duty of the master, at an intermediate port in the course of the voyage, to have the goods taken out and carefully attended to, if he became aware of the existence of an evil which was destroying them, it seems to be clear that the shipowner would not be liable to bear the expense, but the owner of the goods would be bound to reimburse him. See Parsons, *ut supra*, vol. ii. p. 22. Such a case, or the case of any defect or quality of the goods which renders treatment and expense necessary, but which is latent, or even not obvious and to be reasonably anticipated as likely to cause expense at the time of shipment, falls within the principle stated in the judgment in the case of the *Gratitudine*' above quoted, where the master becomes, 'by the policy of the law, acting on the necessity of the circumstances in which he is placed, the agent for the owner of the goods.' The present case appears to the Lord Ordinary to fall within the same general principle. The cargo was given by the shipper as one which could safely be carried in bulk to its destination, and as such it was accepted. The shipowner could not be expected to have such knowledge of the nature and inherent qualities of the cargo as to make him aware of the risk there was—(1) that it might require to be unloaded and re-shipped in a different form altogether; and (2) that, in order to save great deterioration it might require to have considerable expense laid out on it. So far as he was concerned, the inherent quality which caused the expense must, by the nature of the contract, be regarded as latent, or, at least, as not obvious and such as should lead him to anticipate what actually occurred. It is different, however, with the merchant to whom the goods belonged. He is bound to inform himself of the inherent qualities of the goods he ships, and at least must take the risk of these. Moreover, it appears to the Lord Ordinary that, even if the owner of the goods could throw on the carrier the expense of discharging and re-shipment, there is no possible ground for imposing on him the expense of the operations necessary to prevent the serious deterioration of the cargo. That part of the expense is in no view within the contract of carriage, so as to be covered by the freight. For the freight the carrier undertakes to carry and deliver the goods; but if extraordinary expense is required to save the goods from great deterioration, it seems to be clear that this must be paid by the party to whom the goods belong, and for whose behoof the expense is incurred.

"If these views be sound, it appears to the Lord Ordinary that the pursuers are entitled to succeed in their claims of £50 for detention of the vessel. That detention did not arise from a cause ordinarily incident to the voyage, or within the contemplation of the parties when the charter-party was entered into. It is a fair part of the expense caused by the treatment which the cargo required. It was much more for the advantage of the defender that the vessel should remain, giving time for the operations on the cargo, than that the cargo should be taken on board in a condition in which it might have been very seriously deteriorated. The amount charged appears to the Lord Ordinary to be reasonable.

"A charge by the pursuer, Mr Garriock, of £10, 10s. for commission, agency, and trouble, in the whole matter, was objected to, but the Lord Ordinary does not see any sufficient reason to disallow this. The captain might fairly have applied to a shipping agent or merchant to undertake the duty which Mr Garriock did, and the charge appears to be reasonable."

The owner of the cargo reclaimed against this interlocutor.

Authorities cited—1 Bell's Com., 7th ed. 602, 590; *Anderson*, 7 Macph. 836; *Spence* v. *Chadwick*, 6 L. J. 2 B. 313; *Gratitudine*, 3 Robinson, 257; Tenterden on Shipping, 11th ed. 325, 326; Parson on the Law of Shipping, 218; Abbot, 11th ed., 380, 325; *Notava* v. *Henderson*, 5 L. R. 2 B. 346, 2 B. 225.

The Court adhered, and added a finding that the voyage was successfully accomplished, and was beneficial to the owner of the cargo.

Counsel for Reclaimers — Keir and Miller. Agents—Andrew & Wilson, W.S.

Counsel for Respondent—Burnet and Pattison. Agent—W. Mason, S.S.C.

Friday, October 31.

SECOND DIVISION.

[Sheriff of Edinburgh.

BAIRD AND OTHERS *v.* STRATTON.

Road Trustees—General Turnpike Act, 1 *and* 2 *Will. IV., c.* 43*—Surface Water—Dam.*

The tenants of certain quarries having erected a dam to prevent the surface-water from a turnpike road being discharged into the workings—*Held* that the road trustees were entitled to remove this dam, and that it was *ultra vires* of the adjacent proprietor and tenants to act as they had done in erecting it.

