ment being made by the parishes themselves. That this was a question for the Commissioners was recognised in the case of *Borthwick* v. *Temple*, July 17, 1891, 18 R. 1190, the opinions in which were not affected as to this matter by those in the more recent case of *Galashiels* v. *Melrose*.

At advising—

LORD PRESIDENT—I have no doubt that the Lord Ordinary is right.

In the previous case we merely held that liability for the pauper there in question remained with the same parish as previously notwithstanding the Commissioners' order. The parishes in that case, which are the parishes here, having failed to agree upon the rectification of their financial arrangements necessary in consequence of the change of boundaries, went to the Commissioners to determine the matter.

The Commissioners saw that the burden of continuing to relieve paupers within the transferred area which the Court had declared to continue, pinched the old parish, viz., Melrose. Accordingly, instead of fixing that so much of the liability should be borne by the new parish in future, they quite properly ordained the new parish to relieve the old parish of the burden of maintaining the paupers, liability for whom remained with Melrose, at the same time ordering a *quid pro quo* to be given by Melrose.

This award is simply an equitable adjustment of the rates, and does not touch the question of liability which was decided in the previous case. I think this order of the Commissioners was quite within their powers, and I cannot say that I think the case presents any difficulty.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Guthrie—Dundas. Agents—Bruce & Kerr, W.S.

Counsel for the Defenders and Respondents—Rankine—C. N. Johnston. Agents—Romanes & Simson, W.S.

Tuesday, January 23.

FIRST DIVISION.

[Sheriff of Forfarshire.

HORSLEYS *v.* GRIMOND.

Ship—Bill of Lading—Discrepancy between Quantity of Goods in Bill of Lading and Quantity Delivered—Onus.

Where the quantity of goods delivered is less than the quantity stated in the bill of lading signed by the shipmaster, the *onus* of proving that the greater quantity was not in fact shipped, so as to relieve the ship from accounting for such quantity to the holder of the bill of lading, rests with the shipowner.

Where a master signed for 910 bales of jute and only 898 bales were delivered, the owner was *held* not to have discharged this *onus* by the evidence of the master and mate to the effect that all possible care had been taken both in shipping and in looking after the bales, and that those delivered must have exhausted the number shipped; especially as they explained that during the voyage several of the bales had had to be taken out of the ship in consequence of stranding, and were replaced.

Opinion (*per* Lord M'Laren) that where goods are measured by weight, pecuniary claims against the shipowner will not necessarily or probably arise upon a slight discrepancy between the weight stated in the bill of lading and that ascertained at delivery.

Messrs J. & A. D. Grimond, spinners, Dundee, shipped a cargo of jute from Calcutta by ss. "Hesper," owned by Messrs G. & M. H. Horsley, West Hartlepool, for delivery at Dundee. The bill of lading for one consignment, duly signed and delivered by the master of the vessel, stated that 910 bales had been shipped. In an action for the balance of freight still due, brought in the Sheriff Court at Dundee by Messrs Horsley against Messrs Grimond, the latter explained that only 898 out of the 910 bales had been delivered, and that the value of the 12 bales awanting fell to be deducted from the freight.

The pursuers pleaded — "(1) The said vessel having performed the said voyage, and delivered to the defenders respectively all the bales of jute shipped by or consigned to them as aforesaid, and delivered on board at Calcutta, pursuers are entitled, by the terms of the bills of lading, to payment of the freight thereof, with interest and expenses as craved for. (4) If the said 12 bales were not shipped at Calcutta, the pursuers are not responsible therefor."

The defenders pleaded—"(1) The pursuers being responsible, in terms of the charter-party and bill of lading, for the correct delivery of the goods in conformity with the bills of lading, their answer to these defenders' counter claim for 12 bales short delivered is irrelevant and ought to be repelled. (2) The pursuers having short delivered 12 bales of the quantity consigned to these defenders, and received on board the pursuers' vessel, the defenders are entitled to deduction of the value thereof from the balance of freight claimed from them under one and the same contract."

A proof was allowed, in which the pursuers put the chief officer and the master of the "Hesper" into the witness-box. The former deponed that he had most carefully checked with the aid of tally-clerks the bales as they were shipped at Calcutta, and that all so shipped were delivered at Dundee. He explained that the ship had gone aground in the Gulf of Suez, requiring the temporary removal of 150 of the bales into

lighters, but that they had all been replaced into the vessel. The only explanation he could give of the shortage was that in spite of his care there had been an erroneous count at Calcutta, and that the 12 bales had never in fact been shipped. The master deponed that he had signed the bill of lading after checking it with the mate's receipts, that under his superintendence all the bales removed at Suez had been replaced on board, and that all the bales shipped at Calcutta were delivered at Dundee. The defenders produced the bill of lading for 910 bales, and proved that only 898 bales had been in fact delivered, making 1398 out of a total consignment of 1410 bales under their bills of lading.

