stituted by the bill of lading was not entered into with them, but with the charterers, inasmuch as the shippers of the goods were quite aware that the vessel was put up by the charterers as a general ship, and made their arrangements with the charterers accordingly. For any mere breach of contract the charterers, and not the owners, would be responsible. The case is laid entirely on breach of contract, and not on delict: and even if the merits could be reached, the views held by the Lord Ordinary would entitle the defenders to absolvitor. But, of course, the question of jurisdiction must be first disposed of; and as the Lord Ordinary holds there is no jurisdiction because there were no funds due to the defenders arrested, he has decided nothing more in the case.

"The Lord Ordinary regrets that his judgment has extended to so great length. The case, however, is one of importance, and, so far as the Lord Ordinary is aware, of novelty in the law of this country: and he has felt it to be due to the parties that he should deal carefully with the full argument submitted to him, and should state his views of the decisions in the English Courts. These decisions were represented by the defenders as conflicting with each other, but he thinks it will be found that this is not the case when they are thoroughly examined."

The pursuers reclaimed.

Authorities—Maclachlan on Shipping, pp. 307, 308, 311; *Hutton* v. *Bragg*, 22d June 1816, 7 Taunt. 14; *Parish* v. *Crawford*, Maclachlan, p. 311; *Dean* v. *Hogg*, 13th Jan. 1834, 10 Bing. 345; *Christie* v. *Lewis*, 6th Feb. 1821, 2 Brod. and Bing. 410; *Belcher* v. *Capper*, 1842, 4 Mann. and Grang. 502; *Newberry* v. *Colvin*, and cases quoted by Lord Ordinary; *Erichsen* v. *Barkworth*, 2d Dec. 1858, Exch. Ch., 5 Jur., n.s., 517; Kent's Comm., iii., pp. 200, 308, 309, (10th ed.)

Defender's counsel was not called upon.

At advising—

Lord President—The simple question which we have to consider in deciding this case is whether the shipowners could maintain a direct personal action against the shippers for payment of the freight contained in the bill of lading. If they could not that settles the matter, for there is no further subject of arrestment. It does not in the least matter whether or not they had a right of lien over the cargo, or whether, but for the stipulation as to the term of payment, they would have had such a right. There may be such a right which would prevent a party demanding delivery till payment of the freight, but that is not said here. Again, there might be a good right of action against the shipowners for damages occasioned by the misconduct of the master, but it does not follow that there is a direct right of action here. Not one of these questions touches the case before us. I am clearly of opinion that as the shipowners are not entitled to demand payment of the freight under the bill of lading, so there can be no right of action against them. It is quite unnecessary to inquire to what class of charter party this belongs. The only contract into which the shipowners have entered is the charter party. The captain when he signed the bill of lading was the agent of the charterers. The shipowners had nothing to do with that contract, and could not enforce it; all they can enforce is the charter party, which is their contract with the charterers. The two contracts are quite distinct. Though the shipowners might have had a lien over the cargo till freight was paid, I am still of opinion that they have no right of action against the shippers. I agree with the result at which the Lord Ordinary has arrived, but not with the grounds of his judgment.

Lord Deas—I agree with your Lordship. The action is against certain parties who are not liable to the jurisdiction of the Court unless it can be founded against them. The question is whether the funds in the hands of the arrestees belong to the defenders, and that depends on whether the defenders have a direct personal right of action against the arrestees. I agree that the question of lien has very little to do with the matter. Can we hold that the arrestees are liable in a direct action by the defenders? The principle—said to be established in England that you must judge of every charter party by its own terms—is one of which I quite approve, and with which we agree in this country, and it seems to me that under this charter party a direct action would not lie.

Lord Ardmillan—The defenders are owners of the ship, and the question is whether good arrestments have been used in the hands of the shippers, that is to say, whether the freight is due directly to the owners of the ship or to the charterers. I agree that it is safer to avoid the various subtle questions which Mr Scott has raised and argued most ingeniously. The direct liability of the shippers was to the charterers; the contract with which they had to do was the bill of lading, to which the owners were not parties. The contract with which the owners had to do was the charter-party, and with that the shippers had nothing to do. I agree with your Lordships.

Lord Jerviswoode concurred.

The Court pronounced the following interlocutor:—

"Adhere to the interlocutor reclaimed against, and refuse the reclaiming-note; find the reclaimers (pursuers) liable in additional expenses, and remit to the Auditor to tax the amount thereof and report."

Counsel for the Pursuer—Dean of Faculty (Clark), Q.C., and Scott. Agent—A. Kelly Morison, S.S.C.

Counsel for the Defenders—Watson and Trayner. Agent—H. W. Cornillon,, S.S.C.

Friday, May 22.

FIRST DIVISION.

ADLINGTON *v.* THE INVERARAY FERRY AND COACH COMPANY (LIMITED).

(*Ante*, p. 479)

Process—Expenses—Jury Trial—Court of Session Act 1868 § 40.

