. . . . The defenders' business is a very large and extensive one. Their nominal issued capital approximates half a million pounds, but its present market value represented by stocks of whisky and other assets is equal to at least two million pounds sterling. The defenders' books would also disclose large reserves and other hidden funds. The position of a director of the defenders' company which has been wrongfully withheld from the pursuer is therefore one of first-rate importance and pecuniary value. . . ."

The Lord Ordinary has allowed a proof, and in connection with the averments which I have quoted the pursuer asks for a diligence which includes an exhaustive discovery of the defenders' books, and a very wide inquiry into the size and importance of their business and the value of their capital, assets, and stocks.

It must not be assumed that because proof has been allowed in terms which cover every statement upon record, the same width and extent of investigation is to be permitted in respect of every statement so covered as will be allowed with respect to the crucial averments in the case. I do not suggest that the Lord Ordinary would have been entitled to refuse the diligence altogether, on the ground that the averments which I have quoted, and in support of which the diligence was asked, were irrelevant. For those averments have been duly remitted to probation, and to refuse diligence in support of them on that ground would be contrary to the decision referred to by counsel for the reclaimer—*Duke of Hamilton's Trustees* v. *Woodside Coal Company*, 24 R. 294. But the Lord Ordinary has not done this—on the contrary, he has approved parts of the specification while rejecting others. The Lord Ordinary has merely exercised the discretion which in my opinion he undoubtedly possesses as to the length to which the discovery should go. The exercise of that discretion depends in every case on the nature of the documents specified, and the purpose for which production of them is required. In the present case the Lord Ordinary has, I think, exercised his discretion wisely, and while Mr Cooper has said everything that could be said to induce us to take the opposite view, I am not convinced that he has made out any sufficient ground for disturbing the interlocutor.

LORD MACKENZIE—I concur.

LORD SKERRINGTON—I concur.

LORD CULLEN—I concur.

The Court adhered.

Counsel for the Pursuer—Mackay, K.C. —Cooper. Agents—W. & F. Haldane, W.S.

Counsel for the Defenders — Macmillan, K.C.—M. J. King. Agents—Dove, Lockhart, & Smart, S.S.C.

HOUSE OF LORDS.

Monday, June 21.

(Before the Lord Chancellor (Birkenhead), Viscount Finlay, Viscount Cave, Lord Dunedin, and Lord Shaw.)

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

(In the Court of Session, July 4, 1919, 56 S.L.R. 518, and 1919 S.C. 599.)

Ship—Bill of Lading—Freight—Construction of Bill of Lading—Partial Loss of Cargo—Freight Payable on Weight at Port of Discharge, and also "Ship and/or Cargo Lost or not Lost."

A bill of lading provided—"Freight . . . 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."

Owing to a collision sea-water entered the hold and dissolved a portion of the cargo, which was nitrate. The shipowners sued for the freight on the amount, agreed between parties, of the cargo so lost. *Held* (*rev.* decision of the Second Division) that such freight was due.

This case is reported *ante ut supra.*

The pursuers, the Pacific Steam Navigation Company, appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR (BIRKENHEAD)—The questions which are raised in the present appeal are concerned with the construction of a bill of lading. The respondents to the appeal are the endorsees of the bills of lading for a cargo of nitrate carried by the s.s. "Ortega" from Chili to Liverpool. The appellants to the appeal were the owners of the "Ortega," who took on board 15,708 bags of nitrate consigned to certain Liverpool endorsees, who, having received the bills of lading therefor, subsequently endorsed them to the respondents. In the course of the voyage the "Ortega" came into collision with a Liverpool vessel and suffered damage, with the result that sea water penetrating into the hold of the vessel dissolved a quantity of the nitrate. Your Lordships are by the action of the parties relieved from any discussion as to the precise extent of the diminution of the cargo. It has been agreed between them that the diminution of weight to which I have referred is to be accepted as having been 93 tons 3 quarters 23 lbs. The rate of freight to be paid by the consignees is regulated by the margin of the bill of lading, namely, £7, 5s. per ton of 2240 lbs. payable at destination. Calculating the freight at that rate upon the figure already

given of 93 tons 8 qrs. 23 lbs., the resultant sum is £674, 11s. 11d., and this is the sum sued for.

