

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.

The Pacific Steam Navigation Company, shipowners, Liverpool, *pursuers*, brought an action in the Sheriff Court at Glasgow against Thomson, Aikman & Company, Limited, *defenders*, for payment of £674, 11s. 11d., being the balance of freight claimed by them as due on a cargo of nitrate carried by them on board their vessel the s.s. "Ortega" from Mejillones in the Republic of Chili to Liverpool.

The *bill of lading* contained the following clause—"15. Freight for the said goods without discount or deduction to be paid as per margin, and to be collected on the gross weights, measurements or number taken at the port of discharge, and according to the conditions stated in the company's tariff, it being expressly agreed that freight is to be considered as earned, and must be paid ship and/or cargo lost or not lost."

The parties *averred* (as amended)—“(Cond. 5) In the course of her said voyage the said vessel was damaged by collision with s.s. 'Oronza' of Liverpool. Said collision occurred on or about 9.40 p.m. on November 18th, 1917, and about one hour after said s.s. 'Ortega' had passed the Black Head, County Clare, on the West Coast of Ireland, on her voyage to Liverpool. In consequence of said collision sea water entered No. 3 hold and dissolved a part of said nitrate stowed therein, whereby a quantity of said nitrate was lost. At Liverpool there were actually delivered 15,708 bags containing 1400 tons 3 cwt. 3 qrs. 14 lbs. of nitrate, and the parties agreed that 93 tons 3 qrs. 23 lbs. was the weight of nitrate lost through said collision and not delivered. The weight of the nitrate lost in consequence of the said collision was in fact 93 tons 3 qrs. 23 lbs. (Ans. 5) Admitted. (Cond. 6) The defenders have paid the freight on the cargo actually delivered, but decline to pay the freight on the cargo lost, for which they are also liable in terms of the provisions of the bill of lading. The said freight amounts to £674, 11s. 11d. (Ans. 6) Admitted that the defenders have paid freight on the cargo delivered. *Quoad ultra* denied that there is any freight due.”

The *pursuers pleaded*—"1. The defenders being due and owing to the pursuers the sum sued for as balance of freight as condensed on, decree should be granted as craved. 2. The defenders' statements are irrelevant.”

The *defenders pleaded*—"1. The sum sued for not being due and resting owing by the defenders to the pursuers, decree of absolvitor should be granted with expenses. 2. The pursuers' averments are irrelevant.”

On 12th November 1918 the Sheriff-Substitute (THOMSON) repelled the second plea-in-law for both parties and allowed a proof, and on 22nd November, on defenders' motion, granted leave to appeal to the Court of Session.

Argued for the appellants—The special clause "ship and/or cargo lost or not lost" contemplated total loss of cargo—*Borrowman and Others v. Drayton*, 1876, 3 Asp. 303. "Cargo" meant the entire load of the ship, and there was nothing in the context

of this particular bill of lading to alter the natural meaning of the word. If the cargo alone was lost and wholly lost freight was to be considered as earned and must be paid. The pursuers claimed a composite standard for fixing freight, viz., freight on the part delivered and freight on the part lost. This, however, was precisely what was negated in the case of *Spaight v. Farnworth*, L.R. 1880, 5 Q.B.D. 115. If there was to be any innovation on the common law rules as to freight it must be expressed in clear and unambiguous terms—*Elderslie Steamship Company v. Borthwick*, [1905] A.C. 93, 42 S.L.R. 854. It was clear that in the present case the word "cargo" was used collectively and not distributively. If the pursuers' contention were given effect to, two different standards would have to be applied, one of which was defined and the other was a matter of speculation.

Argued for the respondents—The pursuers were entitled to freight on the cargo delivered and also on what was lost through an excepted peril—*Great Indian Peninsula Railway Company v. Turnbull*, 1885, 53 L.T. 325, where it was held that the words "steamer lost or not lost" only covered what was lost through an excepted peril. The contested words in the present bill of lading meant whether ship and/or cargo or any part of them lost or not lost. If the defenders were right they would only have to pay freight on what was actually delivered, however small that was, even if it only amounted to one ounce. If on the other hand that small balance of the cargo were also lost before delivery, liability, on the defenders' contention, for freight on the whole of the cargo lost would at once emerge. This, however, was an unreasonable result and not a natural reading of the language in the bill of lading. If the defenders' construction was right the word "ship" would receive no meaning, e.g., if the ship were lost and part of the cargo were salvaged. Their construction would have received complete effect if the words of the bill of lading had read "cargo lost or not lost" without reference to ship. The words "lost or not lost" simply meant "even if lost," and had the same effect as in a policy of insurance on a ship lost or not lost, i.e., at the date of insurance. There was no contradiction between the two standards for measuring freight, because they did not apply together, for the reason that the same cargo could not be both lost and delivered. The standard of freight to be applied to the part of the cargo that was lost was not any more a matter of speculation than the standard to be applied on the defenders' contention if the whole of the cargo was lost.

