opinion without difficulty that the case contemplated has not occurred, that the condition has not been fulfilled, and therefore that the proprietor is entitled to make a claim against the estate for the balance of his rent.

LORD KINNEAR—I have more difficulty than your Lordships. I entirely agree that the landlord had a legal right to claim payment of his rent from the estate of his deceased tenant. It was not reasonably maintained that the tenant's estate had been discharged. On the other two points I have more difficulty, and my difficulty has not been entirely solved by the opinions which have just been delivered. On the first point, as to whether or not payment was made "punctually," I am very much disposed to agree with the Lord Ordinary for the reasons he has stated. On the second point I am disposed to hold that there was a discharge of all past obligations. During the currency of the lease the landlord agreed to grant an abatement on past rents which were in arrear, on condition that the rent should be punctually paid in the remaining years of the lease. The lease, however, did not come to a natural end, but parties entered into a new arrangement whereby it was agreed that the tenants should renounce the lease as at the following Whitsunday. It seems to me that this renunciation must be looked to for the purpose of settling all the rights of parties *hinc inde*. If I put the same construction on the third article of the agreement as your Lordship, I should agree that the landlord's claim was not discharged, but I cannot put that construction upon it. The clause provides that all the stipulations in the lease, in so far as not already fulfilled or altered by the agreement, should be implemented in the same way and manner as if the leases had expired naturally at the following Whitsunday. It reserves nothing except the rights of parties for the remainder of the leases. It follows that it was necessary that the rent should be paid at the following Candlemas in full, according to the stipulations in the leases, but I do not read any stipulation for past rents due at Lammas 1890. I am therefore disposed to hold that the contract of renunciation put an end to any claim by the landlord for past-due rents.

The Court recalled the interlocutor of the Lord Ordinary, sustained the appeal, recalled the deliverance of the trustee, and remitted to him to rank the appellant in terms of his claim.

Counsel for the Appellant — Craigie. Agent—Frank M. H. Young, Solicitor.

Counsel for the Respondent—Salvesen. Agents—Mackenzie & Kermack, W.S.

Wednesday, March 15.

SECOND DIVISION.

[Sheriff of Lanarkshire.

JOHN MUIR WOOD & COMPANY *v.* G. & J. BURNS.

Reparation—Common Carriers—Limitation of Liability—Negligence of Servants—Special Contract.

A firm in Glasgow bought from an Organ Company in London an organ which was lying in the stores of the Midland Railway Company at Liverpool. The sellers instructed the railway company to deliver the same to a shipping company whose steamers plied between Liverpool and Glasgow, in order that it might be conveyed to Glasgow. A carter in the employment of the railway company took the organ to the steamer and delivered it to the receiving clerk, who signed the delivery-order and wrote "owner's risk" above his name. The shipping company's sailing-bills, which were known to the railway company, *inter alia*, stipulated that the owners of the vessels were not to be liable for any damage that might occur to goods at or after landing, or which might be occasioned thereto by the negligence or error of persons in the ship's service. The organ was carried to Glasgow, and while in course of being discharged fell back into the hold, either by accident or through the negligence of persons in the ship's service, and was smashed to pieces. *Held* (*diss.* Lord Young) that the shipping company were not liable in damages for the injury done to the organ.

In December 1891 John Muir Wood & Company, piano and music sellers, Glasgow, bought from the Bell Organ and Piano Company, London, an organ at the price of £73, 12s. 6d. The Bell Organ and Piano Company had a number of such organs in the hands of Messrs Pellow & Company, their agents in Liverpool, who, their own warehouse being full, kept them in store in the warehouse of the Midland Railway Company at Liverpool.

On 10th December Messrs Pellow & Company received instructions from the sellers of the organ to forward the organ to the purchasers by steamer to Glasgow. Messrs Pellow & Company thereupon instructed the Midland Railway Company to place the organ on board one of the steamers of G. & J. Burns, shipowners, Glasgow, plying between Liverpool and Glasgow. The organ was taken by one of the carters of the railway company to one of the said steamers called "Bear," and placed on board. There was no bill of lading, but there was a printed delivery-sheet. The clerk of G. & J. Burns, on receiving the organ from the carter, wrote "owner's risk" on the delivery-sheet, and signed his name below these words. He also stamped some illegible words on the back of the

delivery-sheet, and handed it back to the carter.

The sailing-bills of G. & J. Burns contained the following conditions—"If from any cause whatsoever . . . goods shall be shipped without a bill of lading or receipt, the owners of said steamers are only liable to, and do only convey and deliver the same on the terms of the bill of lading or receipt adopted by them, and in the same manner as if a bill of lading containing these conditions had been signed, namely, that . . . the owners or agents have power to transhipp . . . goods, and are not liable for any damage or loss that may occur to same during transit, or cartage for shipment, at shipment, on board ship, during the passage—whether on deck or in the hold—or at or after landing; nor will they be accountable for . . . any accident, loss, injury, or damage of what kind soever which may, at whatever time arising, occur through or result from any act of negligence, default, or error in judgment of the pilot, master, mates, mariners, engineers, or other of the crew or persons in the ship's service, or any of their agents, clerks, or servants, or others for whom the owners might otherwise be responsible, and that whether such accident, loss, injury, or damage shall arise from or in consequence of destruction of or injury or damage to live stock, goods, or other cargo, or from errors in navigation, or from delay, or from any one or more of the causes above stated . . . They . . . are not and shall not be held to be common carriers. The owners of said steamers are not liable . . . for loss of or damage to . . . goods . . . during or after delivery on the quay or wharf, or at the railway station or elsewhere, or during discharge or after being discharged into hulk or craft at the ports between which said steamers ply."

