Schedule to the Workmen's Compensation Act 1906, "in fixing the amount of the weekly payment regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity." Now in this case the arbitrator has found as a matter of fact that the workman obtained a certain benefit, and that this benefit should be taken into account in settling compensation. The only point for us is whether on the facts as stated by the arbitrator there are no facts that would entitle a reasonable man to say that this was a benefit. I think, on the contrary, that all the facts point to the conclusion that this was a benefit, and accordingly I think that there is no case at all for the appellant.

LORD KINNEAR, LORD JOHNSTON, and LORD MACKENZIE concurred.

The Court answered the question of law in the affirmative.

Counsel for the Appellant—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Respondents—Horne, K.C.—Carmont. Agents—J. & J. Ross, W.S.

Friday, July 12.

SECOND DIVISION.

[Sheriff Court at Dundee.

TYZACK & BRANFOOT STEAMSHIP COMPANY, LIMITED *v.* FRANK STEWART SANDEMAN & SONS.

Ship — Affreightment — Bill of Lading — Exemptions — Short Delivery — Goods Unmarked and with Wrong Markings —Bills of Lading Act 1855 (18 *and* 19 *Vict., cap.* 3), *sec.* 3.

In an action for payment of the freight of a consignment of jute shipped at Calcutta for delivery at Dundee, the consignee refused to take delivery of certain unmarked bales, on the ground that the bales tendered to him by the shipowners were not part of his consignment since they were not marked in the way described in the bill of lading. The bill of lading contained the following clauses—"(5) Weight, measure, quality, contents, and value unknown," and "(7) the ship is not liable for . . . inaccuracies, obliterations, or absence of marks, numbers, or description of goods shipped." The consignee admitted that the bales tendered at Dundee had been shipped at Calcutta, and had not been changed at any port of call on the voyage.

Held that the bill of lading exempted the shipowners from liability for representations contained in it as to the markings on the bales shipped, and consequently that as since the shipowners had tendered the bales actually shipped, the consignee was liable to pay the freight.

Ship—Affreightment—Short Delivery where Various Consignees — Commixtion — General Average.

Several consignments of jute were shipped at Calcutta for delivery at Dundee. On arrival at Dundee four of the consignees failed to receive the full number of bales specified in their bills of lading. It was found that out of the total cargo fourteen bales were missing, and eleven bales were unclaimed being without marks and incapable of identification. The shipowners offered to account for the value of the fourteen bales. In an action by them for payment of freight against one of the consignees whose consignment fell short to the extent of six bales, the defender claimed to deduct the value of the whole of the six bales from the freight.

Held that the eleven unmarked bales fell to be allocated between the consignees whose consignments were short in the proportions which the quantity shipped by each of them bore to the whole quantity shipped, in accordance with the rule of general average, and therefore that the defender was entitled to deduct from the freight the value of only so many bales as represented the difference between six bales and the number of unmarked bales so allocated to him.

Spence v. *Union Marine Insurance Company*, 1868, L.R., 3 C.P. 427, *followed.*

The Bills of Lading Act 1855 (18 and 19 Vict. cap. 111), sec. 3, enacts—"Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board: Provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims."

Tyzack & Branfoot Steamship Company, Limited, Newcastle-upon-Tyne, *pursuers*, brought an action in the Sheriff Court at Dundee against Frank Stewart Sandeman & Sons, spinners and manufacturers, Dundee, *defenders*, for payment of £175, 1s. 6d., being the balance of freight due in respect of the carriage of bales of jute for which the defenders held bills of lading by the pursuers' steamship "Fulwell," of Sunderland.

