consider, in the first place, whether there was anything to show that the original cause of the dilatation of the heart from which the man ultimately suffered was the accident on the 7th December, because it may have been shown that the accident that then happened started the evil which developed later as the man was working. Or again, it might be shown that he began work in such a defective physical condition, caused by the accident, as to expose him to the injury from which he actually suffered. Both of these are, in the first place, questions of fact, and I think the Sheriff negatives both. I am therefore unable to see any sufficient ground for disturbing his decision.

LORD JOHNSTON—The learned Sheriff-Substitute has in my opinion come to a sound conclusion. But it is not a question for this Court, as the Sheriff puts it in the case before us, whether the arbiter was wrong in holding that the appellant's incapacity since 15th August 1912 was not due to the original accident of 7th December 1911, but whether there was before him evidence from which he could reasonably and therefore competently come to that conclusion.

A miner at the face on 7th December 1911, when throwing out lumps of coal, twisted his back and racked himself. He was off work till 17th February 1912 and received full compensation. He received reduced compensation as partially incapacitated to 3rd March, and still further reduced till 22nd May 1912. But on 1st May 1912 a reference was made to a medical referee, who pronounced that the injured man was then able for light work, and that if he could obtain it in the interim he would be fit for his usual work in three weeks. We are not told whether he got or accepted light work in May 1912. But on the 27th of that month he returned to his ordinary work. Down to July 1912 he worked regularly and full time and had nothing to complain of. But in July he began to feel pain in the cardiac region, and on 15th August 1912 he became totally incapacitated and was found to be suffering from aneurism of the heart. While the Sheriff found that the aneurism resulted from the continuous strain put on his heart muscles from 27th May to 15th August 1912 by work beyond his physical powers, he also found that there was no evidence to connect the aneurism as the cause of his present incapacity with the accident of 7th December 1911.

The appellant did not found his claim upon anything occurring during his period of work from May to August 1912. Had he done so there would have been a case for consideration (akin to *Hawkins* v. *Powell's Tillery Steam Coal Company*, L.R. 1911, 1 K.B. 988), though I think that there would then have been possible reason for excepting to the Sheriff's statement that the aneurism then discovered resulted from continuous strain when "doing work beyond his physical powers." That appears to be a pure inference from the presence of the aneurism, and not as far as I can see established by any evidence as to the development of the aneurism.

But the appellant based his claim on the accident of 7th December 1911. That he met with an accident on that date is true. But he must prove that the injury of which he complains was an injury by or in other words resulting from this accident. I think the Sheriff was justified on the evidence in holding that he had failed to prove any connection between the two, and that therefore there is no ground for disturbing his judgment.

LORD MACKENZIE—I am of the same opinion. There may or may not have been a chain of causation between the accident the workman met with on 7th December 1911 and his condition on the 15th August 1912. It was for the arbiter to say, and I am unable to come to the conclusion that the arbiter was not entitled to make the finding that he has made.

The Court answered the question of law in the negative and dismissed the appeal.

Counsel for Appellant—Moncrieff, K.C.—Keith. Agents—Simpson & Marwick, W.S.

Counsel for Respondents—Horne, K.C.—Strain. Agents—W. & J. Burness, W.S.

HOUSE OF LORDS.

Friday, July 18.

(Before the Lord Chancellor (Haldane), Earl Loreburn, Lord Shaw, and Lord Moulton, Lord Parker being present at delivering judgment.)

TYZACK AND BRANFOOT STEAMSHIP COMPANY, LIMITED *v.* SANDEMAN & SONS,

(In the Court of Session, July 12, 1912, 49 S.L.R. 897, and 1913 S.C. 19.)

Ship — Affreightment — Bill of Lading — Exemptions—Short Delivery—Unmarked Goods not Identifiable as Part of Any Particular Consignment.

A ship's cargo consisted of a number of consignments of bales of jute, and at the port of delivery it was found that the number of bales was short by 14, while, further, 11 bales were unidentifiable with any particular consignment and contained a different quality of jute. In an action by the shipowners for freight against a firm of consignees who had received short delivery, *held* that the consignees were not bound to accept *pro tanto* a proportion of the unidentifiable bales.

Spence v. *Union Marine Insurance Company*, L.R., 3 C.P. 427, and dictum of Lord Russell in *Smurthwaite* v. *Hannay*, [1894] A.C. 504, *distinguished.*

This case is reported *ante ut supra.*

The defenders, Sandeman & Sons appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—In this appeal the House can deal with the questions of law that arise only on the footing that the facts have been conclusively found by the Court below. But I think that the facts have been so fully found that we are in a position to dispose of the case without difficulty.

