sell the heritable estate, and also to grant discharges of real burdens, but he has not been given power under the statute of 1874 to do that without having a proper feudal title in his own person. It rather appears from what we have heard from the bar that the feudal title of the subjects in question is vested in the person of some trustee or trustees who were appointed to hold those estates during the subsistence of the company, and in what manner the title may be competently transferred from the present holder or holders of the title to the petitioner it is not for this Court to advise the petitioner. But one thing has to be said here—either that the statute must have given authority to sell and dispose of those subjects, and to grant discharges of bonds, without making up a feudal title in his own person, or that it has not; and I see no jurisdiction that the Court can have to confer that power if the statute has not given it. There is no creation of any jurisdiction in this Court to authorise the dispensing with any of the ordinary forms of feudal conveyancing in reference to dissolved companies of this kind, and it is not a case in which there can be any application of the *nobile officium*, because it is a matter depending entirely on the construction of the words of the statute. And if we were to grant this power it might turn out that what we had done was after all of no value. It could not possibly shut the mouth of a purchaser or the debtor on a heritable bond from stating an objection that the trustee, the petitioner, had no title either to convey or discharge, as the case might be. That would be quite open hereafter, notwithstanding anything we might do in the way of granting the prayer of this petition. In short, the question, if it is to be tried at all, must be tried in a totally different form from this, and in a way which will bind the parties who may be interested. I am therefore for refusing the prayer.

LORD ADAM—I am of the same opinion. I never was able to understand the ground on which this petition was brought before us. The Court is in use to grant authority to sell to judicial factors, because they are officers of Court, and we also sometimes grant authority to sell in the case of gratuitous trustees, and so on, where they have power to come to us under statute. I am not aware of any other power we have to grant to anybody, whether a person appointed to wind up an estate, or any other private individual who may come to us, authority to sell property without completing a feudal title. I know of no precedent or authority for such a petition as this, and I entirely agree with your Lordship.

LORD M'LAREN—I understand that the property as to which we are asked to give power to sell is partly in the position which your Lordship has pointed out, in the hands of separate trustees, and partly vested in thecompany itself. The property acquired at the later period vests by statute in the company itself, and I suppose it is with reference to property so situated that the difficulty arises, because the company has now dissolved. The estate must be taken in some way from the company. Well, that raises the question between an intending seller and an intending purchaser. There are well-known means of trying the question whether the seller is able to give a good title to the purchaser, but the way of doing it is not by a summary petition. I agree with your Lordship that we have no power to make the title any better than it is in the existing state of the titles; we have no authority to grant such a power as is asked, or to put the trustee, for the purpose of realisation, in any better position as regards his ability to dispose of the subjects than he is under the authority given to him by the statute.

LORD KINNEAR—I am entirely of the same opinion. It is to be observed that the petitioner does not ask us for power to sell; all that he asks is that we should empower him, having sold, to give to his purchaser a disposition without completing a feudal title in his own person—that is to say, we are to decide in this petition, to which the purchaser is not and cannot be a party, that he is bound to accept such a title as the petitioner is in a position to offer him. I quite agree with your Lordship that it is impossible we could grant such a prayer as that. The petitioner can suggest nothing to show that he is, in making this application to the Court, in a different position from that of any other seller whose title for one reason or other happens to be possibly open to challenge. He is in the same position as any private person—no better and no worse; and therefore, as your Lordship pointed out, he is in this dilemma, he either has a good title to convey, and in that case he does not need our authority, or he has not a good title to convey, and in that case we are not in a position to give it.

The Court refused the petition.

Counsel for the Petitioner — Rankine. Agents—John C. Brodie & Sons, W.S.

Wednesday, November 26.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

ADAM *v.* J. & D. MORRIS.

Ship — Reparation — Shippers — Duty of Master to do what he can for Safety of Cargo—Liability of Owners.