The following *narrative* is taken from the opinion of Lord Salvesen, *infra*:—"The

facts in this case lie within a short compass, and are not seriously in controversy. The pursuers' steamer 'Fulwell' loaded in Calcutta between 11th August and 1st September 1909 a cargo of jute in bales for conveyance to Dundee. The cargo was brought alongside in barges, and the bales of jute were hoisted in slings of five or six at a time direct from the barge into the hold of the steamer. Native tallymen were employed by the ship to tally the cargo at each hold, and to see that the number of bales stated in the boat-note handed by the bargee to the tallymen corresponded with the number unloaded from the barge. The boat-note, besides stating the number of bales on board, also described the marks on the bales. It was part of the tallymen's duty not to receive burst or wet bales; and where any such were returned, a note of the number and the reason for rejecting them was put upon the boat-note, as well as a jotting in pencil of the number of slings and the number of bales which each sling contained, with a summation of the total number received from each barge. The principal boat-note was retained by the ship, a copy being delivered to the bargee. A mate's receipt, made out in accordance with the particulars in the boat-note, was signed by the chief officer, and from this document a bill of lading applicable to the particular parcel was made out by the shippers, containing the same particulars, and signed by the ship's agent on behalf of the master.

"The first of the two bills of lading with which we are concerned in this case was for a parcel of 254 bales of jute bearing to be shipped by Ralli Brothers, and having the marks 'Registered, 400 lbs. J.P.S. Nairangunge, 1909-10.' On end 'R.B.'

"Of this parcel 127 bales had the quality mark 2 in red, and 127 bales the quality mark 3 in green. The other parcel had precisely similar marks, but consisted of 246 bales of jute, one-half having the quality mark 2 in red and the other half the quality mark 3 in green.

"The evidence shows, and indeed this was not disputed, that the loading was carried on in the customary way, and so that it was impossible for the tallyman to check the marks on each bale, although he had an opportunity of seeing, with regard to the top layer of bales in the barge, that the marks, generally speaking, corresponded with those indicated in the boat-note. If, however, occasional bales were unmarked or had different marks, this would almost inevitably escape detection. In order to enable the tallyman effectively to check the marks, every sling would have to be laid on deck and the bales turned over with the marked side uppermost, the markings being on a piece of gunny or sacking which is on one side of the bale only, and is held in position by a continuous rope wound round it. Such a method of conducting loading is unknown at Calcutta, and would greatly prolong the operation. The practice, therefore, is for the tallyman not to pay special attention to the marks on each bale, but to accept the description in the boat-note as generally confirmed by his own observation before commencing to unload the barge.

"The cargo as described in the bills of lading consisted of 28,002 bales of jute consigned to thirty-seven different consignees, and included bales of many different marks. The 'Fulwell' had a prosperous voyage, and arrived in Dundee about the 14th of October, when the discharge was commenced and extended over rather more than a fortnight. The method of discharge was the one customary at Dundee. The ship's stevedores hoisted the bales in slings by five or six at a time on to a raised platform, from which they were slid singly down an inclined plane which extended to the nearest shed, where the bales were received by harbour porters employed by the consignees as a body and paid by them. These porters assorted the bales according to their marks, and they were then removed by the consignee to whom each lot belonged. The removal was checked by a shipping-clerk employed by the ship, by a merchant's clerk employed by the consignees, and by a shore-dues clerk on behalf of the harbour authorities. Of the thirty-seven consignees, thirty-three received their full consignments bearing the marks specified in their respective bills of lading. The defenders received 2470 bales out of a total specified in their bills of lading of 2476. Of the number received there were ten which bore the quality mark of 2 instead of the quality mark of 3, which is an inferior quality; but the defenders naturally made no demur to taking the superior quality instead. On the whole cargo there was a shortage of fourteen bales, and in addition there were eleven bales which on 30th October were discovered to have no marks except certain marks on the ends in individual cases. None of these bales can be identified as forming part of the parcels consigned to the consignees who did not obtain their full B/L quantity, and each of them refused to accept any of these bales as forming part of their consignments. The pursuers, while not admitting that there was any shortage in the quantity delivered as compared with the quantity actually shipped, had offered to account for the value of the fourteen bales. The question in the case is whether they are also bound to account for the value of the eleven bales which they actually carried and delivered over the vessel's side but which do not bear the mark described in the various bills of lading, whose holders have not received their full quantities.

