executed by two sisters, who held the property *pro indiviso*. They resolved to separate the property, and the disposition was granted by the wife herself, and the destination was in these terms—"To and in favour of the said Ann Ritchie and John Calman, and longest liver of them two, in conjunct fee and liferent, and to the child or children procreate or to be procreate betwixt them, which failing to the said longest liver of them two, and the said longest liver, her or his heirs and assignees whomsoever in fee, heritably and irredeemably." So that was as nearly as possible the same case as we have here. Lord Benholme in that case delivered a most able and exhaustive opinion, in which all the cases were carefully considered—a complete repertory of law upon the whole subject—and he came to the conclusion that the wife was the fiar. In regard to the matter that the ultimate destination was to her husband, Lord Benholme says this—"For, upon this clause it is obvious to remark, that the survivor is here called to the fee only upon the failure of children, which is inconsistent with the notion that the fee was vested in the survivor by the earlier part of the clause. According to the pursuer's argument, the surviving husband takes the fee, both as institute and afterwards as substituted to the children. Whereas the sounder view seems to be that in the earlier part of the clause the survivor, *qua* survivor, takes merely a liferent, whilst in the latter part, where he is called along with his heirs and assignees, he takes a fee as substitute to the children. The children being thus in the destination preferred to the survivor *qua* survivor, the primary fee must be held to remain with the mother, the true proprietrix, to whom the children are heirs of provision."

The truth is, that the matter was only dealt with as a special destination on survivorship in the event of there being no children of the marriage. I do not think that the destination clause here carries the fee to the heirs of the husband at all. The fee was in Lilias Greig.

Lord Young concurred.

Lord Craighill—Apart from authority, the first of the questions presented in this case would be difficult of decision, but fortunately, as I think, there is authority by which it is governed. There is first the case of *Blair* v. *Henderson*, June 16, 1757, 5 Br. Supp. 335, and also the case of *Myles* v. *Calman, &c.*, February 12, 1857, 19 D. 408. It may no doubt be said—and indeed at the debate was said—that the latter of these cases was distinguishable from the present because there the subjects conveyed were conveyed by the wife. These were her own property, and consequently there was room for the contention that there was a stronger presumption that, according to presumed intention, the fee was to go to her heirs than in the present case where the property conveyed was not the wife's, but was the property of her father. This argument, however, is met and is displaced by the former case which I have cited, where the property conveyed was the property not of the wife, but of her father. Taken together, these decisions seem to me decisive of the present controversy, and consequently in my opinion the answer to the first question must be that the fee vested in the wife.

Lord Rutherfurd Clark concurred.

The Court answered the first question by finding that the fee of the subjects vested in Lilias Greig or Brough, and the case was thereafter settled as regarded the other points raised.

Counsel for the First Party—D.-F. Mackintosh, —Kennedy. Agent—Gregor Macgregor, S.S.C.

Counsel for the Second Party—Cheyne—Low. Agent—A. P. Purves, W.S.

Tuesday, July 5.

SECOND DIVISION.

[Lord Trayner, Ordinary.

MACKILL AND OTHERS *v.* WRIGHT BROTHERS & COMPANY.

Shipping Law—Charter-Party—Construction—Shipowner's Duty on Stowage of a Cargo of Coals and Machinery.

A charter-party contained these provisions—"Owners guarantee that the vessel shall carry not less than 2000 tons dead-weight of cargo" for a lump sum of £2200. "Should the vessel not carry the guaranteed dead-weight as above, any expense incurred from this cause to be borne by the owners, and a *pro rata* reduction per ton to be made from the first payment of freight." A cargo of 2000 tons, consisting of coals and locomotive machinery, &c., was tendered for stowage to the shipowners by the charterers. The former stowed the coals and machinery separately, and were thus only able to stow 1691 tons, whereas if they had stowed the coals and machinery together there would have been room for the 2000 tons stipulated in the charter-party.