A merchant shipped a cargo of oil-cake under a charter-party which exempted the owners from liability for accidents of navigation, even when occasioned by negligence of the master or other servants of the shipowners. After the vessel reached the port of discharge a quantity of water was let into the hold through the negligence of

the engineer in leaving the sea-cock open. The master concealed this occurrence from the shipper, and when the latter discovered that part of the cargo was wet, the master accounted for it by saying they had had heavy weather at sea. Part of the oilcake was entirely spoiled before it was taken out of the ship.

In an action by the shipper—*held* (1), on the facts, that but for the concealment and misrepresentation by the master, the greater part of the damage to the oilcake might have been prevented; (2) that it was the master's duty at once to have informed the shipper of what had occurred; and (3) that the shipowners were liable for the damage occasioned by the master's failure in duty.

Opinion (by the Lord President) that the shipowners were not entitled to answer the shipper's claim by saying that the damage to the oilcake could not have been prevented even if the shipper had been at once informed of what had occurred, as it was the conduct of their representative which deprived the shipper of the opportunity of trying to save the cargo, and it was in the circumstances mere matter of speculation how much of the damage could have been prevented.

By charter-party dated 11th October 1889, entered into between J. & D. Morris, shipowners, Newcastle, and William Adam, chemical manufacturer at Burghead, Elgin, it was agreed that the steamship "Jubilant," belonging to J. & D. Morris, should proceed to Hull, and there load a full cargo of oilcake (about 150 tons), and being so loaded should proceed to Burghead and deliver the same, on payment of freight at a certain rate in full of all port charges and pilotages. The charter-party provided that the shipowners should not be liable for "the act of God, perils of the sea, fire on board, in hulk, or craft, or on shore, barratry of the master and crew, enemies, pirates, and thieves, arrests and restraints of princes, rulers, and people, collisions, stranding, and other accidents of navigation, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners."

The "Jubilant" proceeded to Hull in terms of the charter-party, and took in her cargo on 12th November, the master John Carr granting bills of lading acknowledging that he had shipped 130 tons of oilcake in good order, and 168 bags of gypsum.

The vessel left Hull on the 14th and reached Burghead on the morning of Monday, 18th November. As soon as the vessel arrived the master noted a protest in these terms — "At Burghead, 18th November 1889, I, John Carr, master of the s.s. "Jubilant," who depones that he loaded a cargo of oilcake, &c., at Hull, and sailed on 14th November from Hull, experienced foggy weather from time of leaving up till Friday night, 15th, and had strong wind and heavy sea from N.N.W. on Saturday the 16th, vessel shipping large quantities of water. Put into Fraserburgh for shelter on Saturday morning, 9 a.m. on same day, and sailed from there on Sunday, 17th, at 10.30 p.m., and arrived at Burghead on Monday the 18th at 7.30 a.m., and in the interest of all concerned I hereby notify a protest in the usual manner." On the same day the gypsum was discharged.

On Tuesday the 19th, none of the oilcake having then been discharged, the engineer of the "Jubilant" opened the sea-cock for the purpose of filling the boiler, and forgot to shut it, with the result that about three feet of water got into the hold. The master having discovered what had happened about ten the same night, had the sea-cock shut, and as much of the water as possible pumped out of the vessel. He did not communicate what had occurred to William Adam, the shipper. The next day the unloading of the ship began, and in the afternoon Adam discovered that part of the oilcake, amounting, as was afterwards ascertained, to 40 tons 16 cwt., was damaged by sea water. He accordingly refused to take further delivery till a survey was made, and it was found impossible to have the survey made before the next day. After the survey Adam refused to take delivery of the damaged oilcake, which was discharged and stored on Friday and Saturday. It was subsequently sold by mutual consent of parties, and fetched £37, 2s. 8d.

The present action was raised by Adam against J. & D. Morris for payment of the loss occasioned to him by the damage done to the oilcake.

The pursuer averred, *inter alia*, that it was the duty of the master, when he discovered the flooding of the cargo, as custodier of the cargo, to have informed the pursuer at once of the occurrence, or to have taken steps at once to prevent further injury to the cargo.

