somewhere between the place where the barge was loaded and the ship's side; much easier to steal the jute before it reached the ship's deck than after, and being easier, more likely to be adopted.

The shipowner, in a case like the present, is not bound to account for the manner in which the difference between the cargo acknowledged in the bill of lading and the cargo actually delivered has arisen. He must show that he delivered all that was shipped, and such evidence must be sufficient to overcome the *prima facie* evidence against him which the bill of lading presents. He has no other *onus*. Looking to the whole circumstances of the case, but having regard particularly (1) to the fact that the vessel on arrival at her port of discharge was so fully loaded that another bale could not have been got into the hold, and that therefore she had carried and delivered all that could have been shipped in the ordinary sense of that term, and (2) to the positive testimony of the master and mates of the "Emir," that every bale was delivered which was put on board at Calcutta, I am of opinion that the pursuers have discharged the whole *onus* laid upon them. I venture to think that the discrepancy between the bills of lading and the quantity delivered might reasonably be accounted for, were that necessary, by the occurrence of mere mistake or negligence on the part of the tallymen. I should not be surprised if on the loading of 25,000 bales as this cargo was loaded—many at four hatches at the same time—some mistake occurred in noting down the exact number received, or that a tallyman should (if he found his own figures to differ from the bargeman's note) accept the latter as correct. Such a mode of accounting for the difference would be more readily accepted by me than the unsupported suggestion of theft committed from the ship's deck, in itself very improbable, considering the difficulties attending the perpetration of that crime, and the great probability of its detection. I am therefore for recalling the interlocutor of the Lord Ordinary, and finding the pursuers entitled to decree for £32, 4s. 2d., being the sum sued for under deduction (as the pursuers admit should be made) of £3, 3s., being the freight effeiring to the twelve bales not delivered, because not shipped nor carried.

LORD JUSTICE-CLERK—That is the opinion of the Court.

The Court recalled the Lord Ordinary's interlocutor, and gave decree in favour of pursuers for £29, 1s. 2d.

Counsel for the Pursuers—Ure—Salvesen. Agents—Lindsay & Wallace, W.S.

Counsel for the Defenders—C. S. Dickson—Aitken. Agents—Boyd, Jameson, & Kelly, W.S.

Saturday, February 2.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

LORD ADVOCATE *v.* M'CULLOCH.

Revenue—Succession Duty—Entail—"Predecessor"—Succession Duty Acts, 1853 (16 *and* 17 *Vict. cap.* 51), *secs.* 2 *and* 10, 1888 (51 *Vict. cap.* 8), *sec.* 21 (1).

An entailer destined an estate in 1752 to himself and to D, his only son, and the heirs-male of D's body, and the heirs-male of their bodies, which failing to the heirs-female of D's body. W, the last of D's heirs-male, died without issue in 1892, and the estate then passed to his niece J, who was the great-granddaughter of D, and the heir-female of his body.

Held that in the sense of the Succession Duty Acts J did not take from her uncle W as her predecessor by devolution of law (in which case the succession-duty payable would have been 4½ per cent. on the value of the succession), but succeeded by disposition from her lineal ascendant, the maker of the entail, and was liable to pay duty only at the rate of 1½ per cent.

By deed of entail dated 23rd November 1752, Edward M'Culloch of Ardwall, Kirkcudbright, destined the lands and estate of Ardwall as follows—"To myself, and to David M'Culloch, my only lawfull son, and the heirs-male of his body, and the heirs-male of their bodys, which failing to the heirs-female of his body and the heirs-male of their bodys, which failing to Elizabeth M'Culloch, my eldest lawfull daughter, and the heirs-male of her body, and the heirs-male of their bodys, which failing to Jannet M'Culloch, my second lawfull daughter, and the heirs-male of her body, and the heirs-male of their bodys, which failing to the heirs-female to be procreate of the bodys of my heirs-female foresaid, and the heirs-male of their bodys, the eldest heir-female always succeeding without division, and excluding all heirs-portioners, which failing" in favour of the other heirs mentioned.

