laid down apply to the defenders' averments in this case.

"Farther, the charter party provides that the "merchant" should ship a cargo 'not exceeding what she can reasonably stow and carry,' and that the ship 'so *loaded*' should proceed to Port Natal 'and deliver the same' in good condition, &c.; also that the lump sum of freight should be 'for the full and entire reach of the hold,' &c. Under these clauses it may be fairly said that as the wood was beyond the cargo which the ship could 'reasonably stow and carry,' it was beyond what the defenders were obliged to receive on board; or to deliver in good condition if so received; and therefore that a special agreement had to be made regarding it. The Sheriff-Substitute considers parole of the alleged agreement and relative actings of the parties to be admissible, as indicating that they interpreted the written contract in the way thus indicated.

"Next, in considering the parole evidence, it is also important that the wood belonged to third parties—Couper, Blackwood, & Company — with whom the pursuers had contracted to carry it, that the hold of the ship was almost full when the wood arrived alongside; and for that reason the master refused to Mr Brown, who acted for the pursuers in the shipment, to receive it without the defenders' instructions.

"These facts are proved by the evidence of the master (Reddie), and of Messrs Fell & Macpherson; corroborated by the silence of Mr Brown and the pursuers' other witnesses on the matter. The pursuers were thus in a dilemma; they were bound to the shippers to carry the wood, but could not require the defenders to carry it under the charter party. They consequently incurred damages to the former, unless they could get the latter to carry it under a special arrangement. Some meetings took place between Brown on the one hand, and the master and Mr Fell on the other, which resulted in the wood being received on board, at Brown's request, for carriage of the greater part on deck, where alone he well knew there was room for it. The master (Reddie) and Messrs Fell and Macpherson swear that this was done under an express agreement, by which Mr Brown (after representing to the defenders the obligations under which the pursuers lay to the shippers) undertook all responsibility connected with the carriage on deck. Mr Brown contradicted this, swearing that 'no timber was carried on deck with the pursuers' knowledge or consent. He does not, however, explain under what circumstances the wood was ultimately received on board and stowed on deck; that being plainly for the pursuers' interest, but apparently not for the defenders', as the lump freight seems not to have been reached in the shipments.

"The only point adverse to the defenders is, that whereas their witnesses swear it was arranged that the pursuers should pay the extra insurance as for deck cargo and the stevedores charges (probably trifling) for putting some of the wood into a small vacant part of the hold, the defenders paid all the stevedores charges, and there is no proof of extra insurance. But it is easy to understand that the defenders might have chosen not to insist on these stipulations.

"After carefully weighing the whole evidence, the Sheriff-Substitute is satisfied that the wood was shipped and carried under the special agreement thus explained.

"The pursuers' procurator admitted that all the damage arose either directly or indirectly from the carriage on deck, and that no damages to it by the master or crew independently of that is proved. Besides, the pursuers' averments do not cover any damage of the latter kind.

"On the grounds thus fully explained, the Sheriff-Substitute is satisfied that the defenders should be assoilzied."

Against this the pursuers appealed to the Sheriff-Principal, who recalled the judgment of the Sheriff-Substitute as follows:—