The pursuer pleaded—"(2) The pursuer having sustained loss, injury, and damage as condescended on, through the negligence and breach of contract of the defenders, or those for whom they are responsible, is entitled to reparation as concluded for, with expenses."

The defenders pleaded—"(2) The pursuer having sustained no loss for which the defenders are responsible, they should be assoilzied, with expenses."

Proof was allowed, from which, in addition to the facts above narrated, the following facts appeared—On Wednesday, 20th November, the master telegraphed to the defenders—"No discharging cake. Unfortunately engineer left sea-cock open last night, and spoiled part cargo. Merchant does not know this yet, but noted protest on arrival."

On the same day the master wrote to the defenders as follows—"If the weather permits us to work I will be all out to-morrow, as the merchant is only taking the good cake off the top, and then start with the damaged, therefore I cannot say what quantity there will be, as the water has been 6 inches on the engine-room floor; therefore the water has been the full

length of the ship, and that means a good deal of damaged, but I have not mentioned to any one about the sea-cock being neglected, therefore the only chance for us is to hold to the protest, and having to put into Fraserburgh by stress of weather, as I have told the merchant the ship must have got strained, and then taken up in smooth water, as she is nice and tight." . . .

On 23rd November the defenders wrote to the master, apparently in answer to a previous letter of his which was not produced —"Yours of yesterday with B/L to hand. You must not on any account alter the log-book." . . . The entry in the log-book of date 18th November was to the effect that the captain had noted a protest on arrival of the vessel.

The master was not examined, but the pursuer deponed that when he discovered the damage done to the cargo he applied to the master for an explanation, and the master expressed astonishment at the occurrence, and professed ignorance as to its cause.

Evidence was also led by the pursuer to show that if he had been informed of the wetting of the cargo as soon as it was discovered the greater part of the damage could have been prevented, and evidence was led by the defenders to show that even if the pursuer had been at once informed of what had occurred, the oilcake would have been irretrievably damaged before it could possibly have been unloaded.

On 5th June 1890 the Lord Ordinary (KYLLACHY) pronounced this interlocutor:—"Finds that in November 1889 the defenders carried for the pursuer from Hull to Burghead, in the steamship 'Jubilant,' under charter, a cargo of, *inter alia*, 130 tons oilcake: Finds that the steamer arrived in Burghead on Monday 18th November, and that her cargo was partially unloaded on that day: Finds that on the afternoon of Tuesday the 19th, and before any part of the oilcake had been unloaded, the sea-cock communicating with the vessel's pumps was negligently left open by the defenders' engineer, and that thereby sea water was admitted to the hold of the vessel, and was allowed to rise to a depth of 3 feet or thereby upon the pursuer's oilcake: Finds that the captain of the steamship discovered what had happened, and was informed of the whole circumstances about ten o'clock on the same night, and took immediate steps to have the sea-cock closed, and the water, as far as possible, pumped out, but that he made no communication to the pursuer, who began to discharge the oilcake on the following (Wednesday) morning, and did not discover the damage to the lower part of the oilcake till about four o'clock on that day: Finds that on discovering the damage the pursuer applied to the captain, mate, engineer, and others of the crew for explanations, but they all denied knowledge of the matter, and the captain and engineer in particular professed astonishment at what had been found: Finds that in these circumstances the pursuer thought it necessary to have a survey before taking further delivery, and that it was found impossible to have this survey till Thursday: Finds that the result of this survey was to leave the damage still unexplained, but that the damaged oilcake was on the Friday and Saturday discharged and stored, and afterwards sold by mutual consent, reserving all questions of liability: Finds that the oilcake was before being damaged of the value at Burghead of £8, 10s. per ton: Finds that the quantity damaged was 40 tons 16 cwts,, and that the same fetched a total price (less expenses of sale) of £37, 2s. 8d.: Finds that the admission of sea water to the hold by the negligence of the engineer is admitted to have been an accident of navigation in the sense of the charter-party, and for which, in the absence of other default, the shipowners are not liable: Finds, however, that it was the captain's duty to have at once informed the pursuer of the damage to the oilcake, and also of the manner in which it had been caused, and that the shipowners are responsible for such part of the damage to the oilcake as was due to the captain's concealment of those particulars: Finds that if the truth had been at once told, it would have been possible to have removed the 40 tons of damaged oilcake in the course of a few hours, and that if this had been done the oilcake would still have been worth not less than £6 per ton: Finds that the damage beyond this amount was due to the captain's concealment of the accident which had occurred: Finds in these circumstances that the pursuer is entitled to damages to the extent of £207, 13s. 4d., being the difference between the price of the 40 tons 16 cwts. at £6 per ton and the price which the said oilcake realised, &c., and decerns.