"The matter is somewhat complicated by the circumstance that there is a shortage, and that this falls to be distributed over four different consignees; as also that the same consignees must, according to the pursuer's contention, take the eleven bales among them in proportion to the shortage of their several consignments. I shall, however, for the sake of simplicity treat the case as if there had been one consignment only, and as if of that consignment the whole number of bales had been

delivered except the eleven which were found to be unmarked. How the absence of marks occurred is not made the subject of direct evidence, as indeed it could scarcely have been. The marks might conceivably have been torn off in the course of stowing the cargo or of unloading it, but no suggestion of this kind was made at the time when the question first arose, and it was only long afterwards that an examination was made of the bales in the shed, when some of the defenders' experts say that the ropes had in some cases got slack in the middle, pointing to the possibility of the pieces of gunny on which the markings were stencilled having come off. How little importance is to be attached to this examination after the goods had been exposed to the risk of much handling in the shed may be judged from the fact that two of these bales each weighing 400 lb. had bodily disappeared, having apparently been stolen in the interval. I entertain no doubt that as the quality of the jute did not correspond with any of the consignments on which there had been a shortage, the marks were not on the bales when they were shipped at Calcutta, and that this fact escaped the notice of the tally-clerks owing to the manner in which the goods were loaded on board, and the obvious interest that the bargees acting either for themselves or on behalf of the shippers would have to conceal the absence of marks on a bale by placing it in the centre of the sling. I should further add that it was admitted by counsel for the defenders that the eleven bales in question had been received by the ship at Calcutta, and that there had been no exchange of bales either at Calcutta or at any of the ports at which the vessel called, a supposition which would in any case have been entirely excluded by the evidence."

Both bills of lading contained, *inter alia*, the following clauses—"Shipped, in good order and condition, by Ralli Brothers on board the steamship 'Fulwell'
whereof is master for this present voyage, lying in the port of Calcutta, and bound for Dundee. . . . Bales jute at 400 lbs. being marked and numbered as per margin; and to be delivered subject to the exceptions and conditions hereinafter mentioned, in the like good order and condition, . . . at the aforesaid port of Dundee. . . . (4) The number of packages signed for in this bill of lading to be binding on steamer and owners, unless errors or fraud be proved, and any excess of shippers' marks to be delivered. Any shortage to be paid for at the spot market value on the day of the arrival of the vessel. (5) The following are the exceptions and conditions above referred to—Weight, measure, quality, contents, and value unknown. . . . (7) The ship is not liable for insufficient packing, or reasonable wear and tear of packages; for inaccuracies, obliterations, or absence of marks, numbers, or description of goods shipped, leakage, breakage, loss or damage by dust from coaling on the voyage, sweat, rust, or decay, except through improper stowage. Fines and expenses and losses by detention of ship or cargo, caused by incorrect marking or by incomplete or incorrect description of contents or weight, or of any other particulars required by the authorities at the port of discharge upon either the packages or bills of lading, shall be borne by the owners of the goods."

On 29th August 1911 the Sheriff-Substitute (J. C. SMITH), after proof led, pronounced this interlocutor—"Finds that the defenders, Frank Stewart Sandeman & Sons, are, under bills of lading held by them, entitled to delivery from the pursuers of 2476 bales of jute, and that they have obtained delivery of no more than 2470 bales: Finds that the pursuers are bound either to deliver the six bales still undelivered or to establish a 'valid excuse' for their failure to deliver them: Finds that the pursuers have failed to establish any valid excuse for non-delivery of said six bales, and that therefore the defenders are entitled to deduct the value thereof from the sum sued for: Assesses the value of said bales at £15, 5s. 4d.: Decerns against the defenders for payment to the pursuers of £159, 16s. 2d. (being the sum sued for, £175, 1s. 6d., under deduction of the said sum of £15, 5s. 4d.), with interest thereon as craved."

