went on while he was looking after the stowage in the forehold, probably about twice a-day. There is therefore good ground for saying that the shortcomings of the mate in respect of his ability to prove the tally would account for the contention of the pursuers that they have in fact carried an extra quantity up to 653 fathoms.

Now it is not only legitimate but a very simple mode of proof, when there is a dispute as to how much cargo has been carried by a timber-carrying vessel, to prove that she was carefully stowed and fully laden down to her marks, and that on previous occasions when carefully stowed and fully laden down to her marks she had turned out such and such a quantity of timber, and perfectly valid inferences constantly are drawn from that circumstance. So far as my experience goes inferences drawn from the weight of the timber turned out are more rare and more difficult, because, as my noble and learned friend on the Woolsack has pointed out, everything there depends upon the extent of the saturation or the amount of adhering ice in the cargo. If the Lord Ordinary, having had all these different classes of evidence before him, had said that upon the whole he thought that he could draw a satisfactory inference from the proof of the previous performances of this vessel to supplement the shortcomings of the mate in regard to the tally, I am not prepared to say that I should have thought his judgment could have been criticised; but, unfortunately, he appears to have failed to perceive that as to part of the proof of the tally it was erroneous, and he appears to have been guided by the conclusion that as the pursuers had made a serious and candid effort to carry out their duties under the charter-party and as the defenders had declined to participate in the performance of that duty, he might therefore attach a credence to the pursuers' figures which the proof of them did not entitle him to do, and, as he says, "It is possible that the pursuers' figures may not be quite accurate, still they are at least substantially accurate, and they were ascertained by the method provided in the charter-party and in accordance with the usual custom. The defenders were invited to check them and declined to do so. They relied upon their own figures, and have not proved that they were correct. I am therefore of opinion that they have failed in this branch of the case also." He appears to have thought that under those circumstances the fact that the defenders proved no alternative measurement was warrant for his upholding the claim of the pursuers to have proved their figures.

Now under these circumstances I think that one cannot rest upon his judgment simply as a judgment of the learned Judge who had the opportunity of seeing the witnesses, who considered the facts, and who sitting without a jury dealt with it as a jury question might have been dealt with; and I agree with the conclusions of their Lordships in the Extra Division that as to the proof of the tally at St Petersburg the inability of the mate, the only witness called, to speak to the whole of the tally is fatal. It is true that their Lordships do not appear in their judgments to have directed attention specifically to the facts proved with regard to previous cargoes and to have examined the question how far they would make good the want of sufficient proof of the tally, but they had those figures before them, and so have your Lordships, and, speaking for myself, I am unable to draw any satisfactory conclusion from the previous out-turns; they were largely out-turns of pulp wood. They varied very remarkably. The height of the deck cargo in each case also varies remarkably, and I think it to be impossible to draw any satisfactory conclusion from data so very different which would enable one to say that, assuming that the vessel was carefully stowed throughout and carried all that she could carry, she must have carried more than the 595 fathoms upon which freight has been paid. It is probable that she did, but I cannot on this evidence bring myself to say that it is proved, and the evidence as to the weight given by one witness seems to me to be still less satisfactory, not that it is not perfectly honestly given, but that the data are too uncertain to enable one to draw any satisfactory conclusion from it.

LORD WRENBURY—I concur, and it appears to me that the appellants, failing upon the merits, cannot put forward successfully the contention which they have raised as to our interfering in any way with the manner in which the costs were dealt with in the Court below.

Their Lordships dismissed the appeal, with expenses.

Counsel for the Appellants (Pursuers)—Horne, K.C.—Lippe. Agents—Boyd, Jameson, & Young, W.S., Edinburgh—Holman, Fenwick, & Willan, London.

Counsel for the Respondents (Defenders)—Condie Sandeman, K.C.—Jamieson. Agents—Borland, King, Shaw, & Company, Glasgow—Dove, Lockhart, & Smart, S.S.C., Edinburgh—Ince, Colt, Ince, & Roscoe, London.

COURT OF SESSION.

Saturday, May 20.

SECOND DIVISION.

LYNCH *v.* THE CROWN STEAMSHIP COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Accident Arising out of the Employment—Unexplained Disappearance of Ship's Cook—Inference from Proved Facts.*

In a claim for compensation by the dependents of a ship's cook who had been last seen in the ship's galley when the vessel was at sea, the arbiter found that there were not facts admitted or

proved from which it could be inferred that the deceased met his death by accident arising out of his employment, and refused compensation. *Held* that the arbitrator was entitled so to find, and that he had not misdirected himself in law.