The substance of what has been so found is shortly as follows:—The appellants, who are spinners and manufacturers in Dundee, were the endorsees of 11 bills of lading, representing 11 separate parcels of jute, amounting to 2476 bales. As regards 9 of these parcels delivery was made in full, but in the case of the remaining 2 there was a shortage in delivery. The parcels as to which there was a shortage consisted of 246 bales which were shipped under a particular bill of lading, and of 254 bales which were shipped under another.

The cargo was put on board the respondents' steamer "Fulwell" at Calcutta in August 1909. Bills of lading for 28,002 bales of jute were given by the master of the vessel and were endorsed to 37 different consignees.

The "Fulwell" arrived at Dundee, which was the port of destination, in October 1909, and the discharge of the cargo commenced. It was completed before the end of the month, when it was found that on the out-turn of the ship there were missing 14 bales, and that there also remained in the harbour shed 11 bales forming part of the vessel's cargo which none of the consignees would accept as shipped under their respective bills of lading. Besides the appellants, there were three other consignees who would not accept delivery, and these claimed against the respondents for 4, 8, and 7 bales respectively. The appellants claimed for shortage of 6 bales, the total shortage claimed for being thus 25 bales. All the other consignees, being 33 out of the 37 referred to, acknowledged receipt of the full quantities consigned to them.

The two bills of lading endorsed to the appellants, and over which the dispute has arisen, set forth that there had been shipped in good order and condition on board the respondents' steamer a specified number of bales of jute, "being marked and numbered as *per* margin." In both cases the markings in the margin were in the words "J.P.S. Naraingunge, 1909-10, on end in Red R.B." The total number of bales specified in these two bills of lading was 500, but it is admitted that only 494 bales bearing the marks above mentioned were delivered to the appellants. The bills of lading contained two clauses which are material. Clause 4 declared that "the number of packages signed for in this bill of lading to be binding on steamer and owners unless errors or fraud be proved, and any excess of shipper's marks to be delivered." Clause 7 declared—"The ship is not liable for insufficient packing or reasonable wear and tear of packages; for inaccuracies, obliteration, or absence of marks, numbers, or description of goods shipped," &c.

There having been, as above stated, a shortage in delivery at Dundee to the appellants of 6 bales, they refused to pay freight except on the footing of claiming to set off against the freight the value of the 6 bales not delivered to them. The respondents then raised an action in the Sheriff Court at Dundee, claiming £175, 1s. 6d., being the balance of freight due in respect of the appellants' total consignment. The claim for freight was admitted by the appellants, but they counter-claimed £15, 5s. 4d., being the value of the 6 bales which had not been delivered. The respondents in their pleadings offered to pay to the appellants and the other consignees who complained of short delivery the price of the missing 14 bales already referred to, "in such proportions as they may be found to be entitled to the same," but they maintained that as the four consignees were, as they alleged, bound to allocate among themselves the 11 bales left in the harbour shed, they could not ascertain what part, if any, of the price of the 14 bales would fall to the appellants.

The Sheriff-Substitute decided that the appellants were entitled to deduct the value of the 6 bales not delivered from the sum sued for and assessed their value at £15, 5s. 4d. The respondents appealed to the Court of Session and the Second Division heard the case. In the course of the argument before that Court the respondents expressed their willingness to give the appellants credit for a proportion of the value of the 14 bales, irrespective of whether they would come to an agreement as to the allocation of the 11 bales remaining in the harbour shed.

The Second Division reversed the decision of the Sheriff-Substitute. They held that the appellants were not entitled to any further deduction than the amount which the respondents were willing to concede, which amounted to £8, 11s., and they gave judgment for the difference. The sum in dispute is therefore only £6, 14s. 4d. The question over which the controversy has taken place is, however, one of general importance.

It is, in the view which I take of this case, important to define what was the nature of the claim made on each side. The respondents were suing for freight, and they had to show that they had performed their contract. That contract was to carry and deliver, or tender, at Dundee the bales put on board at Calcutta. Unless they fulfilled this contract they were not entitled to freight on any bales in respect of which they had not fulfilled it.