"*Glasgow, 29th June* 1872.—Having heard parties' procurators on the pursuers' appeal, and made avizandum with the proof, productions, and whole process, Recalls the interlocutor appealed against: Finds it not denied by the defenders that under the provisions of the charter party, No. 10/1, they were responsible for the due loading of the cargo to be carried by their ship the "Abdul Medjid" from Glasgow to Port Natal: Finds it proved by the judgment now final in the previous case of *Couper, Blackwood, & Company* v. *Hutchison and Brown*, the present pursuers, and by the evidence adduced in said case, and held as repeated herein, that a portion of the cargo, consisting of a quantity of timber, was improperly and negligently stowed upon deck, and was damaged in consequence: Finds it instructed by the copy letter in No. 8/4, the authenticity of which is admitted, that the pursuers, on action being raised against them by Couper, Blackwood, & Company for the loss on said timber, intimated a claim of relief against the defenders, on the ground that they had stowed the timber on deck without the pursuers' knowledge, and the present action has been raised to constitute said claim: Finds that substantially the only defence pleaded (see article 5 of statement of facts in defence, No. 3) is that the pursuers themselves, in order to avoid claims for short shipment, asked that the timber should be stowed on deck, as there was not room in the hold, and the master at first refused to do this, but that having got the sanction of the owners (the defenders), he ultimately complied with the request as a favour to the pursuers: Finds that the pursuers did not appoint, and were not responsible for, the master and crew of said ship, and it was the duty of the defenders under the charter party to see to the loading and stowage of the cargo, and, in point of fact, they, or persons in their employment, took the control and management of the loading: Finds that the onus of proving that they were relieved from their responsibility as regards the said timber lay on the defenders, and they have not attempted to establish the fact, except by certain parole evidence, which was admitted subject to all objections to its competency, and which, contradicted as it is by the parole evidence adduced by the pursuers, cannot be held sufficient to prove relief from said responsibility: Therefore, and under reference to the annexed note, repels the defence, and finds the defenders liable in relief, as concluded for, both in the original and the supplementary action, and in expenses, with the explanation that the account, the amount

of which forms the subject-matter of the supplementary action, falls to be taxed before decree is given, and remits the same to the Auditor of Court to tax accordingly, and to report *quam primum*.

"*Note.*—Under the charter party the 'Abdul Medjid' was bound to load for the pursuers' behoof 'a cargo of lawful merchandise, the freighters being bound to pay as freight a lump sum of £1400 for the full and entire reach of the vessel's hold; any freight she makes above that to be equally divided between the owners and charterers.' It was thus for the owners' interest to carry cargo elsewhere than in the hold, on the representation that it was already full, seeing that over and above the £1400 for the use of the hold, they were to be entitled to recover one-half of the freight effeiring to any extra cargo. When the timber in question was laid down on the quay, the hold was not full, but difficulties were started as to stowing the timber there, although, according to the evidence of the master Reddie, 'there was still room below for nearly all of it.' The charter party imposed on the defenders the duty of stowing it in the hold if they could, and if not, at least of stowing it in such a manner that it would not be unnecessarily exposed to injury during the voyage. The Sheriff entertains very grave doubts that it was competent for the defenders to prove otherwise than by writ or oath of party that so material an alteration was made on this part of the written contract as to transfer the risk of the stowage from the defenders to the pursuers, but he abstains from resting judgment on that incompetency, because he is of opinion that, even if parole was admissible, it has failed to establish the defenders' averment. The evidence is mainly that of four witnesses, who are divided against each other, two to two. In favour of the defenders' version there is the defender John Wilson Fell, and his managing clerk James M'Pherson; against it there is the pursuer Thomas Brown, and the master of the 'Abdul Medjid' Alexander Reddie, together with some corroborative circumstances derived from other sources. Fell's statement is as follows:—'I remember the master, Reddie, speaking to me about some wood coming to the quay for shipment. Towards the end of the loading he informed me there was some wood alongside which he could not stow below for want of room. I met pursuers' partner, Mr Brown, on the subject, in company (I think) with Reddie. He said the pursuer would lose by the charter if they did not get the wood in; and that, having engaged with the shippers to carry the wood, they would be in trouble with them if it was left. I then authorised the master to receive the wood on deck which could not be stowed below, on condition that pursuers were to take the responsibility which might arise from its being on deck, and pay any extra insurance, and that pursuers should pay the stevedore for putting the wood into a small part of the hold still vacant, as the ship was to go down the river that tide. Mr Brown agreed to all these conditions.' It will be observed that this statement goes a good deal further than that contained in article 3 of the defences referred to in the preceding interlocutor, which is silent as to the pursuers having undertaken any responsibility. The statement, however, is corroborated by the clerk M'Pherson, who, although he is not spoken to by Fell as having been present at his conversation with Brown and Reddie, swears that he was. What he says is—'I heard' (as taking part in the conversation) 'Mr Brown say he wished to get timber then on the quay shipped. Mr Reddie said he could not, because he was full. Mr Brown said it would be a dead loss if he would not get it taken, as the freight of the goods already shipped would not make up that under the charter party, and he would be in difficulties with the shippers of the timber with whom he had made arrangements to carry it. Mr Fell and Mr Reddie settled in my hearing with Mr Brown that the timber should be taken on board on condition that Mr Brown should pay the extra insurance on the timber to be shipped on deck, and that Mr Brown should at his own expense send stevedores down with the ship to Greenock in order that they might stow as much as they could below, the rest being to remain on deck.' Had M'Pherson's statement stopped here, it would have been nearly in conformity with that in the defenders' defences. But after an interval (though why after an interval does not appear) he makes the important addition —'There was a further condition agreed to at the conversation above mentioned, that Mr Brown, on behalf of pursuers, should undertake all responsibility whatever connected with the timber being carried on deck. Mr Fell stipulated for that condition, and Mr Brown agreed to it.' This is the whole proof for the defenders. On the other hand, the pursuer Mr Thomas Brown, depones emphatically—'Our firm did not authorise the master of the vessel to stow any of the timber, either ours or that shipped by Couper, Blackwood, & Company, on deck. No timber on board was carried on deck with our knowledge or consent. I gave no instructions as to stowing on the deck or elsewhere.' This is corroborated by the two other pursuers, Peter and George Hutchison, who concur in deponing that they did not authorise the master to carry any part of the wood on deck, and did not know that any part of it was so carried. Then there is the important, and apparently neutral, evidence of the master, Reddie. He was examined twice, the first occasion being so far back as 1868, when he was adduced as a witness in Couper, Blackwood, & Company's action against the pursuers, the proof in which action is held as proof here, and when the whole matter must have been fresh in the witness' recollection. He there depones that when the wood came down to the quay—'I went to Merrow & Fell, the owners of the vessel, and told them that I had more cargo on the quay than I could take under hatches. It was subsequently arranged that the wood should be taken on deck, as no harm would come of it if a little care and attention was used.' He adds distinctly—'I did not communicate with the defenders (the pursuers here) in regard to carrying the wood on deck, as I took my orders from Merrow & Fell.' Reddie was re-adduced by the defenders in the present action in May 1871, and he endeavours in his second deposition to make things a little more favourable for his employers, who are now personally implicated, which they were not before. He states that previous to going to Merrow & Fell's office he had seen the pursuer Brown, who said that the ship would have to 'take the wood by hook or crook, because the shippers had paid freight to the pursuers for part of it.' But he goes on to depone—'I stopped the loading, and reported to Mr Fell for instructions. He gave me authority to carry on deck what wood could not go below. There was still room below for nearly all of it. . . . . I refused to take

