maintain the railway, (*b*) work and manage the traffic thereon, and (*c*) collect its revenue —being the three services the performance of which the working agreement delegates to the Caledonian Railway Company. The Owning Company would in addition have had to pay annually in respect of its railway the items which are enumerated in the 6th article of the working agreement, viz.—(1) Government duty, (2) feu-duties, (3) compensation to tenants, (4) rates, taxes, and public and local burdens, (5) interest on borrowed money, and (6) directional and financial management expenses. Without these disbursements there could be no revenue from the railway and consequently no profits, though of course some of these items might not form good deductions in a question of income tax. It does not seem to me to be material that the Owning Company elected with the consent of Parliament to employ the Caledonian Railway Company to perform the services (*a*), (*b*), and (*c*) in return for a "remuneration" which was to be fixed at one-half of the gross revenues of the Owning Company estimated in the way described in the agreement, while the latter company became bound in its turn to the Caledonian Railway Company that out of the second half of the gross revenues it would annually make the payments (1) to (6). The effect of the Parliamentary agreement as I read it was to bring the "concern" of the Lanarkshire and Ayrshire Railway partly within the statutory undertaking of the Caledonian Railway Company with the result that the working company and the owning company acting separately and independently did between them all that was necessary in order to make the railway a revenue-producing subject, and divided that revenue equally between them, the profit earned by each company being the difference between one-half of the gross revenues of the concern on the one hand and its own share of the necessary expenditure as apportioned by the working agreement on the other hand. In my judgment the Lanarkshire and Ayrshire Railway is not carried on by a single railway company, as has been determined by the Special Commissioners, but by two railway companies acting not as joint adventurers and mutual agents but separately and each for its own interest in terms of the special statutory authority to that effect. I do not understand why the Special Commissioners concentrated their attention solely upon the services performed by the Caledonian Railway Company and ignored the equally essential co-operation of the Owning Company.

The Solicitor-General suggested in the course of his argument that the Caledonian Railway Company was in a position analogous to that of a tenant, and that the Owning Company was in a position analogous to that of a landlord. The agreement negatives this view. It is essentially a working agreement in accordance with which the Caledonian Railway Company performs certain services and retains one-half of the gross returns as its "remuneration." The other half of the gross returns which the Caledonian Railway Company is bound to pay over to the Owning Company is not money which once belonged to the former company. It is a part of "the gross revenues of the first party" (the Lanarkshire and Ayrshire Railway Company) collected and received by the second party (the Caledonian Railway Company) but "belonging to the first party" as its agreed-on share of the gross revenues.

For these reasons I am of opinion that the determination of the Commissioners was erroneous and that the appeal should be sustained.

LORD CULLEN concurred.

The LORD PRESIDENT was absent.

The Court reversed the determination of the Commissioners and remitted to them to discharge the assessment.

Counsel for the Appellants—Wilson, K.C. —T. G. Robertson. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Respondent—The Solicitor-General (Morison, K.C.)—R. C. Henderson. Agent—Stair A. Gillon, Solicitor of Inland Revenue.

Saturday, June 28.

FIRST DIVISION.

[Lord Hunter, Ordinary.

CHRISTIE *v.* CHRISTIE AND ANOTHER.

Process—Competency—Husband and Wife — Decree for Aliment for Joint Lives of Parties Granted in Action for Adherence, without Proof, Reserving Right to Apply at any Time to the Court — Decree for Custody of Children without Conclusions therefor.

In a sheriff court a wife and her child craved decree against the husband, (1) that he was bound to adhere to her and to ordain him to adhere, and for payment to her of £1 per week during the joint lives of her and her husband or until they should adhere to each other, and (2) for payment of 10s. per week to the child till the husband should provide the child with suitable maintenance or till the child could support himself. The parties lodged a joint minute settling the action upon the following terms:—"(*First*) that the defender pay to the pursuers £1 per week from and after 10th December 1917, (*second*) that the female pursuer should have the custody of the child . . ., (*third*) that the defender pay the pursuers' agent . . . the sum of £10, 10s. in name of expenses. . . ." The Sheriff-Substitute interponed authority to the joint minute, and (1) granted decree against the husband "for payment to the pursuers of aliment at the rate of £1 weekly during the joint lives" of the husband and wife and "until the further orders of the Court, reserving to either party at any time to apply to