The Sheriff-Substitute (CAMPBELL SMITH) pronounced the following interlocutor:—"Having considered the proof led, productions, and whole process, Finds that the defenders J. & A. D. Grimond are, under bills of lading held by them, entitled to delivery from the pursuers of 1410 bales of jute, and that they have obtained delivery of no more than 1398 bales: Finds that the pursuers are bound either to deliver the 12 bales still undelivered or to establish a 'valid excuse' for their failure to deliver them, or to give the defenders compensation for their value: Finds that the pursuers have failed entirely to establish any valid excuse for non-delivery of said 12 bales, and that therefore they are liable in damages for the value thereof: Assesses the damages at £32, 6s. 6d., and sustains the said defenders' plea of compensation to that extent: Decerns for the restricted sum sued for against said defenders minus said £32, 6s. 6d. with interest from the date of citation, &c.

"*Note.*—Whatever else a bill of lading may contain or may be construed to imply, I take it to be indisputable that it contains an acknowledgment of goods received in good order and an obligation to deliver them in like good order and condition subject to specified exceptions and conditions, and as the counterpart obligation to pay freight at a specified rate per ton or measure as the case may be. The common-sense essence of the contract, of which it is evidence, is to carry goods for hire and deliver them in good order, or otherwise to aver and establish a relevant excuse.

"The Messrs Grimond say that the owners of this ship 'Hesper' have failed to deliver twelve of the bales which they acknowledge receipt of in the bills of lading signed by the captain of that ship, who was the owners' accredited agent, to bind them to the contract under which in this very action they sue for freight.

"The shipowners meet that averment of non-delivery by saying, with no regard to consistency, that they were delivered at Dundee, and that they were not shipped at Calcutta. The substance of their statement is that they know nothing particular about these 12 bales. . . .

"At the debate it was not contended in so many words that the bills of lading were mere waste paper, and that the ship was under no obligation whatever to deliver the goods specified in the bill of lading.

"On the contrary, it was admitted, in accordance with all or at least most authorities that have been permitted to find their way into print, that they were *prima facie* evidence of the facts admitted in them. The total reprobation of bills of lading was not contended for, but the main use that in the shipowner's interest it seemed could be found for them after giving a title to freight was to furnish a nest of excuses for failing to take care of and deliver the cargo. Three of these possible excuses were by way of sample, I suppose, and to atone for the reticence of the record, narrated and expounded for my instruction. Excuse No. 1 was that these 12 bales were never put on board, but were stolen or fraudulently disposed of in accordance with a conspiracy of the crew of the lighter, who brought the jute to the ship's side, and the crew of the 'Hesper,' who probably divided this plunder between them, and that this is barratry in law. . , . Excuse No. 2 was that the 'Hesper' stranded in the Gulf of Suez, and that 'about 150 bales' according to the log-book written by the first mate—precisely 150 bales according to the sworn evidence of the second mate—were then removed to lighten the vessel, and these 12 bales were then lost, it is suggested, in some unexplained and unexplainable manner, so that the insurers should pay for the loss as being a consequence of stranding. Excuse No. 3 was that these bales actually reached Dundee, and were stolen in broad daylight from the public street of Dundee. . . .

"Without having formed any opinion as to the relevancy of suggestions so vague, I have to say of the first two of them that though either may be true—more especially the first—that there is not a tittle of positive evidence in favour of either, and that the third is not merely unsupported by proof, but is to my thinking destitute of all reasonable probability. . . . Authorities there are to the effect that the captain's error cannot bind the shipowners, though the charter-party of this voyage gives encouragement to the contrary idea, but I take it the captain's error always requires to be proved to have been an error—mere possible error is not enough, still less is error that was undiscoverable. No captain could in reason be bound to open bales and boxes or to apply his mind and his skill, such as it may be, to test the contents of parcels or the agreement between internal quality and external descriptive marks. The bale that he has received on board the ship he is bound to deliver—that very bale of jute say, but not another bale, say of silk, though the bale so received by him may have been described as silk. Relief from the consequences of essential error induced by misdescription or misrepresentation is one thing, and relief from an obligation to deliver twelve specific articles capable of being seen and enumerated by a captain, not blind as they were, or as near as inevitable accident would permit of these remaining, is a very different thing.