The appellants, on the other hand, were entitled to have the bales put on board delivered to them as put on board, unless the special stipulations in the bills of lading protected the respondents. As the bales in question had been signed for and no error or fraud was shown within the meaning of clause 4, to which I have

referred before, the respondents could not say that the whole 25 bales had not been shipped. Nor does clause 7 help them. For it can apply only if the goods are proved to have been delivered. If a number of packages were shipped, and that number was delivered to a single consignee, the shipowners, who would have satisfied clause 4 by delivering the proper number, might be protected from inaccuracy or obliteration of marks by clause 7. In the case before the House the Court below has found as a fact that there were 11 bales not marked as described in the bills of lading, and that it is impossible to identify these bales as forming part of any parcels marked as set forth in the bills of lading, and that there are marks on the ends of these bales which showed that some of them could not have been marked "On end in Red R.B."

Now 14 bales have been lost altogether, and there are four consignees to whom the respondents seek to attribute the 11 bales. Why, then, should the appellants be bound to treat their 6 bales as included in the 11 which have arrived rather than in the 14 which did not arrive? It appears to me that a fallacy underlies the reasoning of Mr Horne in the able argument he addressed to us on behalf of the respondents. He assumed that the 6 bales missing could be identified as forming part of the 11 which arrived. But they may have been among the 14 which did not arrive. Your Lordships will observe that, this being an action for freight, the respondents have to prove that they duly tendered the goods shipped. at the termination of the voyage. But this is just what they cannot do. It follows, not only that they must fail in their action for freight in respect of the 6 bales, but that the appellants are entitled to say to them that, having failed to prove their delivery, a counter claim lies for the value of the goods shown to have been shipped but not delivered.

The learned counsel for the respondents relied on the case of *Spence* v. *The Union Marine Insurance Company* (L.R., 3 C.P. 427), where part of a cargo of cotton arrived at Liverpool but could not be identified, and it was held that the property in the part of the cargo which arrived, but of which the marks had been obliterated, had not ceased to belong to the consignees, and that the various consignees had become tenants in common of the mass of cotton according to their respective interests. But that was a case of a claim against an insurance company as for a total loss, and the consignee who claimed in the action had to establish his total loss. He failed for obvious reasons. It is sufficient to say that such a claim presents no real analogy to that which is before us. In *Smurthwaite* v. *Hannay* (1894, A.C. 504), which was an action for non-delivery like the present, there is a dictum in the judgment of Lord Russell of Killowen which suggests that the doctrine applied in *Spence* v. *The Union Marine Insursnce Company* might be applied in a case resembling the present. But that dictum was unnecessary for the decision of the appeal, which turned on a point of procedure only, and the other noble and learned Lords who were parties to the judgment did not express concurrence in it.

For the reasons I have given, I am of opinion that the judgment of the Second Division must be reversed, and that the decision of the Sheriff must be restored, with costs in this House and in the Courts below.

EARL LOREBURN—The able arguments to which we have listened help to reduce within a narrow compass all the material points in this case. This ship received at Calcutta, and gave bills of lading, of which the appellants are indorsees, for 2476 bales of jute. When she arrived at Dundee she delivered only 2470 bales, and the question is whether or not there is a valid claim by the indorsees for the balance of 6 bales undelivered.

Now the answer rests entirely upon the seventh condition or exception in the bill of lading. It is found as a fact that a great many other bales of jute were shipped in this vessel. On arrival all was in order except that 14 bales out of the total shipped, in some unexplained way, were not forthcoming at all, and 11 bales could not be identified as belonging to any consignee by reason of defective or obliterated marking. Upon this the shipowners admitted their responsibility to make good the shortage of 14 bales, but say that they are not liable at all in respect of the 11 bales because the seventh exception relieves them. Their contention is that all the consignees of any jute in this cargo to whom short delivery was made must be settled with upon the basis that the 14 lost bales belonged to them in proportion to their shortage, and that the 11 unidentifiable bales also belonged to them in the same proportion.

The seventh exception runs as follows—"The ship is not liable for insufficient packing or reasonable wear and tear of packages; for inaccuracies, obliteration, or absence of marks, numbers, or description of goods shipped . . ." The owners bind themselves to deliver the goods subject to the exceptions and conditions. In my opinion each bill of lading evidenced or constituted a separate contract by which the owners were bound to deliver the self-same bales that they received, but would be excused from delivery if it was made impossible by obliteration or absence of marks on these particular bales.

Suppose that in this very case all the bales stowed in the ship at Calcutta had been forthcoming at Dundee, but that 11 of them had been found not capable of identification owing to obliteration or absence of marks, so that no one could say to which bill of lading they belonged, there would have been no difficulty. All the bales incapable of identification in that case clearly belonged to one or more of the disappointed consignees in definite proportion to the shortage of which each complained, but which particular bale belonged to which particular consignee could not be proved.

