liquidator had called up all the capital of the company and realised nearly all its assets, but that at the date of his death, 2nd December 1909, there still remained certain properties unrealised; and that accordingly a new liquidator required to be appointed to realise and distribute the remaining assets. On 23rd February 1910 the Court appointed Mr J. Stuart Gowans, C.A., Edinburgh, liquidator in room of Mr Robertson Durham, "he always finding caution before extract."

On 26th February the petitioners presented a note to the Lord President craving his Lordship to move the Court to vary the interlocutor of 23rd February by omitting the words "he always finding caution before extract," and to allow the liquidator to extract his appointment without finding caution.

The note stated—"The liquidation to which this application relates is a voluntary winding-up subject to the supervision of the Court. The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69) contains no enactment that a liquidator in a voluntary liquidation must find caution, and the question whether a liquidator shall be required to do so is expressly left, in terms of sec. 149, sub-sec. (5), to the determination of the Court. The late liquidator was not required to find caution.

"In these circumstances the petitioners humbly submit that it is not necessary under the statute for the liquidator to find caution before extracting his appointment."

Argued for petitioners—It was for the Court to say whether any and what security was to be given by a liquidator—Companies (Consolidation) Act 1908 (8 Edw. VII, c. 69), sec. 149 (5). *Esto* that in Scotland the practice was to ordain the finding of caution, there was no absolute rule, and in England the practice was not uniform. Where in a voluntary winding-up caution had not been required, the Court would not require it from a substituted liquidator after a supervision order had been pronounced—Buckley on Companies (9th ed.) p. 450.

The opinion of the Court (the LORD PRESIDENT, LORD KINNEAR and LORD JOHNSTON) was delivered by the LORD PRESIDENT—The view of the Court is that caution must be found. We shall make a remit to the Lord Ordinary to deal with the question of its amount.

The Court refused the note and remitted to the Lord Ordinary to fix the amount of caution.

Counsel for Petitioners—J. H. Millar. Agents—Carment, Wedderburn, & Watson, W.S.

Wednesday, March 2.

SECOND DIVISION.

[Sheriff Court at Glasgow.

NEW LINE STEAMSHIP COMPANY, LIMITED *v.* BRYSON & COMPANY.

Ship — Charter-Party — Freight — Contract to Pay Freight per Standard Intaken — Cargo not Measured at Port of Loading.

A charter-party of a steamer to carry a cargo of short props from Riga to Grangemouth Dock provided that freight should be payable "for short props 19s. *per* Gothenburg standard intaken." A cargo was loaded at Riga and the master granted a bill of lading which bore that the cargo shipped measured 642·093 standards. In an action for freight at the instance of the shipowner against the indorsee of the bill of lading, it was not proved that the cargo was measured at Riga. The cargo was measured at Grangemouth, and was found to measure 534·36 standards. It was not averred that any part of the cargo was lost on the voyage.

Held (1) that under the charter-party freight was payable on the cargo shipped, and in accordance with the measurement at the port of loading if the cargo were in fact measured there, but (2) that as it was not proved that the cargo was measured at Riga, freight was payable in accordance with the measurement at Grangemouth.

On 27th June 1906 the New Line Steamship Company, Limited, the owners of the steamship "Newport," with the consent of Richard Mackie & Company, Leith, managers of the said steamship, brought, in the Sheriff Court at Glasgow, against Bryson & Company, timber merchants, Glasgow, indorsees and holders of the bill of lading of the cargo thereof, an action in which they sued for £139, 4s. 9d. as the balance of freight due.

On 20th April 1906 a charter-party for "the Newport" had been entered into between Richard Mackie & Company, and H. von Westermann, merchant, Riga, which provided, *inter alia*—"That the said steamer . . . shall . . . load in the usual and customary manner, always afloat, from the said merchant, a full and complete cargo of peeled short props, which the said freighters bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; the ship to be provided with a full deck cargo, . . . and being so loaded shall therewith proceed to Grangemouth Dock, and deliver the same, always afloat, on being paid freight as follows, viz., for short props, 19s. *per* Gothenburg standard intaken. The freight to be paid on unloading and right delivery of the cargo, in cash, without discount."

