LORD CHANCELLOR — Lord Parker has read the opinion I have delivered and expresses his entire concurrence in it.

Their Lordships affirmed the judgment appealed from with expenses.

Counsel for the Appellant in the Appeal and Respondent in the Cross-Appeal — Sir Robert Finlay, K.C. — Watson — Thomas. Agents—Wylie, Robertson, & Scott, S.S.C., Edinburgh — Bower, Cotton, & Bower, London.

Counsel for the Respondents in the Appeal and Appellants in the Cross-Appeal—Solicitor-General for Scotland (Morison, K.C.)—Brown—Wilson. Agents—Ronald & Ritchie, W.S., Edinburgh—John Kennedy, W.S., Westminster.

Tuesday, June 27.

(Before Lord Parker, Lord Sumner, and Lord Wrenbury.)

DAMPSKIBSSELSKABET SVENDBORG *v.* LOVE & STEWART, LIMITED.

(In the Court of Session, February 26, 1915, 52 S.L.R. 456.)

Ship—Freight—Evidence—Measurement of Cargo at Port of Lading — Unproved Measurement.

Freight was to be paid for a cargo of pit-props per intaken piled fathom. The charterers having previously measured the props sent to be taken on board refused to join in a measurement at lading. The ship took a tally. In a question as to the amount of freight due, the ship's mate, who had been one of the two men engaged on the tally, was the only witness adduced to prove it. He admitted that during the taking of the tally he had had occasionally to be away for a short time to see after the proper stowing of the cargo. *Held* that the tally had not been established, his evidence being defective, and in the circumstances no inference from the capacity of the ship or the weight of cargo to rectify the defect being possible.

This case is reported *ante ut supra.*

The pursuers, Dampskibsselskabet Svendborg, owners of the "Chassie Maersk," appealed to the House of Lords on the question of the amount of freight.

At the conclusion of the argument for the appellants, counsel for the respondents being present but not called upon, their Lordships delivered judgment as follows:—

LORD PARKER — I am clearly of opinion that this appeal fails.

The claim of the appellants is for freight, and the amount of the freight has, according to the terms of the charter-party, to be ascertained by measurement of the timber taken on board at the place where it is shipped. The appellants say that such measurement of the timber was in fact taken, and that the timber so measured amounted to 653 fathoms. The question is whether they have proved this. I think that they have proved that the timber was measured, but as regards a not inconsiderable part of the cargo the result of the measurement has not been proved. As to this part the measurements were taken by one person only, who was not called as a witness at the trial. He appears to have communicated the result of the measurement to another person who was called as a witness, but it is quite clear that what was said by the former to the latter is not admissible.

The appellants therefore have failed to prove the figure on which their claim is based, and it does not appear to me that they can fill up the gap in their evidence by inferences to be drawn from the capacity of the ship and from the extent to which and manner in which it was loaded. In fact if we attempt to draw any inference in that way we find that the factors are so uncertain that no proper inference can be drawn. A ship may have a certain capacity, but the amount of cargo which it carries must depend largely upon how its cargo is stowed, and largely also in the case of a timber shipment upon the percentage of moisture which is contained in the timber shipped. I have carefully considered the argument in this respect, and I have come to the conclusion that no inference can be properly drawn by which your Lordships would be at liberty to bridge over the gap in the evidence as to the measurement which took place at the port of shipment.

Under these circumstances, therefore, the appellants appear to me not to have proved their case, and that being so, however much sympathy one may feel for them because they did endeavour to perform the terms of the contract in contradistinction to their opponents in this appeal, yet it cannot be said that they have proved the case they set out to prove. I move therefore that this appeal be dismissed, and dismissed with costs.

LORD SUMNER — I agree. The pursuers having been paid freight on 595 fathoms, and claiming to be entitled to be paid further freight, namely, on the quantity of 653 fathoms in all, have therefore resting upon them the burden of proving that they had shipped and carried and delivered not only an extra quantity but this extra quantity of cargo. The conventional mode of proving that quantity was by the proof of the St Petersburg tally, and although the fact appears to have escaped the attention of the Lord Ordinary, judging by his judgment, the tally at St Petersburg was proved by admissible evidence only up to a certain point, and it is noticeable that the point at which the proof fails left a comparatively small amount of room for error. The excess which is claimed in the present case is about 9 per cent. of the whole 653 fathoms, and the admissions made by the first mate which caused the proof of the tally at St Petersburg to fail were admissions of occasional absences from the deck of the lighter, where for the most part the measuring of the cargo

went on while he was looking after the stowage in the forehold, probably about twice a-day. There is therefore good ground for saying that the shortcomings of the mate in respect of his ability to prove the tally would account for the contention of the pursuers that they have in fact carried an extra quantity up to 653 fathoms.

