LORD MACKENZIE—I agree.

LORD KINNEAR was absent.

The Court answered the question of law in the case in the negative, recalled the determination of the Sheriff-Substitute as arbitrator, sustained the appeal, and decerned.

Counsel for Appellants—D.-F. Scott Dickson, K.C.—Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for Respondents—Munro, K.C. —J. M. Hunter. Agents—Macpherson & Mackay, W.S.

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*Friday, March* 17.

## SECOND DIVISION.

[Lord Mackenzie, Ordinary.

## CRAWFORD & LAW *v.* THE ALLAN STEAMSHIP COMPANY, LIMITED.

*Ship—Bill of Lading—Through Bill of Lading—Liability of Shipowner—Onus—Loading in Rain.*

The consignees of a number of sacks of flour under a through bill of lading from Minneapolis to Glasgow *via* New York, found on arrival of the flour at Glasgow that a number of the sacks were caked. The bill of lading, which was signed by an agent representing both the inland carriers and the shipowners "on behalf of carriers severally but not jointly," bore that the flour had been received at Minneapolis "in apparent good order," and provided that no carrier should be liable for loss not occurring on its portion of the through route. It appeared that the flour was loaded at New York in rain. In an action at the instance of the consignees against the shipowners for payment of the damage caused by caking, *held* (*rev.* judgment of Lord Mackenzie, Ordinary) (1) that the *onus* was on the pursuers to prove that the defenders received the flour in good order, failed to deliver it in like order, and were responsible for any damage caused by its being loaded in rain, and that they had failed to discharge this *onus;* and (2) that the shipowner under a through bill of lading which covered inland and ocean transit was not bound to refuse to ship goods in wet weather tendered to him by the inland carrier on behalf of the shipper.

*Observations* as to the duty of shipowners under a through bill of lading which bound them to promptly present to inland carriers on account of owners of goods any claims for damage.

Crawford & Law, flour importers, Glasgow, *pursuers*, for themselves, and as assignees of certain other firms of flour importers, brought an action against the Allan Line Steamship Company, Limited, *defenders*, for payment of the sum of £184, 19s. 5d., being the loss sustained by them through short weight and caking on certain consignments of sacks and bags of flour forwarded on through bills of lading from Minneapolis, and conveyed from New York to Glasgow on one of the defenders' ships. The loss in respect of short weight amounted to £17, 6s. 11d., and pursuers' claim on this ground was ultimately abandoned in the Inner House.

The bills of lading, which were in similar terms, were subscribed by an agent on behalf of carriers severally but not jointly, and bore that the flour was to be carried *via* the Great Lakes in connection with other carriers on the routes. A specimen bill of lading was to the following effect—"Received at Minneapolis, . . . the following property in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, numbered, consigned and destined as indicated below—. . . Shipper's Weight. . . To be carried to the Port (A) of New York, N.Y., and thence by Allan State Line to the Port (B) Glasgow, Scotland (or so near thereto as steamer may safely get, with liberty to call at any port or ports in or out of the customary route), and to be there delivered in like good order and condition as above consigned, or to consignee's assigns."

Annexed thereto were certain "conditions," which provided, *inter alia*—"I. With respect to the service until delivery at the Port (A) first above-mentioned it is agreed that—1. No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto by causes beyond its control; or by floods or by fire; or by quarantine; or by riots, strikes, or stoppage of labour; or by leakage, breakage, chafing, loss in weight, changes in weather, heat, frost, wet, or decay. . . . 3. No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee. . . . 10. No carrier shall be liable for delay, nor in any other respect than as warehousemen, while the said property awaits further conveyance, and in case the whole or any part of the property specified herein be prevented by any cause from going from said port in the first steamer of the ocean line above stated, leaving after the arrival of such property at said port, the carrier hereunder then in possession is at liberty to forward said property by succeeding steamer of said line, or, if deemed necessary, by any other steamer. 11. This contract is executed and accomplished, and all liability hereunder terminates, on the delivery of the said property to the steamer, her master, agent or servants, or to the steamship company, or on the steamer pier at the said port, and the inland freight charges shall be a first lien, due and payable by the steamship company. II. With respect to the service after delivery at the Port (A) first above-

mentioned, and until delivery at the Port (B) second above-mentioned it is agreed—1. That the carrier shall have liberty to convey goods in craft and/or lighters to and from the steamer at the risk of the owners of the goods; . . . that the carrier shall not be liable for inland damage. . . . 2. That this shipment until delivery at the Port (B) second above-mentioned is subject to all the terms and provisions of, and all the exemptions from liability contained in, the Act of Congress of the United States, approved on the 13th day of February 1893, and entitled 'An Act relating to the navigation of vessels, &c.' 17. It is stipulated that in case the whole or any part of the articles specified herein be prevented by any cause from going in the first steamer leaving after the arrival of such articles at said port, the carrier is only bound to forward them by succeeding steamers employed in the steamship line, or if deemed necessary by said carrier it may forward them in other steamers. 18. That the property covered by this bill of lading is subject to all conditions expressed in the regular forms of bills of lading in use by the steamship company at time of shipment, and to all local rules and regulations at port of destination not expressly provided for by the clauses herein."

The form of the Ocean bill of lading used by the defenders, referred to in article II, 18 above, provided, *inter alia*—"Received, in apparent good order and condition, by the Allan State Line, from the , to be transported by the good British steamship 'Corinthian,' now lying in the port of New York, and bound for Glasgow, with liberty to call at Halifax, N.S., St Johns, N.F., Moville, and Liverpool,
being marked and numbered as per margin, shipper's weight (quality, contents, and value unknown), and to be delivered from ship's deck, where the shipowner's responsibility shall cease, in like order and condition at the port of Glasgow (or so near thereto as she may safely get) unto ,
or to his or their assigns, . . . . It is mutually agreed that . . . the carrier shall not be liable . . . for land damage . . .