"*Opinion.*—In this case the question is as to the liability of the defenders, the owners of the steamship 'Jubilant,' for damage caused to a cargo of oilcake by the admission of sea water to the hold of the vessel while she lay at Burghead Harbour in the month of November last.

"It is not disputed that the sea water found its way into the hold through the negligence of the defenders' servants. But it is, on the other hand, admitted that the accident is to be considered an accident of navigation, and that for such accidents the shipowners are under the charter-party not responsible, unless and in so far as it can be shown that the damage was due to the unseaworthiness of the vessel, or to the shipowners' failure to provide proper stowage, or to some default on the part of the captain or crew after the accident had occurred.

"The pursuer, the owner of the cargo, maintained that the vessel was not seaworthy—that is to say, was not, in the words of the charter-party, 'tight, staunch, and strong, and every way fitted for the voyage,' and he maintained this upon the ground that she was not provided with what he contended were certain usual and simple appliances for guarding against such negligence as occasioned the accident.

"It was not, however, disputed that—assuming ordinary care on the part of the

master and crew—the vessel was seaworthy enough. And in these circumstances the defenders (the shipowners) claim that the case falls within the principle laid down by the House of Lords in the case of *Steel* v. *Craig*, 5 R. (H. of L.) 103, and L.R., 3 App. Cas. 72. And in this I am of opinion that the shipowners are right. I do not say that under his general obligation to provide a seaworthy ship a shipowner may not be bound to provide those aids to navigation and precautions against accident which have come to be universally used, and upon which accordingly persons chartering a vessel may be entitled to rely. Reference was made in the course of the argument to the mariner's compass, and to the ordinary safety-valve in steam boilers, as illustrating this obligation. But I am not satisfied upon the proof that the automatic appliances of whose absence the pursuer here complains are as yet universal or even common in vessels of the class to which the defenders' vessel belongs. And it is, I think, noteworthy that while the Board of Trade have and exercise the power to stop vessels on the ground of unseaworthiness, they do not insist as a condition of seaworthiness upon the introduction of such appliances as those referred to. On this part of the case, therefore, my opinion is with the shipowners.

"I am also in favour of the shipowners on the question of stowage. The pursuer's complaint is that dunnage was not used in stowing the oilcake. But while there is some conflict of evidence on this subject, the pursuer has in my opinion failed to prove that dunnage is either usual or necessary in coasting steamers such as the 'Jubilant,' making such voyages as the voyage in question.

"It remains, however, to consider whether the damage complained of was not at least greatly aggravated by the failure of the captain and the crew to communicate to the pursuer, as soon as they themselves knew it, the fact of the accident, and the manner of its occurrence. I cannot doubt that in this matter it is the duty of the shipowner, and those representing him, to act fairly and honestly by the shipper—to do all in their power to minimise damage, and generally, when damage occurs, to do their best in the interests of the shipper. If it were necessary to appeal to authority on that point, the case of *Notara and Another* v. *Henderson and Others*, 1872, L.R., 7 Q.B. 225, mentioned at the debate, appears to me to be a sufficient authority. And that being so, it seems to me that the true and only serious question in the case is, whether and how far the damage done to this oilcake might have been prevented if the captain and engineer had duly disclosed to the pursuer (1) the fact of the flooding of the oilcake, and (2) the manner in which that flooding had occurred. Upon that question my opinion is with the pursuer. It is, I think, the fair result of the evidence, that if immediate information had been given the damaged oilcake could, and in ordinary course would, have been removed from the hold in a few hours, and if so removed, could and would have been so treated as to make the damage comparatively slight. I think that the delay which occurred was the fair and natural result of the concealment which the captain and the crew practised, and that but for that delay the oilcake, instead of realising on an average less than £1 per ton, would have realised about £6 per ton. I therefore propose to find the shipowners liable for the damage claimed to the extent of the difference represented by those two figures." . . .