The pursuers appealed, and argued—(1) Under section 3 of the Bills of Lading Act 1855 (18 and 19 Vict. cap. 111) the master of a vessel might be liable for misrepresentations in the bill of lading, but the section did not apply to the owners. In this case the owners had proved that they had delivered the actual cargo which they had received and in the same state in which they had received it, and beyond this they had no further liability at common law. As carriers they were not bound by the representations in the bill of lading—*Cox* v. *Bruce*, 1886, 18 Q.B.D. 147, *per* Lord Esher, at p. 151, Lindley (L.J.) at p. 153, and Lopes (L.J.) at p. 154; "*The Ida*," 1875, 32 L.T. 541; *Craig & Rose* v. *Delargy*, July 15, 1879, 6 R. 1269, *per* Lord President at p. 1275 and Lord Shand at p. 1284, 16 S.L.R. 750, at p. 755, 760; *Moes, Moliere, & Troup* v. *Leith and Amsterdam Shipping Company*, July 5, 1867, 5 Macph. 988, *per* Lord President at p. 991, 4 S.L.R. 169, at p. 170; *Horsley* v. *Baxter Brothers & Company*, January 31, 1893, 20 R. 333, 30 S.L.R. 387. (2) In any event the bill of lading itself exempted the pursuers by clause 5 from liability regarding the external marks on the bales, and by clause 7 from liability regarding their internal contents, because the express declarations of a bill of lading could qualify what would otherwise be an admission of liability—*Jessel* v. *Bath*, 1867, L.R., 2 Ex. 267, *per* Kelly (C.B.) and Martin (B.) at p. 273, and Bramwell (B.) at p. 274; *Lebeau* v. *General Steam Navigation Company*, 1872, L.R., 8 C.P. 88, *per* Bovill (C.J.), at p. 93; *Parsons* v. *New Zealand Shipping Company*, [1901] 1 K.B. 548, *per* Collins (L.J.), at p. 565. (3) With regard to the delivery of the bales, the pursuers had discharged the cargo by the method of discharge customary at the port of Dundee,

and had given complete delivery of the bales to the defenders—*British Shipowners' Company, Limited* v. *Grimond*, July 4, 1876, 3 R. 968, 13 S.L.R. 623; *Knight Steamship Company, Limited* v. *Fleming, Douglas, & Company*, July 1, 1898, 25 R. 1070, 35 S.L.R. 834. It was the duty of the consignees to apportion among themselves the eleven bales, and they should do it on the principle of general average—*Spence* v. *Union Marine Insurance Company*, 1868, L.R., 3 C.P. 427, *per* Bovill (C.J.), at p. 436; *Smurthwaite* v. *Hannay*, [1894] A.C. 494, *per* Lord Russell of Killowen, at p. 505.

Argued for the defenders and respondents—(1) The defenders were not bound to pay the freight until the pursuers had tendered to them the goods described in the bill of lading, and if the pursuers had not actually received at Calcutta the bales specified in the bill of lading the *onus* of proof was on them—*M'Lean & Hope* v. *Fleming*, March 27, 1871, 9 Macph. (H.L.) 38; *Smith & Company* v. *Bedouin Steam Navigation Company, Limited*, November 26, 1895, 23 R. (H.L.) 1, 33 S.L.R. 96. On the evidence, it was clear that the pursuers had accepted responsibility, not only for the correct number of bales, but also for the marks upon them. The representations in the bill of lading did not bind the pursuer with regard to the quality of the goods, but loading marks were different from quality marks—*Cox* v. *Bruce* (*cit.*) (*per* Lord Esher at p. 150)—and the expression "shipped in good order and condition" in clause 1 of the bill of lading was a representation that bales marked with certain loading marks had been shipped—*Compania Naviera Vasconzada* v. *Churchill & Sim*, [1906] 1 K.B. 237; *Parsons* v. *New Zealand Shipping Company* (*cit.*). The decision in *Craig & Rose* v. *Delargy* (*cit.*) had been doubted in *Delaurier* v. *Wyllie*, November 30, 1889, 17 R. 167, 27 S.L.R. 148. (2) With regard to the delivery of the bales, the pursuers had not delivered the bales to the defenders, because even if it were held that the pursuers had tendered them, there could not be delivery to a body of unincorporated persons. It was true that in *Spence* v. *Union Marine Insurance Company* (*cit.*) the bales were held to belong to the consignees in common, but that was because in that case the bales were all of the same sort, and they had got mixed up on board while *in transitu*—Bell's Principles, section 1298 (2). That was quite a different state of circumstances from this case. Moreover, in *Smurthwaite* v. *Hannay* (*cit.*) it was held that each of the consignees had a separate claim against the shipowners. The cases of *British Shipowners' Company, Limited* v. *Grimond* (*cit.*) and *Knight Steamship Company, Limited* v. *Fleming, Douglas, & Company* (*cit.*) had no application to this case. They merely decided questions of the delivery of goods to a single consignee where the identity of the goods was not in dispute.