The "Newport" loaded a cargo of short props at Riga. The master granted a bill

of lading, which bore—"Shipped . . . by Mr H. v. Westermann in . . . the 'Newport' (80,583) Eighty thousand five hundred eighty-three pieces of 7′ 8′ 9′ props cont. 591,382 feet Eng. as per specification on the back, . . . unto order or to assigns, he or they paying freight for the said goods after right and true delivery of the cargo, and all other conditions as per charter-party 19s. per intaken Gothenburg standard as per usual scale. . . ."

The specification brought out the number of standards as 642·093. The "Newport" proceeded to Grangemouth and delivered the cargo to Bryson & Company It was measured in their yard, 1½ miles from the dock, by the Customs Fund measurer, who found it to amount to 534·36 standards.

The defenders averred in answer—"(Ans. 3) . . . The freight due on 534·36 standards at 19s. is £507 12 10

Less (*a*) disbursements on account of ship and freight paid to account	£470 15 0	
(*b*) Value of 1751 pieces short delivered . .	24 17 6	495 12 6
which leaves a balance due of		£12 0 4"

The sum of £12, 0s. 4d. the defenders tendered, and they pleaded—"The defenders having tendered the full balance due, are entitled, on payment, to be assoilzied with expenses."

The import of the evidence as to what was done at Riga appears from the opinion of Lord Low *infra*.

On 21st April 1909 the Sheriff-Substitute (WELSH) pronounced this interlocutor—". . . Finds that the defenders are indorsees and holders of the bill of lading for a cargo of props carried by the pursuers' ship 'Newport' in the month of April 1906 from Riga to Grangemouth: Finds that the pursuers carried, and rightly and truly delivered at Grangemouth, all the props shipped under the said bill of lading, and that the pursuers are entitled to freight therefor at the rate stipulated in the charter-party: Finds that the freight of said cargo of props falls to be paid upon the intake measurement set forth in the specification on the bill of lading after right and true delivery of the cargo: Therefore repels the defences: Decerns in terms of the prayer of the petition: Finds the defenders liable to the pursuers in expenses. . . ."

Note.—"The pursuers sue for £139, 4s. 9d., being balance of freight on a cargo of props carried by their steamer 'Newport' from Riga to Grangemouth in April 1906. The defenders in reply to this claim maintain that, as tallied at Grangemouth by the Customs Fund measurer, the cargo was undersized, and that there was a shortage in delivery.

"The bill of lading, of which the defenders are indorsees and holders, is dated at Riga the 21/7 May 1906, and is for 80,583 pieces of 7 ft., 8 ft., 9 ft. props, containing 591,382 superficial feet, as per specification on the back, whereof about 250 standards loaded on deck at merchant's 'risk to be delivered . . . unto order or to assigns, he or they paying freight for the said goods after right and true delivery of the cargo and all other conditions as per charter-party, 19s. per Gothenburg standard intaken as per usual scale.' Among other conditions impressed on the margin of the bill of lading is to be found—'Contents, quality, weight, and value unknown.'

"The charter-party is dated at Riga the 7/20th April 1906, and is between the owners of the 'Newport' and H. v. Westermann, merchant, of Riga. Its material clauses for the purposes of the present action are to the effect (1) that the steamer shall load at Riga, 'from the said merchant, a full and complete cargo of peeled short props . . . the ship to be provided with a full deck cargo, if required by the captain, but at merchant's risk, and being so loaded shall therewith proceed to Grangemouth Dock . . . and deliver the same, always afloat, on being paid freight as follows, viz., for short props 19s. per Gothenburg standard intaken.' (2) 'The freight to be paid on unloading and right delivery of the cargo in cash without discount.'

"The defenders had the cargo tallied and measured in their own yard at Grangemouth, which is a considerable distance from the docks—I think some two miles or so—and their defence is based upon the tally and measurements there made. They maintain that they are liable for freight only on the results arrived at by them.

"They state that they received 534·36 standards as against 642·093 standards in the bill of lading; and that there was a shortage in delivery of 1751 pieces—there being delivered 78,832 pieces, as against 80,583 in the bill of lading.