In an action by the owners against the charterers for full payment of the freight, the Lord Ordinary *held* that the defenders were entitled to a deduction from the lump freight of the freight effeiring to 309 tons, and the expenses caused by the non-shipment of that amount of cargo, upon these grounds—(1) that the shipowners guaranteed that the ship would carry 2000 tons on the voyage in question, subject to the implied obligation of the charterers to furnish cargo of a description that could be stowed up to that weight; (2) that the cargo tendered could have been stowed up to that weight if the coals and machinery had been stowed together; (3) that this was a customary method of stowage, with consent of the shippers; (4) that the shipowners should have obtained these consents, and stowed the cargo accordingly; and (5) that the short shipment not being due to the fault of the charterers, they were entitled to the *pro rata* deduction stipulated in the charter-party. The Second Division *adhered* (*diss.* Lord Rutherfurd Clark). The Lord Justice-Clerk and Lord Young were of opinion (1) that the guarantee in the charter-party was

as to carrying capacity, and not as to the actual fact; (2) that there was no failure of duty on the part of the shipowners; but (3) that under the charter-party a *pro rata* deduction was to be made if the guaranteed dead weight was not carried. Lord Rutherfurd Clark *dissented* on the ground that a deduction could only be allowed either in the case of the shipowners not furnishing a ship of the requisite carrying capacity, or not loading a cargo which with proper stowage could be loaded up to 2000 tons; and that the shippers had not tendered such a cargo.

On 28th May 1886 a charter-party was entered into between Robert Mackill and others, of Glasgow, owners of the steamship "Lauderdale," and Wright Brothers & Company, merchants in London. The provisions so far as bearing materially on the question raised in this case were as follows:—(1) That the ship (then at sea) should proceed to Glasgow and there load all such goods and merchandise as the charterers should tender alongside for shipment, including machinery, the dimensions of the largest pieces thereof being specified, but not beyond what the ship could reasonably stow and carry. (2) That the ship should proceed with her cargo to Kurrachee, and there deliver the same. (3) That the vessel should "deliver the same according to the custom of the port or ports on being paid freight as follows, say for the use and hire of the said steamer a lump sum of £2200 (say two thousand two hundred pounds) in full of all port charges and pilotage." (4) The owners guaranteed that the vessel "shall carry not less than 2000 tons dead-weight of cargo." (5) That "should the vessel not carry the guaranteed dead-weight as above, any expense incurred from this cause to be borne by the owners, and a *pro rata* reduction per ton to be made from the first payment of freight." (6) That a regular stevedore, to be appointed by the charterers, should be employed by the owners to stow the cargo, "to be paid and to be under the direction of the master, who is responsible for improper stowage."

The "Lauderdale" reached Glasgow, and the charterers tendered a cargo of 2000 tons, which consisted of ten locomotive engines and tenders, girders, sleepers, and other railway plant, hogsheads, &c., and coals. Amongst the cargo there were two lots of coal, consisting respectively of 100 and 270 tons. These coals the stevedore placed in holds 3 and 4, separating them from the machinery in holds 1 and 2. The result of this was that a large space in the machinery holds was left unoccupied, and it was found that only 1691 tons of cargo could be stowed, 309 tons, consisting of a quantity of sleepers and hogsheads, having to be left behind. The charterers then offered to allow 270 tons to be stowed among the machinery at an expense to the shipowners of £40, but this offer was refused.

This action was raised by the shipowners for payment of the balance of the full lump freight stipulated in the charter-party. The parties were agreed that this balance amounted to £451, 12s. 8d. The defenders maintained that as the vessel did not carry the guaranteed dead-weight, they were entitled to a *pro rata* deduction from the lump freight in respect of the 309 tons not carried, and also in respect of certain expenses incurred in connection with the non-shipment. In this view of the case the parties agreed that the pursuers were only entitled to a decree for a sum of £106, 12s. 4d. The defenders averred that the short shipment was due to the pursuers' stevedore having adopted the unusual method of stowing the machinery and coals separate, instead of stowing them together, which was the usual method, and the most economical as regarded space. The pursuers replied that the latter method was never adopted, and would cause serious damage to the coal and other cargo.

The pursuers pleaded—"(1) The pursuers having loaded a cargo, and the vessel having proceeded on her voyage therewith, as condescended on, are entitled to decree for the balance of the freight, with interest and expenses as concluded for. (2) The pursuers having stowed as much cargo as the nature of the goods tendered by the defenders would allow, they are not responsible for any alleged shortcoming of the dead weight shipped. (3) Any alleged shortcoming of the cargo shipped being due to the nature of the cargo and to other causes for which the pursuers are not responsible, the defenders are not entitled to claim any deduction in respect thereof."