Walter M'Culloch, the grandson of David M'Culloch, died in March 1892 without issue. On his death the heirs-male of the body of David M'Culloch were exhausted, and the succession opened to Walter M'Culloch's niece, Mrs Christian Jameson M'Culloch, the great-granddaughter of David M'Culloch, as eldest and nearest heir-female of his body. Mrs M'Culloch duly completed her title under the deed of entail on 20th June 1892.

The Crown claimed succession-duty from Mrs M'Culloch at the rate of 4½ per cent. on the capitalised value of her succession, and on 10th July 1894 raised an action against her for payment of £547, 19s. 4d., as the instalments already due of the total sum of £1461, 5s., alleged to be payable by her.

The pursuer averred that the defender's

"predecessor" was her uncle Walter M'Culloch, from whom she took by devolution of law, and that she was therefore liable to duty at the rate of 4½ per cent., and pleaded—"(1) Mrs Jameson M'Culloch being a member of the same *stirps* of the entail as the said Walter M'Culloch, and having taken by devolution from him as her immediate predecessor, is chargeable with succession duty at the rate of 4½ per cent. as a descendant of his sister."

The defender averred that she succeeded by disposition from the entailer as the first of a new series of heirs, and that as he, being her lineal ascendant, was her predecessor, she was liable only in succession duty at the rate of 1½ per cent. This amount she tendered.

The Succession Duty Acts of 1853 (16 and 17 Vict. cap. 51), sec. 10, and 1888 (51 Vict. cap. 8), sec. 21, sub-sec. 1, provide that the succession-duty payable when the successor is a lineal descendant of the predecessor shall be at the rate of 1½ per cent. upon the value of the successor's interest, and that where the successor shall be a descendant of a brother or sister of the predecessor, the duty payable shall be at the rate of 4½ per cent. Section 2 of the Act of 1853 defines "predecessor" as "the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

The Lord Ordinary (WELLWOOD) on 6th December 1894 pronounced the following interlocutor:—"Finds that the defender, Mrs Jameson M'Culloch, takes the estate mentioned on record by disposition from the entailer, and not by devolution by law, and is therefore liable only in succession-duty at the rate of 1½ per cent.: Therefore assoilzies the defenders from the conclusions of the summons, and decerns: Finds the defenders entitled to expenses," &c.

"*Opinion.*— . . . This suit is brought by the Crown in order to determine the rate at which the succession-duty payable by the defender is to be calculated, the rate depending upon whether it is to be calculated according to her relationship to the last possessor, her uncle Walter M'Culloch, or to her great-great-grandfather, the maker of the entail. In the former case the succession-duty payable will be at the rate of 4½ per cent., in the latter it will only be at the rate of 1½ per cent.

"The question depends upon whether, within the meaning of the 2nd section of the Succession-Duty Act of 1853, the defender's 'predecessor' is her uncle Walter M'Culloch, or her lineal ascendant, the maker of the entail, and that again depends upon whether, in the sense of the statute, the defender takes by 'devolution by law' or by 'disposition' from the settlor—that is, the entailer, or to use the equivalent English expressions, 'by descent' or 'by purchase.' The Crown maintains that the defender takes 'by devolution by law,' because she is not named or circumstantially described in the deed, but takes in respect of being one of the heirs of the body of David M'Culloch, a substitute called by name. The defender, on the other hand, maintains that she takes as a fresh *stirps* or first of a new series of heirs, being the nearest heir-female of David M'Culloch.

"To maintain that a person who is called and takes as one of the heirs-female of the body of a substitute previously called by name takes 'by disposition' and not 'by devolution by law,' 'by purchase' and not 'by descent,' seems at first a contradiction in terms. If the destination had been to David M'Culloch and the 'heirs-female of his body,' it would not have been stateable. But it is contended, on behalf of the defender, that the case is different, in respect that the 'heirs-male of the body' of David M'Culloch are called before the 'heirs-female of his body,' and form a separate and independent series of heirs, and that accordingly when the 'heirs-male of the body' were exhausted, and the succession opened to 'heirs-female of the body,' the latter constituted a fresh series, and the nearest heir-female of the body took 'by disposition' from the entailer, and not 'by devolution by law.' Though not without difficulty, I have come to think that the defender's contention is sound.