the Court for any further order or orders which may be necessary," (2) found the wife entitled to the custody of the child of the marriage, and (3) decerned for the sum of expenses against the husband. The husband now brought an action of reduction of the interlocutor of the Sheriff-Substitute, and, averring that he had never authorised a settlement of the action, challenged the interlocutor as incompetent on the ground (1) that it had been pronounced in a consistorial cause without proof, (2) that it awarded aliment during the joint lives of the spouses, and (3) that it dealt with custody though there was no conclusion for custody in the action. *Held* that the interlocutor was competent (1) in respect that the parties had given up the action in so far as it was an action of adherence and therefore consistorial in nature, (2) in respect that, properly read, the interlocutor merely awarded aliment *in hoc statu* and not for the period of the joint lives of the parties, and (3) in respect that the decree for custody was in terms of the agreement of parties; and proof *allowed* on the question of the authority to settle the action.

James Christie, coal miner, 37 Standburn, Avonbridge, *pursuer*, brought an action against Marion M'Millan or Christie, his wife, and John Christie, the pupil child of the marriage, residing with Mrs Christie, *defenders*, concluding for reduction of an interlocutor dated 11th January 1918, pronounced by the Sheriff-Substitute at Falkirk (MOFFATT) in an action of adherence and aliment by the defenders against the pursuer.

The parties *averred* — "(Cond. 2) On or about the beginning of November 1917 the present defenders raised an action of adherence and for aliment against the present pursuer in the Sheriff Court of Stirling, Dumbarton, and Clackmannan at Falkirk. The crave of the initial writ was as follows, viz.—'The pursuers crave the Court—(*First*) To find and declare that the pursuer Marion M'Millan or Christie, being the lawful wife of the defender, the defender is bound to adhere to her and to cohabit with her, and to treat and entertain her at bed and board as his wife; and to ordain the defender to adhere to the said Marion M'Millan or Christie and to cohabit with her, and to treat and entertain her at bed and board as his wife, and that during their joint lives; and to grant a decree against the defender for payment to her of the sum of £1 sterling per week, weekly and in advance as from the date of citation hereon, during the joint lives of the said Mary M'Millan or Christie and the defender or until they adhere to each other: (*Second*) To grant a decree against the defender for payment to the pursuer the said John Christie of the sum of 10s. per week, weekly and in advance as from the date of citation hereon till he shall provide the said John Christie with suitable maintenance or till the said John Christie can support himself, with interest on said respective weekly payments at the rate of five per centum per annum from the date on which the same respectively become due until payment, with expenses. (Signed) Andrew Hunter, solicitor, Falkirk, *agent for pursuers*.' (Cond. 3) The present pursuer lodged defences in said action, and after certain procedure the record in said action was closed, and a proof was allowed to the parties of their respective averments, to proceed on 16th January 1918. . . . (Cond. 4) The present pursuer's law agent in said action was Mr William Stevenson, solicitor, Falkirk, who was instructed by the present pursuer to defend the same. The present pursuer had no intention of settling the said action nor did he do so, and the said Mr William Stevenson had no instructions from the present pursuer to settle the same on his behalf. Notwithstanding this, however, the said law agent on or about 11th January 1918 signed a joint minute along with the law agent for the pursuers in said action in the following terms, viz.—'Hunter for pursuers and Stevenson for defender concurred in stating that the parties had agreed to settle the action on the following terms: —(*First*) That the defender pay to the pursuers aliment at the rate of £1 per week from and after 10th December 1917; (*second*) that the female pursuer should have the custody of the child John Christie; and (*third*) that the defender pay to the pursuers' agent Andrew Hunter, solicitor, Falkirk, the sum of £10, 10s. in name of expenses. The parties therefore crave the Court to grant decree in terms of this minute. (Signed) Andrew Hunter, *pror. for pursuers*. (Signed) Will. Stevenson, *agent for defender*.' Thereafter the said law agents on 11th January 1918 moved the Court to interpone authority to said joint minute, and on the same day the Sheriff-Substitute pronounced an interlocutor in the following terms, viz.—'*Falkirk, 11th January* 1918.—*Act.* Hunter—*Alt.* Stevenson.—The Sheriff-Substitute, on parties' motion, allows joint minute of this date to be received and form No. 12 of process; interpones the authority of the Court thereto, and in terms thereof—(*First*) Grants decree against defender for payment to pursuers of aliment at the rate of £1 weekly during the joint lives of the female pursuer Marion M'Millan or Christie and defender, payable said aliment every week as and from the 10th December 1917 in advance, with interest at the rate of five per centum per annum on each payment from its due date if in arrear, and until the further orders of Court, reserving to either party at any time to apply to the Court for any further order or orders which may be necessary: (*Second*) Finds the female pursuer entitled to the custody of the said John Christie, the male pursuer: And (*third*) Grants decree against the defender for payment to the pursuers' agent Andrew Hunter, solicitor, Falkirk, of the sum of £10, 10s. in name of expenses. (Signed) Alex. Moffatt.' The action of the said Mr William Stevenson in signing and moving said joint minute was unknown to the present pursuer at the time that it was signed and moved, and was unauthorised by the present pursuer, and contrary to the latter's