The defenders pleaded—"(1) The pursuers having failed to stow and carry the guaranteed dead weight of cargo as stipulated in the said charter-party, the defenders are entitled, in terms of said charter-party, to a proportional deduction from the freight payable under the charter-party, and to be reimbursed for the expenses incurred owing to the failure of the vessel to carry the guaranteed dead weight. (2) *Separatim*—In any view, the pursuers were bound to carry as much dead weight as might have been stowed in the 'Lauderdale' by reasonable care and skill, and having failed to do so the defenders are entitled to the abatements and deductions claimed by them. (3) The defenders having all along been willing to account to the pursuers, and to pay them any balance justly due to them, they are entitled to absolvitor with expenses, at all events on payment of the sum tendered."

The proof related to the custom of stowing such a cargo, and also to the question whether the defenders' consent had been obtained to the stowing of 270 tons of coal along with the machinery, at a time when it could have been done. The import of the proof appears from the opinions *infra*.

The Lord Ordinary (Trayner) decerned against the defenders for payment of the sum of £106, 12s. 4d., and *quoad ultra* assoilzied the defenders.

"*Opinion.*— . . . The first question to be decided is, what is the meaning and effect of the clause in the charter-party by which the owners guarantee 'that the vessel shall carry not less than 2000 tons dead weight of cargo.' It is maintained for the pursuers that that clause is only a guarantee that the vessel could carry 2000 tons dead-weight of cargo, but not a guarantee that she would carry that quantity on this particular voyage. I do not, however, so read the clause. To me its language is plain and unambiguous: and I think it means exactly what it says, namely, that the ship shall carry not less than 2000 tons dead weight, and that upon the voyage with reference to which alone the parties were contracting. Had the carrying capacity of the

vessel been the matter guaranteed, the clause could and would have been expressed differently. The other clause of the charter-party which deals with the quantity of cargo appears to me to support this view. It is there stipulated that if the ship should not carry the guaranteed dead weight, a reduction is to be made in the freight proportionate to that part of the cargo not carried. The comparison is to be made between what the owners have guaranteed the vessel shall carry, and that which in point of fact is carried, not between what is carried and the carrying capacity of the vessel. Taking the charter-party as a whole, I am of opinion that the defenders agreed to a slump freight on the guarantee that for that freight 2000 tons dead weight of cargo should be carried, and if less than that weight was carried, the slump freight should suffer reduction in the proportion which the cargo not carried bore to the 2000 tons.

"But even if the pursuers were right in the view for which they contend, the result is not different. Let it be that what was guaranteed was that the vessel *could* carry 2000 tons. It is also bargained that if the vessel 'should not carry the guaranteed dead-weight as above,' the freight should suffer abatement. It is certainly the same thing that is dealt with in both clauses as guaranteed; and so, whether the 2000 tons is the guaranteed capacity, or guaranteed cargo, the freight is to suffer abatement 'should the vessel not carry it.' The vessel did not carry more than 1691 tons, and therefore the freight effeiring to 309 tons falls to be deducted from the slump freight, provided that the short shipment is not attributable to the defenders. I think, however, that the owners' guarantee is subject to the implied condition that the charterers shall tender for shipment 2000 tons of cargo, and cargo of such a description as could to that weight be stowed in the vessel.

"There is no doubt that 2000 tons of cargo were tendered to the pursuers, and in my opinion it was cargo that could have been stowed in the 'Lauderdale.' Among the cargo there were two lots of coals, consisting respectively of 100 and 270 tons. These coals were placed in holds 3 and 4, and occupied space which would otherwise have been available for other goods. The defenders say that the coal should have been stowed, as was customary, among the machinery in holds 1 and 2, the size and character of the machinery making it inevitable that large spaces should be left unoccupied in the holds where it was stowed. It is out of the manner and place in which the coals were stowed that the whole difficulty between the parties has arisen, for if the coals had been stowed among the machinery (as could easily have been done), the after-holds would have afforded space for at least 309 tons more cargo—that is, the whole cargo not shipped. It is proved that it is quite customary to stow coals among heavy pieces of machinery, provided that the owners or shippers of both coal and machinery consent to this being done. Without such consent it is not customary, and would be improper stowage, for the consequences of which the owners would be liable, not only at common law, but also under the stipulations of the charter-party in question. The pursuers say that they had no right to stow the coals among the machinery unless the consent of the shippers of both had been given, and that this was not given. On the other hand, the defenders say that they had nothing to do with the stowage of the cargo, that their whole obligation was to put the cargo alongside, and that if any consents were necessary to enable the pursuers to stow the cargo, it was their business to get such consents. Further, the defenders say (and I think it is proved) that they did consent, as owners of the 270 tons of coal, to its being stowed among the machinery at a time when this could quite well have been done, at an expense to the pursuers of less than £40. I confess I have had some difficulty with this part of the case, but in the end have come to the conclusion that the pursuers were in the wrong. I think they took and acted upon a false view of their duty and obligation to the defenders. Their view was practically this—'There is the ship, put in her what you can, we have no responsibility in the matter'—whereas their duty, in my opinion, undoubtedly was to stow and carry the 2000 tons tendered to them, if it could be done, in order to earn the freight.