All the disappointed consignees were disappointed because there had been absence or obliteration of marks on their own bales as well as upon the bales of the others complaining of shortage. And the shipowners could have said, "Our contract to deliver was conditional; the condition which excused us from delivering has arisen. The facts show that every single bale that each one of you shipped is on board, though its identity cannot be made out because of its defect in marking, for which we are not liable."

But on the facts found in the case now before your Lordships no such protection is available to the shipowners, and for this simple reason. Apart from the 11 unidentifiable bales there were 14 missing bales. It may be that the 6 which the appellants complain have not been delivered to them were among these 14. So the shipowners cannot prove, at least they have not proved, that the failure to deliver these 6 was due to any absence or obliteration of marking of such 6 bales. Clearly the burden of proving that the case comes within the exception lies upon the shipowners who set it up. They have failed in the proof, and stand in the position of men who contracted to deliver merchandise admittedly stowed in their vessel and have been unable to establish an excuse, however probable it may be that such an excuse really exists if the whole truth could be known.

I do not say anything in regard to the argument as to *commixtio*, because it seems to me quite beside the facts of this case. Owners of goods which have become so mixed as to be inseparable have rights among themselves, but those rights cannot over-ride their contractual relations with other persons. I think this appeal should be allowed.

LORD SHAW—[*Read by Lord Parker*]—By the two bills of lading founded on the respondents stood charged with the receipt at Calcutta of 500 bales of jute, and they became responsible for the delivery of the same number to the defenders at Dundee. They have only, however, delivered 494. Unless excused by the conditions of or exceptions in the contract they are liable in respect of the short delivery of 6 bales.

The defenders' goods had been shipped along with many other consignments of jute also destined for Dundee. Delivery of the cargo was made on the wharf *en masse*. In the reckoning 11 bales could not be identified, other 14 had disappeared. Four merchants had short delivery — one of these, the defenders' firm, to the extent of 6 bales. These bales have not been identified with any of the 11 whose marks have gone; on the contrary, Lord Salvesen does not doubt that the quality of the jute in the unmarked bales did not correspond with any of the consignments upon which there had been a shortage. The truth accordingly is, (1) that the respondents became charged with delivery of 6 bales, (2) that they have failed to deliver, (3) that no clause as to obliteration of marks applies to this case because the obliteration occurs on parcels of another quality of goods, and (4) that the failure either to deliver or to identify is thus complete.

On these facts I am of opinion that no case arises for the extrication of the rights of parties by applying any rule of distribution amongst co-owners. For the defenders are not co-owners with others of the remnant of this cargo. Their goods are not in it; and no principle of distribution, confusion, *commixtio*, or right in common, can apply to the case of a merchant whose goods have disappeared, and who is asked to accept in lieu of them, and in satisfaction *pro tanto* of his contract rights, a distributive share in something else no part of which ever belonged to him. I cannot read the opinion of Lord Russell in the case of *Smurthwaite* as justifying any such proceeding. If it did, as was argued, I should respectfully disagree with an opinion to that effect.

The respondents have unfortunately to face the total disappearance of 14 bales. The defenders' 6 may all be among them. Had the shipowners delivered the cargo in full, and had the qualities not been so disconform to those of the goods shipped, they might well have argued with force that all the shippers of goods (and all of them parties to bills of lading in similar terms) stood together to take the risk of confusion by the loss of identifying marks. But the cardinal fact of delivery fails, and with it awanting the doctrine of distribution goes.

Having reached this point I need go no further. For the reasoning and the language of Lord Loreburn are such that I could not presume to add to them, and I venture to adopt in its entirety the judgment of the noble and learned Earl.

LORD MOULTON—[*Read by Lord Parker*]—In this case the pursuers, the present respondents, have brought an action against the appellants to recover freight upon 2476 bales of jute delivered to them at Culcutta to be conveyed on the steamer "Fulwell" to the port of Dundee under the terms of certain bills of lading, eleven in number. The defenders admit the contracts, but allege that the pursuers have failed to perform two of them, in that of the 500 bales specified in those two bills of lading, only 494 bales were delivered to them at the end of the voyage. They claim accordingly that the pursuers have not earned the freight on the 6 bales short-delivered, and further, that they are entitled to set against the freight of the bales actually carried and delivered to them the value of the bales short-delivered

The case was originally held in the Sheriff Court at Dundee. At the hearing the Sheriff-Substitute found in favour of the contention of the defenders, and assessed the value of the bales short-delivered at £15, 5s. 4d., which was the value claimed by the defenders in their pleadings, and on the basis of which they had made a proper tender for the sum due to the pursuers in

respect of freight. Upon certain grounds, presently to be noticed, the pursuers had in their pleadings expressed a willingness to allow to the defenders a credit of £8, 11s., and no more, against the full freight due. The difference between these two sums, namely, £6, 14s. 4d., was therefore the amount which was really in issue between the parties. The Sheriff-Substitute found in favour of the appellants in respect of such sum, but on appeal his decision was reversed by the Second Division of the Court of Session, and it is from their interlocutor that the present appeal is brought.