"Devolution by law does not necessarily infer devolution according to the legal order of succession. In Scotland an entailer may select any known legal category of heirs—heirs of the body, heirs-male of the body, or heirs-female of the body. They are all separate and distinct classes, though none of them represent the ordinary legal order of succession.

"But the entailer having once selected the class or series down which the succession is to devolve, it is left to the law to ascertain the course of devolution—that is, to ascertain who is the person entitled to succeed of the class named by the entailer.

"So long as the line or groove selected by the entailer, in which the estate is to devolve, is not exhausted, each heir takes 'by devolution by law' or 'descent' from his immediate 'predecessor' in that class whatever his precise relationship to him may be. In order to take 'by devolution by law' there must be some relationship within the same class between the successor and the last possessor of the property. The only question is, who is the next heir-male or heir-female, as the case may be? The head of the *stirps* is not the 'predecessor' or 'ancestor' in the sense of the statute; the last possessor is the 'ancestor' and 'predecessor' of the person who succeeds him by devolution by law within the class.

"But if the class selected is exhausted or fails, and another distinct class is called, the first of that class to take in no reasonable sense takes 'by descent' from the last of the extinct class.

"In this question, that is, in deciding whether an heir takes by 'devolution' or 'disposition,' the precise relationship between 'predecessor' and 'successor' is comparatively unimportant. The heir *alioqui successurus* of the last proprietor may take by 'disposition' if called by name or circumstantially described in the deed. Again, a distant cousin or an uncle may take 'by devolution by law,' though the last pro-

prietor has left a daughter. What is material is the mode in which the substitute is called. If he is not called as one of the same class with the last proprietor, the latter is not his 'predecessor.' If here the entailer intended to call heirs-female of the body of David M'Culloch as a separate *stirps*, as he was admittedly entitled to do, could he have done it in any other way? If it had been permissible to treat David M'Culloch as the defender's 'ancestor' the solution would have been simple. But this cannot be done. The test is not relationship to the head of the *stirps*, but to the last proprietor, and that being an artificial test, the existence of the relation of predecessor and successor between the last proprietor and the heir succeeding depends entirely upon the last proprietor having been one of the same class of heirs with the successor in the property. That being so, and Walter M'Culloch not having been one of the same class of heirs as the defender, the only alternative is to hold that the defender is circumstantially described as heir-female of the body of David M'Culloch, and that the entailer is her 'predecessor.'

"The structure of the destination in the entail of 1752 gives emphasis to this view, because the distinction between the different legal classes of heirs is there well marked. Each separate series of *stirpes* is introduced by the words 'which failing.' In some cases the heirs-female of the body of a substitute, whose heirs-male of the body have been already called, are separated by the interjection of another substitute, and his or their heirs-male who are called before them. For instance, the substitute next called is Elizabeth M'Culloch, eldest daughter of the entailer, and the heirs-male of her body, and the heirs-male of their bodies, but instead of next calling the heirs-female of the body of Elizabeth, the entailer calls his second daughter Jannet M'Culloch, and the heirs-male of her body, and then, and then only, calls 'the heirs-female to be procreate of my heirs-female foresaid and the heirs-male of their bodys.' If the eldest heir-female of the body of Elizabeth were to succeed the last heir-male of the body of Jannet, *quid juris?* Would she take 'by devolution by law' from the last proprietor, or from the last heir-male of the body of Elizabeth, or by disposition from the entailer? Surely from the last, and yet she would be called and take, as the defender does, as an heir-female of the body of a substitute previously called by name. In principle I cannot distinguish the present case, though at first sight the order of calling makes the principle more difficult of application.