wishes and instructions. The present pursuer accordingly desires that the interlocutor following upon said joint minute should be reduced in respect that his said law agent had no mandate from the present pursuer to sign and move said joint minute. With reference to the explanations in answer, the several awards by the Sheriff are admitted. Further, admitted that on the date mentioned a meeting took place at which the several parties mentioned were present. Further, admitted that the pursuer's wages have been arrested on several occasions at the instance of the female defender. *Quoad ultra* denied. (*Ans.* 4) Admitted that Mr William Stevenson acted on behalf of the pursuer. Admitted that the Sheriff was moved to interpone authority to the joint minute. The joint minute and interlocutor are referred to. *Quoad ultra* denied. Explained that on 7th November 1917 the Sheriff granted an award of interim aliment to Mrs Christie at the rate of £1 per week and to John Christie at the rate of 7s. 6d. per week, and on 21st December, on the motion of Mrs Christie's agent, granted an interim award of £5, 5s. of expenses. Following thereon, on 26th December 1917, a meeting was held in the office of the said Andrew Hunter, at which there were present the pursuer, the defender Mrs Christie, the said Andrew Hunter, and the said William Stevenson. Terms of settlement were discussed, and it was agreed that the action should be settled on the terms embodied in the joint minute. The pursuer fully understood and instructed his said agent to settle on said terms. Further, he paid his said agent's account by instalments, and up till July 1918 he implemented the decree following on the joint minute by paying the defender Mrs Christie £1 per week. Since that date she has only recovered two small sums by arresting the pursuer's wages. (Cond. 5) *Separatim*, the present pursuer desires said interlocutor to be reduced on the ground of incompetency. In the first place, an award of aliment in an action of adherence and aliment can only be made after proof that the defender in said action is in desertion. In the action in question the Sheriff-Substitute made an award of aliment without proof having been led. In the second place, an award of aliment in an action of adherence and aliment can only be made for the period during which the defender fails to adhere to the pursuer in said action. In the action in question, however, the Sheriff-Substitute has granted an award of aliment to the pursuers in said action during the joint lives of the female pursuer and the defender in said action. In the third place, there was no crave in said initial writ for the custody of the said John Christie. Such a crave was and is incompetent in a process of adherence and aliment. In the action in question, however, the Sheriff-Substitute has in said interlocutor given the custody of the said John Christie to the female pursuer in said action. (*Ans.* 5) Denied. The interlocutor, which is referred to for its terms, awards aliment until the further order of the Court. Said interlocutor interpones authority to the terms of the agreement made by the pursuer as embodied in the joint minute, and is a competent interlocutor."

The pursuer *pleaded*—"2. *Separatim*, the said interlocutor falls to be reduced on the ground of incompetency in respect—(*a*) That the award of aliment made in said interlocutor was pronounced without proof of desertion having been led; (*b*) That said award of aliment was made during the joint lives of the female pursuer and the defender in said action; and (*c*) That the custody of the said John Christie was awarded in said interlocutor to the female pursuer in said action."