The Midland Railway Company were in the habit of shipping goods with G. & J. Burns, and were aware of the conditions on which the latter carried goods. The shipowners also published by advertisement the fact that they only carried goods subject to the conditions in their time-bills.

The steamship "Bear" arrived in Glasgow on 12th December. While the organ was being hoisted on to the quay by the servants of G. & J. Burns, it fell down the hold either by accident or through the negligence of the men, and was smashed to atoms.

Thereafter John Muir Wood & Company brought an action, in the Sheriff Court at Glasgow, against G. & J. Burns for £73, 12s. 6d., the price of the organ.

The defenders lodged defences and pleaded, *inter alia*—"(4) Any damage to said goods occurring while in defenders' hands having arisen from causes for which, under their conditions of carriage, the defenders are not responsible, they should be assoilzied."

On 5th August 1892 the Sheriff-Substitute (SPENS) pronounced the following interlocutor:—"Finds that an organ, the property of pursuers, was conveyed from Liverpool to Glasgow by the defenders' steamer 'The Bear' on or about 10th December 1891, and in the course of being landed at the Glasgow Quay from said steamer by the defenders' servants, was so seriously damaged as to be practically valueless: Finds, under reference to note, that by the terms of the contract of carriage made by the Midland Railway Company on behalf of the pursuers, and by the defenders, liability for the damage sustained is excluded: Therefore sustains the defences and assoilzies the defenders."

The pursuers appealed to the Second Division of the Court of Session, and argued—(1) The sailing-bills were not part of the contract, and therefore the conditions in them did not apply. The words stamped by the clerk on the delivery-sheet might have had reference to the conditions in the company's time-bills, but these words were indistinct and indeed illegible. Besides, the publication of these bills had not been proved, and the one produced in the process did not apply to the date of the present contract. Even if the sailing-bills were held to be imported into the contract, the defenders were common carriers, and could not discharge themselves of their duties by mere notice. (2) The company's clerk had no right to write the words "owner's risk" on the delivery-sheet when it was presented to him by the carter of the Midland Railway Company, and his having done so could not prejudice the pursuers. The carter handed him the delivery-sheet in order that he might sign his name as acknowledging the receipt of the organ, and that was all that he was entitled to do. But even if it were assumed that the words "owner's risk" entered into the contract, they did not exempt the shipowner from liability for loss incurred through the negligence of the labourers employed by them. These words were vague, and must be viewed as meaningless, unless a meaning could be imported into them from other words in the receipt or by looking at the evidence. But no such meaning was imported into them in this case. If there was any doubt as to their meaning, the doubt must tell against the shipping company who were acting in their business as common carriers. In all the cases where a phrase like the above was used, other words in the contract explained it, or the circumstances put a meaning on it—*Stewart* v. *London and North-Western Railway Company*, April 19, 1864, 33 L.J., Exch. 197; *Robinson* v. *Great Western Railway Company*, November 23, 1865, 35 L.J., C.P. 123; *Macawley* v. *Furness Railway Company*, November 15, 1872, L.R., 8 Q.B.D. 57; *D'Arc* v. *London and North-Western Railway Company*, May 7, 1874, L.R., 9 C.P. 325; *Gullin* v. *London and North-Western Railway Company*, February 3, 1875, L.R., 10 Q.B.D. 212; *Mitchell* v. *Lancashire and Yorkshire Railway Company*, April 22, 1875, L.R., 10 Q.B.D. 256; *Lewis* v. *Great Western Railway Company*, December 21, 1877, L.R., 3 Q.B.D. 195; *Burton & Company* v. *English & Company*, December 18, 1883, L.R., 12 Q.B.D. 220, opinion of Bowen, L.J., 223.