"The defender is not of the same class with Walter M'Culloch. She is not an heir-male of the body of David M'Culloch. No doubt Walter M'Culloch was a lineal descendant of David M'Culloch, as is the defender, and if the entailer had called 'heirs of the body' of David M'Culloch, and the defender had been the nearest heir of the body after Walter M'Culloch, he would have been her predecessor. But the entailer selected 'heirs-male of the body,' of which class the defender is not one. The devolution in that line ceased on Walter M'Culloch's death, and it then became necessary to revert to the deed to see what class of heirs were called after 'heirs-male of the body' of David M'Culloch. The law could not discharge that function.

"It might be otherwise were it permissible to treat the heirs-female of the body of David M'Culloch as forming a continuous class or line of heirship with heirs-male of the body; as, *e.g.*, by reading the destination 'to David M'Culloch and the heirs of his body, heirs-male taking first and heirs-female afterwards.' But, even if this could be done by the use of other terms, it has not been done by the entailer. He has preferred the heirs-male of the body of David M'Culloch as a distinct class of heirs; and although he next calls the heirs female of the body of the same substitute David M'Culloch (which he does not do in the other named substitutes), he calls them also as a separate class.

"In short, devolution by law must, in my opinion, be within the class selected; there cannot be devolution by law from one class to another.

"I am told, and I believe it to be the case, that the precise question raised in this case has never before arisen for decision. But I think that the reasoning upon which the decided cases proceeded justifies the conclusion at which I feel myself constrained to arrive. In *Lord Saltoun's* case Lord Saltoun was held to take by disposition, because he took *nominatim*, although he was an heir-male of the body of the entailer and *alioqui successurus* to his brother, the last possessor of the estate. In the course of Lord Neaves' opinion in that case, 21 D. 133, he says—'The destination being in favour of a certain class of legal heirs which it is left to the law to work out, it seems reasonable to say that this series of persons would take by devolution of law, and might be held to derive right from the party to whom they are thus substituted in the character of heirs, the deed leaving it to the law to ascertain and fix their rights in relation to that party as their ancestor. In that view each of the heirs of this class would be held as the predecessor of the immediately succeeding proprietor, and would pay succession duty accordingly; and the same principle might, though not with equal force, apply to every class of legal heirs, such as heirs-male of the body, heirs-male, &c.'

"In the case of *Lord Advocate* v. *Gordon*, July 7, 1872, 10 Macph. 1015, Carlos Pedro Gordon, the heir succeeding, took as an heir-male of Mary Gordon in succession to John Joseph Gordon, who was also an heir-male of Mary Gordon. They were thus within the same class of heirs, and accordingly it was held that, although the defender was the uncle of the last proprietor, he took by devolution by law, and that his nephew was his predecessor in the sense of the statute. The opinions delivered in that case are most instructive, and Lord Ormidale's opinion as Lord Ordinary contains a very

clear exposition of what was decided in *Lord Saltoun's* case.

"In the next case, the *Lord Advocate* v. *Lord Zetland*, December 5, 1876, 4 R. 199, and 5 R. (H. of L.) 51, the defender Lord Zetland succeeded his uncle under a destination to heirs-male of the body. He was thus within the same class as the last proprietor. It was held that he took by devolution by law. In the course of a long and elaborate opinion Lord Hatherley made the following observations, which I think have a bearing on the present case. At p. 56 he quotes with approval the observations of Lord President Inglis—'With regard to this, my Lords, I think that the case is very clearly put by the Lord President—"The entailer has selected the class he wishes to favour—heirs-male of the body—but he has left to the law to say what shall be the order of succession of the individuals within that class. The law, on the death of the eldest son of the *nominatim* substitute, prescribes that the son of that eldest son, and not his immediate younger brother, shall take as the next heir-male of the body of the *nominatim* substitute." He proceeds to say—"The will of the entailer, when he calls a class of heirs-male of the body, is, that the law shall determine within that class who is the person to take on every occasion on which a death occurs among the class causing a devolution of the estate, and from this it seems to follow that on every occasion the transmission of the estate from the dead to the living is a devolution by law."' Lord Hatherley then proceeds—'That, I apprehend, is a very correct mode of putting it, and when you find the word "derived," which has somewhat of a metaphorical aspect, used in the section, you have to say that the donor points to so many fountainheads; but he leaves it to the law to say which is to "derive" the title to the interest under the settlement. The settlement goes on to a certain point when it is arrested, we will say, by the death of a person without issue, and nothing being left to the settlor to do, he having done all that he had to do, and given all directions that he had to give upon the subject in his original deed, the law then provides another channel, following the same course of the stream, going back a little way in the stream and drawing out a channel from thence, and bringing in the nephew as successor to the uncle, and so on. In the later period the title of the succession is derived by law in accordance with the settlement; but it is always derived from the immediate predecessor in the line of heirship which is pointed out by the deed. It seems to me that the only function of the deed, and the only use of the deed, is this—You must go to the deed to find the fountainhead, the *stirps*, the institute, or the substitute, as the case may be. When you have found the institute, or the substitute, who is given to you *nominatim*, it is left to the law to say how it shall devolve. The law then takes upon itself that function, and says how it shall devolve. Though it be a fettered estate it is to devolve to the heirs whom the law points out.'