The important clause in the bill of lading is clause 15, and I will at once proceed to read that clause—"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 acccording 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 relevant passage in the margin is in the following words, "Rate of freight—Seven pounds five shillings per ton of 2240 lbs., payable at destination."

Their Lordships in the Court below have reached the conclusion, founding it upon distinguishable and indeed irreconcilable grounds, that the result of the earlier part of the clause is such as to limit the scope to be given to the words "or cargo" so that it shall apply, and apply only, to the case where the cargo perishes in its totality. The construction of the clause is not in my judgment entirely free from difficulty. If the clause had ended with the word "tariff" it is evident that no controversy at all could have arisen; in such a case the Liverpool measurement would have been decisive and the old principles of our law for the carriage of goods by sea in the absence of any agreement to the contrary would have operated. The difficulty of course lies in the form of that limb of the clause which begins, "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 is contended here on behalf of the respondents that the mental processes through which the minds of the contracting parties passed are intelligible and, rightly understood, support the contention of the respondents. That intention, so it was said, was that in the ordinary case freight should be paid and should be collected on the gross weights or measurements taken at the port of discharge. But then it is argued that the intention of the parties in making this agreement was directed to the nature and risk of maritime casualties especially occasioned by war conditions existing at that moment, and it is contended that the casualty to which of all others having regard to the nature of that war it is presumed that their minds would turn would be the risk of a total destruction of the cargo.

I was for some time affected by this argument, but it is necessary to consider the clause as a whole; it is necessary to ask oneself whether this speculation, not by any means certain, as to the state of mind of the contracting parties at the time when this clause was drafted, is sufficiently clear to render necessary, or indeed to justify, a construction which gives so little effect to the words in the clause which are very specifically imported into it. It is in this connection not unimportant to notice that the language used is of considerable formality, "it," it is said, "being expressly agreed that freight is to be considered as earned and must be paid ship and/or cargo lost or not lost."

It does not very much matter whether one refers to the last three lines of the clause as being a proviso or whether one speaks of them as being a separate expressed agreement. The result is the same. The parties say that the freight for the goods is to be collected on measurements and so forth at the port of discharge, but the parties also agree that that freight shall be considered as earned and must be paid whether the cargo is lost or not lost.

Such being the express and distinct agreement of the parties it is necessary to ask oneself whether or not it be possible to reconcile the last three lines of the clause with its earlier provisions. I am of opinion that it is possible so to reconcile them. In my view the intention of the parties to this contract was, in cases where the cargo reached its port of destination, that it should be dealt with as provided by the earlier part of the clause, but that the minds of the parties then turned to the question of what arrangement was to be adopted in case the cargo was lost or a portion of the cargo was lost, and in that case they provided that some other method of assessing the freight must be adopted.

It was stated by one of the learned Judges in the Court below that in his view the case of the appellants failed because they were bound to set up a standard which did not exist and which could not be established. That view in my judgment cannot be supported, and the Solicitor-General for Scotland very candidly admitted to your Lordships that on the construction of those words which he himself was constrained to put forward he was bound to suggest some standard which is not that of measurement at the port of discharge, and which is nowhere to be found in the express terms of the contract. It might well in another case have formed the subject of argument, and perhaps of difficult argument, as to whether the appropriate standard in such a case as that now under consideration was simply the intake value, or was the intake value as affected by such modifications as have been adopted in the present case; but the parties in the case now before the House have by their agreement rendered it unnecessary for your Lordships to embark upon any inquiry into this branch of the case. Had the parties not reached agreement in this matter such discussion would no doubt have been necessary, but it is relevant to point out that the mere difficulty in assessing the rate proper for adoption would of course, consistently with principles which are very familiar, have been no reason for repelling the inquiry necessary to reach a conclusion.

For these reasons I am of opinion that the judgment of the Court below cannot be supported and should he reversed, and I move your Lordships accordingly.

VISCOUNT FINLAY—I am of the same opinion.

The case turns entirely upon the construc-

tion of clause 15 of the bill of lading. That clause contains two parts which are really quite independent of one another. The first provides for the mode of ascertaining the freight by measurement or by weighing at the port of discharge; the second provides for the case of loss of the cargo and stipulates that freight is to be payable in that case. These are independent provisions, and as the Lord Chancellor has just remarked, the second part is introduced by the words—"It being expressly agreed that freight is to be considered as earned, and must be paid ship and/or cargo lost or not lost."