To appreciate the point in dispute (which is one of considerable commercial importance) it is necessary to state a few facts. The ship "Fulwell" carried on this occasion a general cargo of jute shipped under a number of separate bills of lading. Of this cargo the defenders shipped eleven parcels, the numbers and marks on which were duly recorded in the margins of the respective bills of lading. The goods shipped under nine of these bills of lading were duly delivered, but of the goods shipped under the remaining two there was a shortage of 6 bales. It appears from the evidence that three other consignees also complained of short delivery to the extent of 4, 8, and 7 bales respectively, and the pursuers do not contest the allegation that the number of bales delivered to these consignees fell short of the number specified in the respective bills of lading by these amounts. On the other hand, upon the discharge of the ship 11 bales were found which correspond to none of the bills of lading. The goods shipped by the defenders under the bills of lading in question purported to be of different qualities, and the 11 bales found on the ship did not correspond in quality with any portion of those goods, and, in short, there is no evidence whatever to show that any of the 11 bales formed part of the parcels shipped by the defenders under the two bills of lading under which there was short delivery.

It will be seen, therefore, that inasmuch as there is no question that the pursuers are bound by the statements as to numbers in the bills of lading signed by the master, they are in the position of having to admit that 14 bales were lost, and that none of the 11 bales remaining over can be identified by them as forming part of the goods shipped under the two bills of lading which formed the contracts under which they are suing the defenders.

The pursuers are therefore in the position of being unable to assert that they have delivered to the defenders the goods which they received on their account for carriage. *Prima facie* this is a condition of their right to demand the payment of freight. It remains, therefore, to consider how they excuse themselves from proving the performance of that condition.

In the first place, they set up that the bill of lading is not an absolute contract to deliver, but a contract subject to conditions, and they contend that those conditions provide them with the requisite excuse. The two conditions to which they refer are numbered 5 and 7 in the bill of lading. No. 5 reads thus:—"Weight, measure, quality, contents, and value unknown."

I entirely fail to see what application this has to the circumstances of the present case. It in no wise affects the obligation of the shipowner to deliver the identical goods entrusted to him for transport. Its plain object and effect is to guard him from being supposed to warrant the accuracy of the representations as to weight, measure, quality, contents, and value, that may be found in the description of the goods or their markings as appearing in the bill of lading, and to let it be known that these appear in the bill of lading only as representations made to the master on behalf of the shipper, for the accuracy of which he is in no wise responsible. It is in strong contrast with No. 4, which provides that "The number of packages signed for in this bill of lading to be binding on steamer and owners, unless errors or fraud be proved."

Condition No. 7 (so far as material) reads as follows:—"The ship is not liable for insufficient packing or reasonable wear and tear of packages, for inaccuracies, obliteration, or absence of marks, numbers or description of goods shipped, leakage, breakage, loss, or damage by dust from coaling on the voyage, sweat, rust, or decay, except through improper stowage."

Here again there is no qualification of the absolute obligation to deliver the identical goods consigned to the shipowner for transport. It merely provides that if those goods should be injured in certain ways (one of which is the obliteration of marks), or should have been accepted by the ship without being marked in the way described in the bill of lading, the shipowner shall not be liable for their having been so injured or for their not corresponding to the marking described in the bill of lading. Considering that bills of lading pass into other hands, such a provision is an important protection to the shipowner. The presence of a mark indicating that the goods are the manufacture of some firm of high repute, or otherwise take high rank in the market by reason of their origin, may greatly influence their value, and but for the presence of such a provision in the bill of lading a shipowner might be involved in liability if the goods on delivery were found to be without the marking stated in the bill of lading. I can see no ground for attributing to condition No. 7 any other or different effect to this, which is the plain meaning of its words. But for the purposes of this case it suffices to point out that it cannot possibly qualify the obligation to deliver the identical goods consigned for shipment, nor can it refer to the absence or obliteration of marks on any goods other than those to which the bill of lading refers.