"It is said by Mr Craig, the stevedore, that he frequently asked for small cargo or broken stowage, and complained to the defenders' agent of the want of it, and also that if he had got suitable cargo he could have put about 400 tons more on board than was carried by the ship. The defenders' agent says he never heard of any such complaints. Both witnesses seemed to me truthful and frank. I cannot give the evidence of the one any preference over the evidence of the other. But in this conflict of statement I cannot hold it proved that the pursuers ever complained of the want of broken stowage. Even if they did, and assuming it to be the case that at some time there was a want of small goods for broken stowage, it would not alter my judgment. The defenders were not bound to supply cargo either of the kind or at the time demanded by the pursuers. They were bound to give 2000 tons of cargo (the selection or choice of which lay entirely with the defenders) which could be stowed in the 'Lauderdale,' and to place it alongside within ten days of the vessel's being ready to receive it, or pay demurrage. No claim for demurrage is made, and therefore there is no question about the cargo being tendered in time; and as regards the rest of their obligation, the defenders did tender 2000 tons of cargo, which could have been stowed, had the pursuers taken the trouble necessary to enable them to do it in a certain way. But how it was stowed and where was their business, not the defenders'.

"There is no question here raised of breach of contract on either side, or any claim in respect of such breach. The whole question is, What are the contract rights of parties under the charter-party? These, I think, are not doubtful. The pursuers undertook that their vessel would, or at all events could, carry 2000 tons dead-weight of cargo for a slump freight, and it was agreed that if the vessel carried less than the specified weight the freight should suffer a *pro rata* reduction. The pursuers' vessel has only carried 1691 tons in point of fact, and left behind 309 tons of cargo tendered for shipment. The short shipment has not been caused by the fault of the defenders, and therefore I think they are en-

titled under the charter-party to the reduction which they claim."

The pursuers reclaimed.

At advising—

LORD JUSTICE-CLERK—I concur in the result at which the Lord Ordinary has arrived, although I am not quite prepared to affirm entirely some of the grounds on which he has proceeded. The case, although the dealings between the parties were large, in reality turns upon the construction of the charter-party, and certain facts in regard to the stowage of the cargo which lie within a very moderate compass.

It seems that the charter-party, which was executed in 1886, contained certain clauses on which substantially the dispute between these parties has arisen. The steamer was a large one, and the charter-party contains among other clauses one to this effect—"Owners guarantee that the vessel shall carry not less than 2000 tons dead-weight of cargo." Then it provides as follows:—"A regular stevedore and clerks as customary, appointed by the charterers, to be employed by the owners to stow and take account of all goods, received on board with the measurements, &c., to be paid by and to be under the direction of the master, who is responsible for improper stowage." Then, in regard to freight it provides that the vessel should deliver the cargo according to the custom of the port or ports "on being paid freight as follows, say for the use and hire of the said steamer a lump sum of £2200 in full of all port-charges and pilotage." Then it provides the mode in which the freight is to be paid; and further on the charter-party provides—"Should the vessel not carry the guaranteed dead-weight as above, any expense incurred from this cause to be borne by the owners, and a *pro rata* reduction per ton to be made from the first payment of freight."