"The first question which in my view arises is, what is the true construction of the charter-party and bill of lading? The defenders maintain that the documents mean that freight is to be paid on what is taken into the ship after right and true delivery, and that the terms of the documents mean nothing more; and accordingly, as I understand their argument, that freight is to be paid on the quantity delivered measured at the port of discharge according to the intake mode of measurement, *i.e.*, making the 'outputen' measurement the ruling factor. I am unable to assent to that contention. In my view the word 'intaken' is to be held equivalent to the phrase 'intaken measurement.' It is obvious that a meaning must be found for the word, and I apprehend that the meaning suggested is the one which was intended. I do not see why the word 'intaken' should have the less obvious meaning attached to it of method or style of measurement under which the cargo was taken on board. I think that the phrase 'paying freight for the said goods after right and true delivery of the cargo, 19s. per Gothenburg standard intaken per usual scale,' is to be regarded as having the same import as the phrases used in *Spaight* v. *Farnworth*, 1880, 5 Q.B.D. 115 ('freight payable on the intake measure of quantity delivered'), and in *Mediterranean and New York Steamship Company* v.

Mackay, 1903, 1 K.B. 297 ('freight payable . . . on the intake measure of quantity delivered as ascertained at port of discharge'). That such was the view taken by the sellers is shown by their drawing upon the defenders for the purchase price in terms of the invoice, which draft was accepted. In the invoice freight is deducted in terms of the contract by the sellers on 642 standards. In my judgment, then, the true construction is that the intake measurement is the standard by which the receivers' obligations are to be tested, and by which the freight payable on the cargo after right and true delivery is to be ascertained.

"Now if that view be sound, the next question is whether the pursuers have proved that there was in fact a measurement and tally taken of the timber shipped at Riga. The evidence of the shipper Mr H. v. Westermann is clear to the effect that such measurement took place, and that the figures appearing in the specification endorsed on the bill of lading correctly sets forth the result of that measurement. It is also proved that a tally of the number of props was taken while they were being shipped on behalf both of the shipper and the ship, and that on the result of such tally the captain signed the bill of lading. The tally taken appears to me to have been a careful one, and there is nothing to suggest that it was not correctly carried through. There is no evidence for the defenders (assuming they were entitled to lead such evidence) to show that the intake measurement of the pieces was erroneous. I am accordingly prepared to hold that the measurement appearing in the bill of lading, corresponding with the summation of the specification, is the correct record of the pieces and sizes shipped, *i.e.*, of the intake measurement.

"If that view be sound, the next point of inquiry is whether there was right and true delivery of the cargo—whether the ship short delivered what was taken on board. There is, it may be observed, no averment of loss. Now the evidence of the captain and the first mate of the 'Newport' is that every bit of the cargo which had been tallied in at Riga was delivered over the ship's rail at Grangemouth, and there is no direct evidence to the contrary. There was no tally made at the ship's side of what was discharged either on behalf of the ship or by the defenders. There was, however, a measurement and tally made by the Customs Fund measurer in the receivers' yard, and the defenders maintain that the results obtained by the Customs Fund measurer prove that much less was delivered than the quantity stated in the bill of lading. Now I do not think the measurement and tally made in the receivers' yard can in any way bind the ship —which was no party to such proceedings. I do not find any evidence that anyone on behalf of the ship was requested to take part in the measurement and tally, or even knew that such a process was to take place. The captain indeed says that after the pieces were taken from the ship and put into waggons he does not know where the pieces went to, or what was done with them. I cannot regard such measurements and tally, however accurately reached, as proving what was shipped and delivered, and as contradicting the distinct evidence on behalf of the ship that all the props which were shipped were safely carried and delivered at Grangemouth. As has been before stated, the measurement and tally were made at a considerable distance —some two miles, I think, from the docks —after being carried in waggons and out-with the presence and knowledge of the shipowners. In the method of measurement adopted by the Customs Fund measurer it may be observed that odd inches in lengths and odd decimals in diameter are discarded for the purpose of ascertaining the measurement — which shows that the method is not absolutely accurate. I do not think, however, that I am called on to consider where the discrepancy between the defenders' results and the figures in the bill of lading arises, because, as I have stated, the defenders' results cannot be held to contradict the evidence on behalf of the ship. Now the only object which the defenders' measurements can be used for is to contradict the ship's evidence that all the cargo was delivered; and their contention is based on the theory that they can by this method set aside the intake quantity. In my view, however, the contract is that the intake measurement is the basis upon which freight is to be paid, and the defenders' only concern is to prove, if they can, that pieces of a certain intake measurement have not reached Grangemouth. In order to do this under the contract I think the means are to be found in the specification, which gives in detail the size and number of all the pieces shipped. I do not find any evidence that there is impossibility or even impracticability in adopting this means of checking delivery, although it may cause some delay. This method is, in my view, looking to the terms of the charter-party regarding unloading and right delivery, the proper way in which any shortage in delivery should be ascertained. This method the defenders did not choose to adopt, but adopted another method of ascertaining the quantity delivered, which was not a method specified in the shipping documents, and which as I have indicated I cannot accept as counterbalancing the evidence of complete delivery. I am therefore of opinion that it is proved that everything that was shipped was carried and delivered at Grangemouth, and in my judgment the pursuers are entitled to freight on the intake measurement of the quantity shipped, carried, and delivered, and accordingly to the balance of freight sued for."