The contract of carriage would be of no use to the owner if all the carrier had to do was to plead a few plausible possibilities to save him from delivering in good order the articles of which he had acknowledged receipt in a written document of mutual obligation.

"The only matter of real importance in dispute in this case is, whether the Messrs Grimond should be allowed to set-off the value of these twelve undelivered bales against the pursuers' claim for freight, and upon that matter the Messrs Grimond, in my opinion, are right." . . .

The pursuers appealed to the First Division of the Court of Session, and argued —Even before the Bills of Lading Act 1855 a master was not the agent of the owner so as to make him responsible for goods not actually shipped—*Grant* v. *Norway* (1851), 10 Scott's Comm. Bench Rep. 665. Since then the bill of lading is conclusive against the master, but not against the owner, who is only liable for the cargo actually then on board—*M'Lean & Hope* v. *Munck*, June 14, 1867, 5 Macph. 893; *Grieve, Son, & Company* v. *König & Company*, January 23, 1880, 7 R. 521; *Halmoe* v. *Denholm & Company*, December 7, 1887, 15 R. 152. They had conclusively proved that all the cargo shipped had been delivered, and therefore that the 12 bales were never on board. There had been no rebutting evidence, and after their proof the bill of lading became waste paper upon which the pursuers were not entitled to found.

Argued for respondents—No doubt the ship might prove the goods stated in the bill of lading had not in fact been shipped, but unless that *onus* of proof was discharged the bill of lading remained as *prima facie* evidence against the ship—*M'Lean & Hope* v. *Fleming*, March 27, 1871, 9 Macph. (H. of L.) 38; *Taylor* v. *Liverpool and Great Western Steam Company*, June 5, 1874, L.R., 9 Q.B. 546. The pursuers had failed to discharge that *onus;* indeed they had proved that the bill of lading had been most carefully prepared. They did not found on the stranding as being one of the exceptions under the bill of lading, for their case was that the goods had not been lost at Suez. To say that by leading evidence of care having been taken of all goods received, goods not forthcoming, but for which a receipt had been granted, were proved not to have been in fact put on board, would revolutionise the whole law of common carrier.

At advising—

LORD PRESIDENT—The merchant here has to establish that the ship took on board 910 bales of his jute, and he proceeds to do so by producing the bill of lading, which acknowledges the amount which he now claims. From that point onwards—after production of the bill of lading, and it being proved to be signed and delivered by the master—it falls on the ship to show that that is not an accurate statement of the amount, and that a less amount was truly that which was received on board. The question therefore is simply as to what was taken on board. Once it is ascertained what was taken on board, then the liability of the shipowner is undoubted to make that amount forthcoming, because it is no answer for him to say that the goods have disappeared during the voyage, that being merely a confession of his legal liability to make good the deficiency.

Now, the *onus* in the question of what was taken on board at Calcutta being on the ship, what evidence have we got to make out that 898 and not 910 was the true number of bales taken on board?

The case of the ship being in truth an impugning of the accuracy of the statement made at the time by their own master, they certainly take the oddest way of breaking down the accuracy of that written acknowledgment. They put the master and the mate into the witness-box, and these men together prove, first, that the mate went through a most careful and accurate mode of checking what was noted at the time as being put in the ship; and, secondly, that the captain, furnished with the results of this minute and careful process of scrutiny and examination, then and then only signs the acknowledgment for 910 bales.

If it had happened that the master or the mate was being impugned for the painstaking way in which they have done this, I can hardly imagine that there could have been better evidence in their defence, than that which is tendered ostensibly to rebut the assertion in the bill of lading.

The rest of the evidence consists, as the Sheriff-Substitute very pungently remarks, of a series of speculations as to how the discrepancy could have arisen. I do not think that there is any successfully established theory made out by the evidence.

It is to be noted, as was pointed out to us by Mr Dickson, that the practical and accurate methods which are so well established as having been applied at Calcutta rather seem to have deserted the officers on the voyage, because the log-book shows certain discrepancies about figures, and there are also pieces of evidence which show that in the history of the treatment and manipulation of the goods on the voyage, and particularly during the incident in the Gulf of Suez, the officers are not concurrent as to the place and time at which the whole of the goods which had been put out on lighters had been taken back, some saying that it was in the Gulf of Suez and some in the Bay of Suez. But this Suez incident really comes to no more than this—it cannot be asserted that the goods remained *in statu quo* from the time when they were taken on board at Calcutta till they were taken out at Dundee because a part of the goods were undoubtedly put out on lighters at Suez. I do not think that it is at all satisfactorily proved that such minute and continuous watching took place over the goods in the lighters, that the 12 bales might not quite well have been taken away then. But I observe on that merely to show that here again the ship, having the burden of proof upon it, fails to make out the identity of the quantity put

out at Dundee with that taken in at Calcutta, the chain being broken by the Suez incident. I revert to this that the bill of lading sets up the defenders' case, unless its accuracy has been broken down. The shipowners have carefully proved its accuracy, and they have gone on to show that opportunities occurred during the voyage for the goods going amissing.