At advising—

LORD JUSTICE CLERK—The amendments now made on the record have, as the parties have agreed, rendered proof unnecessary, and we have to decide what is the true construction of article 15 of the bill of lading.

The two rival contentions are (1) that the merchant must pay freight on the cargo delivered at the stipulated rate of £7, 5s.

per ton, and must also pay freight at the same rate on the tonnage of cargo admitted to have been lost by one of the excepted perils; or (2) that where part of the cargo has been delivered freight is only due at the stipulated rate on the quantity delivered.

I think this is a case where the rule *contra proferentem* may well be applied in determining as to the true construction of the clause we have to consider. The initial clause of article 15 is that freight is "to be paid as per margin." The marginal clause provides for the rate of freight per ton of 2240 lbs. payable at destination. But article 15 goes on to say that the freight "is to be collected on the gross weights . . . taken at the port of discharge." I think "to be paid as per margin" means no more than that the freight at the stipulated rate is to be "payable at destination." But it is to be "collected" on the gross weights taken at the port of discharge. Both of these provisions can be fully met if some cargo arrives.

There might, however, be a total loss of the cargo, in which case it would be impossible to apply the standard stipulated for as to "collection." The lost or not lost clause would, it was argued, apply in that event, when the freight would have to be paid as per margin, viz., £7, 5s. per ton of 2240 lbs.—the quantity being determined *prima facie* by the bill of lading. The result as to freight in the event of a total loss of the cargo does not, however, arise in this case—for here the cargo arrived in part. The initial clause of article 15, including the provision as to collection, therefore applies in terms, and in my opinion it is not legitimate to superinduce on that provision the results alleged by the shipowners to follow from the lost or not lost clause.

If any cargo arrives, the data for determining the amount to be paid as freight with perfect accuracy are complete. I do not think there were intended to be two co-existing methods of determining the amount payable as freight. The provision as to the "collection" if and when it comes into operation, as it does when part of the cargo arrives and is discharged in terms of the bill of lading, excludes in my opinion the application of any other standard or measure by which the amount of freight can be fixed, and I think it implies that no freight is to be paid except for the cargo which has arrived. The lost or not lost clause has been very carelessly adopted. For the most part it can plainly have no application at all to the payment of freight. Whether the ship is lost or not freight will have to be paid if the cargo arrives, and will have to be paid as per margin. So too if the cargo is not lost freight will have to be paid as per margin. In my opinion the words which remain—"cargo lost"—do not apply when all but a small portion of the cargo does arrive.

It may be that if no cargo arrives freight can still be claimed under the lost or not lost clause, but that point does not arise in this case, and I express no opinion upon it.

In my opinion the defenders have already paid all the freight that is due, and they ought therefore to be assoilzied.

LORD DUNDAS—I have found this to be a most puzzling case, and even now I cannot say that I have a confident opinion upon it. But I cannot see any better solution than that which your Lordship has indicated and I concur in the judgment which you propose.

LORD SALVESEN—The decision in this case turns on the interpretation that is to be put on article 15 of the bill of lading under which the goods the freight of which is sued for were shipped. The first part of the clause presents no difficulty, for it provides for freight being paid at the rate specified on the margin of the bill of lading on the gross weight, taken at the port of discharge. The remainder of the clause is thus expressed—"It being expressly agreed that freight is to be considered as earned and must be paid, ship and/or cargo lost or not lost."

It seems to be common ground that the phrase "ship lost or not lost" has been imported from contracts of marine insurance, and that when used in a policy it implies that there has been a total loss of the ship, and the main argument for the appellants was that a similar implication applies to the words "and/or cargo." Such a construction of the clause gives full effect to the words actually used. Three alternatives in this view would seem to be contemplated, namely, either that the ship was lost, or the ship and cargo or the cargo alone. That the last contingency should be specially provided for may be explained on the footing that the bill of lading provides for the transhipment of the cargo in certain cases, and in this event the cargo might conceivably be lost although the ship to which the bill of lading applies might arrive. The construction put forward by the shipowners involves the insertion of the words "wholly or partially," the application of which would have to be confined to the cargo, for if the cargo was delivered it would be no concern of the cargo owners whether the ship was seriously damaged in the course of the voyage. Of the two constructions I prefer the former. I think parties, according to the natural meaning of the words used, must have contemplated and provided for the case of the ship and cargo being lost, or the cargo being lost in some other vessel after it had been transhipped, and not the numerous and complex circumstances which might arise if the ship was lost and a portion of the cargo salvaged, or a portion of the cargo were lost by collision or otherwise although the ship reached its destination. Even reading the clause according to the simpler construction it is very difficult to reconcile it with the provision that freight is to be paid according to the gross weight at the port of discharge, which *ex hypothesi* the cargo would never reach. But perhaps the true view of the clause is that it falls to be treated as providing for the exceptional case of the cargo never reaching its destination, in which case it would seem that the intake weight would be the only measure of the amount of freight to which its owners were entitled. The words at the end of the clause appear

to be meaningless, for if the cargo is not lost the amount of freight payable would apparently be regulated by the gross weight at the port of discharge. On the whole matter I have come to the conclusion that this clause, which, I take it, must be construed strictly and against the shipowner who proposes it as modifying the common law, cannot be taken as applying to the case of a partial loss of the cargo. If this view be sound the result is that the defenders are entitled to be assoilzied.