This was an appeal, which came up from the Edinburgh Sheriff-court, against an interlocutor of the Sheriff (DAVIDSON), affirming one of his Substitute (HALLARD). The origin of the case is set forth in the petition presented in the Sheriff-court, of which the narrative is as follows:—"That the petitioner, Sir David Baird, is proprietor of the lands of Newbyth and barony of Gilmerton and others, lying within the parish of Liberton and sheriffdom of Edinburgh. The other petitioners are mineral tenants of the said lands under the said Sir David Baird, conform to lease, dated 15th and 16th May, 20th June, and 1st and 13th July, all in the year 1872. That the boundary of the mineral field embraced in the said lease is a parish or statute-labour road leading from the Edinburgh and Dalkeith turnpike road near Greenend, and again joining the Edinburgh and Dalkeith road about a quarter of a mile to the north of the village of Gilmerton. There is close by this road an old limestone quarry to which access is had from the road. For a number of years past the surface water has been directed from the road into the old quarry, and thence it finds its way to the mineral workings, to the great detriment of the workings and the increase of the expense of pumping. The petitioners, the Glasgow Iron Company, recently closed the channel by which the water finds its way from the road into the quarry by damming it with turf close to the roadside, but on the property of the petitioner Sir David Baird. Towards the end of October last, or in the present month of November, the respondent reopened the channel into the

quarry, and during the recent rains a large body of water has found its way into the quarry, and consequently into the mineral workings. The petitioners, the said Glasgow Iron Company, on the 13th day of November current caused the channel to be again dammed in manner before set forth, but there is reason to apprehend that the respondent will cause the same to be opened up. The present application has thereby become necessary."

The prayer of the petition was for interdict against the respondents "interfering with the petitioners or any of them, or any party employed by them, in preventing, by means used within the lands belonging to the said Sir David Baird, the water from getting into the old quarry above mentioned, and also to interdict, prohibit, and discharge the respondent from removing or interfering with the turf or other materials whereby the petitioners or either of them have within the said lands closed or dammed the channel by which the water finds its way from the road above mentioned into the said quarry, and generally from interfering in any way with the lands and property belonging to and leased by the petitioners respectively, and from causing the water from the said road be carried upon the said lands or into the foresaid quarry."

The road in question is a statute-labour road, and is maintained under the Local Act, 5 and 6 William IV., c. 68, and the Statute Service Act, 8 and 9 Victoria, c. 41.

The respondent stated that the surface water, and that which falls on the road itself—which last, however, is of inconsiderable amount—flows down the road to the point where it is adjoined by the quarry, and, until recently interfered with by the petitioners, the surface water was diverted into the quarry by a water channel in the roadside. This water channel has been in existence for the last sixty or seventy years as the means for draining the road of the surface water from the higher level, without objection by the proprietor or his tenants or any interference on their part. This the petitioner denied.

The sections of the statute bearing on the question are § 21 and § 22 of Act 8 and 9 Vict. c. 41. These are as follows:—Section 21 provides that it shall be lawful for the trustees to make "sufficient side-drains on any high road, with power to conduct the water therefrom into any adjoining land, ditch, or water-course (such land not being the site of any house or garden), in such manner as shall be least injurious to the proprietor or occupier of such land, the said side drains to be maintained at the expense of the trustees." Section 22—"to make sufficient ditches along the side of any highway, provided that if the land is enclosed on the side of such highway, such ditch shall be made on the field side of the fence, and also to make proper ditches and outlets from the said side ditches through any lands adjoining such highway (not being the site of any house or garden, in such manner as shall be least injurious to the proprietor and occupier of such land, and the occupier of such land (unless such land be unenclosed and waste) shall be obliged in all time thereafter to keep clear such side ditches already made along the sides of any highway, when so required by the said trustees or their surveyor; and in case the proprietor or occupier shall neglect or refuse to cleanse such side ditches or other ditches or outlets when duly required by such trustees or surveyors, such trustees or surveyors are hereby empowered to cleanse such side ditches or other ditches or outlets, and levy the expense thereof from the occupier of such ground, provided always that nothing herein contained shall prohibit any proprietor or occupier from substituting to the satisfaction of the trustees any other equally effectual ditch or outlet in place of that constructed by the trustees." Further, under sec. 24 it is provided "that if any person shall fill up or obstruct any ditch at the side of any highway, or any ditch used for conveying water from the said road, or any side-drain thereof, or ditch or drain under the same, such person shall forfeit for every such offence a penalty not exceeding five pounds."