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) in the Sheriff Court at Glasgow, between Mrs Georgina Loutit or Lynch, widow of the deceased John Lynch, 6 Muir Street, Renfrew, as an individual and also as tutor of her pupil child, and another, *appellants*, and the Crown Steamship Company Limited, *respondents*, the Sheriff-Substitute (MACKENZIE) refused to award compensation, and at the request of the claimants stated a Case for appeal.

The Case stated — "The following *facts* were established, viz. — . . . That on 22nd January 1914 the said deceased John Lynch signed on with the respondents as ship's cook and baker on board the s.s. 'Crown of Navarre' belonging to them, and sailed from Glasgow on board the said ship for the West Indies. That on 25th January 1914, when the said ship was three days' journey from Glasgow, the said John Lynch about 6·45 a.m. was in the ship's galley, which is on the bridge deck, and after looking for something there and directing the second cook to have the porridge on at 7 a.m., remarked 'This is a hell of a job;' that he thereafter left the galley and was never seen again by anybody on board. That the said bridge deck on which the galley is situated is fenced by a strong iron railing about 3 feet high with uprights about 4 feet apart; that there was no observable grease on the deck that morning. That on the Friday before the 25th January, which was a Sunday, the deceased had caught hold of the second cook by the arm and said 'Let's finish it,' which the second cook understood at the time as a joke. That there is no evidence beyond that of the captain that the deceased suffered in any way from depression, and he only remarks that he seemed 'a little depressed;' that the deceased was on the best relations with his family. That about 7·30 a.m. on said 25th January the chief steward informed the captain that the chief cook was amissing; that all hands were mustered, a boat got ready, and a hand sent into the forerigging; that the ship was put back on her course and cruised about in the hope of discovering the missing man, but that nothing was seen, and about 9·52 the ship was put on her course again. . . .

"I found in *law* that there are not facts admitted or proved in this case from which it could be inferred that the deceased met his death by accident arising out of and in the course of his employment with the respondents. I therefore found that the respondents were not liable in compensation to the appellants in respect of said death, and found the appellants liable to the respondents in expenses."

In his *note* the Sheriff-Substitute stated—"There is a faint trace of evidence on the part of the captain that this man was 'a little depressed,' but this is not supported, indeed rather opposed, by the other testimony. The young man Judge speaks of his once catching him by the arm and saying, 'Let's finish it,' but he evidently regarded this as a joke, and gave no real tragic meaning to it. Here, then, is a man who goes out of the place where his immediate work is situated, without apparently any of his working tools or utensils in his hand, no apparent duty calling him forth, who gives directions for something to be done by his assistant in about quarter of an hour—and mysteriously disappears.

"The pursuers have the *onus* of showing at least by reasonable inference from proved facts that his death arose by accident out of and in the course of his employment. It was in the course of that employment, but I do not feel entitled to draw the inference that it arose out of it.

"It is not necessary to regard suicide as the only, or even the most likely, alternative. The evidence pointing in this direction is too faint to overcome the natural presumption against any such a conclusion. There are other ways in which he may have fallen into the sea, by pure misadventure, or by trying some dangerous route in the narrow compass of the ship, or even by risking his life by leaning for some purpose of his own, or for amusement, too far over the railings. All this is conjecture. There is nothing, so far as I can discover, to connect his disappearance with a risk incidental to his work as a ship's cook.

"The case of *Kerr or Lendrum* v. *The Ayr Steam Shipping Company*, 1915 A.C. 217, certainly suggests an analogy with this case, but I am inclined to think that there were important circumstances present there which are not here. There is no evidence that the deceased man Lynch was affected with sickness or had been seen leaning over the railings in such a condition. The case of *Proctor*, 1915 W.C.C. 425, is, I think, distinguishable as there was there the inference arising from the facts that the deceased engineer had been engaged examining the screw. On the other hand, the two cases of *Bender* and *Marshall*, 2 B. 22 and 3 B. 514 respectively, present similar difficulties to the present case. I have said it is with regret that I follow these, as I cannot help feeling that where the truth cannot be ascertained the absence of inference may bear more hardly upon the pursuers than a different judgment would upon the defenders. But the statutory conditions of compensation must in every case be fulfilled."

The *question of law* was—"Whether on the above findings in fact the arbitrator could competently find that it was not proved that the deceased John Lynch met his death by accident arising out of his employment with the respondents?"