The defenders reclaimed, and argued—The defenders were not liable for the master's failure to inform the pursuer of the flooding of the cargo—*Grieve, Son, & Company* v. *Konig & Company*, January 23, 1880, 7 R. 521; *British Mutual Banking Company* v. *Charnwood Forest Railway Company*, March 21, 1887, L.R., 18 Q.B.D. 714; Maclachlan on Shipping, 469. In *Notara's* case the accident through which the cargo was damaged occurred during the voyage, when the master had exclusive custody of the cargo. That was not the case here, as the vessel had reached the port of discharge before the accident occurred. The two cases were therefore distinct. Further, the result of the evidence was to show that, even if the pursuer had been informed of the flooding of the cargo as soon as it was discovered, the oilcake could not have been removed in time to prevent it being irretrievably damaged. The pursuer also, when he became aware that some of the cargo was damaged, did not have it at once removed, but took up the position that he was entitled to refuse delivery. There was no reason to suppose that he would have acted otherwise if he had been at once informed of what had happened. If no damage resulted from the master's conduct, there was nothing for which the defenders could be made liable. At anyrate, the Lord Ordinary had much over-estimated the damage.

Argued for the pursuer and respondent—It was as much the duty of the shipowner as the shipper to see to the delivery of the cargo, and the defenders were responsible for the damage which had resulted from the concealment and misrepresentation of the master—*Ford* v. *Cotesworth*, December 17, 1868, L.R., 4 Q.B.D. 127, *per* Justice Blackburn, 134; *Notara, &c.* v. *Henderson, &c.*, February 16, 1872, L.R., 7 Q.B.D. 225. The Lord Ordinary had not over-estimated the damage.

At advising—

LORD PRESIDENT—The vessel "Jubilant," of Newcastle, sailed from Dundee under a charter-party by which she was taken bound to proceed to Hull and there take in a cargo of oilcake (about 150 tons), and being so loaded to proceed therewith to Burghead on being paid freight at a certain rate in full of all port charges and pilotages. The vessel performed its voyage in terms of the charter-party, and arrived at Burghead on 18th November 1889. The first thing the master did when he arrived in port was to note a protest, in which he stated that he had "experienced foggy

weather from time of leaving up till Friday night, 15th, and had strong wind and heavy sea from N.N.W. on Saturday the 16th, vessel shipping large quantities of water. Put into Fraserburgh for shelter on Saturday morning, 9 a.m. on same day, and sailed from there on Sunday, 17th at 10·30 p.m., and arrived at Burghead on Monday the 18th at 7·30 a.m.;" and in the interest of all concerned notified a protest in the usual manner. Now, the meaning of the protest was that any damage which had been sustained was the result of stormy weather. That is the ordinary meaning of a protest, and unless something else is expressed that is always what a protest is understood to mean.

After the vessel arrived in port an accident took place through the fault of the engineer, who, while engaged in pumping water into the boiler, left what is known as the sea-cock open, and the water consequently made its way into the hold of the vessel, and thereby damaged to a considerable extent the cargo belonging to the pursuer. The accident which thus happened was clearly within the exceptions stated in the charter-party, which exempts the shipowners from liability for loss arising, among other things, from "accidents of navigation . . . even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners." The engineer being in the service of the owners they are not liable for damage occasioned by his negligence, but his negligence is not the matter complained of in this action. What the pursuer complains of is that the master of the ship, although he was aware of what had occurred, not only refrained from communicating to him that such an accident had occurred, but fraudulently attributed the wetting of the cargo to a different cause.