With reference to these sections the respondents maintained that the powers conferred on the trustees were to be exercised in the manner least injurious to the proprietor or occupier, and that the ditches must be carried through the adjoining lands, there being no provision for terminating ditches in adjoining lands. The water in the side drain should be conducted by the Road Trustees past the property of the petitioners in a way that will cause injury to no person. The natural lie and fall of the ground admits of this being done at little cost. In the month of June 1872 the mineral tenants began to pump the water out of the old mineral workings in the vicinity of the quarry referred to, and, in the month of September or October following, the extent of the injury caused to the workings by the discharge of water into the quarry from the road became apparent. No complaint was made by the petitioners prior to this time, as the damage that was being done by the discharge of water into the quarry from the drain was unknown.

The petitioners pleaded—"(1) The petitioner Sir David Baird, as proprietor of the lands in question, is entitled to prevent the respondent, and all others, from entering upon the said lands without his consent, and from interfering with the possession of himself or of his tenants, or others on his behalf, or with his or their use of the said lands, and from removing, or in any way interfering with, any works or erections made by or on behalf of him or them thereon. (2) The other petitioners, as the mineral tenants of the said Sir David Baird in the lands in question, are entitled to prevent any person from doing any act or deed within or upon the said lands, without the consent of the proprietor or his said tenants, which may have the effect of injuring the working of the said minerals, or increasing the expense thereof. (3) Specially, the petitioners are entitled to prevent the respondent from entering upon and within the said lands, and from removing any work the petitioners may have done thereon, in order to prevent the flow of water into the mineral workings. (4) The respondent having, without the consent of, and in opposition to the petitioners, entered upon the said lands and removed the turf or other material placed by the petitioners on the said lands to prevent the flow of water into the said mineral workings, and having claimed a right again to reopen the channel on said lands which the petitioners had dammed up, the petitioners are entitled to interdict as craved, with expenses."

The respondent pleaded:—"(1) The water channel, drain, or ditch in question having been in existence for more than the full prescriptive period as a means for conducting water from the road into

the adjacent quarry, the respondent is entitled to have the same kept open and available to him for that purpose. (2) Under the powers conferred by the statute before mentioned the road trustees would have been entitled to conduct the water from the road by such a channel as that in question, had it not already been in existence at the date of the passing of the said statute, and would have been entitled to preserve such a channel, and are entitled to preserve the channel in question in an efficient and available condition, and free from all obstruction. (3) For the preservation of the rights of the road trustees in the premises, the respondent, as superintendent or surveyor foresaid, is entitled to remove the obstructions which have been placed by the petitioners in the course of the said water channel, and any obstructions by which it may be rendered useless for conducting the water from the road, and to enter on the lands in question for that purpose. (4) The petitioners not being entitled to interfere with or obstruct the water channel in question, are not entitled to interdict the respondent from removing such obstructions. (5) The petitioners, the Glasgow Iron Company, having acted, and being still acting, in violation of the provisions of the statute before mentioned, and having subjected themselves to the penalties declared by it, their application for the interdict craved should be refused, with expenses. (6) Generally, in the circumstances, the respondent is entitled to recal of the interim interdict granted, and to have the prayer of the petition refused, with expenses. (7) The existence of the water channel or drain in question having been acquiesced in by the proprietors and occupiers of the adjacent land for a long period of years, the respondent is not now bound to bear the expense of any substitution."

The interlocutor of the Sheriff-Substitute was pronounced on 16th April as follows:—"The Sheriff-Substitute having considered the process and productions, and heard parties' solicitors thereon, finds that for a number of years past a channel has existed leading the surface-water of the road in question into the old quarry mentioned in the proceedings, and belonging to the petitioner Sir David Baird: Finds that recently said channel was dammed up by the petitioners, the Glasgow Iron Company, erecting a ridge of turf and mud on the very verge of Sir David Baird's property: Finds that upon a sound construction of the statute 8 and 9 Vict., cap. 41, secs. 21 and 22, the petitioner, Sir David Baird, is bound to receive the surface-water of the road upon his land by a watercourse constructed by the road trustees, or to propose the substitution of any other equally effectual ditch or outlet for that purpose: Finds that, in these circumstances, the petitioners have failed to justify the obstruction placed by them across the said channel, or to show sufficient cause why the same should be protected by interdict: Therefore recalls the interim interdict previously granted, dismisses the petition, &c.