Argued for the appellants—The arbiter had not pronounced a finding in fact against the claim by the defendants, but had wrongly felt himself precluded by authorities from arriving in law at a finding that deceased met his death by an accident arising out of his employment. Suicide was negatived, and there was no evidence of foul play, or that the deceased had added a risk to his

employment. The *onus* upon the claimants did not require them to exclude every possibility that could be suggested against their claim—*Lendrum* v. *Ayr Steam Shipping Company, Limited*, 1914 S.C. (H.L.) 91, *per* Lord Loreburn at p. 93, 51 S.L.R. 733. It was a reasonable inference that the deceased met his death by an accident arising out of and in the course of his employment, and the arbiter ought so to have found in law. He had in reality misdirected himself in law, and had not given effect to the cases where compensation had been awarded in circumstances similar to the present case—*Mackinnon* v. *Miller*, 1909 S.C. 373, 46 S.L.R. 299; "*Swansea Vale*" v. *Rice*, [1912] A.C. 238; *Lendrum* (*supra*); "*Serbino*" v. *Proctor*, [1916] 1 A.C. 464. These cases were not outweighed by such cases as *Bender* v. *Zent*, [1909] 2 K.B. 41, and *Marshall* v. "*Wild Rose*," [1909] 2 K.B. 46, *aff.* [1910] A.C. 486.

The respondents were not called upon.

LORD JUSTICE-CLERK—Mr Mackay, as he always does, has said everything that can be said in this case, but I do not think it is one in which we can interfere. The arbitrator states all the facts that he has found proved, and then he says that from these facts he cannot infer that this accident arose out of and in the course of the employment. He perhaps goes further than he intended, for according to the explanation in his note he might have found that the accident arose in the course of the employment but could not draw the inference that it arose out of the employment.

Whatever our duties or our powers may be, I do not think the facts stated here would warrant us in taking any further steps in the case. If it were within our power it would be in accordance with our legal duty to send this case back to the arbitrator and say to him that he had not applied his mind to the question whether he could properly infer that this accident arose out of the deceased's employment. But it seems to me that he has already applied his mind to the question and has negatived that conclusion. In the circumstances of this case I think he is final in that matter, and we have no right to interfere with his judgment.

LORD DUNDAS—I am of the same opinion. I am not for interfering with what the learned arbitrator has done. I think it was quite open to him to reach the conclusion that he did, and with regard to his finding, although it is not perfectly expressed, I take it to mean that he has found that the facts admitted or proved do not warrant the inference in law that the deceased met his death by accident arising out of his employment. I think that this conclusion was not merely open to him but that it was quite right.

He treats the case, as appears from the note, as one where the truth "cannot be ascertained." It is undoubtedly for the applicant to prove his case, and here I humbly think that there are almost no material facts at all; and one might say, as Lord Shaw observed in the well-known case of *Marshall* v. *The* "*Wild Rose*," 3 Butterworth's W.C.C. 514, that all is conjecture. To my mind it is not clear that this ship's cook met his death by accident, but assuming that that was so I find no evidence whatever that it was by accident arising out of the employment.

LORD SALVESEN—I am of the same opinion. As the Lord Chancellor pointed out in a recent case—*S.S.* "*Serbino*" v. *Proctor*, [1916] 1 A.C. 464, p. 468—there are three alternative modes in which a man in circumstances like those narrated in the case may have met his death—suicide, foul play, and accident. The appellants maintained that there is a presumption against suicide, that there is a presumption against foul play, and that therefore in the absence of any evidence you must assume that the man perished by accident because there is no presumption against a man meeting his death in that way. Even if that were so, I am not aware that the courts have ever laid it down that if you can affirm that a man perished by accident you must go still further and presume that the accident arose out of his employment, which is the proposition that the appellants must establish in fact before they can ask us to interfere with the arbitrator's award.

Now the arbitrator, as your Lordship has said, applied his mind to this question very closely and very sympathetically so far as the appellants are concerned. He, in the first place, thinks that the evidence of the extraordinary conduct of the man just before the accident happened, and the significant remark which he had previously made to his fellow-cook, were too vague to overcome the natural presumption against suicide. Then he goes on to say—"There are other ways in which he may have fallen into the sea—by pure misadventure, or by trying some dangerous route in the narrow compass of the ship, or even by risking his life by leaning for some purpose of his own, or for amusement, too far over the railings. All this is conjecture. There is nothing, so far as I can discover, to connect his disappearance with a risk incidental to his work as a ship's cook."

Therefore the finding of the arbitrator was that, assuming that the man perished by accident as he is inclined to conjecture, there was nothing to suggest how the accident occurred, or that it was an accident that arose out of his employment. For my own part I have the greatest possible difficulty in understanding how a man could accidentally fall over a ship's bulwark 3 feet high in calm weather in the course of an employment which confined his duties to the deck so fenced, and if it is difficult to suppose that he perished by suicide or by foul play it seems to me equally difficult to understand how he met his death by accident arising out of his employment.

LORD GUTHRIE was absent.

The Court answered the question of law stated in the case in the affirmative.

Counsel for the Appellants—Sandeman, K.C.—A. M. Mackay. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Respondents—Macmillan, K.C.—C. H. Brown. Agents—Smith & Watt, W.S.