"It is also mutually agreed that this shipment is subject to all the terms and provisions of, and all the exemptions from liability contained in, the Act of Congress of the United States, approved on the 13th day of February 1893."

The following narrative is taken from the opinion *infra* of Lord Salvesen:—"This case raises certain interesting and important questions as to the liability of shipowners to assignees under a through bill of lading from Minneapolis to Glasgow. The facts have been ascertained, partly by evidence taken in the United States (I may say, in passing, at inordinate and unnecessary length), and partly by evidence taken in Glasgow; and, so far as I can judge, there is very little conflict between the witnesses. They may be summarised as follows:—

"In December 1903 the defenders' s.s. 'Corinthian' loaded a cargo, the bulk of which consisted of 40,804 sacks and bags of flour. Of these, 4132 packages were found, on the vessel being discharged in Glasgow, to be caked. Caking results from water having obtained access, through the material of which the sack or bag is composed, to the flour, which, so far as it has been injured by the water, forms a hard crust when dry. Any caking, however slight, makes it necessary that the sound contents of the bag should be reconditioned by being separated from the caked portion, and this can be done at a cost of 9d. per sack of 140 lb. and 1s. 6d. per sack of 280 lb. The actual damage caused by caking, apart from the expense of reconditioning, is comparatively trifling, only a few pounds of flour being caked as the result of a bag being wholly immersed in water for a considerable number of hours. Various estimates are given of the weight of the flour under such circumstances, and I think that it may be assumed that it will not exceed 3 lb. or 4 lb. in the case of a bag containing 280 lb. of flour.

"The flour in question was delivered to the Lehigh Valley Transportation Company in October 1903, at the town of Minneapolis. Under the bill of lading it was to be carried *via* 'the Great Lakes in connection with other carriers on the route.' It may be assumed, therefore, that it was carried by rail from Minneapolis to the Great Lakes, along which it was conveyed in some form of craft, until it was again put on railway trucks, in which it was eventually carried to New York, where it was put into warehouses. No evidence has been led by either side with regard to the carriage between Minneapolis and New York. It is, however, certain that it might receive damage in the course of this transit, for a small proportion of the bags was discovered to have been caked after they had reached the warehouses in New York; and the evidence excludes the idea that the injury could have been sustained within the warehouses.

"While the flour was in the warehouses, permits were signed by the agent of the Allan Line, of which the permit dated 12th December 1903 is a sample. These permits were addressed to the clerk of the s.s. 'Corinthian,' and authorised him to receive from the Lehigh Valley Company, on or before the following Saturday, a specified number of sacks of flour to be loaded on board the 'Corinthian.' On these permits being presented the sacks of flour, therein described by numbers, were sorted at the warehouses, and checked by checkers in the employment of the inland carrier. They were then loaded on board barges, a tally being kept by each bargeman of what he received, and a receipt was given by him, of which No. 63 of process is a specimen. The barges were then brought alongside the steamer, and unloaded by stevedores employed by the ship. For this purpose the hatch of the barge was opened, and the bags carried by a gang of men and laid upon canvas slings attached to the tackle of the ship. Each sling was then hoisted over the rails of the steamer and lowered into the hold, where the bags were stowed by

the men in the employment of the steamer. Loading went on simultaneously at four or five hatches of the steamer, and from as many barges, and at the rates of 700 or 800 bags per hour. A checker, employed by the ship, stood upon each barge and kept a tally of the number of packages in each sling, and at the same time noted any appearances of damage which they presented. It is not customary for the checker to make any other examination of the packages than one by the eye. Each checker handed his tally-sheet, which contained any notes as to the condition of the packages, to the receiving clerk of the ship, who granted receipts for each bargeload. Various forms of such receipts were used—one form containing no column descriptive of the condition of the bags, another containing a column in which the number of bags found to be torn and mended was inserted, and a third form containing separate columns for bags torn and mended, stained and caked.

"It is common ground here that the caking was caused by fresh water, and could not have taken place in the hold of the s.s. 'Corinthian.' The pursuers, however, maintain that they have proved that the bags when delivered into the barges at New York were not caked except to an inconsiderable extent, and there is no suggestion that, if so, they were damaged on board the barges before their hatches were opened for the purpose of their being loaded on to the steamer. They rely upon the evidence of checkers and bargemen, all in the employment of the inland carrier, who described the system employed in the delivery of flour into barges for shipment on transatlantic steamers, and spoke to the tally-sheets produced in the present case, for none of them profess to speak from recollection of this particular cargo. It appears that the men actually employed in handling the bags have instructions when they discover a bag to be caked 'to holler out "caked" to the checker, and that he makes a note of this on his tally-sheet', besides observing for himself the condition of the bags as they pass under his eye. If this system were carried out carefully it would probably result in at all events a considerable proportion of the caked bags actually existing in the consignment being discovered, but its efficiency depends mainly on the men who handle the flour, and it must be kept in view that they, as the employees of the railroad carrier, have every motive to minimise any damage which may have been sustained in the course of the transport to New York, where bags are only slightly caked. I think the evidence is to the effect that such caking cannot be discovered by the kind of examination which is made in the course of the delivery from the warehouses into the barges. The best proof of this is the fact that, although on the arrival of the steamer special instructions were given to separate the bags which were caked from those which were damaged, at least 1000 bags which were actually caked escaped observation until they could be handled a second time on delivery to the carters who received them on behalf of the consignees, and whose duty it was not to take delivery of bags which were in any respect injured. It is also obvious that the inspection made at the discharge of the vessel is of a more careful kind than that which takes place in the New York warehouses in the course of delivery into barges; and if one-fourth of the damaged bags escaped detection, then it is more than likely that a much larger proportion may not have been noted by the employees of the inland carriers.