"*Note.*—The Sheriff-Substitute inspected the locality the day before yesterday. He found a channel leading from the roadside watercourse into the old quarry. On the very edge of the roadside watercourse he found a small embankment of turf and mud to keep the surface-water away from the petitioner's land, and the question at issue between the parties is whether this small embankment, which has recently been placed there, is to be kept up.

"The Sheriff-Substitute thinks that this question should be answered in the negative. The statute entitles the road trustees (here represented by the respondent) to conduct the water from any highway into any adjoining land 'in such a manner as shall be least injurious to the proprietor or occupier of such land.' This is in effect a servitude constituted by statute in favour of the road trustees over the adjoining heritors. No doubt the burden must not be made heavier than necessary upon the owner of the servient tenement. But here the channel in question, after being used for many years without complaint on the part of the petitioners, was adopted by the road trustees for the purposes of the statute. It plainly becomes the duty of the petitioner, Sir David Baird, in such circumstances, to propose a new channel in order to relieve the road of the surface-water, if the existing one, so long acquiesced in, has become injurious to himself or his mineral tenant. But neither he nor his tenant are entitled at their own hand to deprive the road trustees altogether of the benefit of their statutory servitude. In placing an obstruction in the channel they did an act which was unlawful, and for which therefore they cannot claim the protection of the law."

The petitioners appealed to the Sheriff, who pronounced the following interlocutor, of date May 12, 1873:—"The Sheriff having considered the appeal for the petitioners, with the process, and heard solicitors, dismisses the said appeal: Finds the respondent entitled to additional expenses, and decerns.

"*Note.*—Some important facts are disputed, but the parties are of opinion, and the Sheriff agrees, that it is not in the circumstances necessary to have a proof in regard to them.

"It seems to be admitted that the road in question receives a large portion of the water that comes on it from the lands of the petitioner Sir David Baird, and that the water of the road has for many years, and prior to 1845, the date of the general Act, been carried off the road at the place and in the manner now objected to by the petitioners, without any previous complaint. That is an important fact, but had it been otherwise the trustees are entitled, under the 21st and 22d sections of the Act of 1845, to make 'side drains on any highway,' and to 'conduct the water therefrom into any adjoining land, ditch, or watercourse.' Now here the water is conveyed from the road by a channel or water course, or cutting or drain of some kind. The Act does not specify what kind of drain is to be made, and the kind of channel or drain in this instance is not described. It is presumed to be an opening or water course, covered or enclosed sufficient to carry off the water.

"Whether this channel at the point interfered with is on the road or on Sir David Baird's land is disputed. Part of it at least, however small, must be, it is presumed, on the road. It is understood to be a drain at the side of the road conveying the water on the road into the land of the petitioners. If so, the petitioners were not entitled to interfere with it as they have done.

A proprietor or occupier has a right to see that a drain is made in such a manner as shall be least injurious to him (sect. 21), and probably the provision at the end of sect. 22 may apply to such a case as the present. But the petitioners have suggested no less injurious mode of clearing the water from the road. It can't be doubted that if any proposition of that kind were made to the trustees it would receive prompt attention."

The petitioner appealed to the Court of Session.

At advising—

LORD JUSTICE-CLERK—If you throw back the water upon the road, you must come here prepared to show some better way of conveying it away. Until you do this you cannot prevent the Road. Trustees removing the dam as they have already done; it may be that there are on record averments to the effect that there is a better mode of conducting the water away, but that is not sufficient; there must be a specific statement as to what that better way is. The Road Trustees are not merely entitled, but they are bound, to carry the water off the road, and this they have done. The appellants aver that this has now become a source of great loss and inconvenience to them, and that the Road Trustees must find another way of discharging their surplus water. This, no doubt, they would be quite ready to do, but no such way has been shown them; and as to the appellants taking the matter into their own hands, and putting up a dam to throw back upon the road this water, I am clearly of opinion that they had no right to act in this manner, and the Road Trustees were taking a perfectly legal step in causing this dam to be removed.