At advising—

LORD SALVESEN—[*After the narrative, supra*]—Each bill of lading contains certain exceptions and conditions qualifying the ship's responsibility for delivering the goods specified therein. There is also an express provision with regard to the number of packages, in these terms—"The number of packages signed for in this bill of lading to be binding on steamer and owners unless errors or fraud be proved, and any excess of shipper's marks to be delivered. Any shortage to be paid for at spot market value on the day of arrival of the vessel." This provision, which is unusual, serves to explain the attitude of the pursuers with regard to the fourteen bales short delivered. Presumably they are unable to point to any particular error or fraud which resulted in the bills of lading being for a larger quantity of bales than was actually delivered at Dundee, although on the evidence there can be little moral doubt that the ship in fact delivered all the bales received.

The only exceptions and conditions which have any bearing on the question relating to the eleven bales are as follows—"(5) Weight, measure, quality, contents, and value unknown;" and "(7) The ship is not liable for insufficient packing or reasonable wear and tear of packages; for inaccuracies, obliteration, or absence of marks, numbers or descriptions of goods shipped." It is unnecessary to consider what would have been the liability of the pursuers had these conditions not been embodied in the bill of lading. The primary duty of a shipowner is to carry in safety the goods received by him from the shipper; and if he does so it is pretty plain that the shipper can have no claim against him because he has induced the ship's agent to sign his name to an inaccurate representation of the marks on the goods so received. There is high authority for the proposition that a consignee is in this respect in no better position than the shipper—*Craig & Rose* v. *Delargy*, July 15, 1879, 6 R. 1270, 16 S.L.R. 750. It is not necessary, however, to enter upon this somewhat vexed question, as it is quite certain that the shipowner may qualify the obligation that he might otherwise be held as undertaking as in a question with the consignees. Thus if the bill of lading bears on the face of it that so many tons of goods have been received, and the obligation is qualified by the words "weight unknown," the owner will not be responsible if a less quantity is delivered to the consignees, although the latter may have paid on the faith of the bill of lading, provided the shipowner in fact delivered the quantity of goods put on board his vessel. This was expressly decided in the case of *Jessel* v. *Bath*, 1867, L.R., 2 Ex. 267. The statement as to the weight of the goods contained in the bill of lading, qualified by the words "weight unknown," was construed as being a representation by the shipper of which the master who signed the bill of lading had no knowledge. Baron Bramwell said—"This document, though apparently contradictory, means this—a certain quantity of manganese has been brought on board which is said by the shipper for the purpose of freight

to amount to so much, but I do not pretend or undertake to know whether or not that statement of weight is correct. On a bill of lading so made out I think no one could be liable in such an action as the present."

I am unable to distinguish that case in principle from the present. Reading the bill of lading as a whole, I think it means that the shipper has represented to the signatory that the bales are marked and numbered as on the margin of the document, but that the latter expressly signs on the footing that the ship will not be responsible if the marks as so described do not prove to be accurate, or if there is an entire absence of marks, or if the description of the goods turns out not to correspond with that given in the bill of lading. This is made all the more manifest by the subsequent clause that if expenses and losses by detention of the ship and cargo be "caused by incorrect marking or incorrect description of contents or weight," such losses shall be borne by the owner of the goods. Now I think it impossible to suggest in the face of such clauses that the agent who signed the bill of lading was guaranteeing the correctness of the markings as stated therein. In these circumstances, had there been only one consignee of this cargo, I entertain no doubt that he would have been bound to take delivery of the eleven unmarked bales as well as those that bore the correct markings, and that he would have had no defence for an action for freight.