Now the terms in which this clause is expressed have given rise to a considerable diversity of view in the Court below. They appear to me to be reasonably clear—"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." That settles conclusively any question as to whether the weight was to be taken as at the port of loading or as at the port of discharge, and expresses what would result from law in ordinary cases, that it is at the port of discharge that you ascertain the amount of the cargo that should be paid for. It puts the amount of freight which is to be paid on the cargo, depending of course upon the quantity or weight of the cargo delivered, beyond all controversy, and that is the only point to which the first part of the clause seems to me to be directed.

Then the clause goes on to deal with a totally different matter—"It being expressly agreed that freight is to be considered as earned, and must be paid, ship and/or cargo lost or not lost." Now it has been said that that part of the clause has operation only in a case of total loss, and I think that the respondents' argument as presented by the Solicitor-General resolves itself really into the question whether that is the right reading of that part of the clause, namely, whether it is confined to the case of total loss of the whole cargo or not. I do not think that part of the clause can be confined to the case of such total loss. The words must be read distributively, and if a portion of the cargo is totally lost I cannot see how the later words of this first paragraph of clause 15 are not just as applicable to that case as they are to the case of the total loss of every bit of the cargo.

Now in a case of total loss either of the whole of the cargo or of a portion of the cargo any provision for measurement or weighing at the port of discharge is, of course, absolutely inapplicable from the very nature of things; there can be no measurement or weighing at the port of discharge of goods which have never arrived there, and the first part of the clause has no application. The Second Division appear to have treated the first part of clause 15 as being capable of controlling and overriding the last part of the paragraph. They read the provision for taking the weight or amount as at the port of discharge as controlling the meaning of the last words of the paragraph which deal with the case of the cargo in whole or in part not arriving at all. It appears to me that that construction is quite inadmissible.

For these reasons it appears to me that the conclusion arrived at by the Sheriff in this case was right and that the decision of the Second Division reversing him must itself be reversed. We cannot of course simply restore the decision of the Sheriff, because as I understand it the parties have arrived at an agreement that in the event of your Lordships adopting the construction of clause 15 to which I have referred there should be a direction that judgment should be entered for the amount.

Under these circumstances it appears to me that the proper course is that judgment should be entered for that amount and, I suppose, that the cause should be remitted to the Court below in order that that may be done.

VISCOUNT CAVE—I agree.

LORD DUNEDIN—I concur with the opinion of my noble and learned friend on the Woolsack. It seems to me, although the matter is not without difficulty, that it is a much simpler construction to hold that these words apply to a partial as well as a total loss of cargo than to hold the opposite.

LORD SHAW—I agree with the judgment intimated from the Woolsack.

The learned Solicitor-General said that it was the duty of this House to construe the express agreement of the parties with regard to freight being earned although the cargo was lost, as an agreement confined to the case of a total loss. His reasons were two. He said that upon a true view of the contract he thought the parties during the war must have had total loss and that alone in their mind and intention. That was his first argument. I cannot think the parties meant any restriction of the kind. I think the parties meant to stipulate that the non-arrival of the cargo or any portion of it at Liverpool still left freight due for the whole. I put the case to the learned counsel, but I am sorry to say I got no very satisfactory reply—Is it a very likely thing, if they thought about that matter at all (which was the conjecture making the hypothesis of the argument), that they would exclude from the scope of their intention such a case as that of an accident at sea, whether by war or normal collision, in which one portion, say half of the cargo, was jettisoned, thereby saving the other half of the cargo and the whole of the ship? That is a very natural thing to contemplate, and I cannot look upon this case as one in which it or the like of it was excluded from their meaning.

The second part of the argument is that when you look at this contract you must agree that it is a contract which did not provide for the case of partial loss because the machinery for the assessment of that loss would be improper or unavailing. I hold that argument, in regard to the construc-

tion either of an Act of Parliament or of a contract, to be one of the most dangerous arguments which can be used in a court of law. Parties make provision for their substantial rights, or Parliament makes provision for the substantial rights of parties. In working out those rights there are certain mechanical or, it may be, administrative courses to be taken. These may in the particular circumstances fail; but it would be a very bad thing if the substantial rights created either by Parliament or by contract were to disappear in consequence of a defect or inapplicability in that subsidiary machinery by which they could be worked out.