The defender pleaded—"3. *Separatim*, the defender should be assoilzied in respect—(*a*) The said interlocutor is competent; (*b*) The said interlocutor having interponed authority to a joint minute embodying the terms of settlement agreed to by the pursuer, the pursuer is not entitled to challenge same."

On 5th June 1919 the Lord Ordinary (HUNTER) allowed the parties a proof of their averments and to the pursuer a conjunct probation.

The pursuer reclaimed, and argued—The interlocutor was incompetent and should be reduced. (1) An action of adherence was consistorial—Court of Session (Scotland) Act 1850 (13 and 14 Vict. cap. 36), section 16; Conjugal Rights (Scotland) Act 1861 (24 and 25 Vict. cap. 86), section 19. The Sheriff-Substitute had pronounced decree without proof, which was incompetent—Court of Session Act 1830 (11 Geo. IV, and 1 Will. IV, cap. 69), section 36—*Sleigh* v. *Sleigh*, 1893, 1 S.L.T. 30. The same rule applied to the Sheriff Court, where it was now competent to try consistorial causes—Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), section 5 (2), and First Schedule, Rule 23, as amended by the Sheriff Courts (Scotland) Act 1913 (2 and 3 Geo. V, cap. 28), section 3, First Schedule. (2) The decree for aliment was during the joint lives of the parties, whereas it was only competent to award aliment so long as the husband refused to adhere. (3) The interlocutor incompetently dealt with the custody of the child, for no decree for custody had been craved, and further in such an action as the present it was incompetent to ask decree for custody—*Heriot-Hill* v. *Heriot-Hill*, 1906, 14 S.L.T. 182. In any event the Sheriff could only deal with custody in an action of a consistorial nature, and in so far as it was consistorial the action had been departed from.

Argued for the defenders—The interlocutor in question was competent. The action was for adherence, or failing that, aliment. So far as directed to adherence the action was consistorial, but the parties had departed from that part of the conclusions and had agreed upon aliment, for which alone decree had been given. That was quite competent upon a joint minute and without proof—*Wright* v. *Wright*, 1894, 2 S.L.T. 29. The fact that the decree was for aliment during the joint lives of the parties was immaterial, for the decree was clearly only *in hoc statu* and not permanent. [Lord Mackenzie suggested that the words

"during the joint lives" did not refer to the term of the payment but to the conditions of the payment.] The form of decree would be found in A.S. 20th December 1823. It was competent to pronounce a decree for custody of children without any conclusion therefor —*Symington* v. *Symington*, 1874, 1 R. 871, 11 S.L.R. 369; Conjugal Rights (Scotland) Act 1861, (*cit. sup*), section 9.

LORD MACKENZIE—This is a reclaiming note against the interlocutor of the Lord Ordinary, who has allowed parties a proof of their averments. The ground of the reclaiming note is that, antecedent to any question of proof and independent of it, there are objections to the interlocutor of the Sheriff-Substitute which he pronounced on 11th January 1918, showing that that interlocutor was inherently invalid. These objections are set out in the second plea-in-law for the pursuer under three different heads—(*a*), (*b*), and (*c*).

The case arises out of an action which was brought by the wife and the son of the present pursuer in the Sheriff Court, and the first conclusion of that action was that the defender—the present pursuer—was bound to adhere and that he should be ordained to adhere. Then there was a conclusion for aliment at the rate of £1 a week "during the joint lives of the said Mary M'Millan or Christie and the defender, or until they adhere to each other." The second conclusion of the action was for aliment payable to the son, in the usual terms, and limited until he was in a position to support himself.