These are the clauses on which the case turns, and I am of opinion, in the first place, that the guarantee as to the carrying capacity of the vessel was a guarantee that applied to capacity, and not to the actual fact. For the owners to guarantee that she should carry any particular cargo would be unreasonable and unmeaning. What is meant is, that if cargo is brought forward by the charterers to the extent of 2000 tons, the vessel shall have capacity enough to carry it. Then there is the further provision which is expressed in very general terms—"Should the vessel not carry the guaranteed dead-weight as above, any expense incurred from this cause to be borne by the owners, and a *pro rata* reduction per ton to be made from the first payment of freight." I take that to mean that the freight is to be paid on the cargo actually carried, whatever that may be, and that if the cargo actually carried does not come up to 2000 tons, an abatement of the freight payable and calculated on the tonnage is to be made. And the provision does not seem an unreasonable one, because of course it was the interest of the owner and of the charterer that the vessel should carry as much as possible—of the owners in order that they might get their freight calculated on that tonnage, and of the charterers in order that they might have the most profitable use of the vessel. Therefore, it was quite a reasonable provision that, while the vessel was capable of carrying 2000 tons, and was guaranteed reasonably to do so, the freight should be paid for in proportion to the actual tonnage of cargo carried. Of course that view does not imply fault on either side. If the owners, by improper stowage or otherwise, have diminished improperly the carrying capacity, then unquestionably the charterers will have a claim against them. On the other hand, there are many contingencies in the course of the voyage of a large vessel of this kind that might prevent the vessel carrying up to the 2000 tons without any fault on the part of anyone, and it is to meet these contingencies that this clause has been introduced. Such I take to be the actual meaning and intention of the charter-party, and now, how is application of that meaning to be made to the particular facts?

The facts that require to be attended to are simply these—The stevedore was appointed by the charterers and paid by the owners. There was a certain quantity of coals to be taken on board, and there was also a certain quantity of machinery that had to be stowed on board; and the stevedore, acting upon his own responsibility, put the machinery into one part of the hold of the vessel, and the coals into the other. Unquestionably by so doing a good deal of space was occupied by the machinery which ought to have been occupied by ordinary cargo. One can easily understand how a difficulty on such a matter might arise. Complaint was made after that was done, but not before, that the stevedore had not packed the coals along with the machinery so as to fill up the interstices of space. It rather appears that that might have been done, but, on the other hand, it does not appear that there was any duty on the part of the stevedore to do it. On the contrary, the evidence is clear that it was an arrangement which might be injurious both to the machinery and the coals, and the stevedore says he never thought of doing so unless the owners of the cargo desired it. In this case apparently the charterers did desire it, but they did not express their desire until after the thing was done, and ultimately the dispute went off upon the question who should pay the expense of any alteration involved in the removal of coals from the place in which they had been stowed. I am of opinion that there has been no sufficient evidence that the stevedore did anything but what was reasonable and right in the stowage. If the charterers had sooner expressed their view he might have done otherwise, but I am not prepared to say that there was any failure on his part, and there was no fault on the part of the defenders. Therefore the question really arises on the terms of the charter-party, and I am of opinion that, as the vessel did not carry cargo up to the 2000 tons, freight is not chargeable on that amount. I think the Lord Ordinary's judgment is right.

LORD YOUNG—I also agree in the result at which the Lord Ordinary has arrived, although, like your Lordship, I am not able to concur in all the reasons mentioned in the Lord Ordinary's note. At the same time, I am not sure that my dissent from his reasoning is of the same character exactly as your Lordship's. I think there was here no blame imputable to the shipowners in the matter of stowage. I think they stowed the

cargo that was presented to them properly, and that under the circumstances they would not have acted properly had they stowed it otherwise. The result was, however, that they were only able to put on board 1691 tons of the cargo which was presented, which was 309 tons short of the guaranteed dead-weight carrying power of the ship. That raises the question—and it is really the only question in the case—whether, under these circumstances, there is a claim for deduction from the freight stipulated in the charter-party to an extent corresponding to this 309 tons short of the 2000 tons.

