fenders, and especially showing that a deck-load is objectionable, the pursuers referred to "Greenhow on Shipping," p. 104; "Maude and Pollock on Shipping," p. 325; and "M'Lauchlan on Shipping," p. 561.

In the opinion of the Lord Ordinary both of the grounds of liability relied on by the pursuers have been sufficiently established.

With regard to the first—viz., the fault of the defenders in shipping a deck-load of deals at Quebec—and it may be enough by itself to subject the defenders in liability to the pursuers—the Lord Ordinary has been unable to see any reasonable ground for doubt. The witnesses who speak to it are so numerous as to render it unnecessary to particularise them. They consist of grain merchants, of shipmasters and other mariners, of shipping agents, of marine insurance agents, and of Lloyd's and other surveyors—persons of great experience—and judging by their appearance and manner when examined, of unquestionable respectability and intelligence. These witnesses completely establish the fact, in the Lord Ordinary's opinion, that it is contrary to the custom and usage of trade and the rules of nautical practice to take a deck-load of deals over a cargo of wheat in the hold from Montreal to Liverpool, and that to do so, especially in the fall of the year, was to expose the ship and cargo to great risk and danger. The way in which a deck cargo of deals so operates is fully explained in the proof; and the evidence of Captain Grange, the port-warden of Montreal, when the Sir John Moore loaded there; of Captain Doane, who, with Captain Calhoun, examined the ship on her arrival at Liverpool, is, on this point, worthy of especial notice. These witnesses also, as well as many others, speak very distinctly to the deck-load having been the main, if not the sole, cause of the damage to the pursuers' wheat. There is no doubt some counter evidence for the defenders, but the Lord Ordinary has found it impossible to arrive at the conclusion that it is sufficient to obviate the effect of that adduced for the pursuers. In regard, indeed, to the question whether, by the custom or usage of trade, a deck-load of deals above a cargo of wheat in the hold was justifiable or not, the Lord Ordinary cannot help thinking that the defenders' evidence, as compared with that of the pursuers, is most meagre and unsatisfactory. And the few instances of vessels bringing grain from Canada, with a deck-load of deals, spoken to by some of the defenders' witnesses, appear to the Lord Ordinary, when the special circumstances attending them are kept in view, rather to support the general rule, as contended for by the pursuers, than to disprove it.

As to the overloading of the Sir John Moore, the evidence adduced for the pursuers greatly outweighs, in the Lord Ordinary's opinion, that for the defenders. On this point he has in particular to refer to the evidence of Captain Grange, and the statement in the certificate given by him as port-warden of Montreal, at the time the Sir John Moore took in her cargo there. And with a deck-load of deals, a very little overloading was evidently calculated seriously to aggravate the risk and danger to which the ship and cargo were exposed on a voyage across the Atlantic in the fall of the year.

At the same time, the Lord Ordinary having regard to the whole evidence as to the stormy weather encountered by the Sir John Moore on her voyage from Montreal, as shown by the log-book, and spoken to by some of the witnesses; and having regard also to the leakage at her keel, as described by the defenders' witness, John Robinson, and attributed by him and others to the grounding of the vessel in the St Lawrence on her passage down from Montreal, has felt himself unable to resist the impression that to some extent the damage sustained by the wheat in question is attributable to the perils of the sea and navigation, for the results of which the defenders are not, under the contract of carriage in question, responsible. Even the pursuers' witnesses, Captains Doane and Calhoun, do not negative this view, for in their report or certificate, No. 127 of process, they merely say that the deck-load would "contribute very materially to the damage," and several witnesses speak to the frequency of grain cargoes suffering damage, more or less from causes, as the Lord Ordinary understood the evidence, irrespective of fault on the part of the shipowners. It is no doubt difficult, or rather impossible, to ascertain with exactness the amount of damage sustained by the wheat independently of the fault of the defenders; and all the Lord Ordinary can say in regard to this is, that acting on a careful consideration of the whole proof bearing on the subject, he thinks the deduction he has made of £138, 14s. 1d. from the gross amount of damage is calculated to meet the justice of the case.

In concluding, the Lord Ordinary has to state that it was with much hesitation and reluctance, and only on the repeated and most urgent solicitation of both parties, that he consented to the case, in place of being tried by a jury, being dealt with under and in terms of the recent statute. What chiefly influenced the Lord Ordinary in at length yielding in this respect to the wishes of the parties was the statement, amounting almost to an assurance, made by them both, to the effect that the only serious contention would relate to the question of liability at all, and not to the amount of damage, and that the evidence, with little exception, would consist of depositions of witnesses who were unable to attend to be examined personally. That statement, however, although doubtless made in good faith at the time, has turned out to be very erroneous; and if the Lord Ordinary had known how matters really stood, he should certainly have sent the case to trial by a jury. (Intd.) R. M.

Agent for Pursuers—John Leishman, W.S.
Agents for Defenders—G. & H. Cairns, W.S.

Thursday, Jan. 24.

SECOND DIVISION.

FITZWILLIAM'S EXECUTORS *v.* FREELAND AND LANCASTER.

Process—Proof—Evidence Act. When the Court remit to a Lord Ordinary to take proof under the Evidence Act he has no power, unless specially authorised, to grant diligence for the recovery of documents, or commission to take the depositions of aged witnesses or witnesses going abroad.