Argued for defenders and respondents—(1) The conditions of their sailing-bills had been imported into the contract. That they only conveyed goods on the conditions specified in their sailing-bills had been promulgated by advertisement. That was enough to import these conditions into the contract—Bell's Comm. i. 389. It had been brought to the notice of the pursuers or the agents acting on their behalf, that these conditions existed, and a general publication of conditions such as these brought to the knowledge of the shippers had been held to be sufficient in *Phillip* v. *Edwards*, November 23, 1858, 28 L.J., Exch. 52. It was their usual practice to send goods under these conditions, and these conditions were well known to the Midland Railway Company, who had often sent goods by the defenders' ships before. The form of a contract may be gathered from placards or even handbills—Scrutton on Charter-Parties, p. 6. The argument that the sailing-bill produced had not been proved was now stated for the first time, and was not raised before the Sheriff. (2) "Owner's risk." The delivery-sheet continued the contract, and it was open to either of the parties to put any condition into the contract just as if it was a bill of lading. The present contract was made in the ordinary way that the defenders had been accustomed to make contracts with the Midland Railway Company. The only question remaining was, what was the meaning of the words "owner's risk?" The meaning of that phrase was well known. It meant that the owner was to bear all the risks of carriage, including damage done by the negligence of the men—Carver on Carriage by Sea, section 103. Scrutton on Charter-Parties, p. 180; *Burton & Company* v. *English & Company, supra* L.R., 12 Q.B.D., opinions of Brett, M.R. p. 220, and Bowen, L.J. p. 223; *Carr* v. *Lancashire & Yorkshire Railway*, May 8, 1852, 21 L.J. Exch. 261; *Great Northern Company* v. *Marville*, May 10, 1852, 21 L.J., Q.B.D. 319; opinion of J. Coleridge, 322. All the authorities quoted on the other side showed that "owner's risk" put on the owner all risks incidental to the goods *in transitu* except wilful damage by the carriers or those for whom they were responsible. In this case the transit was not at an end—the organ was not off the ship. Over and over again it had been decided that printed conditions on a railway ticket constituted a contract. This was a much stronger case. The defenders should be assoilzied.

At advising—

LORD JUSTICE-CLERK—The pursuers of this action were the purchasers of an organ from a firm in London, and that organ required to be forwarded to them. At the time of the sale it was in a store at Liverpool belonging to the Midland Railway Company. The sellers, through their forwarding agent at Liverpool, employed the Midland Railway Company to place the organ on board ship. The organ was taken by the railway company's carter to the defenders' steamer "Bear," and it was put on board. There was no bill of lading, but there was a delivery-sheet, which is printed. The clerk who received the organ from the carter put upon this sheet an acknowledgment that the organ had been received and the words "owner's risk." It is said that a stamp was also used to place upon the sheet the words "All goods carried subject to the conditions in company's time bills; inward condition, weight, and contents unknown." But it appears that whether from defect in the stamp or otherwise these words are not legible upon the delivery-sheet, and I put them altogether aside.

The clerk having, then, written "owner's risk" on the sheet, handed it back to the carter, and the organ was conveyed to Glasgow. On pursuers sending down to the ship it was discovered that it had been broken and destroyed, and they declined to take delivery. The additional proof shows that it was so destroyed by being allowed on a wet snowy day to slip off the truck on which it was placed while still on board, and immediately after being raised from the hold, and so to fall back into the hold. This occurred either through carelessness or mere accident—I rather think the former on consideration of the proof. These being the facts, the pursuers claim against the shipowner the value of the organ. Their position is that they made no contract with the shipowner, but left it to the sellers to find carriage of the organ, and that they did so through the Midland Railway. I think that the pursuers can found only on the contract with the Midland Railway Company who shipped the organ. What was that contract between the shipowner and the Midland Railway Company? The shipowners, the defenders, are carriers who receive goods for conveyance to Glasgow. They publicly advertise that they carry goods. The conditions on which they do so are in their notices. If a person ships goods with them, they are, apart from special contract, received in accordance with these published notices. They are contained in the bill produced in process. An objection was stated at the debate before us on 2nd March that the bill produced did not apply to the date in question, and that the publication of these notices was not proved, but the Sheriff mentions in his note that no such question was raised before him, and it was too late at that stage to raise it before us.

Now, the Midland Railway Company who delivered the organ knew these conditions. They knew that the defenders published that they would not be liable for such an injury as here occurred, that people who shipped with them must insure otherwise against the specified risks, and that the rates of freight charged were fixed on these conditions only. I cannot doubt that when they delivered the organ they did so on the defenders' conditions. They had, according to the evidence, been constantly dealing with them, and knew their conditions well.

Now, with regard to special stipulation, the words "owner's risk" were placed

upon the delivery-sheet. The defenders were entitled to make that a stipulation upon which they would carry the goods, for though public carriers they were entitled to make special stipulations. Did they then make that stipulation effectively? I think that they did. These words "owner's risk" have been construed in various cases and have been held binding upon shippers. Of course, if those acting for the pursuers had never agreed to that condition but had repudiated it and taken away the organ, the case would have been different. But I think that the proof makes it clear that the Midland Railway Company knew and assented to the condition that the organ was received at owner's risk. Warren, their manager at Liverpool, says that he did know this, and that the organs he had previously shipped were received on receipts which "bore 'owner's risk' or words to that effect."

I conclude, therefore, on the whole matter, that the defenders were entitled to make the condition, and did make it, and that in knowledge of those who shipped the organ. If, therefore, the defenders only took the organ on the footing that they were not to be responsible for such an accident as occurred to it, I think that the judgment must be affirmed.