It appears to me that the pursuer has succeeded in this part of his case. There is a great deal of evidence which it is unnecessary for me to go over, but there are one or two documents which I think it necessary to refer to, and which I think are quite sufficient to establish this part of the pursuer's case.

On the 20th of November 1889 the master telegraphed to the defenders, who are the owners of the vessel, in these terms—"No discharging cake. Unfortunately engineer left sea-cock open last night, and spoiled part cargo. Merchant does not know this yet, but noted protest on arrival"—the last clause signifying that the master had noted a protest on the arrival of the vessel. On the same day the master followed up his telegram by a letter, in which he said—"If the weather permits us to work I will be all out to-morrow, as the merchant is only taking the good cake off the top, and then start with the damaged, therefore I cannot say what quantity there will be, as the water has been 6 inches on the engine-room floor, therefore the water has been the full length of the ship, and that means a good deal of damaged, but I have not mentioned to anyone about the sea-cock being neglected; therefore the only chance for us is to hold to the protest, and having to put into Fraserburgh by stress of weather, as I have told the merchant the ship must have got strained, and then taken up in smooth water, as she is nice and tight." He there states distinctly that he made a misrepresentation in point of fact as to the cause of the damage, and that statement the defenders allow to be made without challenge, and thereby make it their own. In the course of further correspondence this is made even more clear by a passage in a letter from the owners to the master, in which, referring apparently to a proposal which had been made by the latter to assign a different cause for the damage to the cargo in the log-book from that which had already been assigned, they say —"Yours of yesterday with B/L to hand. You must not on any account alter the log-book"—that is, the log-book is to stand with the statement under 18th November, that the master had noted a protest in common form against wind and weather, and had ascribed the damage to stormy weather met with at sea instead of to the true cause, viz., the engineer's negligence, which was known both to him and the owners. These documents, I think, establish beyond dispute, not only that the master concealed from the merchant the real cause of the damage, but that he ascribed it, with the knowledge and assent of the defenders, to a different cause altogether from the true one.

That being so, it is very difficult to see how it is possible to differ from the statement made by the Lord Ordinary that in this matter the duty of the shipowners and their representatives was to act fairly and honestly by the shippers, and that if they neglected this duty they must be held liable for the consequences. The conduct of the master does not fall within the same category as that of the engineer. It is the duty of a master, when an injury has been caused to cargo by an excepted cause, to repair by all the means in his power the mischief which has been done, and to land the cargo in as good a condition as the circumstances will admit. The neglect of this duty does not fall within the exceptions in the charter-party, for it is a plain duty to the shipowners and the merchant and all concerned. Not only did the master in this case not fulfil that duty, but he violated it in the most gross manner.

The Lord Ordinary has referred to one authority, though he thought it almost unnecessary to appeal to authority because the principle was so very clear, but the doctrine established by that authority—*Notara and Another* v. *Henderson and Others*, L.R., 7 Q.B.D. 225—is so very clearly expounded by Mr Justice Wills that I think it worth while to ask your Lordships' attention to one or two short passages in his judgment. He decribes the duty of the master, to which I have been referring, "as a duty imposed upon the master, as representing the shipowner, to take reasonable care of the goods entrusted to him, not merely in doing what is necessary to pre-

serve them on board the ship during the ordinary incidents of the voyage, but also in taking reasonable measures to check and arrest their loss, destruction, or deterioration by reason of accidents, for the necessary effects of which there is, by reason of the exception in the bill of lading, no original liability." That is precisely the duty which I have been endeavouring to describe, and occurring in circumstances quite analogous to the present case, because the bill of lading in that case contained a clause quite as strong in its terms as the clause in the charter-party here. His Lordship goes on further to say—"The exception in the bill of lading was relied upon in this Court as completely exonerating the shipowner, but it is now thoroughly settled that it only exempts him from the absolute liability of a common carrier, and not from the consequences of the want of reasonable skill, diligence, and care, which want is popularly described as 'gross negligence.'" That appears to me to be the sound doctrine applicable to a case such as the present, and precisely in point. Applying that doctrine of law to this case, it is perfectly plain that the master not only failed in the exercise of reasonable diligence and care, but grossly and purposely violated his duty.