LORD COWAN—I entirely concur, and think there is no authority whatever for this application.

LORD BENHOLME—I am of the same opinion. The trustees cannot be called upon to suggest a better way of disposing of the water; the suggestion, and more than that, a specified plan, showing how they propose that the water should be carried off, must come from the appellants. The question, as it has come up, is not before your Lordships in a proper shape for consideration.

LORD NEAVES—I am quite of the same opinion. All the appellants practically say here is—"There is another and a better way of getting rid of this water; we know there is, but we won't tell you what it is; you must find that out for yourselves." This will not do; the Road Trustees are not put to show another way, and the appellants must satisfy the Court that there is another and also a better mode of carrying off this water.

The Court dismissed the appeal, and affirmed the judgment of the Sheriff, with expenses.

Counsel for Appellants—The Solicitor-General (Clark), Q.C., and Pearson. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Counsel for Respondents—Watson and Marshall. Agents—Cotton & Finlay, W.S.

Saturday, November 1.

SECOND DIVISION.

SPECIAL CASE—JOHN COWAN (DICK'S FACTOR) AND DICK'S TRUSTEES.

Succession—Marriage-Contract — Trust-Settlement — Double Provision.

A, by his marriage-contract, bound himself to pay £1000 to the child of the marriage at the first term of Whitsunday or Martinmas after his death. By a posterior trust-settlement A directed his trustees to make over the residue of his estate among his children equally in liferent, and their issue in fee,—*Held* that the provision of £1000 in the contract was in addition to the provision in the settlement.

The parties to this Special Case were John Cowan, as factor *loco tutoris* to Miss Isabella Jane Dick, younger daughter of the late Alexander Dick, of Lumloch, *of the first part;* and the trustees of the said deceased Alexander Dick, *of the second part.* The facts as stated in the case were as follows:—The said Alexander Dick died at Bridge of Allan upon the 10th day of September 1871, survived by his wife, Mrs Jane Geddes or Dick, who also died at Bridge of Allan upon 21st November 1871. The said Alexander Dick was twice married, and left two daughters, Charlotte Sarah Janet Dick, the sole issue of his first marriage with Mrs Charlotte Slater or Dick, and Isabella Jane Dick, the sole issue of his second marriage with the said Mrs Jane Geddes or Dick. The party of the first part was duly nominated and appointed factor *loco tutoris* to the said Isabella Jane Dick, who is still in pupillarity, conform to act and decree of the Lords of Council and Session in his favour, dated the 22d day of October 1872. By the contract of marriage between the said Alexander Dick and his first wife, mother of the said Miss Charlotte Sarah Janet Dick, dated 12th April 1855, he made certain provisions in favour of his said first wife, in the event of her surviving him, which, in consequence of her predecease, did not come into operation, but the contract did not contain any provision for children of the marriage, or any discharge of their legal rights. Any money which the said Alexander Dick derived or acquired through his first wife has merged in his general estate. By contract of marriage entered into between the said deceased Alexander Dick and the said also deceased Mrs Jane Geddes or Dick, and to which the trustees of her father, the late Archibald Geddes, Esq., merchant, Leith, were parties, dated the 11th day of July 1865, the said Alexander Dick bound and obliged himself in certain provisions in favour of his said spouse, and also bound and obliged himself, in the event of there being only one child of the said marriage, to make payment of the sum of £1000 to the said child, and that at and against the first term of Whitsunday or Martinmas after his decease, with a fifth part more of penalty in case of failure, and interest of the said sum at the rate of five per cent. per annum, from and after the term of payment during the not payment of the same. The said Alexander Dick further bound and obliged himself to aliment and educate the children of the marriage in a manner suitable to their station until the provisions in their favour therein contained should be paid or become payable, or until they should be otherwise provided for. It was further provided that the provisions contained in the said marriage-contract in favour of the child or children of the said marriage should be in full satisfaction to them of all bairns' part of gear, legitim, portion-natural, and executry, and everything else which they could claim by and through the death of the said Alexander Dick. The said Mrs Jane Geddes or Dick, by the said marriage-contract, conveyed the whole estate which should belong to her during the subsistence of the marriage, except her interest under the trust-deed of her brother, the deceased John Geddes, and her interest in the trust-estate of the said deceased Archibald Geddes, to the trus-