"The loading of the 'Corinthian' commenced on the 19th December, and was without incident, except so far as regards Sunday the 20th. On that day, according to the log-book of the vessel, it was raining heavily at six in the morning; at seven the loading for the day commenced; at eight it is noted that there was a fresh breeze and rain; at noon, fresh breeze and continuous rain. There is a later entry in the afternoon—fresh breeze and rain throughout, and at five work for the day was stopped. By six the weather was clearing, and no more rain is noted to have occurred later in the evening. Mr Ismey, who is in charge of the local office of the United States weather bureau, situated not more than two miles from the place where the s.s. 'Corinthian' was loaded, states that rain commenced at 11·45 p.m. on the 19th December and ceased falling at 6·20 p.m. on the 20th. During that time something less than one inch of rain fell—a considerable precipitation according to our notions, but which is looked upon in New York as a moderate rainfall. It was said that reading the log-book and the evidence of the meteorological expert together it might be inferred that this rainfall took place almost entirely between 6 a.m. on the morning of the 20th and 6·30 in the evening of the same day; but I do not think that this can safely be inferred. The last entry on the 19th in the log-book is at midnight; and while there is one entry which presumably was made between midnight and 6 on the following morning, to the effect that there was at one time a moderate breeze and light drizzling rain, it does not follow that a large part of the rainfall may not have taken place during the night. Various persons engaged in the loading speak of the rain not having been at all heavy, and say that after working the whole day they were not obliged to change their clothes. Evidence from recollection of events which took place so many years back must be accepted with some reservation; but I think the general statement that when rain is coming down heavily it is customary to stop loading altogether seems to indicate that the heaviest showers were between 6 and 7 before loading commenced, and after 4·30 or 5, when it was stopped for the day. The inference that I draw from the evidence taken as a whole is that while the rain during the actual loading time was more or less continuous, it was not

so heavy as to suggest the propriety of stopping operations.

"The case originally made by the pursuers upon record was that the caking of the 4000 bags was due to the negligence of the defenders in carrying on the operation of loading their ship during rain, without taking any precautions to protect the flour from wet; and, in particular, it was averred that they had not erected suitable coverings over the hoisting apparatus, the deck, and the holds. This case, the Lord Ordinary holds, has been entirely disproved, and I agree with him. The defenders have demonstrated that they took all the precautions which are usual in loading flour from barges into an ocean liner. In particular, they had bell tents erected over each of the hatches and covered ways, beneath which the sacks of flour travelled in their passage from the barges to the holds of the ship. They also used sawdust to suck up any wet that might fall on the tarpaulins on to which the bags were lowered, and from time to time they changed the canvas slings when they became so wet as to be likely to injure the bags. It is true that these precautions did not provide absolute protection to the flour, because there is necessarily a slit or opening in the bell tent so as to enable the tackle to be worked, and some rain would fall upon the bags through this opening during the short period that elapsed, estimated at not more than one or two minutes, from the time they were put in the slings until they were deposited in the ship's hold. It is impossible to say that some wetting resulting in caking might not result from this exposure; but I confess to being extremely sceptical that it could be of a serious nature, or affect so large a proportion of the bags which were loaded on the Sunday. Considerably more damage in my opinion would result to the bags while in the barges, for their hatches (which were large) were uncovered during the whole period. On this part of the case I need only add that there is no evidence that it is customary to interrupt either the loading or the discharging of a steamer at New York or Glasgow because of rain unless the rainfall is of an unusually heavy description; and there is no suggestion of any other precaution to protect the flour from rain which the pursuers might have taken and did not take."

On 23rd December 1909 the Lord Ordinary (MACKENZIE), after a proof, pronounced the following interlocutor—"Finds that under the bills of lading founded on, the defenders were bound to deliver to the pursuers at Glasgow the cargo shipped on board the 'Corinthian' at New York in like good order and condition as received by them: Finds that in terms of said bills of lading the said cargo was received by the defenders in apparent good order at New York, except as notified by them to the inland carriers: Finds that the defenders notified at New York to the inland carriers that only 110 sacks or bags of the flour shipped were received by them 'caked': Finds that the defenders ascertained and notified to the consignees at Glasgow that 4132 of said sacks or bags were 'caked': Finds that the defenders have failed to prove that the damage by 'caking' to 4022 of said sacks or bags (being the difference between 110 and 4132) did not arise whilst the goods were on board the 'Corinthian' or in their custody: Therefore finds that the defenders are liable in damages to the pursuers in respect of 4022 bags 'caked': . . . Grants leave to reclaim."

*Opinion.*—"The case made against the defenders is that under the bills of lading founded on they were bound to deliver at Glasgow the consignment of flour shipped on board the 'Corinthian' at New York in December 1903 in like good order and condition as received by them. The flour was consigned from Minneapolis to Glasgow under through bills of lading. . . . At New York the receipts granted by the defenders to the inland carriers, the Lehigh Valley Railway Company, bore that out of the consignment of 41,110 sacks and bags only 110 were damaged by caking. On delivery at Glasgow the defenders ascertained that 4132 sacks or bags were caked. Caking is a well-recognised form of damage to flour. A layer next the covering becomes like a biscuit. The covering seems to be firm and is hard to the touch. The caking in question was caused by fresh water. At New York the short weight on the consignment as noted was 490 lbs. At Glasgow it was 5834 lbs.

"The damages claimed for the difference between 110 and 4132 caked bags is £167, 12s. 6d., and for the short weight £17, 6s. 11d. The important matter is that of the caked bags, for it appears from the evidence of Mr Price, the head of Herbert Bradley & Company, millers' agents, New Jersey, that the object of this action, which has been in Court for a number of years, is to stop the loading of flour at New York in wet weather.