It is curious that on a matter of this kind, which must be of frequent occurrence, there should be no precise authority in point as to the responsibility of the ship. Two cases were however referred to, in both of which the decision was in favour of the shipowner, although there was no express exemption in the bill of lading. The first is the case of *Cox* v. *Bruce & Company* (1886, 18 Q.B.D. 147), where the master had signed a bill of lading for 192 bales described as marked R.C. 2 and 286 marked R.C. 3. The 2 and 3 were quality marks. On delivery it turned out that there were fifty-nine bales short of No. 2 quality and fifty-nine in excess of No. 3. The consignee who had acquired the bill of lading for value without notice of any incorrectness in the description of the goods, claimed the difference in value between fifty-nine bales of No. 2 quality and the same number of bales of No. 3. It was held that the shipowners were not liable either for breach of contract or on the ground that they were estopped by the representation in the bill of lading. There was a special clause in that bill of lading, with which we are not concerned here, which was construed as meaning that the responsibility for correct delivery did not attach unless the quality marks had been correctly inserted in the bill of lading. The ground of the decision appears to have been that the master had no power to bind his owners by an incorrect description of the goods any more than he could bind them by an incorrect statement of the number or weight; and the case is also important as showing that Lord Esher took the same view as Lord President Inglis in *Craig & Rose* v. *Delargy*, that an endorsee of a bill of lading has no higher rights than the shipper. The other case is that of *Parsons* v. *New Zealand Shipping Company*, ([1901] 1 Q.B. 548), where certain carcases had been shipped under a bill of lading which contained a marginal description of them as marked 622 X, whereas a corresponding number of carcases marked 522 X was tendered. The action was directed against the agents who signed the bill of lading, and not against the shipowners; and yet it was held that the defendants were not liable. A. L. Smith, M.R., put his judgment on a special clause in the bill of lading which ran as follows—"The ship shall not be responsible for correct delivery or loss unless each package is distinctly, correctly, and permanently marked by the merchant before shipment with a mark and number or address." He construed this as meaning correctly marked with the mark and number according to the bill of lading, and held that the clause was inserted to meet a case where the goods were not correctly marked according to the bill of lading. In my opinion the clause in the bill of lading we are considering is much more clear and unambiguous, and, if so, it follows that the pursuers cannot be answerable for the misdescription.

A difficulty arises in the present case from the circumstance that there was a shortage of fourteen bales; and the defenders say that it may be that the whole of the bales in respect of which they claim were amongst those for which the ship admits liability. It appears, however, that exactly the same position is taken up by the other three consignees against whom actions for freight have also been raised (these actions to await the decision in the present case), and I think it is perfectly plain that none of the eleven bales can be identified with any of their shipments. These eleven bales must, however, have formed part of one or more of the four parcels in question. How, then, are they to be distributed? It appears to me that the answer is furnished by the decision in *Spence* (1868, L.R., 3 C.P. 427). In that case the marks on a large number of bales of cotton had become so obliterated by sea water that none of them could be indentified as belonging to any particular consignee. It was held that these bales must be attributed to the consignees in the proportion that the quantity to which each was entitled bore to the whole quantity shipped. That was a case against underwriters, the ground of action being that as it was impossible to indentify any of the bales as being the plaintiff's he was not bound to receive them, and that as in a question with the underwriters there was a total loss of the bales. It was pointed out by Bovill, C.J., that this argument would equally apply if not a single bale had been lost, and if the marks only had been obliterated, and would lead to the strange anomaly that although all the goods which had been put on board arrived