the deck cargo till authorised by the owners. I don't remember of having been present at any interview between Brown and Fell. Brown did not tell me of any arrangement with Fell as to deck cargo.' On cross, the witness says he adheres to the evidence already adverted to, which he had given in the action at Couper, Blackwood, & Company's instance; but at the same time indicates that the pursuer Brown must have known that a part of the wood was to be carried on deck, which, even if true, was a different thing from undertaking 'the responsibility of such carriage.' He also adds —'Mr Fell did not tell me (that I remember) that he had arranged with pursuers as to carrying on deck. I did not arrange for that with Brown. . . . . Mr Fell asked me if it would damage the ship's deck to carry timber on it, or if it would be dangerous. I said it would injure the deck. Defenders then allowed me to carry it, provided the decks were cared for by lifting the timber occasionally in fine weather to clean the deck.' There is one other thing of some importance, favourable to the pursuers, viz., that whilst both Fell and M'Pherson say that the pursuers agreed to pay the stevedore for stowing the wood, and also extra insurance on the portion to be carried as deck cargo, they (the pursuers) deny this, and have shown that in point of fact they paid neither stevedore nor insurance. On the whole, therefore, the evidence, such as it is, comes simply to this, that there was a difficulty in taking the wood on board, that the pursuers urged that it must be done, and that the defenders ultimately resolved to stow a portion of it on deck, but it is not proved that the pursuers consented to, or authorised, or knew of its being so stowed, and much less that they admitted the necessity and undertook the risk. The deterioration thence arising is therefore a charge against the ship, both under the charter-party and the bill of lading No. 8/2 granted by the master, acknowledging that the timber was received in good order, and undertaking that it shall be delivered in like good order. Finally, and *separatim*, it would appear, *first*, that a good deal more timber was left on deck than there was any occasion for, seeing that there was room in the hold for nearly the whole of it; and *second*, that the deck load was not so carefully attended to during the voyage as it should have been, and therefore suffered more than was necessary. On the above grounds, though not without some hesitation, the Sheriff has arrived at a different conclusion from the Sheriff-Substitute."