"The case made on the record, which was adjusted so far back as 5th July 1904, is not one founded simply on the bills of lading but is one of fault. Conds. 24 and 25 set out in detail the nature of the fault alleged, that the defenders failed to take proper precautions to protect the flour from wet during loading. This case, I think, the pursuers have failed to prove. The evidence shows that from the railway cars to the covered barges, and from the barges to the ship, the usual methods were adopted, and no one suggests any other or extra precautions that could have been taken. The bulk of evidence was taken at New York on commission, and it is to be regretted it was taken in so prolix a fashion. Delivery was made to the defenders when the sacks or bags were placed in their slings, and they were hoisted on board with the usual protection of a bell tent and awnings. Therefore if the *onus* was on the pursuers to prove fault I should be prepared to hold that they had failed.

"At the close of the hearing on evidence, however, the pursuers added a new plea-in-law to cover the main point argued on

their behalf, which is in these terms—'The defenders being bound under and in terms of the said bills of lading to deliver the said flour at Glasgow to the pursuers and their cedents in good order and condition and of the full specified weight, subject to the exceptions notified by the defenders at New York, and having failed to do so as condescended on, are liable to the pursuers and their cedents in the loss and damage sustained by them.' This is a plea apart from any question of negligence, and depends upon the terms and effect of the bills of lading. The through bills of lading say that the flour was received at Minneapolis 'in apparent good order, except as noted (contents and condition of contents of packages unknown) . . . shippers' weight,' to be delivered in like good order and condition. The point taken by the defenders in the amendments they have made to meet the pursuers' new plea is that the words 'except as noted' apply only to Minneapolis and not to New York.

"The effect, however, of the ocean bill of lading is to charge the defenders with the receipt of the flour 'in apparent good order and condition,' except in so far as they notified the inland carrier that the contrary was the case, *i.e.*, to the extent of 110 caked bags. The argument for the pursuers on this head is that the statement in the bills of lading that the flour was shipped 'in apparent good order' is an admission by the defenders that so far as they had an opportunity of judging the flour was so shipped. It is proved that caking can be ascertained by external examination. The pursuers then contend that the words 'shippers' weight (quality, contents, and value unknown)' are not sufficient to destroy the effects of the words 'in apparent good order,' as an admission that such sacks or bags were in good order externally when shipped; and that therefore the *onus* is upon the defenders to prove that the damage did not arise whilst the goods were on board the ship or in their custody. This is the law as stated by James, L.J., in *The Peter der Grosse* (1875), 1 P.D. 414, and applies in my opinion to the present case.

"I think the defenders have failed to discharge this *onus*. It is proved that one of the six days upon which the cargo was loaded—Sunday, 20th December 1903—was a rainy, blowy day; the slings in which the bags and sacks were put had to be changed owing to their getting wet; a tarpaulin had to be spread over the 'stool' below the square of the hatch upon which the sacks or bags rested when lowered into the hold; sawdust was sprinkled over the tarpaulin to absorb the moisture; there is evidence from at least one of the defenders' witnesses that if a tarpaulin and sawdust were required it was unwise to go on loading; this sawdust was seen adhering to the caked bags when they were discharged at Glasgow, a feature which according to the evidence of Mr Horne, an excellent witness, made the bags suspect at once; added to this is the fact that packages collected from various quarters bore traces of all having suffered the same kind of damage, indicating that they had all been damaged by one cause and at one time.

"This body of evidence, though it may not be sufficient to establish affirmatively fault on the part of the defenders in not ceasing to load in the rain, makes it in my view impossible for them to discharge the *onus* which the terms of the bills of lading impose upon them. In reaching this conclusion I do not leave out of sight the evidence of the ship's crew that they did not get wet on the 20th. The ship's log and Mr Emery's evidence, however, show how bad the weather was. Nor do I proceed upon the view suggested that the lighters were on the weather side of the ship, so that the rain was driving into the opening in the bell tent, which I do not think satisfactorily made out.

"The defenders maintain that they are not liable for the sacks or bags which as the result of their examination at New York they notified were damaged, though the damage was not specified to be from caking. They found strongly on the passage in Cond. 24, where the pursuers aver that the defenders 'notified to the inland carriers the number of damaged sacks and bags and the short weight on delivery to them, distinguishing the number "caked," "torn and mended," "stained," "wet," and "weighed."' It is proved that these figures were 26 caked, 2825 torn and mended, 1044 stained, and 84 wet—total 3979. There is no evidence in this case to show whether claims were made against the inland carriers in respect of these sacks and bags, and if so what was paid. The contention of the defenders is that they notified as damaged substantially the same number of sacks as those the pursuers now claim for as caked; that a stained bag might be caked as well, so might one be that was torn and mended; and that it was not for them to classify the damage. I think the weight of the evidence is against the defenders on this point. It shows that there is a duty on the checker to ascertain and note damage by caking as distinguished from staining, and other kinds of damage. It is important to do so. Caking is damage to the contents of the bag indicated by external appearance; staining is damage to the sack or bag only. Underwriters pay for caked, but not for stained sacks and bags. Therefore in so far as the sacks and bags were not noted as caked at New York, it must be held against the defenders that they were not caked when delivered to them, in which case they are liable under the bills of lading for the additional sacks which were found to be caked on delivery at Glasgow. . . .