But although these points were made the subject of argument on behalf of the respondents, they do not represent the contention upon which they principally relied, and which was the ground of the

decision in their favour by the Second Division of the Court of Session. Their main defence was an alleged principle of our law to the effect that in such a case as the present, where there is a residue of unidentified goods and a shortage in delivery, the shipowner can compel the consignees to take the unidentified goods as a *pro tanto* fulfilment of the contract to deliver. To prove the existence of such a principle they cited the decision of the Court of Common Pleas in *Spence* v. *The Union Marine Insurance Company* and certain expressions appearing in the opinion of Lord Russell of Killowen in the case of *Smurthwaite* v. *Hannay* in this House. These cases I shall presently examine, but I think it convenient in the first place to submit to an independent examination the doctrines of our law in cases where goods belonging to different owners have become mixed so as to be incapable either of being distinguished or separated.

If we proceed upon the principles of English law, I do not think it a matter of difficulty to define the legal consequences of the goods of A becoming indistinguishably and inseparably mixed with the goods of B. If the mixing had arisen from the fault of B, A can claim the goods. He is guilty of no wrongful act, and therefore the possession by him of his own goods cannot be interfered with, and if by the wrongful act of B that possession necessarily implies the possession of the intruding goods of B, he is entitled to it (2 Kent's Commentaries, 10th edition, 465). But if the mixing has taken place by accident or other cause for which neither of the owners is responsible, a different state of things arises. Neither owner has done anything to forfeit his right to the possession of his own property, and if neither party is willing to abandon that right the only equitable solution of the difficulty, and the one accepted by the law, is that A and B become owners in common of the mixed property.

Farther than this I do not think that it is safe to go. That the whole matter is far from being within the domain of settled law is shown by the divergence of opinions as to the relative shares of the participating parties in the case of an accidental *commixtio*. Blackburn, J., in *Buckley* v. *Gross* (following Kent's Commentaries) considers that they would be tenants in common in equal shares. In *Spence* v. *The Union Marine Insurance Company* they were judged to possess the mixed mass in proportion to the probable amounts of their contributions to it. The fact is that the conclusions of the Courts in such cases, though influenced by certain fundamental principles, have been little more than instances of cutting the Gordian knot—reasonable adjustments of the rights of parties in cases where complete justice was impracticable of attainment. I doubt whether even the fundamental principles enunciated above would be strictly adhered to in extreme cases where they would lead to substantial injustice. For instance, if a small portion of the goods of B became mixed with the goods of A by a negligent act for which A alone was liable, I think it quite possible that the law would prefer to view it as a conversion by A of this small amount of B's goods rather than do the substantial injustice of treating B as the owner of the whole of the mixed mass.

It is from these propositions of law that the pursuers in this case attempt to spell out a right to compel the defenders to accept a proportion of the unidentified bales as a good delivery under the bills of lading. There are, to my mind, two fatal objections to this—the one of fact and the other of law. In the first place, before any such principles can be applied it is necessary that it should be proved or admitted that the goods of the owners in question have in fact contributed to form the mixed mass. If the goods of A and B have become mixed, and it is possible, but not proved or admitted, that some of C's goods are in the mixture, there cannot possibly be a presumption of law that they are or are not to be found there, and accordingly C cannot be compelled to take up the position of being a co-owner with A and B, nor is he entitled to insist on being regarded as such co-owner if A or B objects thereto. Whether his goods are to be found therein is a question of fact which must be proved by the party asserting it. Now in the present case there is not the slightest proof that any of the goods shipped under the bills of lading issued to the defenders are to be found in the unidentifiable bales. Everything, indeed, points the other way, because they are of a wholly different quality to any of the jute purported to be shipped by the defenders. But it is not necessary to discuss this question, or to do more than say that it is admitted that 14 bales must be taken to have been lost, and there is no evidence, and there can be no presumption of fact, that the 6 bales belonging to the defenders were not among these missing bales. It follows, therefore, that, accepting to the full the above doctrines as to the effect of a confusion of goods, they afford no ground for requiring the defenders to accept the position of co-owners of the unidentifiable bales.