That is well known to be the law with regard to Acts of Parliament. It never was more clearly expressed than by Lord Halsbury in the case of *Lysons* v. *Andrew Knowles & Sons, Limited* (1901 A.C. at p. 86), in which he says, construing the Workmen's Compensation Act—"But it is said: if a workman is not employed for at least two weeks how can you average his earnings or his agreed earnings by an 'average' which when you have only got one term is an impossible phrase;" and then he adds this—"Well for my own part, if I came to the conclusion that there had been no mode by which the quantum should be fixed in the schedule, I should still be of opinion that there was no repealing of the right which had first been granted, but that, by arbitration or by some other means which I think would be quite within the powers of the Act, the compensation should be ascertained." The identical principle applies in the present case. Assuming that the parties did contemplate, and that the contract covers, the case of a partial loss, I am not deterred from granting the substantial right to freight contracted for by the fact that difficulties may arise as to how the particular weight of the goods lost is to be ascertained. I agree that the parties have done what any persons in such a position would have done; they have had it ascertained by the ordinary commercial means by men on the spot. It is quite true that certain calculations had to be made on the assumption that the goods lost were on the "average" to be taken as in the same condition as the goods which arrived; that is all that they have done. There is nothing complex, nothing difficult, nothing troublesome about it. I do not wonder that the parties have agreed on the figures, and for my part the fact that the figures had to be so ascertained does, as I say, weigh in no way with me. The right to freight, delivery or no delivery, remains. I do not think that it was ever lost.

Their Lordships reversed the interlocutor appealed from, and remitted to the Court of Session that decree be pronounced for £674, 11s. 11d., with expenses.

Counsel for the Appellant—Condie Sandeman, K.C.—W. G. Normand. Agents—Maclay, Murray, & Spens, Glasgow—Boyd, Jameson, & Young, W.S., Edinburgh—T. Cooper & Company, London.

Counsel for the Respondents—Solicitor-General for Scotland (Murray, K.C.)—W. T. Watson. Agents—Fyfe, Maclean, & Company, Glasgow—Beveridge, Sutherland, & Smith, W.S., Leith—Weightman, Pedders, & Company, Liverpool—Botterell & Roche, London.

Tuesday, June 22.

(Before Viscount Haldane, Viscount Finlay, Viscount Cave, Lord Dunedin, and Lord Shaw.)

WILLIAM BAIRD & COMPANY, LIMITED *v.* M'GRAW.

(In the Court of Session, November 27, 1919, 57 S.L.R. 114.)

Master and Servant—Workmen's Compensation—"Arising out of and in the Course of the Employment"—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1).

A boy, a coal picker, went one day to the pit, not for the purpose of working, but to recover his wages for work previously done. He acted as he had previously done, and while waiting at a place where the workers were accustomed to go, for the man from whom he would get his pay slip, he received injury by accident. *Held* (*sus.* decision of the First Division) that on the facts stated the injury was "arising out of and in the course of the employment."

This case is reported *ante ut supra.*

The employers, William Baird & Company, Limited (appellants in the Court below), appealed to the House of Lords.

At delivering judgment—

VISCOUNT HALDANE—Authorities have been cited in support of the appellants' case tending to show that in circumstances presenting analogies to those before your Lordships the tribunals have held that the claim was not in respect of anything which in those particular cases arose out of and in the course of the employment. I should be loth, so far as I am concerned, to make the decision of this case turn upon a meticulous comparison with the circumstances in other cases. I think the purpose of the statute was that we should look at the facts in each case broadly, apply certain principles, and attach great weight, so far as mere facts are concerned, to the view of them taken by the arbitrator, or the County Court Judge, as the case may be, and if there had been an approving judgment of the Court below, be predisposed to take the same view of the facts as that judgment did. But it is not necessary in this case to go into the question, because when we turn to the facts themselves in the appeal they lie in short compass and are fairly plain.

In March 1919 the respondent, a boy called M'Graw, 16 years of age, was a coal picker at the Mossblown Pit of the appellants. The coal-picking tables are tables on to which coals from the pit are dropped as they are