An appeal was thereupon taken to the Court of Session.

For the appellants (defenders) it was argued that the timber had been loaded on the deck with the consent of the pursuers, and that where the cargo had been so loaded with the charterers' consent no claim could lie against the owners. That the loading, further, was at the express request of the charterers. The charter-party provided that freight was to be paid for at the rate of "a lump sum of fourteen hundred pounds sterling for the full and entire reach of the said vessel's hold—any freight she makes above that to be equally divided between owners and charterers." In this case the cargo proved too large for the hold, and the captain refused to take it on deck. Then a meeting took place between Mr Brown and Mr Fell, and the result was that Fell and the captain agreed to take the cargo on the deck, without any additional freight being payable, they, however, not being responsible for any resulting damage.

The respondents (pursuers), on the other hand, argued, (1) that looking to the nature of the contracts and allegations, parole proof was incompetent; and (2) that the result of the evidence was not to establish an agreement, the *onus* of proving which clearly lay upon the appellants.

At advising—

Lord Justice-Clerk—The question in this case arose out of the following circumstances:—A cargo of timber was to a certain extent carried on deck, and the consequence was that it arrived at Port Natal in a damaged state. On account of this the shippers, Messrs Couper, Blackwood, & Co., brought an action against the charterers (who are the pursuers in this action), and obtained decree against them for damages. The present action is brought by the defenders in the former action for relief against the owners. The allegations of the defenders in this action are very simple, for they aver that the timber was carried on deck because the pursuers specially requested that they might be allowed to do so.—Thus the defenders say, the arrangement having been made mainly for the pursuers' convenience, we are not responsible.

In reply to these averments the pursuers maintain that no such agreement was entered into; that any such arrangement was inconsistent with and incompetent in face of the charter-party; and that parole proof of such an agreement is incompetent in face of the written documents.

Now, I am not sure if I read the provisions of the charter-party aright, but I cannot read them otherwise than as a contract for the whole space available for cargo, in so far as compatible with the reasonable loading of the ship. The charterers were to pay £1400—any freight above that price to be divided between the owners and charterers.

The charterers obtained cargo sufficient to make up the full freight, but in order to load it they had to place part of it on deck, besides loading the hold. Now, I cannot see anything in the charter-party precluding the allegation that this was necessary to enable the charterers to make the freight, and that the owners consented to the arrangement. On the contrary, I think that the possibility of such an arrangement is contemplated in the charter-party.

So I do not see anything to prevent the owners and charterers coming to an arrangement that part of the cargo was to be carried on deck, or to preclude evidence of the fact that this was done with the knowledge of the charterers. Now, upon the evidence before us there is no doubt that the charterers did know, for it is proved that there was an application by them to the master to load part of the cargo on deck, and that the master thereupon obtained leave from the owners to do so. That being the state of the case, I am of opinion that the judgment of the Sheriff should be recalled.

Lord Cowan—I cannot see why the charter-party should exclude parole evidence, for although nothing is said in the charter-party about deck cargo, yet there are provisions for extra freight which I think contemplate the possibility of extra cargo. Now, all that is to be proved by parole here is that the parties concurred in an arrangement by which cargo was carried on deck over and above what the hold could contain. That does not

contradict the charter-party; on the contrary, it explains it. The import of the parole proof is clearly shown by the Sheriff-Substitute, and I think that his judgment is right. I therefore concur with your Lordship.

LORDS BENHOLME and NEAVES concurred.