Tuesday, May 16.

SECOND DIVISION.

[Lord Anderson, Ordinary.

MITCHELL *v.* ALLARDYCE AND OTHERS.

Diligence — Friendly Society — Validity of Charge—Chargers not Connected by Legal Evidence with Creditors in Bond and Disposition in Security — Friendly Societies Act 1896 (59 *and* 60 *Vict. cap.* 25), *sec.* 50.

A bond and disposition in security in favour of three persons, the "present" trustees of a friendly society and their successors in office, was registered for execution, and the debtor charged on the extract to make payment to three different persons, the trustees at the date of charge. *Held* that in the absence of legal evidence connecting the two sets of persons the charge was not properly authorised, and suspension *granted.*

The Friendly Societies Act 1896 (59 and 60 Vict. cap. 25), section 50, enacts—"Upon the death, resignation, or removal of a trustee of a registered society or branch, the property vested in that trustee shall, without conveyance or assignment, and whether the property is real or personal, vest, as personal estate subject to the same trusts, in the succeeding trustees of that society or branch either solely or together with any surviving or continuing trustees. . . ."

Robert Mitchell, Glasgow, ropemaker, *complainer*, brought a note of suspension against Wiliam Allardyce, caretaker, Robert Hamilton, cartwright, and Fleming Jackson, woodcarver, all of Glasgow, *respondents*, seeking to suspend a charge to make payment of the principal sum of £800 contained in a bond and disposition in security granted by him at Whitsunday 1896, to Thomas Dickie, bellhanger, Glasgow, Donald Ross, blacksmith, Partick, and John Archibald Macmillan, manager to wine merchant, Glasgow, the then trustees of the St Mungo Lodge of the Loyal Order of Ancient Shepherds.

The complainer, *inter alia*, pleaded—"(3) The respondents not being the creditors specified in the bond, were not entitled to charge the complainer without first having obtained letters of horning."

The *facts* are given in the *opinion* (*infra*) of the Lord Ordinary (ANDERSON), who on 9th December 1915 repelled the complainer's third plea-in-law.

Opinion.—"At Whitsunday 1896 the then trustees of the St Mungo Lodge of Ancient Shepherds lent to the complainer, on the security of heritable subjects, the sum of £800. The bond and disposition in security granted by the complainer, and duly recorded for publication in the Division of the General Register of Sasines applicable to the county of the barony and regality, was duly recorded. At the date of the said bond the trustees of St Mungo Lodge, which is a friendly society registered under the Friendly Societies Act 1875, were Thomas Dickie, Donald Ross, and John Archibald Macmillan. . . .

"On 24th September 1914 intimation was made to the complainer on behalf of the present trustees of the Lodge, who are the respondents called in this action, that repayment of the said loan would be required at the expiry of three months from the date of the intimation. A correspondence thereupon ensued between the complainer on the one hand and the secretary of the Lodge, and thereafter the Society's solicitors, on the other.

". . . The position, however, taken up by the complainer in July 1915 was, in effect, a refusal to pay the sum due.

"The respondents accordingly on 8th July 1915 registered the bond for execution in the Sheriff Court books of the county of Lanark and obtained an extract.

"On 10th July the respondents applied, under the Courts (Emergency Powers) Act 1914, to the Sheriff of Lanarkshire at Glasgow for leave to proceed with diligence against the complainer for the enforcement of the decree contained in said extract registered bond. The complainer opposed this application, but after proof had been led the Sheriff-Substitute on 22nd July granted the application.

"On 23rd July the respondents charged the complainer, on an *inducice* of six days, to make payment to them of (1) the principal sum of £800 contained in the bond; (2) a fifth part more of liquidate penalty incurred through failure in the punctual payment thereof; and (3) interest of the said principal sum at the rate of five pounds sterling per centum per annum from the term of Whitsunday last until payment.

"The complainer, in the argument which was addressed to me, maintained that a debtor in the position of the complainer is entitled to be assured of his creditor's identity so that he may receive a proper discharge of his debt—that is to say, in the present case, that the respondents are duly appointed trustees of St Mungo Lodge and the successors of the three trustees who were parties to the bond. I entirely assent to this, but it is for the debtor to take the necessary steps to satisfy himself on this point. If there had been dubiety as to this matter the complainer could have raised the point in the proceedings before the Sheriff-Substitute or in this process, but he has not done so. On the contrary, his averment in statement 1 is that the respondents are the present trustees of the Lodge. I must therefore proceed upon the footing that the respondents were properly appointed trustees of the Lodge, and that they are the successors in office of the grantees of the bond.

"The complainer's reasons of suspension are highly technical and thus are not cal-