contained in articles 13 and 14 of the contract of lease between the parties referred to in the application upon the following conditions—(1) That the applicants shall not charge fares exceeding those proposed by them in the scheme set forth in article 2 of the minute; (2) that the suspension shall not be founded on in any further proceedings for the valuation of the tramway undertaking under article 17 of the said contract of lease unless with the sanction and authority of the Court obtained upon application made for that purpose and subject to such terms and conditions, if any, as to the Court may seem fit: Continue the cause with liberty to either party to apply for the recal or modification of this order."

Counsel for the Applicants — Constable, K.C.—T. G. Robertson. Agents—J. Miller Thomson & Co., W.S.

Counsel for the Respondents—Macmillan, K.C.—Gentles. Agents—Cumming & Duff, W.S.

Saturday, May 22.

FIRST DIVISION.

[Lord Blackburn, Ordinary.

MACQUEEN *v.* MACKIE & COMPANY DISTILLERS LIMITED.

Process—Proof—Diligence for Recovery of Documents—Discretion of the Judge as to Details of Specification.

Proof having been allowed in general terms, *held*, in a reclaiming note against a disallowance of certain documents in a specification, that the same width and extent of investigation would not as of course be allowed of every averment remitted to probation as of the crucial averments, but short of disallowing all diligence to recover documents required for the proof of subsidiary topics the matter was within the discretion of the Lord Ordinary.

Robert Haldane Macqueen, *pursuer*, brought an action against Mackie & Company Distillers Limited, *defenders*, concluding for £1854 damages for breach of contract.

The pursuer *averred*—"(Cond. 1) The pursuer in the beginning of the year 1912 was engaged by the defenders Mackie & Company Distillers Limited, who do a very large trade in whiskies both at home and abroad, as the head of their export department. The terms of the engagement are contained in a letter from the pursuer dated 16th February 1912 and letter of confirmation and acceptance from the defenders to him of even date. The engagement was that the pursuer should act as the head of the said department for a period of two years at a commencing salary of £300 per annum. It was further a term of the engagement that if the pursuer was satisfactory in his said managership he was to be made a director of the limited company at the end of the two years. (Cond. 2) The prospective post of director in the defenders' company was lucrative in a monetary sense and was also very valuable to a young man such as the pursuer was from the point of view of position and prospects. The said promise was a material consideration in the pursuer's mind in inducing him to enter the defenders' service. (Cond. 3) The pursuer acted for two years as head of the department to the entire satisfaction of the directors and the company, and his engagement was continued thereafter without any question being raised or any discussion taking place as to his complete suitability or as to the satisfaction of the board with his services. By tacit relocation the pursuer's engagement was continued from year to year. The commencing salary of £300 in or about June 1915 was agreed to be increased to £400 per annum, the said increase to take effect immediately upon the pursuer's return from military service. (Cond. 4) Notwithstanding the complete satisfaction with the pursuer's services at the end of the second year in February 1914 no offer of a directorship was made to the pursuer although he had acquired the necessary qualification in shares. Upon the pursuer reminding the chairman of directors, Mr Peter Jeffrey Mackie, of this promise and remonstrating about the failure to implement the same, the said Mr Mackie, acting for the board and with its authority, at two verbal interviews and afterwards in writing confirmed that the original agreement on this matter stood and indicated that the pursuer's chance would come quite soon. The pursuer accordingly continued in the defenders' employment in reliance on the said promise and expectation. . . . (Cond. 5) During the period of continued employment foresaid the late war broke out, and in the summer of 1915 the pursuer deemed it his duty to join His Majesty's forces in order to fight for his country. He accordingly did so on or about 10th August 1915 with the full knowledge and approval of the company. In consequence of an interview with the said chairman of directors preparatory to the pursuer going on service it was agreed between the pursuer and the board that he should enlist, but that his position should be kept open for him on his return, and that on his return he was to be paid a salary of £400 a-year. The terms of this agreement were confirmed by a letter dated 7th June 1915 from the pursuer to the defenders, in which, *inter alia*, he said—'My position is to be kept open for me, and on my return I am to be paid a salary of £400 a-year.' In addition, and as part of the said agreement, by a letter written by the said P. J. Mackie on behalf of the board of directors, a written promise of the directorship foresaid was given. On the strength of these contractual promises the pursuer joined His Majesty's army, ceasing to be in the employment of the defenders' company. (Cond. 6) The pursuer served in various places and ultimately for a considerable time in Egypt. He did not obtain his demobilisation till 31st July 1919. (Cond. 7) In or about November 1918, and while there was yet no immediate prospect of his release