The defenders appealed, and argued — (1) The ordinary rule was that freight was payable on the cargo delivered, and there was nothing in the charter-party under construction to take the present case out of the ordinary rule. No doubt it was competent to stipulate for a lump sum freight— *Merchant Shipping Company, Limited* v.

Armitage, 1873, L.R., 9 Q.B. 99 — or to stipulate that freight should be payable on the quantity measured into the ship — *Spaight* v. *Farnworth*, 1880, L.R., 5 Q.B.D. 115; *Mediterranean and New York Steamship Company, Limited* v. *A. F. & D. Mackay*, [1903] 1 K.B. 297; *London Transport Company, Limited* v. *Trechmann Brothers*, [1904] 1 K.B. 635; *The "Emmy,"* Shipping Gazette, August 9, 1905; *Oostzee Stoomvart Maats* v. *Bell & Harrison*, 1906, 11 Com. Cas. 214. But in the present case there was no contract to pay freight on the quantity measured into the ship. There was a well-known way of expressing that obligation—to provide that freight should be payable on the "intake measure" — *Spaight* v. *Farnworth, cit.*; *Mediterranean and New York Steamship Company, Limited* v. *A. F. & D. Mackay, cit.* But here the word "measure" was not present, and as it was not the practice to vary the terms of charter-parties at random the true inference was that no such obligation was intended to be expressed. Evidence as to usage was inadmissible to explain a written contract—*Inglis* v. *Buttery*, March 12, 1878, 5 R. (H.L.) 87, 15 S.L.R. 462; *Tancred, Arrol, & Company* v. *Steel Company of Scotland, Limited*, March 7, 1890, 17 R. (H.L.) 31, 27 S.L.R. 463. (2) Even if, contrary to the defenders' contention, freight was payable on the quantity measured into the ship, the pursuers were not entitled to succeed. It was not proved that the cargo had been measured into the ship at Riga, and there was thus no machinery for ascertaining the amount of freight. The bill of lading, though it was *prima facie* evidence against the ship — *Smith & Company* v. *Bedouin Steam Navigation Company, Limited*, November 26, 1895, 23 R. (H.L.) 1, 33 S.L.R. 96—was not binding on the defenders. The only evidence of what went into the ship was what came out. Accordingly, even on the pursuers' construction of the charter-party, freight was payable on the quantity delivered at Grangemouth. (3) The question what amount of cargo was delivered at Grangemouth was a question of fact. The best evidence was the tally. It was not a good objection that the cargo was tallied at the defenders' yard, which was one and a-half miles from the docks where the ship was unloaded—*Gehrckens* v. *Love & Stewart, Limited*, February 14, 1905, 12 S.L.T. 720.