LORD YOUNG—The material facts of the case are these—In December 1891 the pursuers bought from a London Company an organ of a certain description at the price of £73, 12s. 6d. The sellers had a number of such organs in the hands of their agents in Liverpool, who for their own convenience kept them in store in the warehouse there of the Midland Railway Company, their own warehouse being full. On 10th December these agents received instructions from the sellers to fulfil their sale to the pursuers by forwarding an organ by steamer to their address in Glasgow, after ascertaining by examination that it was sound and in good order. This was done on the same day. The sellers' agents had the organ examined, packed, and addressed to the pursuers, and instructed the Midland Railway Company to have it carted in one of their vans from their warehouse to the quay at which the defender's steamers plying between Liverpool and Glasgow load, to be shipped by the first steamer. These instructions were obeyed also on the same day (10th December), and on that day also the defender's steamer the "Bear" sailed for Glasgow with the organ on board.

It is according to the evidence, and not, I understand, disputed, that the sellers' contract with the pursuers was implemented, and the property passed when the organ was put in good order addressed to them on board the ship, or on the quay at the ship's side, which admittedly was done. The organ never reached the pursuers, it having been smashed into bits by falling down the hold when in course of being hoisted by the defenders' servants after the ship's arrival in Glasgow on 12th December.

In this action the pursuers claim the value of the organ from the defenders as damages for their failure to carry and deliver it in safety, and the pursuers' property in the organ, the value of it, and the defenders' failure to carry and deliver it in safety being admitted, the defenders' liability, on the facts so far as I have hitherto stated them, is I think *prima facie* clear.

The defence to the action is accordingly founded on an averment that "the defenders contracted with the Midland Railway Company to carry the organ at owners' risk, and on the terms and conditions contained in said sailing bills, and set forth in writing and indorsement these terms upon the consignment or delivery-note of said railway company, which was retained by them, and is now produced by them and marked No. 9/1 of process." The question therefore is, whether this document No. 9/1 of process, having due regard to the facts as I have, I think, fully stated them, constitutes a special contract of carriage whereby the defenders are relieved of the liability which would otherwise have attached to them. It is a large and important question, for it affects (or may) not only every purchaser of goods on contract for delivery to a carrier addressed to him, but also every seller on such contract, and every intermediate carrier or vanman who takes a receipt on handing over the goods to whatsoever carrier is to convey them to their ultimate destination.

It would not, I think, have affected the question had the Midland Railway Company carried the organ from London addressed as it was, with instructions to deliver it to the defenders at the dock in Liverpool to be forwarded by first steamer according to the address. It is only a little more striking that all they were required or authorised to do was to send it in one of their vans from their store to the dock, their charge therefor being 6d. That they were authorised to make a special contract of carriage with the defenders, discharging or limiting their responsibility as carriers from Liverpool to Glasgow, is not suggested, and the evidence is conclusive that they were not, and that neither their manager nor any other ever thought of doing such a quite disinterested and motiveless thing. The question is, whether what they actually did nevertheless legally imports such a contract between them and the defenders.

And I may here conveniently, I think, notice the question whether the defenders are common carriers. Professor Bell in his Principles, section 160, defines a common carrier thus—"A common carrier is one who for hire undertakes the carriage of goods for any of the public indiscriminately from and to a certain place." This definition is, I think, accurate, and applicable to the defenders. Mr Sutcliffe, their manager in Liverpool, says in his evidence —"There is no contract in regard to any of the goods carried by our steamers as a rule, unless you can look on the actual shipment as a contract. We act simply as a railway company in regard to the con-

veyance of goods which are offered in an open station. (Q) But you advertise your ships to be sent away at a certain day and hour, and invite the public to send goods for shipment by your steamer?—(A) Yes sir, and where specially large lots are required to be shipped arrangements are made, but with such things as these none are made." I must therefore hold that the defenders are within the scope of the law as stated, accurately I think, by Professor Bell (Prin. sec. 159)—"The contract of carriage may be express, depending on the terms of the agreement, or implied from the status of a common carrier with goods fixed on him by receipt or parole proof, and which by his office he is as much bound to carry as if there were a special contract. He is bound to take the goods offered, and can justifiably refuse them only," on grounds which clearly did not exist in this case.

It this be so, it seems to follow that when the box in question (to the condition of which no exception is taken), addressed as it was to the pursuers, was offered to the defenders on the quay, they were bound to take it and carry it to Glasgow, on the contract "implied from the status of a common carrier," and were in no condition to require a special contract. They might indeed have offered a special contract on such exceptional terms as might have induced the sender to agree to it had the circumstances reasonably admitted of such an offer. But to have proposed a special contract on exceptional terms to the vanman who brought the box would have been absurd. Accordingly we are informed that not a word passed between the defenders' receiver and the vanman, and had the latter not brought a delivery-sheet with him—and the fact of the receipt of the box from him stood on parole or admission—which could not have been withheld by the defenders, who aver that the box was carried by them to Glasgow, and charge for the carriage accordingly, I do not see what case the defenders could have stated. Had the box been brought by a common carter or porter, he would probably not have brought a "delivery-sheet." But railway companies usually or invariably furnish their vanmen and porters by whom they deliver goods with a "delivery-sheet," in order that they may bring back evidence that they have delivered the goods with which they were charged. This is familiar to most householders, and also to the servants who answer the door bell and take in boxes and parcels—for the servants usually sign such delivery-sheets. The signature of the receiver is in the last column, which is in the sheet before us headed "Received in good condition by." In the present instance the defenders' "receiver" wrote into this column the words "owner's risk," and then signed his name. The question is whether the "delivery-sheet" was thereby converted from its *prima facie* obviously and familiarly proper purpose into a "special" contract of carriage between the Midland Railway Company and the defenders whereby the latter were relieved of their responsibility as common carriers to the owners of the goods to whom they were addressed, and I am of opinion that it was not. The receiver of the box was at liberty to acknowledge or not as he saw fit that the box was received by him in good condition, but he could not in my opinion convert the sheet into a contract with the railway company by any words he chose to write upon it. This opinion and the reason for it obviously extend to the stamp about conditions.