Now, on the assumption that the present pursuer's agent in the Sheriff Court had authority to settle the action—a matter which is in dispute and will require to be determined by a proof—the statement is "that the parties had agreed to settle the action on the following terms:—(*First*) that the defender pay to the pursuers aliment at the rate of £1 per week from and after 10th December 1917; (*Second*) that the female pursuer should have the custody of the child John Christie; and (*Third*)" that there should be a payment of expenses; and the interlocutor which was pronounced by the Sheriff-Substitute sets out—"On parties' motion, allows joint minute of this date to be received . . . ; interpones the authority of the Court thereto, and in terms thereof—(*First*) Grants decree against defender for payment to pursuers of aliment at the rate of £1 weekly during the joint lives of the female pursuer Marion M'Millan or Christie and the defender, payable, said aliment, every week," and so on, "until the further orders of the Court, reserving to either party at any time to apply to the Court for any further order or orders which may be necessary; (*Second*) Finds the female pursuer entitled to the custody of the said John Christie, the male pursuer."

Now, branch (*a*) of the second plea is to the effect that the award of aliment was incompetent, because it was pronounced without proof of desertion, and certain statutory provisions were referred to (Court of Session Act 1830, 11 Geo. IV. and 1 Will. IV. cap. 69, section 36; also section 16 of the Court of Session Act 1851, 13 and 14 Vict. cap. 36) as showing that in certain actions a judge cannot proceed except *causa cognita*; he cannot pronounce a decree of consent.

The decree which was here pronounced falls under none of these categories; it was merely a decree for aliment. Nor does the finding that the female pursuer is entitled to custody fall under any of the categories. The Sheriff-Substitute in the present case did not pronounce a decree that the husband was bound to adhere. Had he done so without hearing evidence the decree would of course have been bad. But the parties passed from that part of the conclusions of the action, and the case was settled on the footing that aliment was to be paid. I can find no statutory prohibition which makes it incompetent for the judge having jurisdiction—as the Sheriff now has—to give effect to an agreement of parties regulating the payment of aliment and the custody, without any evidence having been led.

Branch (*b*) of the second plea is to the effect that the award of aliment was incompetent as having been made during the joint lives of the female pursuer and the defender. As I understood the argument it was intended to make this point—that the Sheriff-Substitute had determined what was truly a consistorial question and determined it during the joint lives of the husband and wife. I am far from saying that the terms of the interlocutor of 11th January are not open to criticism, but I think that in construing such an order it is fair to look, first of all, at what it was that the pursuer asked. The pursuer asked that the aliment should be paid during the joint lives or until they adhered, and that was a perfectly correct crave, because that is the nature of any award of aliment which is made. It is an award which continues only until the parties adhere or until the award is recalled. Accordingly, when one reads further in the interlocutor one finds that not only is there a decree against the defender for payment of aliment during the joint lives but that it is expressly declared to be until the further orders of the Court, reserving right to either party to apply. That means that if and when the circumstances change, and the husband desires to adhere, then he could, by lodging a minute in the process, ask the judge who made the original order to take the matter up and to dispose of it by a further order. But I desire to safeguard myself from suggesting that that would be his only remedy, because I take it that if he had fairly indicated his intention to adhere, and was nevertheless charged to make payment upon the original order for aliment, he would have his remedy in the Bill Chamber by way of a suspension. Accordingly I think, on a fair construction of the interlocutor, that branch (*b*) of the second plea should also be repelled.

Branch (*c*) raises this question, that there being in the original summons no crave for the custody of John Christie, a decree to that effect could not competently be intro-

duced into the joint minute nor into the interlocutor. It is to be observed that that is an objection which is of a totally different character from the objection that a Sheriff has no jurisdiction to pronounce a decree in a consistorial case without hearing proof. If he transgressed the statutory prohibition then his decree would be *funditus* null. But there is no question that the Sheriff has jurisdiction to regulate the custody of children, and all that he has done here was strictly within his jurisdiction. And accordingly branch (*c*) of the second plea seems to me to be ill founded for the purpose for which it was put forward in argument, because we were asked to sustain it *simpliciter*. On the pleadings the fact is averred that the pursuer was a party to the pronouncing of the interlocutor of 11th January. The interlocutor sets out that it was "on parties' motion," and it is stated that he agreed to settle the action on these terms. Now if these matters are proved, then I think that he would certainly be held to have waived any ground of objection that the Sheriff-Substitute had pronounced the order for the custody of the child without any appropriate conclusion in the action.