Argued for the pursuers—(1) Under the charter-party the defenders were bound to pay freight on the quantity of cargo shipped—*Spaight* v. *Farnworth, cit.*, was in point. In that case freight was declared to be payable on the "intake measure" of quantity delivered. The word "measure" was not present here, but it was not necessary that it should be present — *Oostzee Stoomvart Maats* v. *Bell & Harrison, cit.*; *The "Emmy," cit.* The vice of the defenders' construction was that it gave no meaning to the word "intaken." If possible, some meaning must be found for every word in the charter-party—*Elderslie Steamship Company, Limited*, [1905] A.C. 93. Further evidence of usage might competently be resorted to to explain the meaning of technical words—Bell's Prin., sec. 524. The evidence of the trade witnesses in the present case made it clear that the charter-party was understood by the trade in the sense contended for by the pursuers. (2) It was proved that the cargo was both measured and tallied at Riga. The tally was efficient and the measurement was in accordance with the usual methods of the port. But it was in truth immaterial whether the cargo had been measured or not. The bill of lading was the best evidence of the quantity shipped, and there was nothing in the proof to displace it. (3) It was proved that no part of the cargo was lost at sea, and that everything which went into the ship at Riga came out at Grangemouth. That being so, the pursuers had fulfilled their obligations under the charter-party — *Langlands & Sons* v. *M'Master & Company*, 1907 S.C. 1090, 44 S.L.R. 805.

At advising—

LORD LOW—The first question in this case is, What is the true construction of the words in the charter-party "on being paid freight as follows, viz., for short props 19s. *per* Gothenburg standard intaken. The freight to be paid on unloading and right delivery of the cargo"?

The defenders argued that the Gothenburg standard was only referred to as specifying the scale according to which the amount of the cargo was to be ascertained, and that there was nothing in the charter-party to take the case out of the rule that freight is only payable upon cargo shipped, carried, and delivered. I am unable to adopt that construction, because in the first place it seems to me to give no effect to the word "intaken." Further, it is to be remembered that the Gothenburg standard is a measure of dimension, and accordingly I read the charter-party as meaning that the freight shall be at the rate of 19s. for every Gothenburg standard of short props put on board.

It therefore seems to me that the terms of the charter-party in this case are practically identical with those in the case of *London Transport Company* v. *Trechmann Brothers*, [1904] 1 K.B. 635. In that case the charter-party provided that the ship should deliver the cargo "on being paid freight at the rate of 10s. 6d. per ton of 20 cwt. gross weight shipped payable on right and true delivery of the cargo." In other respects the charter-party was in substantially the same terms as in this case. The cargo was sugar in bags, and part of it was lost during the voyage. The shipowners claimed the full freight upon the ground that upon a sound construction of the charter-party the freight stipulated was truly a lump sum freight. The Court of Appeal, however, rejected that view and held that the consignees were only liable to pay freight on the amount delivered, but that the freight was to be calculated upon the weight of the sugar put on board. That was a case in which, as I have said,

part of the cargo was lost during the voyage, but I think that it follows, from the reasons upon which the judgment was based, that if the whole cargo put on board had been carried and delivered, freight would have been payable on the weight as ascertained when the cargo was shipped, and that it would have been no answer for the consignees to say that that weight must be wrong because the cargo when delivered weighed much less.

Now in this case it is plain that the whole of the cargo which was put on board at Riga was delivered at Grangemouth. If, therefore, the construction which I put upon the charter-party be sound, the defenders are bound to pay according to the measurement made at Riga, if the cargo intaken there was in fact measured.