"This is sufficient for the disposal of the case. It is right, however, that I should refer to what is now the pursuers' third plea-in-law, in so far as it bears on the matter of caking. It is in these terms—'*Esto* that any of the loss and damage condescended on was sustained prior to delivery to defenders; they having failed to notify same to the inland carriers, are bound to make good such loss and damage to the pursuers for

themselves, and as assignees foresaid.' This is an alternative view to that already dealt with, and proceeds on the footing that the damage was done not at sea but on land. Now the through bill of lading contains these provisions, l. 3—'No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee.' . . . 'Claims for loss or damage must be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than 30 days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event.' It also provides that the steamer is not liable for any loss or damage that may have occurred before delivery at New York—'while agreeing to promptly present to inland carriers for account of owners of goods any claims for shortage or loss or damage that may have occurred before delivery of goods at the port.'

"As indicated in my opinion of 16th June 1906, I think this imposed the duty upon the defenders of making such inspection of the consignment as might be reasonable in the circumstances. If the pursuers prove fault against the defenders in the discharge of that duty, that may form the ground of liability against them.

"Now the situation upon the evidence appears to be this — The owners were anxious to get their vessel dispatched as soon as possible. The barge captains were reluctant to deliver to the ship except upon clean receipts. The loading of what was a very large cargo was pressed on, with the result that the examination which would have disclosed caking was not properly made. I do not think the system of examination can be successfully challenged. It seems to have been the usual one. I do, however, think that the thoroughness of it may.

"Captain Christie of the Allan Line, who has had considerable experience, though some years before 1903, condemns the way the inspection is carried out in practice. He says, 'I don't think the inspection which was made by the steamer's checker was sufficient to enable the steamer to know how many bags that were loaded were caked.' He admits that the checker could have had a reasonable opportunity of seeing what the bags were like if the loading had been delayed two or three days. My view is, that if shipowners undertake such an obligation as was imposed by the through bill of lading here, they cannot be excused from taking reasonable steps to carry it out by pleading that the sailing of the ship will thereby be delayed. The result of the inefficient inspection was, if the damage was inland damage, that the steamer's checker only found out at New York that 110 bags were caked, when there were 4132, the difference being 4022, or nearly 10 per cent. of the cargo. This is evidence to show that the defenders did not take all reasonable steps on behalf of the consignees, which renders them liable under the obligation imposed on them by the through bill of lading. The American cases cited of the *Savannah, Florida, and Western Railway* v. *Harris*, 23 American State Reports 551; *Morganton Manufacturing Company* v. *Ohio River and Charlestown Railway Company*, 61 American State Reports 679, impose a greater responsibility on the last carrier. In the view I take it is not necessary to express an opinion as to how far the law there laid down is applicable to the present case.

"I am of opinion that the defenders are liable on the ground stated in the pursuers' second plea-in-law, the plea added on amendment. If, however, the view is taken that they have proved the damage did not arise whilst the flour was on board ship, then in my opinion they are liable under the pursuers' third plea-in-law.

"Findings will be pronounced giving effect to the ground of liability stated in the pursuers' second plea-in-law."

The defenders reclaimed, and argued—The Lord Ordinary had decided the case, not on the grounds originally averred on record, viz., fault, but on the question of *onus* under the bill of lading. The case now made was one of breach of the contract of carriage as contained in the bill of lading, and the effect of the Lord Ordinary's judgment was that on the terms of the bill of lading the *onus* was on the defenders to show that the damage to the flour was received elsewhere than under their custody. The shipowner, however, was not an insurer under the bill of lading, and he was only liable for fault or for a presumption of fault arising from a certain state of facts—*Wilson, Sons, & Company* v. "*Xantho*," 1887, 12 A.C. 503, *per* Lord Herschell at p. 510. The contract of carriage in a bill of lading was to carry only with reasonable care—*Laurie* v. *Douglas*, 1846, 15 M. & W. 746. The bill of lading was the sole measure of the shipowner's liability, and the present bill of lading had special exceptions, one of which was damage on the inland carriage. The defenders were within the above-cited case if they showed that under the excepted clause the loss which arose might have arisen inland — "*The Duero*," 1869, L.R., 2 A. & E. 393; *Hamilton, Fraser, & Company* v. *Pandorf & Company*, 1887, 12 A.C. 518. The effect of these cases was that an agreement to ship goods under a contract of carriage came in place of the law of common carriers—*Hill* v. *Scott*, [1895] 2 Q.B. 371 and 713. To superimpose a contract of insurance on the bill of lading would lead to the anomalous result that the more lax the inland carriers' servants were the greater chance would they have of placing the burden on the unfortunate shipowner. The circumstances in which under a bill of lading the *onus* would be on the shipowner to exouse himself were stated by Lord President Inglis in *Craig & Rose* v. *Delargy*, July 15, 1879, 6 R. 1269, at p. 1276, 16 S.L.R. 750. There was no presumption from the mere signature of the bill of lading that the shipowner was responsible—*Royal Hungarian Sea Navi-*

*gation Company* v. *Bruce & Wilson*, not reported. The Lord Ordinary had applied to the present case a totally wrong class of law, viz., that of the "*Peter der Grosse*," 1876, 3 Asp. 195, 1 P.D. 414. That was a case of a bill of lading signed by the master of the ship that the goods were in good order and condition, whereas here the words were "apparent good order and condition." There was here no evidence as to the state of the flour at New York, and in any event all that the shipowner required to do was to show that caking would not be *prima facie* apparent to the mate at loading, and this on the evidence he had done. The damage was not obviously external, so that the shipper could not connect it with the shipowner. The obligation of the defenders was to carry the goods from New York to Glasgow in good order, and they were only liable for fault, the people primarily responsible being the railway company — Scrutton on Charter Parties and Bills of Lading, 6th ed., p. 135-137, and article 52 and footnote —Macnamara's Law of Carriers by Land, 2nd ed., sec. 197. In the same year as the case of the "*Peter der Grosse*," was decided the case of "*The Ida*," 32 L.T. 541, which put the *onus* the other way. Defenders here were in the same position as successive railway carriers, who were not responsible for loss arising off their own lines—*Kent* v. *Midland Railway Company*, 1874, L.R., 10 Q.B. 1; Scrutton, *cit. sup.*, p. 190. In any event, if there was any *onus* on the defenders they had discharged it by showing that neither during the voyage nor at the loading at New York could caking have been caused, all the usual precautions having been taken. There was no obligation on the shipowner as to loading except to do so in a reasonable manner. As a matter of law it was not for the shipowner to stop taking cargo, but under the bill of lading it was the duty of the carrier not to tender the goods if he thought they ought to be carried in some other way. The defenders' liability only began when the goods were on the ships' slings, and he was only liable to deliver the goods in the same condition as he had received them. There was no evidence, however, as to the condition of the contents of the bags at any stage until the last, and the detection of caking by ocular inspection was difficult. Defenders had notified to the best of their ability the damage observed.

