at any time to pay a larger sum. No doubt the defenders' predecessors did in fact in later years pay larger sums than £1000 Scots. They granted augmentations from time to time down to 1830, but in not one of the records which deal with or instruct these augmentations does it appear that they did so as matter of legal obligation. It was maintained, as I understood the argument, that underlying the grant of an augmentation, and forming the true source and reason of it, was an admission or recognition of a binding duty to provide a reasonable stipend according to the requirements of the times. But the tenor of the minutes directly contradicts that contention, making it plain that any increase was of goodwill and according to the discretion of the Corporation. In regard to what I may call the plea of identity of stipends as affecting the older churches, I concur entirely with the opinion expressed thereanent by the Lord Ordinary.

With reference to the other four churches —St George's, St Enoch's, St John's, and St James'—the question falls to be determined by the construction to be put upon the decrees of erection pronounced by the Court of Teinds.

In regard to St Enoch's, the decision in the case of *Peters* v. *The Magistrates of Greenock* (19 R. 643, and 20 R. (H.L.) 42) is directly in point in favour of the pursuers' contention.

The words "not under" occur also in the decrees of erection of St John's and St James', but there are added the words "without prejudice to the minister receiving such additional stipend as the pursuers may afterwards think fit to confer." This clause does not, however, it seems to me, have the effect of qualifying in any way the legal significance of the earlier words as ascertained by the House of Lords in *Peters* case—*cf. Rainie* v. *Magistrates of Newton-on-Ayr*, 22 R. 633.

By the decree of erection of the Wynd Church, afterwards St George's, dated 3rd August 1763, the defenders are bound to provide the ministers who shall serve at such church "with a competent and legal stipend of 2000 merks." Before considering this decree I should say here that the terms of it are not in my opinion affected by the decree of transportation dated 24th February 1808, according to which the Corporation are to furnish the ministers who shall serve at the church with a competent and legal stipend to the same amount as the ministers in the other parish churches in the city. The primary purpose of the summons was not to furnish a stipend but to effect the substitution in all respects of St George's in a new locality for the Wynd Church, which had become ruinous and unhealthy, and the settlement in the new church of Dr Porteous, the then minister of the Wynd Church, and I read the clause as to stipend as simply meaning that the minister when settled in the new church was to have the same stipend as he had been receiving when settled in the Wynd Church, which was at the date of the transportation equal in amount to the stipend which the ministers in the other city parishes were at that date being paid. It is in the decree of erection that the true measure of the Corporation's obligation in the matter of stipend is to be found, and that was, as already stated, to provide the minister "with a competent and legal stipend of 2000 merks." On the construction of this obligation the pursuer argued with much force that the all-important words are "competent and legal," and that the sum named was of little importance except to ascertain what was at the date of the decreet a competent and legal stipend. Now it is true that great weight was given to those words "competent and legal" in the case of *Peters*, while the words "not under" are not once referred to in the opinions of the noble Lords. The judgment, however, was pronounced with reference to a decreet which contained these words "not under," and both the Lord Chancellor and Lord Watson approved of Lord Wood's opinion in the case of *Cæsar* v. *Magistrates of Dundee* (20 D. 859, note) on the construction of a decreet in similar terms. *Cf.* also *Thomson* v. *Magistrates of Greenock*. The question is a narrow one in my judgment, but the words "of 2000 merks" must, I think, be read as taxative, and intended to fix once and for all what was the competent and legal stipend which the Corporation came under obligation to pay to the minister of the church.

I concur in thinking that the reclaiming notes should be refused.

LORD SALVESEN did not hear the cases.

In each case the Court adhered to the interlocutor of the Lord Ordinary, and in the actions at the instance of the Rev. Archibald Maclaren, the Rev. Andrew James Campbell, and the Rev. John D. Glass, remitted the cause back to the Lord Ordinary to proceed therein as accords.

Counsel for the Pursuers—Mackay, K.C.—J. Stevenson. Agents—Auld & Macdonald, W.S.

Counsel for the Defenders — Macmillan, K.C. — Fleming. Agents — Campbell & Smith, S.S.C.

Saturday, March 19.

SECOND DIVISION.

[Lord Ashmore, Ordinary.

BOOKLESS BROTHERS *v.* GUDMUNDSSON.

Expenses—Abandonment of Action at Common Law—Right of Defender to Expenses—Discretion of Lord Ordinary—Desirability of Obtaining Opinion of Lord Ordinary when Party Dissatisfied with his Decision.

A firm of fish merchants who had chartered the freight of a vessel which was on time-charter to a general merchant, brought an action against the merchant for damages for short delivery of a cargo of cod, and in their pleadings

founded upon a clean bill of lading, a duplicate of which they produced in process. The defender lodged defences, in which he averred that the cargo was carried under a qualified bill of lading, which he produced in process. The pursuers before the record was closed lodged a minute of abandonment, and the Lord Ordinary without giving an opinion dismissed the action and found no expenses due to or by either party. The defender having reclaimed the Court recalled the interlocutor of the Lord Ordinary and found the defender entitled to expenses on the ground that nothing had been shown to justify a departure from the ordinary rule, namely, that when a pursuer raises an action and then after defences have been lodged abandons it, he must pay the expenses to which the defender has been put.