The Court pronounced the following interlocutor:—

"Find that the pursuers entered into the charter-party No. 10/1 of process: Find that the vessel was navigated on the voyage by the master and crew as the defenders' servants: Find that the pursuers, as charterers of the ship, agreed with Messrs Couper, Blackwood, & Co. of Glasgow to carry therein on the said voyage 563 boards and 85 deals respectively of red pine, being then 'in good order and well conditioned,' and to deliver them in like good order at Natal, the usual risks of the sea, the act of God, and the Queen's enemies, excepted: Find that the said wood, having been taken on board by the master and others as the defenders' servants, was conveyed to Natal, but that on delivery there a large proportion of it was found to be much damaged, in consequence of having been carried on deck throughout the voyage, and been thereby injured by the weather and heat: Find that the wood in question was so carried on deck with the pursuers' knowledge and consent, and under an agreement between the parties, by which the pursuers undertook the risk of its being so carried: Therefore recall the judgment appealed from: Sustain the defences; assoilzie the defenders from the conclusions of the summons, and find the defenders entitled to expenses both in this and Sheriff-court; remit to the Auditor to tax the same and to report, and decern."

Counsel for Defenders (Appellants)—Watson and Keir. Agents—Webster & Will, S.S.C.

Counsel for Respondents (Pursuers)—Solicitor-General (Clark) and Balfour Agents—J. & R. D. Ross, W.S.

Friday, March 14.

FIRST DIVISION.

MURE *v.* MURE.

Divorce—Evidence—Question inferring Criminality—Right of Witness to decline to answer.

In an action of divorce the pursuer obtained a commission to examine a party resident abroad, with whom the defender was alleged to have committed adultery. The allegation of adultery was founded upon an action of affiliation raised at the instance of the witness proposed to be examined against the present defender some time previous. The defender moved the Court to instruct the commissioner to warn proposed witness that she was not bound to answer the question as to having had sexual intercourse with defender, adultery being a crime in law. The pursuer resisted the motion, on the ground that the witness, having by her own act made public the fact of her intercourse with the defender, was not entitled to the protection of the Court. *Held* that the Judge Ordinary must append to his commission the instruction craved by the defender; and further, if witness elected to answer, and did so in the negative, then questions might be put founded on her deposition in the affiliation case, with a view to testing her credibility.

Friday, March 14.

FIRST DIVISION.

[Lord Jerviswoode, Ordinary.

MATHER *v.* MACBRAIRE AND BERWICK SHIPPING CO.

Salmon-fishing—Medium filum—*Alveus*—*Public River—Damage by Floods.*

In a case where two parties were owners of salmon fishings on opposite sides of a public tidal river, the boundary being the *medium filum* of the stream, and where an alteration in the bed of the river had been caused by unusually heavy floods,—*held* that the one proprietor whose fishery was injured by the alteration was entitled to interfere with the *solum* of the river to the effect of restoring it to its normal condition.

This was an action regarding salmon-fishings in the Tweed. The pursuer, Mr Mather, was owner of the fishings on the English side, Mr Macbraire of those on the Scotch, both of them being within the tidal or public portion of the river, and the *medium filum* being the common boundary. The Berwick Shipping Co. were Mr Macbraire's tenants. Across the *medium filum*, and *ex adverso* of the parties' lands, stretched a gravel bank, forming species of dam across the river, and left partially dry at low tide. This bank, which was about 125 yards long, began close to the English side, and stretched across the river to within about 20 yards of the Scotch side, and it was in the channel between the end of this bank and the Scotch shore that the great volume of water flowed, and consequently up this channel that most of the salmon passed. The method of fishing in use here was by watching, or as it is called "fording" the fish; that is to say when a fish is seen to ascend the channel the net is cast in the still water above, and the fish landed.

The *medium filum* being the boundary of the two fisheries, the proprietor on the Scotch side had obviously a great advantage in having the main channel on his side, and the strongest reason for keeping it there. In 1867, and again in 1871, violent floods occurred, which cut a gap in the gravel bank and so brought the main channel close up to the *medium filum*, thereby greatly increasing Mr Mather's facilities for fording the fish. This gap was on each occasion filled up by the defender, and the course of the river restored to its normal condition; and it was to restrain these operations that the present action was raised.