Now it is not only legitimate but a very simple mode of proof, when there is a dispute as to how much cargo has been carried by a timber-carrying vessel, to prove that she was carefully stowed and fully laden down to her marks, and that on previous occasions when carefully stowed and fully laden down to her marks she had turned out such and such a quantity of timber, and perfectly valid inferences constantly are drawn from that circumstance. So far as my experience goes inferences drawn from the weight of the timber turned out are more rare and more difficult, because, as my noble and learned friend on the Woolsack has pointed out, everything there depends upon the extent of the saturation or the amount of adhering ice in the cargo. If the Lord Ordinary, having had all these different classes of evidence before him, had said that upon the whole he thought that he could draw a satisfactory inference from the proof of the previous performances of this vessel to supplement the shortcomings of the mate in regard to the tally, I am not prepared to say that I should have thought his judgment could have been criticised; but, unfortunately, he appears to have failed to perceive that as to part of the proof of the tally it was erroneous, and he appears to have been guided by the conclusion that as the pursuers had made a serious and candid effort to carry out their duties under the charter-party and as the defenders had declined to participate in the performance of that duty, he might therefore attach a credence to the pursuers' figures which the proof of them did not entitle him to do, and, as he says, "It is possible that the pursuers' figures may not be quite accurate, still they are at least substantially accurate, and they were ascertained by the method provided in the charter-party and in accordance with the usual custom. The defenders were invited to check them and declined to do so. They relied upon their own figures, and have not proved that they were correct. I am therefore of opinion that they have failed in this branch of the case also." He appears to have thought that under those circumstances the fact that the defenders proved no alternative measurement was warrant for his upholding the claim of the pursuers to have proved their figures.

Now under these circumstances I think that one cannot rest upon his judgment simply as a judgment of the learned Judge who had the opportunity of seeing the witnesses, who considered the facts, and who sitting without a jury dealt with it as a jury question might have been dealt with; and I agree with the conclusions of their Lordships in the Extra Division that as to the proof of the tally at St Petersburg the inability of the mate, the only witness called, to speak to the whole of the tally is fatal. It is true that their Lordships do not appear in their judgments to have directed attention specifically to the facts proved with regard to previous cargoes and to have examined the question how far they would make good the want of sufficient proof of the tally, but they had those figures before them, and so have your Lordships, and, speaking for myself, I am unable to draw any satisfactory conclusion from the previous out-turns; they were largely out-turns of pulp wood. They varied very remarkably. The height of the deck cargo in each case also varies remarkably, and I think it to be impossible to draw any satisfactory conclusion from data so very different which would enable one to say that, assuming that the vessel was carefully stowed throughout and carried all that she could carry, she must have carried more than the 595 fathoms upon which freight has been paid. It is probable that she did, but I cannot on this evidence bring myself to say that it is proved, and the evidence as to the weight given by one witness seems to me to be still less satisfactory, not that it is not perfectly honestly given, but that the data are too uncertain to enable one to draw any satisfactory conclusion from it.

LORD WRENBURY—I concur, and it appears to me that the appellants, failing upon the merits, cannot put forward successfully the contention which they have raised as to our interfering in any way with the manner in which the costs were dealt with in the Court below.

Their Lordships dismissed the appeal, with expenses.

Counsel for the Appellants (Pursuers)—Horne, K.C.—Lippe. Agents—Boyd, Jameson, & Young, W.S., Edinburgh—Holman, Fenwick, & Willan, London.

Counsel for the Respondents (Defenders)—Condie Sandeman, K.C.—Jamieson. Agents—Borland, King, Shaw, & Company, Glasgow—Dove, Lockhart, & Smart, S.S.C., Edinburgh—Ince, Colt, Ince, & Roscoe, London.

COURT OF SESSION.

Saturday, May 20.

SECOND DIVISION.

LYNCH *v.* THE CROWN STEAMSHIP COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Accident Arising out of the Employment—Unexplained Disappearance of Ship's Cook—Inference from Proved Facts.*

In a claim for compensation by the dependents of a ship's cook who had been last seen in the ship's galley when the vessel was at sea, the arbiter found that there were not facts admitted or