But it is said, in any event, that although that is the case, the cargo was so thoroughly damaged before it could have been got out that no damage, or at least, if any, only very slight damage, was in point of fact sustained by the pursuer in consequence of the master's conduct, and that the judgment of the Lord Ordinary on that point is wrong. What the Lord Ordinary says is this—"It is I think the fair result of the evidence, that if immediate information had been given the damaged oilcake could, and in ordinary course would, have been removed from the hold in a few hours, and if so removed could and would have been so treated as to make the damage comparatively slight." In that view of the evidence I concur.

Apart, however, altogether from that view of the evidence, I think the contention of the defenders may be met by another answer, to the effect that it is not in the mouth of the master or shipowners to say that the goods could not have been removed in a few hours. It is not in the mouth of the person who has deprived the merchant of the power of removing his goods to say that. It was the conduct of the master which made the removal of the goods an impossibility. We cannot tell—nobody can tell—how much of the cargo might have been saved but for that conduct, because we do not know the appliances or the number of workmen that might have been employed, and it depends on these facts whether the cargo could have been removed in time or not. Therefore I think, on all principles of justice, the defenders are not entitled to make the answer to the pursuer's claim that the cargo could not have been removed in time because they, or rather their representatives, failed to give him the opportunity of trying to remove it.

On the merits of the case, therefore, I think the decision of the Lord Ordinary is in accordance with justice and authority.

LORD ADAM—This is an action of damages brought by a cargo-owner against shipowners for injury done to the cargo on a voyage from Hull to Burghead, and before the cargo came into the pursuer's hands. There is no question that the cargo was damaged to a large extent, nor is there any question as to the immediate cause of the damage. We know that the ship arrived at Burghead on 18th November, and that while it was lying there on 19th November the engineer opened the sea-cock for the purpose of filling the boiler, and that having had a dispute with the captain, he went on shore without remembering to shut the sea-cock, with the consequence that the sea water got into the vessel to the depth of 3 feet. The mistake of the engineer was the immediate cause of the damage, and so far as the direct damage is concerned, it is admitted that the pursuer has no claim to be compensated for it, in respect of the clause in the charter-party which declares that the shipowners shall not be liable for the negligence of the "master, mariners, or other servants of the shipowners." But then, as I understand the position taken up by the pursuer, it is this—he admits that to some extent the damage was due to the negligence of the engineer, but denies that the entire damage was due to that cause, maintaining that part of the damage was due to conduct of the master, for which the shipowners are responsible, and this raises the controversy between the parties.

The conduct of the master which is complained of is this—and there is no dispute about the facts—that the master, though aware on the night of the 19th of November of the accident which had occurred, and of the water being in the hold of the vessel, failed to communicate to the pursuer, when it came to his knowledge, I do not say the cause, but even the fact of the accident, and left him to find out the wet state of the cargo for himself, which he did on Wednesday afternoon. The pursuer further says that when he did discover the fact that water was in the hold, the master made a direct allegation of a false character as to the cause; and this appears to be the case from the correspondence between the master and the shipowners, for the master first telegraphs to the shipowners informing them of the accident, and saying that the merchant does not know of it yet, and then in a letter written the same day says that he has told the merchant the ship must have got strained. So that we have it under the hand of the master not only that he concealed the truth, but that he made a direct misrepresentation to the merchant as to the cause of the accident, and the pursuer maintains that the extra damage beyond that necessarily caused by the inroad of water was caused by the master's conduct, for the reason that if the master had disclosed to him the state of the cargo, as was his duty, it would only

have been damaged to a very small extent, and would not have been totally destroyed.