LORD GUTHRIE—Four views have been expressed on the part of the 15th clause of the bill of lading in question in this case. The pursuers have been consistent throughout in maintaining that full freight must be paid on the whole cargo loaded, whether delivered or undelivered, in whole or in part; and they seek to avoid all difficulty as to the ascertainment of the weight of freight lost in whole or in part by pointing out that the parties have agreed on the weight to be taken in this case. It seems to me sufficient to say that this agreement was only made for the purpose of the case and does not involve any admission in law. In order to avoid the effect of the words "freight is to be considered as earned, and must be paid, ship and/or cargo lost or not lost," the defenders argued in the Sheriff Court that these words ought to be held *pro non scripto*, leaving freight payable under the first part of the clause only on goods delivered, as the weight shall be ascertained at the port of discharge. In the Inner House the defenders accepted the Sheriff-Substitute's view that effect must be given to the latter part of the clause, and they maintained that it could be reconciled with the first part of the clause by limiting its application to the case where the whole cargo was lost, in which case it would have no application to the present case, where only part of the cargo was lost. A fourth view commended itself to the Sheriff-Substitute. He thought that if loss of cargo took place from ordinary causes, such as, I presume, evaporation, no freight would be payable on such lost cargo, whereas if the loss took place from such an untoward cause as the collision which happened in this case freight would be payable. The Sheriff-Substitute avoided the difficulty about ascertaining the weights of such lost cargo by saying that the amount would fall "to be ascertained in the best practicable way, as was done in *Spaight v. Farnworth*, 1880, 5 Q.B.D. 115," a case which can be of no assistance in the present case, because in that case the dimensions to be ascertained were of existing timber which had not been lost, whereas in the present case the weight to be ascertained is of non-existent material.

It appears to me that the most reasonable construction of the latter part of clause 15 is to hold it applicable, in the case of cargo, both to total and partial loss. No reason has been suggested why freight should be payable on undelivered cargo when the whole contents of a ship have been lost, whereas if any portion has been saved no freight is payable on the part, however

large, which has been lost. But this does not end the matter. The question still remains—How is the weight of the lost cargo to be ascertained, to which the rate of £7, 5s. per ton is to be applied? The material does not exist as in *Spaight's* case. The weight as ascertained at the port of loading cannot bind the shippers, who repudiate responsibility for this weight on the face of the bill of lading. It appears to me that there is no standard by which the weight of the lost cargo can be ascertained, and therefore that the clause is incapable of execution.

I accordingly agree in the result arrived at by your Lordships that the defenders must be assoilzied.

The Court assoilzied the defenders.

Counsel for the Pursuers and Respondents—Sandeman, K.C.—Normand. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Defenders and Appellants—Dean of Faculty (Murray, K.C.)—W. T. Watson. Agents—Beveridge, Sutherland, & Smith, W.S.

Wednesday, July 9.

SECOND DIVISION.

(SINGLE BILLS.)

[Sheriff Court at Wigtown.]

THOMSON v. EARL OF GALLOWAY.

(Reported *supra*, p. 448.)

Expenses—Landlord and Tenant—Arbitration—“Expenses of and Incidental to Arbitration and Award”—Expenses Incurred in Preparing and Submitting Special Case to Sheriff—Expenses in Sheriff Court—Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64), Second Schedule, sec. 14.

Held that expenses incurred in preparing and submitting a special case under the Agricultural Holdings (Scotland) Act 1908 for the opinion of the sheriff did not fall within an allowance by the sheriff of "expenses in this court" but were expenses "of and incidental to the arbitration and award" in the sense of section 14 of the Second Schedule of that Act, and as such in the discretion of the arbiter.

The Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64) enacts—Second Schedule, section 14—"The expenses of and incidental to the arbitration and award shall be in the discretion of the arbiter, who may direct to and by whom and in what manner those expenses or any part thereof are to be paid . . ."

In an arbitration arising out of a claim for compensation lodged by William Thomson, tenant of the farm of Polwhilly, Wigtownshire, against the landlord, the Earl of Galloway, the arbiter who had been appointed by the Board of Agriculture proposed certain findings, and the landlord