The defenders had the cargo measured after it was delivered to them at Grangemouth. That measurement was made after the timber had been taken to the defenders' yard, which is about a mile and a half from the docks, but I think it is certain that none of the timber, or practically none, was lost during the transit from the ship to the yard. The measurement was made by the principal Customs measurer at Grangemouth and his assistant. They both say that the measurement was carefully made, and there is no reason to doubt that that was the case. Now according to the measurement which is alleged to have been made at Riga, the timber put on board amounted to 642·093 standards, while according to the measurement at Grangemouth it amounted to only 534·36 standards, a difference of about 108 standards, or nearly one-sixth of the whole. That is so large a discrepancy that the inference is that whichever of the two measurements is right, the other must be wrong. As I have said, I think that the Grangemouth measurement is proved to have been correct, but that in itself will not aid the defenders, because if the timber was measured at Riga in the usual way, and by properly qualified persons, I do not think the defenders could be allowed to contradict that measurement by any measurement made at Grangemouth. As I read the charter-party, the shipper agreed to accept the Riga measurement, and in doing so I think that he took the risk of an error being made in the measurement.

The defenders, however, were entitled to be satisfied that the cargo put on board was measured at Riga, and that the amount in respect of which the pursuers now claim freight was the amount ascertained by that measurement. The only evidence, however, which the defenders had was the bill of lading, attached to which is a specification of the cargo, giving the number of the different pieces and their dimensions, and bringing out the number of standards at the amount which I have mentioned. Now I do not think that the bill of lading proves the alleged measurement at all. I think that the statement of measurement in the bill of lading is in a somewhat different position from the statement of the number of pieces. The master who signed the bill of lading had no personal knowledge either of the number of pieces or of the measured quantity, but a tally of the number of pieces put on board had been kept by the ship's officers and ship's servants, and it was from them that the master got his information. In regard to that matter, therefore, the bill of lading may very well be regarded as *prima facie* evidence. But no measurement of the timber put on board was made by anyone connected with the ship, or at the ship, and therefore the statement of measurement appended to the bill of lading means no more than that the master was told by someone representing the shipper that the timber had been measured and was found to be of the amount stated. That, it seems to me, does not make the bill of lading evidence to any extent that the timber had actually been measured.

The question therefore, in my opinion, comes to be, whether the pursuers have proved that the timber put on board was in fact measured? In my judgment that question must be answered in the negative. The only evidence led for the pursuers upon the matter is that of Mr Von Westermann, the original shipper. According to his evidence, the cargo consisted of a number of different lots of timber obtained from different "suppliers or sellers," and the lots were measured in the different storing grounds of these sellers, about a fortnight before the ship was loaded. When the ship was ready for loading, the timber was sent by the various sellers to the ship in lighters engaged by them. Mr Von Westermann had nothing personally to do either with the measurement or with seeing that the timber measured was taken to the ship and put on board. He only instructed measurers to make measurement, and he left it to his "outside man" Koppel Feigelman, who was not examined as a witness, to see that the cargo which was measured was shipped.

Now in the first place I do not think that it is proved that the measurement of the various lots which were intended for the cargo in question amounted to 642·093 standards. I have no doubt that Mr Von Westermann believes that that was the case, but I do not understand him to speak from his own knowledge. He says that the measurement sheets were left with the measurers, and that the specification attached to the bill of lading was written out by a Mr Zehrpe, who is not a witness, nor does it appear how he got his information. Further, it is not proved that all the lots which were measured a fortnight before the ship was loaded were brought to the ship and put on board. It is indeed said that all the lots measured must have been put on board, because the number of pieces given in the specification is exactly the same as the number tallied by the ship's officers when the cargo was put on board—in both cases 80,583. It seems to me to be rather remarkable that two tallies (supposed to be made quite independently of each other) of such a vast quantity should bring out exactly the same

number, especially as the tally made when the timber was being loaded was conducted under great pressure. As I have said, one does not know where Mr Zehrpe got the information upon which he wrote the specification for the bill of lading, and I cannot help suspecting that the number of pieces in the body of the bill of lading and in the specification came from the same source. When a tally was made at Grangemouth, the number of pieces was counted as being 1751 short of the number in the bill of lading. Of course the tally at Grangemouth may not have been absolutely correct, but it was made by experienced measurers with the ordinary precautions to secure accuracy, and it is difficult to believe that they made so large an error.