A common carrier cannot, in my opinion, discharge himself of all or any of his duties and responsibilities as such by a mere notice or declaration. I therefore attach no importance to the declaration in the lengthy "notice" indorsed on the defenders' time bills that they "are not and shall not be held to be common carriers." If they are not, the declaration is superfluous; and if they are, it is inoperative. They are notwithstanding "bound to take the goods offered," unless their nature or condition be such as to justify refusal. A carrier may no doubt tender a special contract on special terms, which, if agreed to, will be valid. And this may be done not only in particular cases with individual senders, but generally, so far as the tender of special terms by the carrier is concerned, by a general standing notice—so that if assented to by the sender there will be acceptance and contract accordingly. Whether or not there was such assent, and contract accordingly, has been the issue tried in a good many cases. But the speciality of the contract tendered in this manner (whether accepted or not) is twofold—on the one side favourable to the carrier by limiting or discharging his responsibility, and on the other favourable to the customer by lowering the rate of hire. In this case it is not alleged that any contract as to charge or rate of hire was made or tendered, and the circumstances exclude the possibility of such a thing. The defenders' case must therefore be that they were at liberty to refuse the goods unless on the condition that they should be relieved in whole or in part of their responsibility as carriers, and that the fact of the vanman taking back the "delivery-sheet" with the words "owner's risk" written on it implied assent to that condition. It was contended for them in argument before us that the responsibility and risk which would otherwise have been on them were thus transferred to the Midland Railway Company, and that the pursuers ought therefore to have directed their action against that company. It is not the fact, and is not alleged, that the pursuers expressly or impliedly authorised the railway company or any other to put the risk on them, or to discharge their legal rights against the carriers. Hence the defenders' contention that the pursuers' remedy lies against the Midland Railway Company (or possibly against the seller of the goods as responsible to him for the conduct of the railway company), for otherwise their defence

would involve the proposition that the owner of goods forwarded to his address would be without remedy for their inexcusable destruction in the hands of the carrier, although nothing had been done by him, or with his authority, to prejudice his legal rights. Now, in my opinion the pursuers were right in pursuing the defenders—the carriers—and would, on the facts before us, have failed in an action against either the seller or the Midland Railway Company. This indeed follows from what I have already said. I may add that I much doubt whether any officer or servant (even the manager) of the Midland Railway Company could have bound the company by undertaking the risk of the carriage of goods by the defenders from Liverpool to Glasgow even had he done so expressly and in writing, and certainly such an undertaking, which would have been, as I have already observed, quite gratuitous and motiveless, cannot in my opinion be implied from the words on the delivery-sheet written and signed by the defenders' clerk. With respect to the seller, he certainly neither wrote, nor spoke, nor said anything which could put an obligation on him, or deprive the pursuers of their remedy against the defenders. The delivery-sheet of the Midland Railway Company, whatever might be written or stamped on it, he never saw or heard of. It is said that the railway company had often employed the defenders to carry goods for them before, and knew that the words "owner's risk" were always marked on the delivery-sheet. I think the evidence shows that the railway company attached no importance to these words, and that they considered that no contract was made by them. I also put the question to defenders' counsel during the argument if it would have made any difference whether the carter who carried down the organ to the ship had carried goods in this way before, or was one who never had done so. It was not contended that that made any difference.

With respect to the defenders' second plea-in-law, "There being no contract between the pursuers and defenders, the action is incompetent," I have only to say that I think it unsound. It is trite law and of familiar application in practice that when goods are forwarded by a seller in fulfilment of an order, and the property in them passes to the buyer by delivery to the carrier, he is the proper pursuer of an action against the carrier if they are lost or damaged in his hands.

I have characterised the destruction of the pursuers' property in the defenders' hands as inexcusable, or rather as not excused. It is proved that the organ was handed over to the defenders well packed and in good condition, and that it was tendered by them to the pursuers smashed into bits. There is no suggestion of any extraordinary accident such as might account for the damage consistently with due and reasonable care on the part of the carriers. All they say is, that it "was damaged at landing by accidentally falling down the hold as it was being removed therefrom."

I am therefore of opinion that the judgment of the Sheriff-Substitute ought to be reversed.