safely at their destination there would be a total loss on the whole of them for the purpose of insurance law. In another part of his opinion he says—"There is no authority nor sound reason for saying that the goods of several persons which are accidentally mixed together thereby absolutely cease to be the property of their several owners and become *bona vacantia*." Applying this principle to the present case, and on the assumption of the facts above referred to, the just way of distributing the unmarked bales to each consignee is in proportion to the total shortage. Parties are agreed as to the way in which this works out in the case of the present defenders, and the sum to which they are entitled in respect of the six bales of which they have not meanwhile taken possession. If the ship had to make good the value of these bales, the sum would work out, as the Sheriff-Substitute has fixed it, at £15, 5s. 4d., but on the assumption that the defenders are bound to take their proportion of the eleven bales this sum is reduced to £8, 11s., which will form a deduction from the admitted freight. I propose, therefore, that we should recal the Sheriff-Substitute's interlocutor, and make appropriate findings in fact consistent with the views above expressed; and should grant decree for the sum of £175, 1s. 6d., under deduction of £8, 11s., with interest, as concluded for. As the whole controversy has turned on the obligation of the defenders to take their proportion of the eleven unmarked bales, they must be found liable in expenses both here and in the Court below.

An argument based upon the decisions in the two cases of the *British Shipowners Company* v. *Crimond* (July 4, 1876, 3 R. 968, 13 S.L.R. 623), and the *Knight S.S. Company* (July 1, 1898, 25 R. 1070, 35 S.L.R. 834) I only notice in case it might be thought that it had been overlooked. I have no doubt these two cases were well decided, and in any event they are binding upon us; but except in so far as it appears from them that the customary method of discharging jute cargoes at Dundee was followed in the present case they appear to me to have no application. The mere fact that the harbour porters took delivery of certain bales from the ship's side on the instructions of the general body of consignees has, in my opinion, no bearing on the question whether any particular consignee is bound to pay freight on these bales if they turned out not to form part of the parcel for which he held a bill of lading. The question would still be open whether the tender of these bales by the shipowners to any particular consignee or consignees was a tender which they were bound to accept. If, for instance, it had been established that the bales in question had been substituted by the shipowners for other bales which were in fact consigned under one or more of the bills of lading, the provisional delivery to the harbour porters would not affect the right of the consignees in question to reject the bales. According to the recognised method of discharge at Dundee it would be quite impracticable to ascertain during the course of unloading, and before the bales were delivered across the ship's rail, whether they formed part of the consignment which the harbour porters were authorised by their constituents to receive. The decisions quoted are merely to the effect that where bales so received do form part of the cargo belonging to consignees who have instructed the harbour porters to attend to their interests, the risk of damage from exposure on the quay or otherwise falls to be borne by the receivers whose property they *ex hypothesi* were, but delivery *per se* could not in the circumstances effect a transfer of property of goods which were not in fact shipped by any of the merchants from whom the holders of the bill of lading derived their right.

The LORD JUSTICE-CLERK, LORD DUNDAS, and LORD GUTHRIE concurred.

The Court postponed issuing an interlocutor to allow its terms to be adjusted.

Counsel for Pursuers and Appellants—Horne, K.C.—Watson. Agents—Alexander Morison & Co., W.S.

Counsel for Defenders and Respondents—Dean of Faculty (Dickson, K.C.)—A. R. Brown. Agents—Elder & Aikman, W.S,

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Friday, July 12.

FIRST DIVISION.

[Sheriff Court at Kirkcaldy.

ARNOTT *v.* FIFE COAL COMPANY, LIMITED.

(*Ante*, June 17, 1911 S.C. 1029, 48 S.L.R. 828.)

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *First Schedule* (15)—*Remit to Medical Referee—Finality of Referee's Report—Wage-earning Capacity—Appeal—Competency.*

A miner who had sustained an injury to his eye was paid compensation down to a certain date, when, on the report of the medical referee that he was as fit as any other one-eyed man to resume his work underground, the arbiter terminated the compensation. On appeal the Court recalled the determination of the arbiter and allowed a proof. Thereafter the arbiter found in fact that the claimant had not since the date of the accident worked underground, that he had made various applications for such work without success, that whereas before the accident his wages were upwards of £2 a-week, he was now able to earn only 18s. a-week, and dismissed the application for review.

In an appeal at the instance of the employers the Court *refused* to disturb the arbiter's decision, *holding* that the question as to the workman's wage-earning capacity was one of fact on which his decision was final.