

the manager to examine the clasps. Therefore I agree with the Sheriff-Substitute that it was the duty, not of the general manager, but of the engineman, who was the manager in that particular place. The general manager had a more comprehensive duty. I am therefore of opinion that the case fails also with respect to the general manager, and so I think the Sheriff's judgment should be recalled and decree of absolvitor pronounced.

In conclusion, I should only like to observe that the Employers Liability Act puts the matter on another footing, not on any different view of the legal principle which governed the relation previously, as stated in the passage I read from Lord Cairns' opinion, but on grounds of policy and expediency, viz., whether it is not more fitting that all the risks incidental to a more or less dangerous trade, though not attributable to the trader's fault, should be borne by him. Now, by the law, irrespective of the statute, that is the result to which it will always be brought ultimately. He who carries on a trade will always—speaking from what may be called the political economy point of view—be brought in the last resort to bear the risks incidental to it. But the principle of the common law was founded on the terms of the contract between the parties. They were at liberty to regulate the matter of risk as they pleased. They might contract that the servant should take all risks, with right of action against anyone who was directly to blame for his injury, wages of course being in consideration of this arrangement; or wages being less, the master might undertake to guarantee the servant against all risks. It is all a matter of contract and consideration of wages. The principle of the common law was that a contract should be implied where none was expressed. If the parties had not expressed their mind on the subject, it was to be implied, and the implied term was that the servant should take all the risks incidental to the ordinary conduct of the trade, of course with recourse against anyone in fault towards him. But the Act has put this to a certain extent on another footing, and put directly on the master the risks incidental to his trade. But the case being under the common law, must be ruled by the common law. I am therefore for recalling the Sheriff's judgment and assolvizie both defenders.

LORD CRAIGHILL—In this case the pursuer seeks damages from one or other of the defenders for the death of her husband, which was caused by an accident while working at the defenders' furnaces by the breaking of the clasp which attached the cage, in which he was being elevated, to the chain by which it hung. It is said that the flaw in the clasp which caused it to give way was such as could have been discovered by ordinary care. In regard to the existence of the flaw, I agree with the finding of the Sheriff's interlocutor, but I differ from him in finding that fault was thereby chargeable against the defenders. I need not explain the grounds on which I have reached this conclusion. The law applicable to the case is that which prevailed before the passing of the recent Act. The law on that point has been settled since the case of *Wilson v. Merry & Cunningham*, and I think that case is applicable here. But the general manager also is

brought in, and liability sought to be established against him. It would undoubtedly be the case that if it were shown that he had a duty of inspection in reference to this material he would be liable. With regard to that I confess I have had some doubt whether it might not reasonably have been maintained in the circumstances that he had such a duty. But as my opinion in that matter has not gone beyond a doubt, I do not feel called upon, or indeed entitled, to dissent from the opinion of Lord Young.

LORD RUTHERFURD CLARK concurred.

LORD JUSTICE-CLERK—I concur in the result arrived at by your Lordships, on the ground that fault has not been made out against either of the defenders, and that being so, and the accident having occurred prior to the passing of the Act, I have no doubt on the legal question. I am gratified to think that this is perhaps the last case which we shall have to consider under that aspect of the law.

The Court sustained the appeal and assolvizied the defenders.

Counsel for Pursuer (Respondent)—Brand—Sym. Agent—Thomas Dowie, S.S.C.

Counsel for Defenders (Appellants)—Trayner—Readman. Agent—Alex. Morison, S.S.C.

Thursday, December 21.

## SECOND DIVISION.

[Sheriff of Lanarkshire.

LITTLE & CO. v. DONALDSON BROTHERS,  
*et e contra*,

AND

LITTLE & CO. v. HAY & SONS.

*Ship—Charter-Party—Freight—Deviation—Breach of Contract—Unforeseen Circumstances—Stress of Weather.*

D., of Glasgow, entered into a contract of affreightment with L. & Co., of Glasgow, whereby the latter agreed to carry from Barrow to Glasgow a certain quantity of iron, and that their steamers for the purpose should proceed with all convenient speed to Barrow to load, and that the first of them should be in Glasgow harbour on the 12th or 13th, and the last not later than 14th October, "unforeseen circumstances excepted." One of the steamers provided by L. & Co. to carry out this contract sailed from Glasgow on 11th October for Dublin with a cargo of coals, and was then to go to Barrow for the iron, and thence to Glasgow. She was detained by violent storms between Glasgow and Dublin, and between Barrow and Glasgow, and only reached Barrow on 17th October, and Glasgow on 26th October. In an action by L. & Co. for freight, and a counter action by D. for breach of contract caused by delay—*held* that the question not being one of deviation from a voyage agreed on, but of contract to be at a certain place at a certain time, "unforeseen circumstances ex-

cepted," L. & Co. were warranted in expecting the vessel to perform the voyage in time; that she had been delayed by "unforeseen circumstances" in the sense of the charter-party; that no damages were therefore due for detention; and that she had earned her freight.