LORD RUTHERFURD CLARK—The question is, whether the piano was carried by the defenders at owner's risk, or as common carriers?

I think that it is proved that the defenders' sailing or time bills declare that goods of this class will only be carried at owner's risk. A specimen bill is produced. It sets out that the shipowners are not to be liable for damage to goods during transit whether on deck or in the hold, or at or after landing, or in other words, that the goods are to be at the risk of the owner. It is said that it is not shown that this bill was in force when the piano was sent. Perhaps the evidence is not so direct as it might have been. But I think that it is sufficient. Mr M'Guick, one of the defenders' servants, says that "our time-tables state on the back of them that anything like musical instruments are to be carried at owner's risk." This is evidence of a long practice, and I cannot doubt that it extended to the period to which I have referred.

The sailing-bill is part of the contract which the shipper makes with the shipowner. It must be so, otherwise a contract would be forced on the shipowner which he never agreed to make. Of course he is bound to make due advertisement of the conditions of carriage, so that the public should have sufficient means of obtaining knowledge of them. It is not said that the sailing-bills were not duly published.

But further, the contract on which the piano was received was made with the Midland Railway Company. The defenders are in my opinion liable under that contract and under no other. The officers of that company were quite aware that the defenders did not carry goods of that class except at owner's risk, and they cannot say the entry of "owner's risk" on the receipt given to the carter was made without authority.

I am therefore of opinion that the piano was carried at the risk of the owner, and that the defenders should be assoilzied.

LORD TRAYNER—In December 1891 an organ was shipped on board one of the defenders' steamers at Liverpool, consigned to the pursuers, and to be delivered at Glasgow. In the course of discharging the steamer at Glasgow the organ was damaged to such an extent as, according to the pursuers' averment, to be rendered worthless. The present action is brought to recover from the defenders the price of the organ, on the ground that the injury done to it, and the consequent loss sustained by the pursuer, was occasioned by the fault or negligence of the defenders, or of those for whom they are responsible. It is not disputed that the organ was delivered to the defenders in good order at Liverpool, and was not delivered by them at Glasgow; that it was practically destroyed while

being discharged from the ship at Glasgow, and that the sum sued for is the price of the organ—that is the amount of the damage. The only question is, whether the defenders are liable to the pursuers in the circumstances, having regard especially to the contract under which the defenders undertook the carriage of the organ. To reach the solution of this question, two matters of primary importance require attention—(1) with whom was that contract made, and (2) what were the terms of that contract.

1. The contract of carriage in question was ultimately a contract between the pursuers and defenders. If not, the pursuers could not claim under the contract for damages in respect of a breach thereof. But as the pursuers were not personally present in Liverpool, where the contract was made, it was primarily a contract made there by the pursuers' agent. The facts are as follows—The pursuers having bought an organ (from a firm in London), which was then in store in Liverpool, the sellers instructed their agents in Liverpool to have the organ forwarded to the defenders, who in turn employed the Midland Railway Company (in whose stores the organ was) to send the organ to the defenders' steamer. The railway company accordingly directed one of their carters to take the organ to the defenders' vessel, and with him sent the "delivery-sheet," No. 9/1 of process. That sheet bears to have reference to an organ sent by the Midland Railway Company to the defenders, consigned to the pursuers. That sheet was signed by the defenders' clerk who received the goods, in evidence that he had received from the railway company the organ there described, to be forwarded to the defenders. In these circumstances I do not think it doubtful that the defenders' contract was made with the Midland Railway Company (the only persons the defenders knew in the transaction), although they were acting not for themselves, but on behalf of the pursuers, under the instructions they had received from the Liverpool agents. So far as the defenders were concerned, the railway company were the shippers of the organ, who would have been liable for the freight and other charges connected therewith had the consignee refused to take delivery and refused payment of freight. It is immaterial to the case of the defenders whether the railway company were themselves shippers of the organ or the agents of the pursuers in shipping it. If they were the shippers, the pursuers must either adopt the contract made by them or they have no contract on which they can sue; if the railway company acted as agents for the pursuers, the pursuers are bound by the contract which their agents made. The contract, then, having been made between the defenders and the Midland Railway Company, either for themselves or for the pursuers, it remains to be considered