Accordingly, for the reasons that I have stated, I think we are now in a position to grant the motion which was made by counsel for the respondents, and repel the second plea-in-law for the pursuer in all its three branches and affirm the judgment of the Lord Ordinary, and the case will go back for proof.

LORD SKERRINGTON—The pursuer claims that he is entitled to have this case decided in his favour without any inquiry. So taking the case we must assume that the solicitor who signed the joint minute on behalf of the present pursuer and invited the Sheriff-Substitute to interpone his authority thereto and to pronounce the decree under challenge did so with the authority of his client. It is a strange thing for a man to come into Court and say that he invited the judge to pronounce a decree in certain terms and that he now wants that decree to be set aside. None the less I suppose such a claim would be competent if the pursuer could make out that what he asked the judge to do was something utterly lawless and incompetent.

The first ground of challenge was that the Sheriff-Substitute had contravened an Act of Parliament by pronouncing a consistorial decree without evidence. The minute shows that the parties departed from the consistorial conclusion for adherence and aliment, and asked the Sheriff-Substitute to confine his attention to the matter of aliment. It is news to me that that is not a perfectly competent procedure. It happens daily in consistorial actions that the parties prefer not to have a public proof in regard to their unhappy life, but as they both intend to live apart from each other that a sum of alimony is fixed by agreement, and that the Court pronounces decree for payment of that sum, to continue until one of the parties demands adherence or until the Court is asked to fix a larger or a smaller sum owing to some change of circumstances. The first ground of challenge therefore fails.

The second ground of challenge proceeds in my view, upon a misinterpretation of the decree following upon the joint minute. That decree was unfortunately expressed, and I hope that in dealing with so delicate a matter as the relations of husband and wife and the custody of the children those whose duty it is to prepare interlocutors in the Sheriff Court, where, of course, there was no jurisdiction until 1907, will take care to avoid forms which are slovenly and objectionable. Reading the decree, however, in the light of the conclusions of the action and the joint minute, I do not think that it bears the meaning attributed to it by the pursuer in branch (*b*) of the second plea-in-law. It is not the case that the Sheriff-Substitute professed to alter the law of Scotland as to the duties of husband and wife by awarding this lady a separate aliment for the remainder of her life. The decree undoubtedly uses the words "during the joint lives" of the parties, but it goes on to reserve to either party the liberty of applying to the Court; and no better reason could be imagined for applying to the Court than that either party had chosen to depart from the voluntary contract of separation contained in the minute, and insisted upon his or her legal right to demand adherence. Further, I do not think that the decree means that the only remedy in such a case must be an application to the judge who pronounced the decree. Seeing that it was based upon a joint minute which was in substance a voluntary contract of separation, the husband, if charged to make payment, could suspend upon the ground that he had recalled that agreement and demanded that henceforth his wife should adhere to him.

The third objection is purely a process objection. It was irregular for the Sheriff-Substitute to pronounce a finding as to custody in an action which on the face of it did not raise any such question. But the irregularity could have been cured by adding the necessary conclusion to the initial writ, and if that had been done there could have been no question as to the propriety of finding that the wife was entitled to the custody of the child. The parties took a shorthand method and agreed in their joint minute that a finding in these terms should be pronounced. The objection has no substance and ought to be repelled.

Accordingly I agree with your Lordship that the whole of the second plea-in-law may be repelled, and that the interlocutor of the Lord Ordinary allowing a proof ought to be affirmed.

LORD CULLEN—I have come to the same opinion.

As regards head (*a*) of plea 2, it appears to be clear enough that the statutory requirement of proof does not apply to the case. As regards head (*b*) of the pursuer's second plea I think the terms of the decree do not exceed what *ex hypothesi* he, under the joint minute, agreed with the pursuer in

asking from the Sheriff-Substitute. And as regards head (c), the finding is entirely conform to the terms of the joint minute. This being so, I do not think that the pursuer, assuming that he authorised the joint minute, is entitled to complain of this decree and have it reduced.

The Court adhered.

Counsel for the Pursuer—Sandeman, K.C. — Maclaren. Agent — Lindsay C. Steele, Solicitor.

Counsel for the Defenders—D. Jamieson. Agents—Dove, Lockhart & Smart, S.S.C.