Donaldson Brothers, steamship agents in Glasgow, having a contract with an American firm to carry for them to Baltimore by their steamship "Concordia," which was announced to sail from Glasgow about 15th October 1881, a quantity of iron lying at Barrow, entered into a contract of affreightment, by charter-party dated 10th October 1881, with James Little & Co., steamship owners in Glasgow, by which it was agreed that Little & Co. should furnish to them certain steamships, thereafter to be named, which should with all convenient speed proceed to Barrow-in-Furness, and there load 1014 tons pig-iron and blooms, and being so loaded should therewith proceed to Queen's Dock, Glasgow, and deliver the same to Donaldson & Co., on being paid freight at the rate of 4s. 3d. per ton for pig-iron, and 4s. 6d. per ton for blooms—the first steamer to be alongside in the Queen's Dock on Wednesday 12th October, or Thursday 13th October, and the last not later than Friday 14th October, "unforeseen circumstances excepted." Not having at the time sufficient steamers of their own at command to carry the amount of cargo specified, Little & Co., by charter-party dated 10th October, entered into a contract of affreightment with James Hay & Sons, steamship owners in Glasgow, that the latter should charter to them a steamer or steamers, which should proceed with all convenient speed to Barrow, and there load 600/700 tons of said iron and blooms, and being so loaded should proceed to Queen's Dock, Glasgow, and there deliver the same. By this charter-party it was stipulated that the steamers were to be loaded at Barrow not later than Thursday 13th October, "unforeseen circumstances excepted."

Little & Co. furnished two steamers of their own for the execution of the contract—the "Ariadne" and the "Larry Bane." Hay & Sons furnished to Little & Co. two steamers of theirs, the "Jasper" and the "Palermo." The latter steamer was substituted for the "Pearl," which they had at first intimated their intention of sending. The "Ariadne" and "Jasper" duly arrived at Queen's Dock from Barrow, and discharged their cargo on 14th October. The "Concordia" on 15th October, the day of sailing, left the Queen's Dock, and proceeded to the Tail of the Bank, where she was detained by her owners, Donaldson Brothers, waiting the arrival of the rest of her cargo from Barrow, the fact of her detention having been intimated to Little & Co. on the 17th. The "Larry Bane" had left Glasgow for Barrow to take in cargo on 10th October; she met with very stormy weather between Glasgow and Barrow, and did not reach the latter port till 16th October. She did not return to the Clyde till the 19th. She then, by Donaldson Brothers' instructions, under reservation of all claims, discharged her cargo into the "Concordia" at the Tail of the Bank instead of at Queen's Dock. The "Palermo" left Glasgow on the 11th October, and proceeded first with a cargo of coals (which she had been previously under a contract to carry) to Dublin, and thereafter to

Barrow, which she reached on the 17th, leaving for Glasgow with a cargo of pig-iron on the 18th, where she at length arrived only on the 26th. The "Concordia" had sailed for Baltimore on the 22d with the amount of cargo which had been carried by the "Ariadne," the "Jasper," and the "Larry Bane." On the same day Donaldson Brothers had made a claim on Little & Co. for six days' demurrage of the "Concordia," at £50 a-day. On the 25th they instructed Little & Co. to order the "Palermo" to Liverpool with her cargo, they paying freight as to Queen's Dock, under reservation of all questions. Little & Co. intimated this claim and instructions to Hay & Sons, who refused to order the "Palermo" to Liverpool except on withdrawal of all claims of demurrage and all other claims on account of delay, and on receipt of direct instructions and a fresh charter from Little & Co. The parties failed to come to an arrangement in this matter, and the "Palermo" accordingly proceeded to Queen's Dock as per charter-party. It appeared from the evidence of the "Palermo's" officers, and from her log-book, that owing to stormy weather she had not been able to reach Dublin till the evening of the 14th, having been storm-stayed for a day and a-half in Lamlash Bay, leaving there on the 16th and reaching Barrow the same day. She left Barrow on the 18th, the same day as the "Larry Bane" and had proceeded on her voyage to Glasgow nearly as far north as the Mull of Galloway, when on the 19th she was driven back by a violent storm to the Isle of Man, and took refuge in Port Erin there, whence, owing to the continuance of the storm, she did not sail till the 25th, arriving at Queen's Dock early in the morning of 26th. It appeared from the evidence of several witnesses that an average passage from Barrow to Glasgow would be from twenty to twenty-four hours. That of the "Larry Bane" on this occasion was less than twenty-four hours. It appeared that she took a course nearer inshore than the "Palermo." The witnesses who had been on board the "Larry Bane" spoke to having encountered a "strong breeze" only on the way from Barrow to Glasgow. The log of the "Palermo" described the weather from the 18th to the 26th as having been extremely stormy.