But there is, in my opinion, an objection of law which is equally serious. The doctrines to which I have referred deal with property, and not with contract. To illustrate my meaning, let me take a case where the circumstances are such as would justify in the strongest manner the application of these doctrines in the case of goods shipped under bills of lading. Let me assume that A and B were the owners of two separate parcels of cargo which have become inseparably and indistinguishably mixed, without loss and without deterioration. It may well be that they could assert the position of joint owners in the mixed cargo, and as such take action against any person who sought to get possession of it or convert it to his own use. But it does not follow that the shipowners would have performed their contract of carriage. Their duty is to deliver the goods entrusted to them for carriage, and they do not perform that duty if all that the consignee

obtains is a right to claim as tenant in common a mixture of those goods with the goods of other people. No doubt if such a right is of some value, and the consignee avails himself of it, the shipowners are entitled to the benefit of what he receives in reduction of damages for their breach of contract, just in the same way as they would be entitled to credit for whatever value the goods possessed if they were delivered mixed up with some extraneous substance which lessened their value or compelled the consignee to go to expense in separating it out. In the present instance, therefore, the defenders were, under the bills of lading, entitled to the delivery of their goods, and even if the pursuers could compel them to take up the position of co-owners of the mixed mass, it would not be a defence to their claim for breach of contract to deliver, nor would it affect the damages recoverable thereunder, except so far as they had received or could receive payment representing the value of that co-ownership. The pursuers would have no right to claim that the right of the shippers to the proceeds of the goods as co-owners was a fulfilment of their own contract of carriage. They could only claim that any payment so received or receivable would be *pro tanto* a reduction of their liability in damages by reason of the defenders having received or being in a position to receive payment to that extent, so that the damages which they would suffer from the breach of contract would be diminished by a like amount. In the present case the defenders have received no payment of this kind, and for all that appears in the case the unidentifiable bales may possess no appreciable value, so that, apart from all other grounds, the pursuers are not on this account in a position to claim any reduction of the damages *prima facie* due from them to the defenders for their breach of contract to deliver.

The nature and consequences of the contention of the pursuers are well illustrated by considering the manner in which they have arrived at the sum of £8, 11s. for which they express their willingness to credit the defenders. The number of bales short-delivered was 25, of which 14 are admitted to have been lost. The value of the 6 bales short-delivered to the defenders is fixed at £15, 5s. 4d., and £8, 11s. is arrived at by taking fourteen twenty-fifths of that sum. The pursuers therefore contend that they have specifically performed their contract with respect to the remaining eleven twenty-fifths of the missing 6 bales (*i.e.*, two and sixteen twenty-fifth bales) by telling the defenders to take their share of 11 unclaimed bales which are not shown to be identical with or to correspond in any particular with the bales which they undertook to deliver.

I now turn to the decisions which it is contended establish doctrines inconsistent with the above conclusions. The chief, and in fact the only decision to which we are referred, is that of *Spence* v. *The Union Marine Insurance Company*. The facts of that case were as follows:—Cotton belonging to different owners was shipped for Liverpool in bales specifically marked. On her voyage the ship was wrecked, all the cotton was more or less damaged, some of it was lost, and some was so damaged that it had to be sold at an intermediate port. The rest was sent on to Liverpool. By reason of the ship being wrecked the marks on all but a portion of that sent on to Liverpool were obliterated. The plaintiff was the holder of a bill of lading for 43 bales, and of these 2 only were identifiable at Liverpool and were duly received by them. They had insured the whole parcel, and the action was an action by them against the underwriters as for a total loss of the 41 bales. I should add that the unidentifiable portion of the cargo had all been sold (under an arrangement whereby the sale was to be without prejudice to the rights of the parties), and the proceeds divided among the owners who had not received their goods in proportion to the number of bales short-delivered.

In these facts there are three matters worthy of special notice. In the first place, it was not disputed that all the goods had been duly shipped, and that the loss had been occasioned entirely by the ship being wrecked. In the second place, the goods appear to have been all of the same character, so that it was only a question of the number of bales belonging to each particular owner. In the third place, the action was one of insurance, and the sole question was whither the plaintiffs were entitled to say that there had been a total loss of the 41 missing bales. There was no question of breach of contract to deliver. It was therefore open to the Court to regard the case as one in which, by reason of the perils of the sea, and from no other cause, it came about, first, that the goods became indistinguishably mixed, and, secondly, that a portion of this mixed mass was lost. Under those circumstances the owners of the goods were clearly entitled to take up the position of having become co-owners of the mixed mass, and of every part of it, and therefore of the surviving portion of it, and seeing that the goods were all of the same quality this was the only position they could take up in fairness to the underwriters. Everything had been done consistently with this view, and all that the Court decided was that this was the proper view to take of the matter; and if the judgment be carefully read it will, in my opinion, appear that the Court arrived at its decision from the considerations that I have enumerated above, and did not purport or intend to make any addition to the law as to the effect of *commixtio* as previously enunciated by recognised authority.