There are two provisions in the charter-party upon which the question depends. The one is that which guarantees that the ship shall carry not less than 2000 tons dead-weight of cargo. The other is the provision that should the vessel not carry the guaranteed weight as above mentioned any expense incurred from this cause is to be borne by the owners, and a *pro rata* deduction per ton made from the first payment of freight. Now, I do feel great difficulty in the case. I see great force in the view that the owners only guaranteed that this ship is of capacity to carry dead-weight up to the 2000 tons, and that there is no failure with respect to that guarantee if the particular cargo presented to them when properly stowed can only be received on board to the extent of 1691 tons. I say I think there is great weight in that argument. If a cargo is presented which can only properly be stowed to the weight of 1600 odd tons, that does not show the vessel is not of the guaranteed dead-weight carrying capacity, because whatever the dead-weight carrying capacity of a ship may be, it is quite plain that it would not carry any cargo up to that weight. The area of a ship will not carry just anything up to that. Even attending to the stowing and packing properly, a vessel may not accommodate anything like 2000 tons. On the other hand, the considerations are strong that this was an ordinary cargo—exactly such as was expected, namely, coals and machinery. There was no fault on the part of the shipowners. They were responsible for the proper stowage—for stowing as much as the ship with proper stowage would carry. They stowed the cargo properly, but found that with proper stowage the ship could only carry 1691 tons. Now, that puts it all right so far as they are concerned. So far as the shipper is concerned, he presented the very cargo which was expected, and just as the shipowners were disappointed by finding that they could not stow it up to the carrying power of the ship by 300 tons, so the shipper was disappointed by having 300 tons of his cargo left behind. Now, that is a kind of case which one would expect to find provided for in the charter-party. The intended cargo is presented, but in the result it is found that 300 tons must be left on shore and not taken. Now, that being the actual case which has happened, what then? The charter-party here provides that should the vessel not carry under this contract the guaranteed dead weight, then a *pro rata* deduction of so much per ton shall be made from the payment of freight. In point of fact this vessel did not carry the guaranteed 2000 tons by about 300 tons. If that case is not provided for by the words I have read, I have certainly a difficulty in figuring the kind of clause which would meet the case. Upon that ground therefore I concur in the result which the Lord Ordinary has arrived at, which is just to allow a deduction corresponding to the 300 tons which the ship with proper stowage was unable to take on board.

I do not agree with the argument which was addressed to us in support of the view of the Lord Ordinary any more than I agree with that view of the Lord Ordinary, that it was the duty of the shipowner to put coals amongst the machinery. I think it was not his duty to do so. By the charter-party he was liable for proper stowage, and I think it is according to the evidence that no other stowage which was practised would have been proper. Therefore I do not proceed upon the view that the shipowner ought to have assented to the irregularity, although it may be frequently done, the irregularity, namely, of putting coals amongst the machinery. I proceed simply upon the view which I have stated, that with an ordinary cargo such as was contemplated to be taken, and without fault on either side, there was a carrying power short of what was expected to the extent of 300 tons. I am disposed, although not without some difficulty, to apply the clause to which I have referred to this case, and to allow a corresponding deduction.

Lord Rutherfurd Clark—I am disposed to agree with the Lord Ordinary in the construction which he has put on the charter-party, and to hold (1) that there was an implied obligation on the shipper to furnish a cargo which with proper stowage could be loaded to the stipulated amount; and (2) that a deduction from the gross freight can only be allowed where there has been a breach of obligation on the part of the shipowner, either in not furnishing a ship of the requisite carrying capacity, or in not loading the cargo to the amount of 2000 tons, being able so to do. I think that no breach of obligation in either respect has been committed by the shipowners, for they furnished a ship of the carrying capacity of 2000 tons, and loaded all the cargo which it was possible to load consistent with proper stowage. Hence, in my opinion, it follows that no deduction from the freight can be allowed. I think that the shipper did not here furnish a cargo which with proper stowage could be loaded to the extent of 2000 tons. The only condition on which that amount could have been loaded was that machinery and coals should be stowed together. But that would have been improper stowage unless with the consent of the owners of the machinery and the owners of the coals. This consent I think the shippers were bound to obtain, and to furnish to the shipowner before either the machinery or coals were loaded. They did not do so, and these articles were loaded in separate places in accordance with the intention of the shippers. When it was found that the ship could not carry 2000 tons of dead weight with this form of stowage, it was proposed that the coals and machinery should be stowed together, for which the shippers had obtained the necessary consent. This would have necessitated the removal of part of the cargo, and would of course have caused expense. It appears to me that the expense should have been borne by the shippers, but they declined to do so. Hence I think that the shipowners were

justified in refusing to unload so much of the cargo already loaded, so as to permit of the machinery and coals being stowed together. On the whole, I am opinion that as there was no breach of obligation on their part the shipowners are entitled to receive the full amount of the stipulated freight.

Lord Craighill was absent on circuit.

The Court adhered.

Counsel for Reclaimers—Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Respondents—Jameson—Salvesen. Agents—Boyd, Jameson, & Kelly, W.S.

Wednesday, July 6.

SECOND DIVISION.