Argued for the pursuers and respondents —Defenders were liable under the bill of lading. This imposed on the shipowner only his common-law responsibility to deliver the goods in the like condition that they were received. Pursuers held the acknowledgment of the agent of the inland and ocean carriers that the goods were delivered at Minneapolis in apparent good order and condition, and defenders had undertaken to deliver in the like good order and condition at Glasgow, and their agents' receipt barred them from saying that they were not in good order later. Certain defences were no doubt open to them, and under the bill of lading they were not to be liable for inland damage, but the *onus* was on them to show that the damage occurred before the goods arrived at New York—*Smith & Company* v. *Bedouin Steam Navigation Company, Limited*, November 26, 1895, 23 R. (H.L.) 1, 33 S.L.R. 96. It was the duty of the shipowner to determine whether it was too wet to load. In this particular case, under a through bill of lading, the shipper could not be said to tender the goods at all, because the inland carrier was bound to hand them on. The defenders had given an acknowledgment at New York that the flour had been received in wet weather in good order, and this imposed the *onus* on them of showing that the damage which had arisen was not due to them—The Harter Act 1893, sec. 4, *vide* Carver on Carriage by Sea, 5th ed., sec. 103a, and Scrutton on Charter-Parties and Bills of Lading, pp. 402 and 403. The section in question—sec. 4 of the Harter Act—imposed on the shipowner responsibility for the apparent order and condition of the merchandise, and the bill of lading was subject to it. "Apparent good order and condition" was really equivalent to "good order and condition." Caking was apparent in the ordinary course of handling the cargo and did not require detailed examination. Unless he proved, therefore, that the damage arose on land the shipowner was liable — the "*Peter der Grosse*," *cit. sup.*, *per* James, L.J. The pursuers did not found on fault, but on the law of carriers. The liability of a shipowner was the same as a common carrier —Carver on Carriage by Sea, secs. 2 and 22. The effect of this might be to make him really an insurer of the goods. The same principle was laid down in Scots law —Bell's Com. i, 495—and rested on the edict *nautæ caupones*. The pursuers had delivered the goods to the defenders' agent at Minneapolis, and they were really shipped there. In the present case there was a contract with defenders to carry these goods, and this left it entirely within the defenders' discretion as to when they were to be taken—Article ii, 17, of bill of lading. The shipowner was therefore under an absolute responsibility as an insurer, and his liability had nothing to do with negligence — Carver, sec. 1-20. There was here no modification of this liability by contract, otherwise the defenders must show that the pursuers consented to the loading going on in rain, and they had not done so. There was no evidence that the consignee pressed the ship to take the goods, and there was no authority to the effect that the shipowner was freed from liability because the goods were tendered. The *onus* was on the last carrier to show that the damage took place before he received the goods—*Savannah Florida and Western Railway* v. *Harris*, 23 Amer. State Reports, 551; *Morganton Manufacturing Company* v. *Ohio River and Charleston Railway Company*, 61 Amer. State Reports, 679. But, further, even if the defenders proved that the

damage had taken place before they received the goods, they were still liable on the through bill of lading under Article ii, 11, for failing to notify this damage at New York. By so failing they had prevented the consignees from timeously presenting their claim for damages to the inland carriers.

At advising—

LORD SALVESEN—[*After narrating the facts ut supra*].—These being the facts the Lord Ordinary has held that the effect of the ocean bills of lading is to charge the defenders with the receipt of the flour in apparent good order and condition, except in so far as they notified the inland carrier that the contrary was the case, that is, to the extent of 110 bags; that caking can be ascertained by an external examination, and that the *onus* is upon the defenders to prove that the damage done did not arise whilst the goods were on board the ship or in their custody, and that as they did not cease to load in the rain it was impossible for the defenders to discharge the *onus* which the terms of the bill of lading lay upon them. I am unable to assent to the chain of reasoning as expressed in these propositions.