from the army, the pursuer received from the defenders' board through Mr Mackie a letter dated 21st October 1918. After mentioning proposals by some of the board to go out of business Mr Mackie wrote, *inter alia*—'I do not think it would be to the advantage or happiness of yourself or of the firm' (meaning the defenders) 'for you to consider a return here. . . . We are convinced there can be no future for you here in this firm.' The letter further informed the pursuer for the first time that a Mr Jackson, one of the pursuer's assistants in the export department, had been put in his place as head of the export department, and had been given the directorship promised to the pursuer. The said letter was written by Mr Mackie on behalf of the board of directors acting for the company, and it was meant to be and was in fact a definite refusal to obtemper the contract to keep the said position open and to afford the pursuer a directorship. The defenders were thus in breach of their contract with the pursuer. In answer to pursuer's remonstrances sent from Egypt, where he was stationed, Mr Mackie further wrote on 22nd January 1919 and confirmed that the beforementioned decision of the board was final, but *ex gratia* offered to pay the pursuer a sum equal to six months' salary. He also stated—'My directors request me to say that there were certain contingencies and conditions, I think, contained in the letters you quote which have not been fulfilled and which cannot be carried out.' (Cond. 8) In point of fact there were no such conditions and contingencies as alleged, the only condition ever imposed in the matter of this directorship being that the pursuer should satisfactorily serve as head of said department for two years, as he did. Nothing had occurred in the meantime to justify the defenders in refusing to fulfil their engagements to the pursuer. The pursuer had given satisfaction in his position both for the trial period of two years and afterwards, and his continued employment by the defenders in the said capacity was in consequence of such satisfaction. (Cond. 9) The pursuer became demobilised in July 1919 and tendered his services to the defenders, demanding fulfilment of their said bargains, but they have wrongfully and without any cause or excuse refused to fulfil these bargains, and have not taken the pursuer back to his old position at £400 a-year or provided him a directorship. 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. (Cond. 10) The pursuer has suffered loss, injury, and damage in consequence of the defenders' said breach of contract. He has been forced to put his services on the market at a most unfavourable time. By the custom of trade the pursuer had he returned to the defending company's service in his former position would have been entitled to one year's notice of termination. He has thus lost the right to at least one year's employment with the defenders at £400 a-year, and he has finally lost all chance of the said valuable directorship."

The Lord Ordinary (BLACKBURN) having allowed a proof the pursuer lodged a specification of documents, for recovery of which he sought a diligence.

The *specification* included the following:—"2. The minute books of the defender company or the board of directors thereof that excerpts may be made therefrom at the sight of the Commissioner of all entries between the said dates relative (*a*) to the satisfaction or dissatisfaction of the company or board thereof with the services of the pursuer; (*b*) to the engagement of the pursuer; (*c*) to the promise of a directorship to the pursuer; (*d*) to the increase of the pursuer's remuneration; (*e*) to the determination not to continue the pursuer in employment; (*f*) to the reason or reasons for such determination; (*g*) to the size and importance of the business of the company both home and foreign; (*h*) to the value of the capital of the company and its assets, and particularly to the true value of the stocks of commodities appearing in its balance-sheets; and (*i*) to the worth of and remuneration for a seat on the board of directors of the company."

On 18th March 1920 the Lord Ordinary refused to grant a diligence for the recovery of the documents called for under sub-heads (*g*), (*h*), and (*i*) of head 2 of the specification, and *quoad ultra* granted, *inter alia*, the other documents called for.

The pursuer reclaimed, and argued—The pursuer was entitled to obtain documents disallowed so as to enable him to prove the value of the post he had lost through the defenders' breach of contract. His averments as to the capital of the defenders and their reserves and hidden funds entitled him to the documents by which those averments could be proved. Whether relevant or irrelevant those averments had been remitted to probation, and consequently the pursuer must be entitled to obtain the materials for proof of those averments—*Duke of Hamilton's Trustees* v. *Woodside Coal Company*, 1897, 24 R. 294, 34 S.L.R. 257; *Barr* v. *Bain*, 1896, 23 R. 1090, 33 S.L.R. 780.

Counsel for the defenders were not called upon.

LORD PRESIDENT (CLYDE)—This is a reclaiming note against an interlocutor disallowing certain parts of a specification of documents for the pursuer in an action of damages for breach of contract. The averments upon which the pursuer bases his application are to be found in articles 2 and 9 of the condescendence, and are as follows—"(Cond. 2) The prospective post of director in the defenders' company was lucrative in a monetary sense and was also very valuable to a young man such as the pursuer was from the point of view of position and prospect . . . (Cond. 9)

. . . . 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