It seems to me that the Sheriff-Substitute's conclusion is right, although the findings in his interlocutor may be slightly varied.

LORD ADAM—I am of the same opinion. It is no doubt true that the receipt granted by the master of a vessel in the bill of lading for certain goods is not conclusive evidence against the owners of the vessel that these goods were in point of fact received on board. But nevertheless I think that that receipt does charge the owners with the goods. They may discharge themselves in many ways, but the *onus* lies upon them to show that the goods acknowledged in the bill of lading were never in fact received on board, or it may be that owing to an exception in the charter-party they may discharge themselves of the goods.

Now, looking at the facts in the case, I agree with your Lordship that so far as the owners are concerned, all the evidence goes to confirm the fact that they did receive the goods. The captain took minute care that the goods were checked before he signed the bill of lading.

All that the owners say is, that though they are unable to say how the goods disappeared, they did in point of fact disappear.

I agree with your Lordship and with the Sheriff-Substitute that that is not sufficient to free them from liability.

LORD M'LAREN — I am very far from asserting that in every case of discrepancy as to weight between descriptive statements in bills of lading and the quantities of goods actually taken on board and delivered, or even in the case of a discrepancy as to the precise number of a large quantity of bales or packages, the bill of lading is to be treated as a document laying upon the owners an unqualified obligation to deliver according to its terms.

It has been laid down under different forms of expression in a series of cases that the master has no authority to sign bills of lading except for the numbers and quantities of goods which he has taken on board his ship, and if it be proved that bills of lading do not represent goods put on board, then although the bills of lading may be obligatory on the master who signs them, they will not in the case supposed be binding on the owners.

But the question of fact which arises in this case is, I apprehend, to be solved according to the principle laid down in the case of *M'Lean & Hope* v. *Fleming* by one of the noble and learned Lords taking part in that case. Lord Chelmsford, after stating the legal limitation of the master's authority, proceeds—"But it is not to be presumed that the master had exceeded his duty. His signature to the bills of lading is sufficient evidence of the truth of their contents to throw upon the shipowner the *onus* of falsifying them and proving that he received a less quantity to carry than has been acknowledged by his agent." Now, the facts of the case in which this principle was laid down were of this nature. It was a case of a contract for carrying a cargo of bones from the Black Sea to Scotland. The ship came home only half filled. The master had protested for short cargo, but, in ignorance of the language in which the bills of lading were expressed, the master had signed bills of lading representing a quantity in quintels amounting to a full cargo of bones. All the Judges who took part in the decision both in this Court and in the House of Lords were of opinion that the owner had discharged the *onus* of proving that the full cargo represented in the bills of lading was not in fact shipped. I observe the Lord Chancellor says—"As regards the matter of fact, I think it is proved to demonstration that the cargo never was on board." But one sees that even in cases where there is no fraud or systematic short delivery, there may be discrepancy of weight arising from the carelessness of weighers and difficulty of maintaining a perfectly efficient system of checking the weights and the like. I am anxious that in anything we decide in this case it should not be supposed that in a question as to weight the amount or quantity stated in the bills of lading is to be precisely binding on the owners of the ship, and that in case of a slight discrepancy between the weight stated in the bill of lading and the weight as ascertained at delivery, pecuniary claims against the owners would necessarily and probably arise. Here we have nothing to do with weight, but the contract expressed in the bill of lading is for the delivery of a specific number of bales of jute. These are not small objects as to which mistakes in counting might easily be made. They are bales weighing four cwts. Their loading necessarily proceeds slowly though aided by steam machinery, and there ought to be no difficulty in keeping a rigorously exact account of the number of bales put on board. Therefore in such a case I should think the presumption that the bill of lading truly represented the cargo put on board is peculiarly strong, always supposing that there is no fraud on the part of the master. There is evidence no doubt that the fraudulent abstraction of cargo is a thing which is extensively practised at the port of shipment, Calcutta, but there is no suggestion that there was fraud in this particular case, and I am unable to find in the evidence any statement which proves that a full cargo was not put on board, or which even throws reasonable doubt on the correctness of the bills of lading. If this vessel had performed her voyage without detention at any place the circumstance that the holds never were opened or that the goods never were displaced in the course of the voyage and that all cargo found in

the hold at Dundee was delivered,—this might have gone some length to prove or suggest the probability of numerical error in the bills of lading. We are not dealing with a case of that kind because we know that the ship was stranded near Suez, and it is common ground that 150 bales or thereby were removed from the ships and put into lighters where they lay for a whole night, and a question arises whether the full number of bales was put on board again.