"As I have already said, I have felt great difficulty about this case. The natural course seems to be to hold that all the heirs of the body, male and female, of David M'Culloch, took by descent; but, on fuller consideration of the previous decisions on the construction of the 2nd section of the Succession Duty Act, and the reasoning on which they proceed, I think that the logical result is in favour of the defender's contention.

"I shall therefore find that the defender takes by disposition from the entailer, and not by devolution by law from her uncle Walter M'Culloch, and that accordingly she is liable in succession-duty at the rate of 1½ per cent."

The pursuer reclaimed, and argued—The pursuer took by devolution of law from her uncle Walter, because she was not named or circumstantially described in the deed of entail, but came after him in accordance with the order fixed in the deed, as one of the *stirps* beginning with David M'Culloch. It was not necessary for devolution to go in the ordinary legal order of succession; it might be according to the directions of the deed—*Lord Advocate* v. *Lord Saltoun*, June 7, 1860, 3 Macq. 659; *Lord Advocate* v. *Home-Drummond*, November 12, 1867, 40 S.J. 21. The deed fixed the order in which David's heirs were to succeed, and the law showed who was to succeed in that order. The defender therefore was not one of a new class, but merely the next of David's heirs in the order of succession, and so succeeded her uncle.

Argued for the defender—The pursuer's argument was founded on a fallacy as to the meaning of "*stirps;*" *stirps* was not mentioned in the statutes. It was necessary to consider whether the ordinary law of succession was sufficient to carry out the purposes of the entail, or whether you had to look back to the deed itself. So long as there were heirs-male of the body of David M'Culloch, they naturally succeeded one another by devolution of law. But when they ceased, the defender had to refer back to the deed of entail to show that she was one of the next favoured class, the heirs-female, for the ordinary law of succession was not enough for her. Accordingly, she must take by disposition from the entailer—*Lord Advocate* v. *Gordon*, July 19, 1872, 10 Macph. 1015, at p. 1022; *Lord Advocate* v. *Lord Zetland*, December 5, 1876, 4 R. 199, at p. 205; February 12, 1878, 5 R. (H. of L.), p. 51.

At advising—

LORD PRESIDENT—I agree with the Lord Ordinary, and my opinion may be very briefly stated. The question in what cases anyone takes an estate by disposition, and in what cases by devolution, has been so fully discussed in the three decisions cited by his Lordship, that I do not think it doubtful to which class the present case belongs.

The deed of Edward M'Culloch gave the estate first to David M'Culloch and the heirs-male of his body and the heirs-male

of their bodies. Each heir-male took undoubtedly by devolution by law, the deed having specified the class of heirs and left the law to devolve the estate within that class. Walter M'Culloch, the heir-male just dead, so took by devolution of law. Had he left a son, that son would have taken by devolution by law, and would have been the successor of Walter in the line of heirs-male of David M'Culloch.