2. What the terms of the contract were? There was here a bill of lading in the usual or ordinary form, and therefore the terms of the contract were to be ascertained from a consideration of the documents we have, and the surrounding facts. The defenders are owners of a line of steamers trading regularly between Liverpool and Glasgow. They are common carriers between these two ports. They put their steamers on the berth as general ships, and receive goods from all comers for carriage from the one port to the other. In such circumstances, and when no special contract is made by bill of lading or otherwise, what is it which constitutes the contract of affreightment between the shipper and the shipowner? The shipowner by advertisement in the newspapers or other public notice announces his ship as on the berth ready to take goods to a particular port, and the terms on which he is prepared to carry them. If the shipper thereupon, and without any special stipulation, sends goods to that ship for carriage, the terms of the contract are contained in the advertisement or public notice. The advertisement is the shipowners' offer, accepted by the shipper sending his goods; the offer and acceptance make the contract. If that was the contract here, we have the terms of it expressed in the "sailing-bill" issued by the defenders, of which No. 7/1 of process is a copy. *Inter alia* it provides, as one of the conditions on which the defenders offer or engage to carry goods, that they shall not be "liable for any loss or damage that may occur to same during transit or cartage for shipment, at shipment, on board ship, during the passage, whether on deck or in hold, or at or after landing." If the organ in question was carried on this contract, the pursuers cannot recover the sum sued for from the defenders, it being the amount of damage occasioned to the organ "at or after landing." It was said for the pursuer that this condition (above quoted) would not absolve the defenders from liability for their own fault, and would not cover (for example) a case of damage occasioned at landing through insufficient or bad ship's tackle. Accepting that view, for the purposes of this case, it does not avail the pursuer. The cause of the damage (if not a mere accident which I rather think it was), was not attributable to the defenders' fault. It was, at the highest, the result of carelessness on the part of a labourer employed in the discharge, whose competency and experience generally for that kind of work are not questioned. There is no room for reasonable doubt that the Midland Railway Company through their responsible servants knew quite well of the conditions set forth in the defenders' "sailing-bills," which was regularly delivered at the railway company's offices. I see no reason therefore for doubting that they made the contract in question on the faith and in accordance with these conditions, and that the pursuers are bound by them as part of the contract which they, or their agents for them, made with the defenders.

It was argued, however, for the pursuers that the conditions of the "sailing-bill" could not be taken into account, because it had not been proved that the conditions

set forth in the bill No. 7/1 of process were the conditions in force in December 1891, when the organ in question was shipped. Perhaps this is so. But I am not prepared to listen to this argument now, because it appears from the Sheriff-Substitute's note that in the Court below it was not disputed that the conditions printed on the sailing-bill produced were the conditions in force at the date of the organ's shipment, and it was certainly assumed before us in the debate which took place before the additional proof was allowed. I think this question, if it was to be raised at all, should have been revised at an earlier stage of the case.

Apart, however, from the general conditions set forth in the sailing-bills, the defenders maintain that under special contract they are not responsible for the damage done to the organ in question. When the organ was sent by the Midland Railway Company to the defenders, the clerk who received it signed the railway company's delivery-sheet, having first added the words "owner's risk." He also stamped the sheet with certain words referring to the defenders' conditions set forth in their sailing or time-bills. What these words were the railway company, from former experience, knew very well, but as in this particular sheet the stamped words are not legible, I give the pursuers the benefit of this and disregard the stamped words entirely. The defenders maintain that their contract was, however, clear and distinct that they only undertook to carry the organ at "owner's risk." Now what did these words import? They (and similar words such as "at merchant's risk") have been the subject of construction and interpretation in several English cases to which we have been referred, and I cannot better express my own view as to the meaning and effect of the words in question than by quoting a single sentence from the opinion of Bowen, L.J., in the case of *Burton* v. *English*, L.R., 12 Q.B.D. 223. Speaking of the import and effect of the words "at merchant's risk," he says—"Now, that clearly is a stipulation in favour of the shipowners, and *prima facie* it seems to me meant to relieve them from the responsibility of some act of their servant by which they would otherwise be bound, and from the incidents of some risk which otherwise would fall upon them as carriers and under their contract of carriage." In the same way, Brett, M.R., said—"I should say that this stipulation would cover any act of the master or crew, which being done by them as servants of the shipowner would otherwise make him liable." Opinions to the same effect practically were delivered in the case of *Louis*, L.R., 3 Q.B.D. 195, when the words were, as here, "owner's risk." In that case, however, the Court considered these words in connection with the course of dealing between the parties. The defenders in this case can also appeal to the course of dealing between them and the Midland Railway Company in support of their contention. Taking, then, the words in question as above interpreted, they are sufficient to support the defence here maintained. The organ in question was not damaged through any fault or failure in duty on the part of the defenders, nor through the wilful fault of their servants, but, as I have already said, through the negligence of a servant, if not through mere accident.

It was, however, suggested, if not argued, that the addition of the words "owner's risk" to the receipt which the defenders' receiving clerk gave to the railway company's carter was the addition of a term to the contract to which the pursuers or their agents never acceded. I am not moved by that consideration, for I think it is not consistent with the facts disclosed by the proof. It is to be observed, and it is not without importance, that the words, as expressing a condition of the contract, were never objected to until after the damage sued for had been done. After the carter had returned to his employers with his "delivery-sheet" which bore the words in question, the railway company could, for anything that appears to the contrary, have re-claimed the organ and declined to ship it on the terms there expressed. They did not do so, and the reason is perfectly clear. The railway company knew, as the proof demonstrates, from the experience of a long course of dealing with the defenders, that the latter would not ship or carry organs on any other terms. This contract, therefore, was the only contract they could or did expect the defenders to make. The defenders had never professed to be common carriers of organs, and with regard to such goods had invariably made special contracts at "owner's risk" with the railway company.

I am of opinion that the appeal should be dismissed.