Now, the witnesses who were examined on this point—the master and the ship's officers—say that they were satisfied that all the bales were put on board on the following day, and I do not doubt that in the evidence which they have given these witnesses express their honest belief as to the state of the facts on which they were examined. Still I cannot see that the evidence altogether excludes the possibility of certain bales having been lost in the process of transhipment. Theft is not the only possibility. Bales may have fallen into the sea when being loaded or unloaded, or while they were lying loose in the lighters. In short, we are necessarily in some ignorance of the history of this incident of the voyage. It is not urged on the part of the owners that they are within one of the known exceptions of a contract of carriage. If their case had been that the ship was stranded, that they used their best endeavours to take care of the cargo during the operation of lightening the ship, but that some of the bales had disappeared notwithstanding the use of proper precautions, a different question would have been raised, and one can easily see that in such a case the owner might succeed in avoiding liability on different grounds. But the owner's case as maintained by evidence and in argument is that it has been proved that all of the bales taken out of the ship at Suez were restored, and they seek to bring the case to this—that it is certain that the full quantity of goods set out in the bills of lading was not put on board. I do not think that the evidence is so conclusive on that point as to satisfy me that bales may not have disappeared in the course of the voyage. The result is that the owners have I think failed to discharge the duty which was incumbent upon them, if they wished to avoid the present claim, of establishing that the master had signed bills of lading in excess of the quantity of goods put on board, so that to the extent of the difference the owners are not bound by his act. I agree with your Lordships that the interlocutor ought in substance to be affirmed.

LORD KINNEAR—I am of the same opinion. A shipmaster has no authority to bind his owners by an acknowledgment on a bill of lading for delivery of goods which have never been taken on board, but on the other hand the master is the owner's agent to receive the goods when the ship is on general freight, and therefore his bill of lading is evidence against them that the goods which he acknowledges to have been shipped were in fact shipped. The owners may be released of the obligation which it *prima facie* imposes on them to deliver the goods in good order, if they can show that as matter of fact these goods were not put on board; but then the *onus* of falsifying their own bills of lading, or their master's bills of lading, lies on them. Therefore it appears to me that the only question we have to consider is the question of fact whether the owners have demonstrated that the bales now in question, which their master acknowledges to have received, were never in fact put on their ship. On that question my verdict is in the negative. We cannot infer the quantities shipped from the quantities delivered, because in consequence of what occurred in the Gulf of Suez the owners have failed to prove that all the goods shipped at Calcutta were carried safely to Dundee. I think they have failed to disprove the bill of lading, and therefore I agree with your Lordships that the Sheriff-Substitute's interlocutor should be in substance affirmed.

The Court adhered.

Counsel for Pursuers and Appellants—Salvesen—Younger. Agents—Lindsay & Wallace, W.S.

Counsel for Defenders and Respondents—Graham Murray, Q.C.—Dickson. Agent—J. Smith Clark, S.S.C.

Tuesday, January 23.

FIRST DIVISION.

SILVER AND OTHERS *v.* GREAT NORTH OF SCOTLAND RAILWAY COMPANY.

Process—Diligence—Recovery of Documents—Reparation — Railway — Accident to Wayman—Right to Recover Reports and Communications between Head Officials and Local Officials—Regulations of Other Railway Companies.

A wayman in the employment of a railway company having met with a fatal accident, his widow and children brought an action against the company.

Held that they were not entitled to a diligence for recovery (1) of the rules and regulations of other railway companies, or (2) of reports and communications passing between the head officials and subordinate officials of the defenders' company.

In this action, which was raised in the Sheriff Court at Aberdeen, the widow and children of William Silver sued the Great North of Scotland Railway Company for damages on account of the death of the said William Silver, who was a foreman wayman in the defenders' employment.

The tenor of the pursuers' averments was as follows—On the morning of January 23, 1893, William Silver was employed in seeing that a section of the defenders' railway was clear. He was examining the up-line,