I am therefore of opinion that the pursuers have not proved that the cargo intaken at Riga was measured, and that it is proved that the cargo shipped, carried, and delivered was much less in amount than the alleged Riga measurement. In these circumstances the freight falls to be calculated upon the number of Gothenburg standards contained in the cargo carried and delivered, and the only evidence of what that number was is the Grangemouth measurement. It therefore seems to me that that measurement (the correctness of which, as I have already said, I see no reason to doubt) must be adopted for the purpose of ascertaining the amount of the freight. The result is brought out in the statement of accounts between the pursuers and defenders given by the latter in their third answer to the condescendence, and as that statement was not challenged, it must be taken to be correct, and accordingly the pursuers are entitled to decree for £12, 0s. 4d.

LORD DUNDAS—I have come to the same conclusion. The question as to the construction of the contract between the parties does not really arise for decision, because the pursuers have not, in my judgment, established the facts necessary to raise it. I agree in thinking that they have failed to prove that the timber was measured at Riga; and the freight must therefore, in this state of matters, be ascertained upon the number of standards brought out by the measurement made at Grangemouth, which appears to have been a reliable one.

LORD MACKENZIE—The claim here is for a balance of freight said to be due on a cargo of pit props carried by the s.s. "Newport" from Riga to Grangemouth.

The charter-party provides that the ship is to deliver the cargo "on being paid freight as follows, viz., for short props 19s. per Gothenburg standard intaken. The freight to be paid on unloading and right delivery of the cargo."

The bill of lading bears that there were shipped 80,583 pieces of 7 feet, 8 feet, 9 feet props, containing 591,382 feet Eng. as per specification on the back, and contains this clause—"Paying freight for the said goods after right and true delivery of the cargo and all other conditions as per charter-party, 19s. per intaken Gothenburg standard as per usual scale." On the back of the bill of lading is a specification bringing out the number of pieces and cubic feet above mentioned, and also the measurement as bearing 642·093 standards.

The contention on behalf of the respondents (pursuers) is that the statement in this specification of the number of standards is conclusive, and that the appellants (defenders) are bound to pay freight calculated upon this measurement. The general rule is that freight becomes payable only on so much cargo as has been shipped, carried, and delivered. The respondents say that this general rule does not apply here; that it does not matter what the measurement was of the standards delivered at Grangemouth (no case being made of loss of cargo), their bargain having been to receive freight on the measurement as ascertained at the port of loading." This, they maintain, is the effect of the word "intaken," and in support of their view certain English cases were referred to. In the *Mediterranean and New York Steamship Company, Limited*, [1903] 1 K.B. 297, and *Oostzee Stoomvart Maats* v. *Bell & Harrison*, 1906, 11 Com. Ca. 214, however, there was a clause that the bill of lading was to be conclusive as to the quantity delivered to the ship. The case referred to in argument in the latter case also contained the same clause. If there had been such a provision here it would probably have entitled the shipowners to say that the accuracy of the measurements in the specification attached to the bill of lading could not be impugned. In the absence of such a declaration it is not in my opinion permissible, whatever construction is put upon the expression "intaken," to say that the measurement in the specification cannot be inquired into. Upon the question of construction I think that the meaning of the charter-party and bill of lading is, to use the language of Collins, M.R., in the *London Transport Company* v. *Trechmann Brothers*, [1904] 1 K.B., at p. 644, that the shipowners "should have a perfectly indisputable weight, the weight when the cargo is shipped, as the basis on which the charterers are to pay freight." The contention of the appellants appears to me to treat the word "intaken" as surplusage. The result of this, however, is not to hold that the appellants are bound by the specification as such, though they would be bound to pay freight on the intaken measure upon right delivery of the cargo if it were proved that such a measurement had been properly made at the port of loading and correctly entered in the bill of lading.

In the present case I think it appears from the evidence that there was no proper measurement at Riga. The importance of the measurement in the eyes of the shipowners is seen from a letter which may competently be founded on against them of 20th April 1906, in which they instructed the captain to see that a proper check was kept on the measurements. The captain's

evidence is that he has not learned how the measurement of pit props is taken which is filled into the bills of lading, but they are not taken alongside the ship. They are taken, he says, in the country at different depôts, from which they are brought by lighters or by railway. "They arrive at the measurement by some method I have no doubt." It is the captain who signs the bill of lading. He says —"In signing the bill of lading I had no information to check the number of feet or the quantity stated in standards." Mr Von Westermann of Riga says the cargo was measured for him there about a fortnight before the props were loaded, but the man who measured (Feigelmann) was not examined, nor was Zehrpe, who wrote out the particulars in the specification endorsed on the bill of lading. None of the measurement sheets have been produced. The tally slips for the number of pieces are produced. It cannot, in my opinion, be held that a proper measurement was made at the port of loading.