With regard to the duty of the master in the circumstances which arose, I agree with the principles laid down in *Notara's* case, and expressed in the passages read by your Lordship. It was said, however, in the course of the argument, and with truth, that the circumstances of that case were not the same as the present, the difference being that in *Notara's* case the injury to cargo happened in the course of the voyage, the circumstances there being that the vessel having put into a port for repairs, was in that port when the accident took place. It was held that in such circumstances it was the duty of the master to endeavour to diminish any loss resulting from the accident.

In this case the fact that the ship had finished its voyage makes no difference as to the master's duty in the circumstances, for the cargo was still in his custody, and so he was bound, as the Lord Ordinary puts it, "to do all in his power to minimise damage." Indeed, I did not understand that Mr Asher seriously controverted that, for he appeared to me to put his case not so much on the ground that there was no duty on the master to make the occurrence of the accident known to the merchant, but on this other ground, that even if the master had made the disclosure which it was said he ought to have made, the cargo would, by the time it could have been got out, have been as thoroughly damaged as it actually has been. That, he maintained, was proved.

Now, I do not say that that might not have been found a good defence if it was proved, but I am very clear that the *onus* of proving it lay on the shipowners. If, however, no damage resulted from the improper conduct of the master, no damages could be given to the shipper, but I think that the defence is unsuccessful in point of fact. I agree with your Lordship that we can merely speculate on what the consequences might or might not have been if the master had not failed in his duty. One can, however, imagine cases in which the defence might have been good. Suppose, as Mr Salvesen put it, that this had been a cargo of sugar. In that case it could have made no possible difference that the merchant had not been told of water having got into the hold till twelve hours after the event, but the present is not in the least a case of that sort. It is not made out, and indeed there is no evidence to show, that if due notice had been given to the shipper, and misrepresentations had not been made, the vessel could not have been unloaded in half or quarter the time which was actually taken, or, as the Lord Ordinary puts it, "in a few hours."

The defenders must therefore, I think, be held responsible for the condition of the cargo in so far as that condition was occasioned by the fault of the master.

LORD M'LAREN—As to the facts of this case, I agree with your Lordship that that part of the damage for which the Lord Ordinary has given decree is directly attributable to the positive misrepresentation of the master of the ship, made in the interests of his employers, communicated to them, and not disavowed by them. It therefore follows, in my opinion, that the owners should be responsible for the damage, which is the direct result of their own act. In saying so, I do not mean to suggest any doubt as to the soundness of the proposition that the mere concealment by the master of a ship from the consignee of facts material and necessary to enable the consignee to take instant measures for the saving of his cargo may not be a good ground for subjecting the shipowners in damages. On the contrary, I agree with all that is said by Mr Justice Wills and by your Lordship on that subject. The facts of the case have been very fully considered by your Lordship, and I have nothing to add to the review given of these facts, but only to express my entire concurrence in the proposed judgment.

LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuer — Guthrie — M'Lennan. Agents — Cumming & Duff, S.S.C.

Counsel for the Defenders—Asher, Q.C.—Salvesen. Agents — Boyd, Jameson, & Kelly, W.S.

Tuesday, November 28.

FIRST DIVISION.

GOVERNORS OF DOLLAR INSTITUTION, PETITIONERS.

Educational Endowments—Application to Court to Alter Scheme—Educational Endowments (Scotland) Act 1882 (45 *and* 46 *Vict. cap.* 59), *sec.* 20.

Section 20 of the Educational Endowments Act of 1882 enacts that in any scheme the Commissioners may provide for the alteration of the scheme by the Court of Session, upon application made, with consent of the Scotch Education Department, by the governing body or any party interested, provided that such alteration should not be contrary to anything contained in the Act.

The governors of an institution, under a scheme prepared by the Educational Endowments Commissioners, which contained a provision in terms of the section above quoted, petitioned the Court to amend the scheme by providing that pensions granted by the trustees who had preceded them in the management of the institution should be burdens on the trust, and that the governors should have power to grant retiring allowances to such teachers as had served the trust for a long time, and were old and infirm at the passing