In the first place, I think it is plain that the admissions contained in the through bill of lading as to the condition in which the flour was received, applies, and can only apply, to Minneapolis, and the obligation to deliver in the like good order and condition, while it is undertaken by the agent who signs it on behalf of all the carriers, severally but not jointly, does not apply in turn to successive carriers. No bill of lading of any kind was signed by the master or agent of the steamer at New York, and there is therefore no express contract on which the indorsee of the bill of lading can found as against the defenders. It may, nevertheless, be implied against the defenders that they were bound to carry the flour described in the bill of lading from New York to Glasgow in the same condition in which they received it, and this I think came to be the pursuers' contention. In that case, however, they must rely upon other evidence than the bill of lading as to the actual condition in which the flour was received by the defenders at New York, and this—they say—is supplied by the receipts which were granted, on their behalf, by the receiving clerk, Mr Le Furge. Now these receipts bear, with regard to the 4394 packages shipped on the 20th, that they were received in rain; that they were all more or less stained; that a large number of the packages were torn and mended; and that in the case of one lot, consisting of 2694 packages, that seven bags were caked. The pursuers say that it is implied from those receipts that only seven out of the total number were caked, because only seven are so noted. I have already made some observations showing that such an inference is not justifiable, and that a large number of bags which were only slightly caked might well escape detection in the rapid transfer that takes place from the barges into the hold of the steamer. It is also probable that many of the bags which were marked "stained" may have been or become caked, because rain, which falls on a bag in sufficient quantity to cake some of the contents, generally—although not invariably—leaves a stain behind it. But in any event, if the caking resulted from the rain which fell during the 20th, it would not have been proper to have noted the bags as "caked"; for whether the rain which falls upon a bag during the operation of loading will result in caking part of the contents, can only be ascertained after the bag has dried. Had a bill of lading been granted by the ship, it would, no doubt, have contained the qualifications expressed in the receipts that I have already referred to; and would have notified to the consignees that the bags received on the 20th were all more or less stained, and had all been received in rain—which would have been an intimation that they might eventually prove to be damaged by caking on arrival.

Under the through bill of lading there is an express provision that no carrier shall be liable for loss or damage not occurring on its portion of the through route; and in the form of the ocean bill of lading used by the Allan State Line, which is incorporated in the bill of lading sued on, there is also a provision that the ship shall not be liable for land damage. It is therefore plain that, apart from a clause to which I shall afterwards refer, if the caking of the bags of flour took place before loading on the steamer, or the flour had previously been exposed to conditions which would render it liable to cake after its delivery to the steamer, the defenders would not be responsible. The whole question therefore seems to me to turn in the end upon (1) whether the pursuers have proved that the defenders received the flour substantially in perfect order and failed to deliver it in like order, and (2) whether the defenders are responsible for such damage as may have resulted from the flour loaded on the 20th of December, having been received by the ship in rainy weather.

1. For the reasons I have already indicated, I think the pursuers have failed to discharge this *onus*. They can certainly take very little benefit from the receipts which were granted by Le Furge, for these show that the flour loaded on the 20th was not in good order and condition, nor do I think that the evidence of the checkers, who tallied the flour on its way from the warehouses to the barges, is at all conclusive of this question. It was not in the interest of the inland carrier to discover defects in the flour which had taken place on the inland route; and the examination they made was of a somewhat perfunctory character, and would, I think, not disclose any damage except what was very obvious. Further, I think the probability is that any damage that resulted from the rain on the 20th took place while the flour was still in the barges belonging to the inland carriers, and before it was put into the ship's slings. If, as I hold, the *onus* is upon the pursuers

to prove the amount of damage caused by the rain after the bags were put into the ship's slings, then they were just as little able to discharge this as the defenders would be if it lay upon them to prove that no such damage resulted. It would, of course, have been different if there had been a bill of lading signed on behalf of the ship acknowledging receipt of the flour in good order, and undertaking to deliver it in the same order, for this would have been a contractual obligation which it would lie upon the ship to excuse itself from discharging. Here, as I hold, there is nothing of the kind.

2. According to Mr Price,* the object of the present action is to prevent a shipowner under a through bill of lading from receiving flour in wet weather except on the footing that he shall be responsible for all bags that may be found to be caked on delivery. The contract itself contains no provision to this effect, and it will certainly not be implied. If, however, the ship must be held to insure the safe delivery of the goods (apart from perils expressly excepted) from the moment that the goods are put into its slings until the discharge, or if loading in rain is to be regarded as a fault of the shipowner, the declaration of his liability in law might no doubt have equivalent results. In the case of an ordinary bill of lading it appears to me that no such question could arise. The shipowner has no control of the loading operations. He must receive the cargo at such time or times as it is tendered to him by the shipper; and if it is tendered to him in rain, I know of no ground upon which he can refuse to receive it except that the loading of the cargo in a wet state might endanger the safety of his ship. There is no recorded case in which a shipowner has been held liable to the shipper or consignee for injury to the cargo because of its having been loaded in rain. At best the act of loading is a mutual operation; and if the shipper desires to have his goods loaded in rain, which may possibly damage the cargo which belongs to him, he cannot throw the responsibility upon the ship, the agents of which, in the ordinary case, have much less knowledge than the shipper of the extent to which rain will damage the goods tendered. A consignee has no higher right than the shipper in a matter of this kind—*Craig & Rose* v. *Delargy*, July 15, 1879, 6 R. 1269.

But then it is said that a higher responsibility is imposed on the shipowner in the case of a through bill of lading such as this, and that for the reason that the owner of the goods is not present at the time of shipment, and cannot therefore be taken to consent to the cargo being loaded in rain. I do not think that this distinction is tenable. I think it may well be argued that the inland carrier by whose servants the flour is tendered for shipment is the agent, for that purpose, of the original shipper, and that it is for him to decide rather than for the ship under what weather conditions it may properly be tendered. Apart from this, I think the shipper impliedly consents to the cargo being delivered from one carrier to another according to the usual custom and with reasonable care on the part of both; and if notwithstanding such care the goods suffer injury, the risk is upon him. The forwarding of the cargo with due despatch is at least as much in the interest of the shipper as of the respective carriers on the route; and a refusal by the ship to take delivery of cargo in rainy weather, however slight, or it may be because of an occasional shower while the loading is going on, might entail very much heavier loss in the shippers than that caused by the rain where proper precautions are taken to prevent the cargo from being injured. Under the terms of the contract contained in the through bill of lading, the flour must be carried in the first steamer leaving after the arrival of the flour at New York unless prevented by any cause—one exception which would not protect the shipowners if they shut out cargo, duly tendered to them in time for shipment, without reasonable ground. If, then, it should be thought desirable in the interest of a shipper of flour that no flour should ever be loaded in rainy weather, that ought to be made matter of express stipulation in the contract of carriage, in which case no doubt the carrier who broke the stipulation would be responsible for the damage caused by such breach.