The Court pronounced the following interlocutor:—

> "Recal the interlocutor appealed against: Find in fact (1) that on or about December 10, 1891, there was shipped on board the defenders' steamship "Bear," by the Midland Railway Company, the organ in question, to be carried to Glasgow and there delivered to the pursuers; (2) that said organ was so shipped by the Midland Railway Company and received by the defenders on the conditions as to carriage thereof set forth in the defenders' sailing-bills, of which No. 7/1 of process is a copy, and in the delivery-sheet No. 9/1 of process; (3) that by said conditions it was, *inter alia*, stipulated that the defenders were not to be liable for any damage that might occur to said organ at or after landing the same, or which might be occasioned thereto by any act, negligence, default, or error in judgment of persons in the ship's service, and further, that said organ was to be carried at "owner's risk;" (4) that the said organ was carried by the defenders to Glasgow, and that while the same was in the course of being

discharged from said steamship it fell back into the hold and was so damaged as to be practically destroyed; (5) that said damage was not occasioned by or through the fault of the defenders or the wilful negligence of them or any of their servants; but (6) was occasioned either through the neglect of one of the persons in the ship's service engaged in the discharge of said steamship or through accident: Find in law that the defenders are not liable in damages for the injury done to said organ as aforesaid: Therefore dismiss the appeal, assoilzie the defenders from the conclusions of the action, and decern."

Counsel for Pursuers — Ure — Salvesen. Agents—J. B. Douglas & Mitchell, W.S.

Counsel for Defenders—Dickson—Aitken. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, March 17.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

EDINBURGH UNITED BREWERIES, LIMITED, AND ANOTHER *v.* MOLLESON AND ANOTHER.

Title to Sue—Reduction—Right of Sub-Vendee to Reduce Original Contract.

A entered into a contract of sale with B, who re-sold the subjects at a profit to C, to whom A conveyed them. It subsequently appeared that a fraud had been perpetrated upon B, for which A was civilly although not personally responsible. C, with the concurrence of B, brought an action against A for the reduction of the contract between A and B and of the disposition from A to C—the contract between B and C not being impugned.

Held that the pursuers had no title to sue.

Opinion expressed that had B offered to take back the subjects and repay C in full, or even had repaid the profit and assigned his right to sue to C, he or his assignee would have had a good title.

Contract — Construction — Sale Dependent on Amount of Profits—Resolutive Condition.

An agreement was entered into upon 11th November for the sale of a brewery at the price of £20,500, of which £3700 was to be paid at once, and the remainder at 31st December. It bore, *inter alia*, that the "arrangement" proceeded upon the basis that the nett profits of the concern had averaged £3750 for the last two years, and that in the event of its being ascertained that this was not the fact, the arrangement should be at an end, and the £3700 repaid. Also that the purchaser should be entitled to have the books, &c., examined by an accountant with the view of verifying the amount of the profits.

Held that the "arrangement" referred to the preliminary steps towards the completion of the contract, and did not mean the contract of sale, executed or unexecuted, and that said contract was not conditional upon the profits being as stated; but that upon the books, if honestly kept, being examined, and the purchaser satisfied as to the profits, the condition was fulfilled, and that the contract was not open to reduction, except on the ground of fraud, after payment of the remainder of the price.

Fraud—Misrepresentation—Implied Truthfulness of Business Books—Responsibility for Falsification of Books by Clerk.

Held that a condition that business books should be exhibited to an intending purchaser for the purpose of having the stated amount of the profits checked, was not fulfilled by exhibiting books falsified for his own ends by a managing clerk employed by the seller, although the seller himself was entirely ignorant of the fraud and the falsification had not been made in view of the sale.

David Nicolson, brewer and wine merchant, Edinburgh, in consequence of failing health, executed a trust-deed in favour of James Alexander Molleson, C.A., Edinburgh, in January 1887, under which he conveyed to his trustee, *inter alia*, the Palace Brewery, Edinburgh, and certain maltings and bottling stores connected therewith.

Mr Molleson entered into an agreement, dated 4th and 11th November 1889, with W. H. Dunn, London, acting for the London Contract Corporation there, for the sale as at 31st December 1889 of the brewery and the stores and stocks, &c., connected therewith. The sum to be paid for the stores, stocks, &c., was to be determined by an arbiter, who subsequently fixed £10,566, 10s. 1d. as the price.

Under the first article of the agreement Dunn, the first party, agreed to give, as at 15th November 1889, £20,500 for the brewery itself, but subject to the explanation given in the 10th article, which was in the following terms—"The arrangement herein set out proceeds upon the basis that the nett profits from said brewery and wine businesses amounted during each of the two years ending 31st December 1887 and 31st December 1888 to £3750 or thereabout upon an average, and in the event of its being ascertained that this is not the fact, this arrangement shall be at an end, and the second party shall be bound to repay the said sum of £3700. The first party, with the view of verifying the amount of the profits for said two years, shall, immediately upon delivery hereof, be entitled to have the books, accounts, and vouchers connected with said businesses examined by an accountant named by him."

Article 4 provided—"The price shall be payable as follows—The sum of £3700 upon