The Court remitted in this case to the Lord Ordinary, under the third section of the recent Evidence Act, to take a proof. When the case came before his Lordship, one of the parties lodged a specification of documents, to recover which he craved the Lord Ordinary to grant a commission and diligence. The Lord Ordinary expressed doubt as to his power to do so, because, although

he was the Lord Ordinary before whom the cause first depended, the Court had power under the Act to remit either to one of themselves or to any other of the Lords Ordinary. He therefore feared that his powers were simply ministerial, and suggested that the application made to him should be renewed in the Inner House. The Court, after consulting with the other judges, expressed an opinion that the Lord Ordinary was right in the view which he had taken of the extent of his powers. The Court granted the motion, with a recommendation that in future, with the view of avoiding such questions and making it unnecessary to come back to the Court, parties should, when the remit is made to the Lord Ordinary, state whether they would require a commissioner to recover documents or to take the depositions of aged persons or witnesses going abroad. When this was done, the Court would, when remitting to the Lord Ordinary, confer upon him the necessary powers.

Counsel for Pursuers—Mr Watson. Agent—J. Henry, S.S.C.

Counsel for Defenders—Mr Millar. Agent—James Webster, S.S.C.

OUTER HOUSE.

(Before Lord Kinloch.)

PATTEN'S TRUSTEES *v.* CAMPBELL'S EXECUTORS.

Expenses—Taxation—Fees to Counsel. Held by Lord Kinloch that agents are entitled to exercise a certain discretion in regard to the amount of counsel's fees, and that the auditor should interfere only when that discretion was abused.

In taxing the pursuers' account of expenses in this case, the auditor of Court deducted £1, 1s. from a fee of £3, 3s. paid to counsel to revise summons; £1, 1s. from a fee of £3, 3s. paid to revise condescendence; £1, 1s. from a fee of £2, 2s. paid to adjust record; £1, 1s. from a fee of £4, 4s. paid to debate; and £2, 2s. from a fee of £6, 6s. paid to senior counsel to debate.

The pursuers objected to the auditor's report, and the Lord Ordinary sustained the objections. His Lordship observed that agents were entitled to exercise a certain discretion as to the fees to be paid to counsel in each particular case, and it was only when that discretion was abused that it was the province of the auditor to interfere. That was not the case in the present instance.

Counsel for Pursuers—Mr N. C. Campbell. Agent—John Forrester, W.S.

Counsel for Defenders—Mr Adam. Agents—Adam, Kirk, & Robertson, W.S.

Friday, Jan. 25.

FIRST DIVISION.

DUKE OF RICHMOND *v.* WHARTON DUFF.

Clause—Reservation—Construction—Usage. A disponer of salmon fishings reserved to himself and his successors in the estate "the privilege of fishing with the rod for our amusement only." *Held* (aff. Lord Barcaple, dub. Lord Deas), that the privilege so reserved was personal, and could not be communicated by the disponer or his successors to their family or friends, there being no allegation of a practice inconsistent with this construction.

This was a question between the Duke of Richmond and Captain Wharton Duff of Orton. In 1829 Captain Duff's predecessor disponed the fishings of Orton in the river Spey to the Duke of Gordon's trustees, in whose right the pursuer now is; and the disposition contained this reservation:—"Reserving always to me, the said Richard Wharton Duff, and my successors in the lands and estate of Orton, the privilege of fishing with the rod for our amusement only." The pursuer contended that this reservation was entirely personal to the proprietor of Orton for the time being, while Captain Duff maintained that it entitled him to fish by his friends living in his house, as well as himself. He did not plead that it entitled him to fish for profit, or even by his gamekeepers or servants.

Lord Barcaple gave effect to the pursuer's construction of the clause, adding to his interlocutor the following

"*Note.*—The question between the parties is whether the privilege of fishing reserved in the disposition of the fishings of Orton by the late Mr Wharton Duff to the Duke of Gordon in 1829 is strictly personal to the proprietors of the estate of Orton for the time being, or may be communicated by them to members of their family, or to friends residing with them at Orton. Looking only to the clause of reservation in the disposition, there do not appear to be *termini habiles* for the more extensive construction contended for by the defender. It is in these terms:—'Reserving always to me, the said Richard Wharton Duff, and my successors in the said lands and estate of Orton, the privilege of fishing with the rod for our amusement only.' This is, in expression at least, the constitution of an individual and personal privilege. If it is not to be so construed, there is nothing in the words of the clause to limit the right in the way proposed by the defender himself, so that it shall only be communicated to friends residing at Orton. Being expressly reserved for amusement only, it could not be exercised by gamekeepers or other hired servants, nor could it be let to sportsmen for a rent. But if the proprietor of Orton may, in the exercise of the privilege, grant permission to others to fish for amusement, it does not appear on what ground his right to do so is to be limited to friends residing at Orton. The defender founded on the case of the Earl of Aboyne *v.* Innes, House of Lords, 10th July 1819, 6 Paton 444, as supporting his contention. But the judgment in that case goes too far for his argument, Mr Innes being found entitled to exercise the privilege of fowling by his gamekeeper, or by any qualified friends. It is not easy to ascertain from the report on what precise ground the decision was rested, but the Lord Ordinary is disposed to think that prescriptive possession was an essential element in the case. As the disposition makes express reference to the lease of the fishings existing at its date, the Lord Ordinary thought it right to have it produced, in order that it might appear whether it affords any light for construing the clause in question. It contains a somewhat similar clause, reserving to Mr Wharton Duff, the landlord, and his successors, 'and to any of their friends that may be at Orton, and have liberty from them, the privilege of fishing with the rod at all legal times during the continuance of this lease, and of appropriating to themselves such fish as they may catch therewith,' accounting to the tacksmen for their value at a certain rate. The Lord Ordinary thinks the larger terms of this clause cannot, upon admissible