Now, however, Mrs Jameson M'Culloch takes, not because she is heir-male, but on the contrary, because there are no more heirs-male. Neither does she claim, because it is a legal consequence of the destination to heirs-male that she should now take. On the contrary, she points to the deed of Edward, the entailer, which, now that the law has executed his commission to devolve the estate down the line of heirs-male, steps in and starts a fresh line of succession.

To my thinking the case is just the same as if the heirs-female now called had been the heirs-female of some stranger, who and whose heirs-male had never yet taken at all. Suppose that, instead of going back to David and giving to his heirs-female, the entailer had called the heirs-female of some son, or relation, or stranger not hitherto named in the deed—the heirs-female let us say of some Mark M'Culloch—they surely would take by disposition. The argument would be merely the extension of *Saltoun's* case from a man named to the heirs (or a particular class of heirs) of a man named. I cannot see how it can make any difference that the new class of heirs are the heirs-female of a man whose heirs-male have been exhausted. In the one case, as in the other, you have to go back to the deed for a fresh start, instead of letting the law work out the line first started.

I am for adhering.

LORD ADAM concurred.

LORD KINNEAR—I am entirely of the same opinion, for the same reasons. The rule laid down in the case of *Lord Saltoun* is that, where a successor derives his title by descent, the person through whom he claims as his ancestor is by a reasonable construction of the Act his predecessor, but when the lands are taken, not by descent from the person last vest and seised in them, but by operation of the deed, by a person who is his heir-general, or heir of any particular class through the last possessor, then the settlor must be the predecessor.

Therefore, agreeing with everything your Lordship has said, I do not think it necessary to add any further observations.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Pursuer—Sol.-Gen. Shaw—A. J. Young. Agent—P. J. Hamilton Grierson, Solicitor of Inland Revenue.

Counsel for the Defender — Graham-Murray, Q.C. — Crole. Agents — Boyd, Jameson, & Kelly, W.S.

Saturday, February 2.

FIRST DIVISION.

WATSONS *v.* ROBERTSON AND OTHERS.

Process—Nobile Officium—Petition to Compel Arbiter to Proceed—Competency.

Held that a summary petition craving the Court to ordain arbiters to issue an award was not an appropriate form of procedure in a case where the questions to be decided were of some complexity and involved disputed facts.

By a mineral lease dated 19th May 1893, Messrs John Watson and Thomas William Watson leased from Lord Belhaven and Stenton a coal-field on his estate, with entry at Whitsunday 1893. It was provided that the tenants should be entitled to give up the lease at Martinmas 1893 on giving a month's notice, and that the landlord should be entitled at its termination to take over certain plant and machinery at a valuation to be made by two men of skill to be mutually chosen by the parties as arbiters, or by an oversman to be named in case the arbiters should differ. Lord Belhaven and Stenton died upon 6th September 1893, and Mr Ralph Dundas, C.S., Edinburgh, was appointed judicial factor *ad interim* on his estates. The lessees gave up their lease at Martinmas 1893, and the judicial factor intimated to them that he was prepared to take over in terms of the lease—(1) The whole machinery and fittings at Nether Johnstone pit, (2) the whole machinery and fittings at Over Johnstone pit, (3) certain machinery and fittings at No. 10 pit, and (4) houses and buildings on the said lands belonging to the lessees.

In accordance with this intimation a deed of submission was entered into on the 6th December 1893, whereby the lessees nominated David Rankine, and the judicial factor nominated William Robertson, as arbiters for the purpose of valuing the machinery, plant, &c., in accordance with the terms of the lease. The arbiters appointed John Stedman Dixon as oversman. The arbiters met on the ground on the 8th December 1893 and at other dates, and mutually agreed on the valuation of all the plant and machinery except that in No. 10 pit. They did not, however, issue any award.

On 16th November 1894 the lessees, Messrs John and Thomas Watson, presented a petition to the Court of Session craving the Court "to ordain the said William Robertson to join with the said David Rankine within such short time as your Lordships may fix, in making and issuing as arbiters aforesaid an award under the said reference fixing the value of the subject particularly set forth in said deed of submission, or otherwise in the event of the said William Robertson and David Rankine differing in opinion as to said value within such time, to ordain the said William Robertson to