[Lord M'Laren Ordinary.

MACFARLANE *v.* BLACK AND COMPANY AND ANOTHER.

Reparation—Slander—Issue.

A newspaper published an article regarding a candidate at a Parliamentary election headed "Macfarlane the Scoffer." The article contained, *inter alia*, this passage—"Is the man who would stand up before a respectable audience and speak sarcastically about 'God Almighty's earth' a man whom you could admire?" In an action of damages for slander, *held* that the pursuer was entitled to an issue.

Another article in the same newspaper stated that it was alleged a boat from the candidate's yacht was observed fishing on Sunday. *Held* (*diss.* Lord Young) that there was no issuable matter in this statement, as it was not alleged in the article that there was fishing on Sunday with the consent or authority of the candidate.

This was an action of damages for slander by Donald Horne Macfarlane, East India merchant, 62 Portland Place, London, against Alexander Black & Company, designed as printers and publishers, 83 and 85 George Street, Oban, and John Stewart of Coll, in the county of Argyll, jointly and severally, the publishers and printers of a newspaper called the *Oban Telegraph and West Highland Chronicle*, on the ground that they had published certain articles in that newspaper of and concerning the pursuer, who was at the time candidate for the Parliamentary representation of the county of Argyll, which were false and slanderous.

The pursuer averred that during the whole period of his candidature the defenders had persistently inserted and published, and caused and allowed to be inserted and published, abusive malicious, calumnious, and untrue statements regarding him, not only in his public capacity, but also in his private character as a gentleman, and in regard to his religious views. That a paragraph was inserted by the defenders in the issue of the said newspaper for 9th July 1886 entitled "Macfarlane the Scoffer." That the paragraph was couched in most offensive terms, and proceeded—"The Irish people tolerate a few vices, but a political quack they at once dismiss. He talks to the 'rabble' in a vulgar and morally offensive way." The same paragraph also put the question—"Is the man who would stand up before a respectable audience and speak sarcastically about 'God Almighty's earth' a man you could admire? The most ignorant crofter in the Highlands would blush to the roots of his ears if he had in an unguarded moment publicly used the same words." That the said paragraph referred to the pursuer, and falsely, calumniously, and maliciously represented him as a scoffer at religion, as morally offensive in his public addresses, and as sneering at the Divine government and Providence.

The pursuer further averred that in the same issue of that newspaper the defenders had inserted and published a paragraph headed, "Mr D. H. Macfarlane's doings" in which, *inter alia*, it was stated—"It is also affirmed that a boat from Mr Macfarlane's yacht was observed fishing near the Lochy on Sunday. Mr John Boyd and other members of the local Land League are reported to be incensed at this conduct, and to have refused to give further support to Mr Macfarlane's candidature."

The pursuer averred that it was untrue that any boat from his yacht fished or was observed fishing near the Lochy on Sunday.

The pursuer pleaded—"(1) The defenders having published in said newspaper a paragraph or paragraphs containing false and calumnious statements in reference to the pursuer, are liable in reparation. (2) The paragraphs libelled being calculated and intended to injure the pursuer, and having had that effect, the pursuer is entitled to reparation for the loss and damage thereby caused."

The defenders pleaded—"(1) The statements of the pursuer are irrelevant and insufficient in law to support the conclusions of the summons. (2) The articles libelled having been only fair comment on the pursuer's political attitude the defenders should be assoilzied. (3) The statements of the defenders not having been false they are entitled to absolvitor. (4) The defenders not having slandered the pursuer are entitled to be assoilzied."

The pursuer proposed the following issues—"(1) It being admitted that on or about 9th July 1886 the defenders wrote, and caused to be published in the '*Oban Telegraph and West Highland Chronicle*' of that date the article contained in Schedule A hereto appended, whether the said article or part thereof is of and concerning the pursuer, and falsely and calumniously represents him as a scoffer at religion, as morally offensive in his public addresses, and as sneering at the Divine government and Providence, or contains similar false and calumnious representations of and concerning the pursuer, to his loss, injury, and damage? (2) It being admitted that on or about 9th July 1886 the defenders wrote and caused to be published in the '*Oban Telegraph and West Highland Chronicle*' of that date the article contained in Schedule B hereto appended, whether said article or part thereof, is of and concerning the pursuer, and falsely and calumniously represents him as a person guilty of a public breach of the Sabbath observance, who was