Observed per Lord Salvesen—"Where a Lord Ordinary has disposed of a case without giving any opinion, and parties are dissatisfied with his judgment, it would be a very reasonable course if they afforded the Lord Ordinary an opportunity of writing a note which could be before us at the time when the reclaiming note came to be discussed."

Bookless Brothers, fish merchants and exporters, Aberdeen, *pursuers*, brought an action against Andreas Gudmundsson, general merchant, Leith, for payment of £510 with interest.

The pursuers averred, *inter alia*—"(Cond. 2) On 27th August 1919 the pursuers entered into a charter-party with G. K. Gudmundsson & Company, shipbrokers, Reykjavik, as representing the defender, by which they chartered the freight of the s.s. 'Freja,' which was then on time-charter to the defender. By the charter-party the 'Freja' was to load 350 tons dry fish in bales, the loading ports being Hafnarfiord and Dyrafiord, and the destination the Port of Leith. (*Ans.* 2) The charter-party, dated 27th August 1919, is referred to for its terms, beyond which no admission is made. (Cond. 3) At Hafnarfiord the pursuers loaded on board the said s.s. 'Freja' from their stores, there known as Birrell's Stores, 644 bales cod marked D.H.B. (erroneously stated in the bill of lading D.H.D.) and 1010 bales cod mark (A). The vessel proceeded to Dyrafiord to complete her loading, but no question arises as to the loading at that port. The loading at Hafnarfiord was carefully done and the number of bales accurately counted. (*Ans.* 3) It is admitted that the pursuers loaded certain bales at Hafnarfiord and completed loading at Dyrafiord. *Quoad ultra* denied. It is believed and averred that only 910 bales of cod marked (A) were loaded at Hafnarfiord. (Cond. 4) As before set forth the pursuers loaded on board the said ship at Hafnarfiord, *inter alia*, 1010 bales cod mark (A) and received from the master of the vessel a clean bill of lading in duplicate therefor undertaking to deliver the said 1010 bales to the pursuers at the Port of Leith. A duplicate of the said bill of lading dated 3rd September 1919 is herewith produced. (*Ans.* 4) Denied. Reference is made to answer 3. Explained that the bill of lading under which the goods were carried was signed by the master himself with the qualification 'weight and quality and quantity unknowing and marks.' The said bill of lading is produced herewith and is referred to for its terms, which are founded on. It contains, *inter alia*, stamped upon the margin the general conditions and exceptions applicable to the said voyage. The said qualifications, conditions, and exceptions are terms of the contract between the parties. The alleged duplicate bill of lading produced by the pursuers is not a correct copy, and was not signed by the master or anyone having his authority. The whole bales shipped were duly discharged at Leith from the steamer into shed and were thereafter at the pursuers' risk in terms of the said bill of lading. (Cond. 5) On the arrival of the said vessel at Leith the pursuers presented the said bill of lading and called upon the defender to deliver the said 1010 bales to them. The defender has, however, delivered only 910 bales, and has thus failed to deliver 100 bales, for which he is responsible. The value of each bale is £5, 2s., or a total of £510, being the sum sued for. The pursuers have sustained loss and damage to this extent through the defender's failure to deliver as aforesaid. The defender, however, refuses to admit the pursuers' claim and the present action has accordingly been rendered necessary. (*Ans.* 5) Admitted that on arrival of the vessel at Leith the pursuers through Messrs Langlands & Sons presented a delivery order to the defender and received in exchange therefor *ex* shed 910 bales cod marked (A). Admitted that the defender refuses to admit the pursuer's claim. *Quoad ultra* denied under reference to the preceding answers. Explained that the bill of lading presented along with the delivery order was the bill of lading signed by the master with the qualifications and general conditions and exceptions set forth in answer 4."

The pursuers pleaded—"The defender having failed to deliver to the pursuers the whole of the bales of cod contained in the bill of lading condescended on, decree should be pronounced as concluded for with expenses."

The defender pleaded, *inter alia*—"3. The defender having delivered in accordance with his contract with the pursuers the whole goods shipped, as condescended on, is entitled to absolvitor. 4. The defender having discharged from the steamer all bales of cod shipped, and all bales thereafter being at the pursuers' risk, the defender is entitled to absolvitor."

Before the record was closed the pursuers lodged a minute of abandonment.

On 20th July 1920 the Lord Ordinary (Ashmore) pronounced this interlocutor—"The Lord Ordinary in respect of the minute of abandonment dismisses the action and decerns: Finds no expenses due to or by either party."