Thursday, July 3.

FIRST DIVISION.

LYDE MALCOLM AND OTHERS, PETITIONERS.

Process—Petition—Minor and Pupil—Dispensing with Citation of Next-of-Kin—Form of Prayer—Act 1672, *cap.* 2.

In a petition craving the Court to dispense with the citation of the next-of-kin of a pupil on the father's side and on the mother's side in an action for the purpose of making up a tutorial inventory of the pupil's estates, the petitioners, who were the widowed mother of the pupil and certain tutors nominated by the father, averred that there were no next-of-kin either on the father's or mother's side major and within Scotland, and craved the Court "to find that the inventory to be made up in the . . . process, with concurrence of a delegate to be named by the Court in the course of the said process, shall be as valid and sufficient" as if the next-of-kin had been cited. The Court *granted* the prayer of the petition upon the petitioners amending and substituting the words "the Lord Ordinary" for the words "the Court."

Mrs Alice Maud Davis or Lyde Malcolm, widow of the late Sackville Malcolm Berkeley Lyde Malcolm, mother and as such tutrix-at-law of her pupil daughter Ethel Maud Sackville Lyde Malcolm, and Mrs Ethel Sackville Lyde and another, tutors to Ethel Maud Sackville Lyde Malcolm, acting under a nomination of tutors and curators to her by her father, *petitioners*, brought a petition to dispense with the citation of the next-of-kin in an action brought by the petitioners for the purpose of making up a tutorial inventory of their ward's estate.

The petitioners *averred, inter alia*—"That there are no next-of-kin on either the father or the mother's side major and within Scotland. The petitioners are accordingly unable to comply with the forms of citation required by the Act 1672, cap. 2, and the present application is therefore made to your Lordships to have such citation dispensed with."

The *prayer* of the petition was—"May it therefore please your Lordships to appoint this petition to be intimated on the walls and in the minute-book in usual form, and upon resuming consideration thereof, in respect of the circumstances of this case, to dispense with the citation of the next-of-kin of the said Ethel Maud Sackville Lyde Malcolm, both on the father's side and on the mother's side, and to find that the inventory to be made up in the said process, with concurrence of a delegate to be named by the Court in the course of the said process, shall be as valid and sufficient, and shall have the same force, strength, and effect, as if the next-of-kin on the father's and mother's side had been cited and had concurred in making up the same, or after being so cited had failed to appear; or to do further or otherwise in the premises as to your Lordships may seem proper."

On 26th June 1919 counsel for the petitioners moved in the Single Bills that the prayer of the petition be granted, and referred to the Juridical Styles, vol. iii, p. 778, and the Scots Styles, vol. iii, p. 137.

Thereafter the prayer of the petition was amended by substituting for the words "the Court" the words "the Lord Ordinary."

The Court granted the prayer of the petition as amended.

Counsel for the Petitioner — Pitman. Agents—Tait & Crichton, W.S.

Friday, July 4.

SECOND DIVISION.

[Sheriff Court at Glasgow.

PACIFIC STEAM NAVIGATION COMPANY *v.* THOMSON, AIKMAN, & COMPANY, LIMITED.

Ship—Bill of Lading—Freight—Freight Payable, "Ship and/or Cargo Lost or not Lost"—Loss of Part of Cargo.

The bill of lading of a cargo of nitrate provided—"Freight is to be paid as per margin and to be collected on the gross weights, measurements or number taken at port of discharge . . . it being expressly agreed that freight is to be considered as earned and must be paid, ship and/or cargo lost or not lost." In the course of her voyage the vessel was damaged by collision and a small part of the cargo was in consequence dissolved by sea water and was thus lost. The owners of the vessel claimed freight in terms of the bill of lading not only on the part of the cargo delivered but also on the part lost. *Held* (*dub.* Lord Dundas) that freight was only due on the part delivered—*per* the Lord Justice-Clerk and Lord Salvesen on the ground that the bill of lading did not apply to partial loss of cargo, and *per* Lord Guthrie on the ground that there was no standard by which the weight of the lost cargo could be ascertained, and that therefore the clause was incapable of execution.