In these circumstances the intaken measure not having been ascertained, it is necessary in order to calculate the freight to have recourse to such materials as there are in the case. The measurement made by Mr Cook, the Customs measurer at Grangemouth, seems to have been carefully made, and the scale he applied was the Gothenburg scale. No doubt it was made in the receiver's yard, and no one representing the ship was present. It was, however, made by an impartial person, and is the only trustworthy measurement in the case. I think the freight should be calculated upon it. He measured the cargo at 534·36 Gothenburg standards.

I am therefore of opinion that the appellants' position as stated in ans. 3 is correct, and that they are only due the sum of £12, 0s. 4d., which they tendered.

The LORD JUSTICE-CLERK and LORD ARDWALL were absent.

The Court pronounced this interlocutor

"Sustain the appeal and recal the interlocutor appealed against: Find (1) that by the charter-party and bill of lading condescended on the shipper (whom the defenders now represent) was bound to pay freight, after true and right delivery of the cargo of props carried by the pursuers' ship 'Newport' from Riga to Grangemouth, at the rate of 19s. per Gothenburg standard intaken; (2) that the pursuers claim payment of freight in accordance with the alleged measurement (amounting to 642·093 Gothenburg standards) contained in the specification attached to the bill of lading; (3) that it is not proved that the timber of which the details are given in the said specification was put on board ship at Riga or that the timber which was put on board there was measured; (4) that all the timber put on board at Riga was delivered to the defenders at Grangemouth, and that the timber so put on board, carried, and delivered amounted to 534·36 Gothenburg standards; (5) that in these circumstances the defenders are only bound to pay freight at the stipulated rate upon the amount of timber delivered, namely, 534·36 Gothenburg standards; and (6) that upon that footing the amount still due by the defenders to the pursuers is £12, 0s. 4d., for which sum with interest as libelled grants decree against the defenders," &c.

Counsel for Pursuers (Respondents)—Murray, K.C.—Spens. Agents—J. & J. Ross, W.S.

Counsel for Defenders (Appellants)—Sandeman, K.C.—C. H. Brown. Agents—Webster, Will, & Company, W.S.

HOUSE OF LORDS.

Thursday, March 3.

(Before the Lord Chancellor (Loreburn), Earl of Halsbury, and Lord Atkinson.)

GREENOCK HARBOUR TRUSTEES *v.* CARMICHAEL.

(In the Court of Session, June 11, 1908, 45 S.L.R. 753, and 1908 S.C. 944).

Judicial Factor—Powers—Statute—Power to Raise Rates of a Statutory Undertaking—Factor "to Receive the Whole or a Competent Part of the Rates and Duties and Other Revenues of the Trust"—Greenock Harbour Act 1880 (43 *and* 44 *Vict. cap. clxx*), *sec.* 70.

The Greenock Harbour Act 1880, sec. 70, enacts—"Every application for a judicial factor under the provisions of this Act shall be made to the Sheriff, and on any such application the Sheriff may, by order in writing, after hearing the parties, appoint some person to receive the whole, or a competent part of the rates and duties and other revenues of the trust until all the arrears of interest or of principal, as the case may be, . . . be fully paid."

Held (*aff.* judgment of the Court of Session) that a judicial factor so appointed had no power at his own hand to raise the rates, his only power being to receive them when collected, and to apply the funds so received.

This case is reported *ante ut supra.*

The statutes in question are quoted in Lord Atkinson's opinion (*infra*) and in the previous report.

The defender, the judicial factor, appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—I agree with Lord Atkinson's reasons for affirming the Order of the First Division, which I have had the advantage of reading in print.