In a case where a husband and wife brought an action for bodily injuries sustained by them under separate issues, and the wife recovered £25, and the husband one farthing—*held* that the husband was entitled to expenses, he not

being in the position of a pursuer who had recovered less than £5 in terms of section 40 of the Court of Session Act 1868.

This was an action of damages at the instance of a husband and wife for bodily injuries sustained by both in a coach accident, the husband suing for his own interest and as administrator-in-law for his wife. The case went to trial before the Lord President and a Jury at the late sittings (*ante*, p. 479) on two issues, the first relating to the injuries sustained by the wife and laying the damages at £450, and the second relating to the injuries of the husband and laying the damages at £50. The jury returned a verdict for the pursuers on the first issue, assessing the damage at £25, and for the husband on the second issue, damage one farthing.

The pursuers now moved the Court to apply the verdict and find them entitled to expenses.

The defenders resisted this as regards the expenses applicable to the second issue, and asked for the expenses themselves, on the ground that the verdict on the second issue was practically in their favour.

ASHER, for them, quoted the 40th section of the Court of Session Act 1868, which provides "Where the pursuer in any action of damages in the Court of Session recovers by the verdict of a jury less than £5, he shall not be entitled to recover or obtain from the defender any expenses in respect of such verdict," except in certain specified cases, of which the present was not one. He maintained that this section excluded the husband's right to recover any expenses in respect of the issue relating to himself.

DARLING, for the pursuers, replied that the section quoted did not apply to the husband here, who was the substantial pursuer in both issues, and he contended that as the true question between the parties had been fault or no fault, and as no additional expense had been caused by the second issue, the pursuers were entitled to their full expenses.

The Court gave decree in terms of the verdict, and found the pursuers entitled to expenses, holding that the husband was not in the position of a pursuer who had recovered less than £5, and that no additional expense had been caused by the second issue.

Pursuers' Agents—Bruce & Kerr, W.S.

Defenders' Agents — D. Crawford & J. Y. Guthrie, S.S.C.

Friday, May 22.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

LA COUR & WATSON *v.* GEORGE DONALDSON & SON.

Ship — Place of Discharge—Demurrage— Charter-party—Bill of Lading.

A steamer was chartered to bring a cargo of wood to a certain port, "or as near thereunto as she could safely get," and being unable to get a berth at the quay, lay about sixty feet off it. It was proved that such cargoes were frequently landed at this port by means of rafts or lighters, but the affreighter, though called on to take delivery, delayed doing so until the vessel could get a berth at the quay. —*Held* that they were liable for demurrage, the vessel having reached her place of discharge within the meaning of the charter-party.

Held that the quantity stated in the bill of lading must be held to be the quantity actually delivered, in the absence of direct proof of short delivery.

This action was brought by Messrs La Cour & Watson, merchants and ship brokers in Leith, owners of the steamer Enniskillen, against George Donaldson & Son, timber merchants, Alloa, for (1) £100, for demurrage of the said vessel for four days, and (2) the sum of £5, 1s., 11d. as the ballance of freight due to the pursuers.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 23d December* 1873.—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, including the proof, finds it established by the pursuers that there is resting-owing to them by the defenders, 1st, the sum of £100 sterling in respect of demurrage; and 2d, the sum of £5, 1s. 11d. sterling in respect of freight, with interest on these sums respectively at the rate of 5 per cent. per annum, from the 11th of July 1873 till payment, and decerns accordingly against the defenders for payment to the pursuers of said sums and interest: Finds the pursuers entitled to expenses; allows an account thereof to be lodged, and remits it, when lodged, to the Auditor to tax and report.

"*Note.*—The pursuers' claims for demurrage and balance of freight have reference to a cargo of railway sleepers which the pursuers, as owners of the steamship 'Enniskillen,' contracted to bring from a port in Sweden to the defenders at South Alloa.

"According to the charter-party, which is dated 27th May 1873, it was agreed between the parties, the pursuers, as owners of the 'Enniskillen,' on the one hand, and the defenders, as the affreighters, on the other, that the steamer, having taken on board a cargo of railway fir sleepers, should proceed therewith to 'South Alloa, or as near thereunto as she may safely get,' and (with the usual exceptions of the act of God, the Queen's enemies, &c.) 'deliver the same to the affreighters, or to their assigns,' on being paid freight in the manner and at the rates therein stipulated; and the charter-party farther bears, 'cargo to be brought to and taken from alongside at merchant's risk and expense. The steamer to be loaded and discharged as fast as she can load and deliver, demurrage over and above the said lying days at £25 per day.'

"The 'Enniskillen' arrived with her cargo of railway sleepers at South Alloa on Tuesday evening the 1st of July 1873. She could not then, however, or until the Monday following, the 7th of July, get alongside of the quay, but remained moored about 50 or 60 yards from the quay. Part of the cargo was delivered to and received by the defenders on Saturday the 5th of July, and the remainder of it on the Monday, Tuesday, Wednesday, Thursday, and Friday of the following week. So far the Lord Ordinary did not understand there was or could be any dispute. But while the pursuers maintain that four lay days only—viz., Wednesday the 3d of July, the day after the arrival of