The case of *Smurthwaite* v. *Hannay* is of a different character. In that case bales of cotton were shipped by several shippers upon a general ship for carriage to Liverpool, and upon arrival it was found that the number of bales landed fell short of those shipped, and that the marks upon some of the bales so landed had become obliterated so that identification was impossible. These latter bales were sold and

their proceeds distributed proportionately among the several consignees who had received short delivery. It would seem that all the bales were treated as being similar.

Under these circumstances sixteen holders of bills of lading joined in one action against the shipowners, claiming damages for non-delivery of the specified number of bales. The defendants applied to stay the action on the ground that neither order 16, rule 1, nor order 18, rule 1, justified the joinder of such causes of action. The sole question before the Court therefore was as to the construction of these rules. The Court of Appeal had decided in favour of the plaintiffs, and from that judgment the defendants appealed to this House. In the result the appeal was allowed, and it was decided that on the true construction of the rules in question the various holders of the bills of lading could not combine as co-plaintiffs in one and the same action.

In the course of the argument counsel for the appellants suggested that unless holders of bills of lading could thus join in one action they would be placed in a position of some difficulty, because the defendants might attribute a sufficient number of the unmarked bales to the particular plaintiff suing, and so meet his claim. I have some difficulty in appreciating the legitimacy of such an argument when the sole point before the Court was as as to the construction of the language of certain rules. There is certainly no presumption that such rules are sufficient to prevent difficulties arising in practice, and it is evident that Lord Russell did not base his opinion on any such ground, for he says—"The argument of convenience was strongly pressed upon your Lordships. I am by no means certain that that argument has in the facts of this case much weight, but whether it has or has not, it cannot be regarded if, as I think, the orders and rules do not authorise that joinder of plaintiffs which has here been attempted."

Nevertheless it is true that he does say in his judgment that the difficulty suggested by the plaintiffs is not a real one, because the defendants could only attribute to each single owner of a bill of lading a proportion of the unidentified bales in answer to their claim for non-delivery. Under the circumstances of the case this could be nothing other than an *obiter dictum*. It was doubtless justified in that particular case by the fact that it was common ground that all the bales were similar, and that the parties had been acting on the basis of their being owners in common of the unidentifiable bales, seeing that the proceeds of the sale of those bales had been divided amongst them proportionately. Under these circumstances no objection could be made to the statement that they were owners of the unidentifiable bales in proportion to their respective interests. But if the noble and learned Lord intended to go further than the circumstances of that case, and to say that a tender of a proportion of unidentifiable bales is to the extent of that number of bales an answer to a claim of the holder of a bill of lading for short delivery, I am of opinion that the dictum was erroneous and cannot be justified. But I see no reason for thinking that his Lordship intended to lay down any such principle, or that he had before his mind the general case of short delivery under bills of lading.

For these reasons I am of opinion that this appeal ought to be allowed.

Their Lordships reversed the interlocutor complained of, with expenses.

Counsel for Pursuers and Respondents—R. S. Horne, K.C.—Hon. Wm. Watson. Agents—J. & H. Patullo & Donald (Dundee)—Alex. Morison & Company, W.S. (Edinburgh)—Beveridge, Greig, & Company (Westminster).

Counsel for the Defenders and Appellants—D.-F. Scott Dickson, K.C.—Condie Sandeman, K.C.—Arthur R. Brown. Agents—Johnstone, Simpson, & Thomson (Dundee)—Elder & Aikman, W.S. (Edinburgh)—Linklater, Addison, & Brown (London).

Friday, July 18.

(Before the Lord Chancellor (Haldane), Lord Shaw, and Lord Moulton, Earl Loreburn and Lord Parker being present at delivering judgment.)

MAIR *v.* RIO GRANDE RUBBER ESTATES, LIMITED.

(In the Court of Session, November 12, 1912, 50 S.L.R. 125, and 1913 S.C. 183.)

Company — Shares — Misrepresentation — Rescission of Contract to Take Share—Fraudulent Misrepresentation.

A shareholder brought an action for the rescission of his contract to take shares and for repayment of the amount paid thereon, averring that he had become a shareholder "in reliance on the statements in the said prospectus and report therein incorporated and in the belief that they were true," and that "he has recently learned that the said statements were false and fraudulent." The statements referred to gave a very favourable account of the rubber producing capacity of certain territory over which the company was being formed to acquire a concession, and were declared to be excerpts from a report made before the incorporation of the company by one of the directors. The prospectus stated that no payment would be made for the concession until after the report had been confirmed.

Held (*rev.* judgment of the First Division) that the averments were relevant.

This case is reported *ante ut supra.*

The pursuer Mair appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—If the question in this appeal were one simply of procedure,