The pursuer reclaimed, and argued—The pursuers had been entirely unsuccessful in the action, and the Lord Ordinary had exer-

cised his discretion wrongly when he did not award expenses to the defender—*Murphy* v. *Farme Coal Company*, 1918 S.C. 659, 55 S.L.R. 557; *Feeney* v. *Fife Coal Company*, 1918 S.C. 197, 55 S.L.R. 223; *Speedie* v. *Blyth*, 1854, 16 D. 375; *Caledonian Iron and Foundry Company* v. *Clyne*, 1831, 10 S. 133; Maclaren, Expenses, p. 60. It was competent to appeal on a question of expenses merely—*Jack* v. *Black*, 1911 S.C. 691, 48 S.L.R. 586; *Garriock* v. *Glass*, 1911 S.C. 453, 48 S.L.R. 347.

Argued for the respondent—The pursuers had been misled by the incorrect copies of the bill of lading, which were in circulation, and the defender ought to have stated his position without lodging defences. The Lord Ordinary had rightly exercised his discretion, and in any event his discretion ought not to be interfered with—*Caldwell* v. *Dykes*, 1906, 8 F. 839, 43 S.L.R. 606.

LORD JUSTICE-CLERK—The question for our decision is presented to us in a most unsatisfactory aspect, because we have neither the correspondence which apparently passed before the action was raised, nor any note of the Lord Ordinary's views on the matter. Therefore we have to proceed on the statements of the parties without any indication as to what moved the Lord Ordinary in taking the course he did. We find that the pursuers raised an action on a bill of lading which was incomplete, and besides was signed not by the master but by someone on his behalf. It was, however, a clean bill of lading. In the defences they were met with a bill of lading which bears the very important memorandum — "Weight, quality, and quantity unknowing, and marks." The pursuers must have had both bills of lading in their possession at some time or other, although perhaps not simultaneously. They passed on the complete bill of lading, which was not clean, to the receivers of the cargo in order that they might receive the cargo, which they did. Thereafter they sued upon the other bill of lading, and when they were met in the defences with the bill bearing the memorandum they abandoned their action before the record was closed. I cannot conceive any people acquainted with shipping matters getting a bill of lading with that memorandum and one without and not noticing the difference, because the difference is so material. The Lord Ordinary apparently heard an argument on the question now before us and exercised his discretion in the matter. In that state of matters the Court would as a rule be most unwilling to interfere with the discretion of the Lord Ordinary. But having, as I have said, no clue as to the grounds on which he proceeded and no note explaining his views, I cannot say I find in Mr Cooper's argument anything to justify a departure from the ordinary course, namely, that when a pursuer raises an action, and then after defences have been lodged sees proper to abandon it, he must pay the expenses to which the defender has been put. Therefore I think we ought to recal the judgment of the Lord Ordinary and find the defenders entitled to their expenses.

LORD DUNDAS—Like your Lordship, I am very unwilling to interfere with the discretion of a Lord Ordinary upon a pure matter of expenses. The Lord Ordinary must have had reasons which seemed to him good and sufficient for depriving the defender of his expenses, but the difficulty is that he has not told us what these were, and from the debate at our bar I have not learned any sufficient reason why the defender should not have been awarded his expenses. I think we must therefore recal the interlocutor of the Lord Ordinary. One other word. *Prima facie* the defender here would, I think, have been entitled to absolvitor, but Mr Sandeman explained that he did not desire this, and was content with dismissal of the action. I only mention this lest it should hereafter be supposed that this judgment was an authority for holding that the defender was only entitled to dismissal.

LORD SALVESEN—I concur with both your Lordships. I would only add a word as to the suggestion made by Lord Dundas in the course of the debate, that where a Lord Ordinary has disposed of a case without giving any opinion, and parties are dissatisfied with his judgment, it would be a very reasonable course if they afforded the Lord Ordinary an opportunity of writing a note which could be before us at the time the reclaiming note came to be discussed. I see no incompetency in that, and it would be very much easier to dispose of the matter when one knew the views which had influenced the Lord Ordinary in reaching his decision.

LORD ORMIDALE was not present.

The Court pronounced this interlocutor—

"Recal said interlocutor [19th March 1921]: Of new dismiss the action and decern: Find the defender entitled to expenses against pursuers in the Outer House and Inner House and remit the account to the Auditor to tax and to report."

Counsel for the Reclaimer (Defender) — Sandeman, K.C. — Normand. Agents — Boyd, Jameson, & Young, W.S.

Counsel for the Respondents (Pursuers)—Cooper. Agents—Macpherson & Mackay, W.S.

Saturday, May 21.

FIRST DIVISION.

KIRKCALDY CAFÉ COMPANY, LIMITED, PETITIONERS.

Company — Memorandum — Alteration — Company Existing for Philanthropic Objects—Resolution to Remove Restriction on Rate of Dividend — Companies (Consolidation) Act 1908 (8 *Edw. VII, cap.* 69), *sec.* 9 (*b*) *and* (*e*).

A company which was registered in 1901 presented a petition for confirmation of an alteration in the memorandum of association. The company's leading