The pursuers further founded on the form of the permit signed by the ship's agents and addressed to the clerk of the s.s. 'Corinthian,' and especially on the marginal note, which is in these terms—'It is understood that any engagement of cargo is on the condition that such cargo can, in the judgment of the steamer's agents (having regard to weather and other circumstances) be put on board the steamer in proper time before the advertised sailing date." They contended that the clause in brackets showed that the ship reserved to itself complete control as to the weather in which the cargo should be put on board, and was therefore responsible if the cargo were shipped in weather in which it might be injured. Now I have no doubt that this clause gave the shipowner the right to stop loading if in the state of the weather or other circumstances the cargo could not be put on board the steamer in proper time, but it can never be construed as enlarging his responsibility. The clause is inserted for his protection—to absolve him from the consequences of goods being left behind, although a permit has been duly presented to the last inland carrier. In my judgment it does not confer upon the steamer any right to refuse to load cargo in wet weather other than what it possesses at common law.

Lastly, a strenuous argument was maintained on clause 2 of the part of the through bill of lading which applied to the ship. The clause is in these terms—"Steamer being only responsible for such part of the goods as have been actually delivered to the steamer at the port (A) first above

* Export agent of the Millers' National Federation, U.S.A., one of pursuers' witnesses.

mentioned; and steamer not liable for any loss or damage that may have occurred before such delivery, while agreeing to promptly present to inland carriers, for account of owners of goods, any claims for shortage, or loss or damage that may have occurred before delivery of goods at the port (A) first above mentioned." In the argument maintained on this clause the pursuers assumed that they had failed to prove that the damage which resulted in caking had not taken place before delivery to the steamer; but they maintained that the clause laid upon the ship's agents the duty of discovering all damage that had previously occurred and of notifying same to the inland carriers, and that their failure to do so transferred to the ship the responsibility which would otherwise have lain on the inland carrier. They connected this clause with clauses 3 and 11 in the part of the through bill of lading applicable to the inland carrier, and they said that on the terms of these clauses the failure of the ship's agent to notify damage sustained by the goods prior to delivery to the ship prevented them from making good their claim against the inland carrier, and so made the shipowner responsible on the ground that through his breach of contract they had been deprived of their right of compensation. I confess that I have every difficulty in construing the particular clause founded on. It provides that the steamer is to "promptly present to inland carriers, for account of owners of goods, any claim for shortage, or loss, or damage." At first sight that suggests merely the handing on of a claim which has already been made up; and it was admitted that it could scarcely throw upon the ship the duty of making up a claim for loss which could not be accurately done without knowledge of the extent of the damage, the value of the goods damaged, and the like. If, for instance, the flour had been put in barrels as it used to be, and had been wetted during the inland journey, it would be quite impossible for the shipowner after the barrels had dried to know whether any injury had been sustained to the goods; and yet on one construction of the clause their failure to do so would imply a breach of contract. Accordingly the pursuers were driven to construe this clause as meaning that the shipowner was to notify to the inland carrier in his receipts the number of packages which bore external marks of having been injured, such external examination being consistent with loading in the customary rapid manner. In so construing the clause the pursuers are, I think, taking a considerable liberty with the language, and they were in any case constrained to admit that they could not well maintain that the ship ought to have notified as damaged the thousand bags which were only discovered to be caked at Glasgow, after they had been twice handled with the special object of detecting caking. But at best I think the clause can only mean that the shipowner shall take reasonable care to ascertain, by such examination as is compatible with the ordinary rapid loading of similar cargo, what packages appear to bear marks of external damages. I find in the proof nothing to suggest that such reasonable care was not exercised. A competent checker was provided on each barge, and a great many more bags were notified as having received external damage than ultimately proved to be in fact damaged. But further, even if there had been a failure in this respect, I do not see how the pursuers could succeed in obtaining damages for the alleged breach of contract unless they first showed that but for the breach they would have been indemnified by the inland carrier. Now one of the exceptions applicable to the inland carriers is that they are not to be responsible for loss or damage arising by wet; and in the face of this exception it would have been necessary for the pursuers to prove that although damaged by wet the flour would not have been so damaged but for the fault of one or other of the inland carriers. No such proof is forthcoming in the case, and I am therefore of opinion that this clause does not afford sufficient alternative ground upon which we could hold the defenders liable.

On the whole matter, therefore, I have come to be of opinion that the Lord Ordinary's interlocutor must be recalled, and that the defenders are entitled to be assoilzied from the conclusions of the action.

The LORD JUSTICE-CLERK and LORD ARDWALL concurred.

LORD DUNDAS, who was present at the advising, was absent at the hearing.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defenders.

Counsel for the Pursuers (Respondents)—Sandeman, K.C.—D. P. Fleming. Agents—Gill & Pringle, W.S.

Counsel for the Defenders (Reclaimers)—Morison, K.C.—C. H. Brown. Agents—Webster, Will, & Company, W.S.

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*Thursday, March* 16.

## SECOND DIVISION.

[Lord Skerrington, Ordinary

## STUART *v.* POTTER, CHOATE, & PRENTICE AND OTHERS.

*Contract—Constitution of Contract—Letter Affording Evidence of Pre-existing Contract, but not Constituting Contract—Document in re mercatoria.*

A firm of New York stockbrokers, having acquired an interest in a syndicate which had been formed to underwrite an issue of bonds, disposed of a participation therein to a London stockbroker. 13,000 dollars of this participation were ultimately acquired by a Scottish insurance company; 95 per cent. of the price was paid to the London broker. At the request of