Little & Co. raised an action against Donaldson Brothers in the Sheriff Court at Glasgow, concluding for £194, 7s. 6d. freight due under the contract. Donaldson Brothers averred in defence that they had suffered damage from breach of contract by Little & Co, by the delay in the arrival of the vessels at Glasgow, to the extent of £847, 9s. 3d., and pleaded that they were entitled to set off this sum against the freight sued for. They also raised a counter action against Little & Sons for damages for breach of contract, concluding for £625, 19s. 8d., being the said sum of £847, 9s. 3d., less amount of freight due under the charter. Little & Co. thereupon raised an action of relief against Hay & Sons, pleading that the loss alleged to have been sustained by Donaldson Brothers was caused by their fault. Hay & Sons pleaded that they had contracted only with Little & Co., that Donaldson's alleged damage being as regarded them consequential only, they could not be liable therefor, and that they had fulfilled their contract with Little & Co.

The Sheriff-Substitute (LEES) conjoined the three actions. After proof he found, in conformity with the above-stated facts, and further, "that the 'Palermo,' one of the two steamers sent by Hay & Sons, . . . was not despatched at a time which allowed any reasonable prospect of its complying with the terms of the contract: Finds that it did not do so, and thereby caused Donaldson Brothers to suffer loss to the extent of £343, 6s. 2d: Finds that Donaldson Brothers are liable to Little & Co. in respect of freight to the extent of £194, 7s. 9d: Finds in law (1) that Little & Co. having by their breach of contract caused loss to Donaldson Brothers to the extent aforesaid, are bound to compensate them to that extent, under deduction of the sum payable for freight; and (2) that the breach of contract by Little & Co. having been caused by the fault of Hay & Sons, the latter are liable in relief to them of the damages and expenses, so far as judicially incurred, payable by Little & Company to Donaldson Brothers: Repels the pleas of parties so far as inconsistent herewith: Decerns against Little & Company for payment to Donaldson Brothers of the sum of £148, 18s. 5d., with the legal interest thereon from the date hereof till payment: Finds Little & Company liable to them in their expenses in both actions: Finds James Hay & Sons liable to James Little & Company in payment of the sum of £343, 6s. 2d., and relative interest, and of their expenses," &c.

"*Note.*—I think it is plain that there was here a breach of contract. Four vessels were named, and the last was to be alongside the Queen's Dock not later than Friday 14th October, 'unforeseen circumstances excepted,' but it was not till Monday the 17th, or Tuesday the 18th, that any distinct notice, or perhaps any notice at all, was given that the 'Palermo' had been substituted for the 'Pearl.' It is not, however, necessary to lay much stress on this, and it is fair to say that apparently the substitution was intended for the charterers' benefit.

"But it was a bargain of which time was of the essence, and the restriction as to time was written by Little & Company themselves. They also knew that the goods were for transhipment, and therefore that it was important that they should be delivered in terms of the contract. The 'Jasper' and the 'Ariadne' started duly and returned timeously. The 'Larry Bane' started in good time, and though there seems to have been some delay at Barrow, I think the evidence establishes that her non-arrival till Wednesday the 19th was due to stress of weather.

"But as regards the 'Palermo' the case is different. Whilst the other vessels started timeously and went straight to their destination, she started on the Tuesday on a circular voyage by Dublin; and when it is remembered how far she had to go, how many times she had to load and unload, how many tides she had to catch, and what the period of the year was, all that one can say is that for her to be back within the stipulated time was not impossible. If everything happened in the most fortunate manner, it was just within the bounds of possibility that she might return in time.

"Now, where the time within which a matter can be done is uncertain, and the contract provides a day as the latest possible which will suffice for the implement of the contract, I do not

think it is justifiable, on any reasonable attempt to implement the contract, to make that day the earliest on which the contract can possibly be implemented. No doubt it may be that even if the 'Palermo' had started for Barrow direct on the Tuesday she might not have returned within the time stipulated. Still she would presumably have returned as soon as the 'Larry Bane,' and the iron could have gone in the 'Concordia' to America. But the point is, that as regards the 'Palermo' Little & Company never made any reasonable attempt to implement their contract, and they did not implement it, and the circumstances which prevented their doing so were what was to be expected, and not unforeseen. . . .

"There remains for disposal the action for relief brought by Little & Company against Hay & Sons. In it Little & Company ask for relief of the sum in which they are found liable to Donaldson Brothers, and of their costs, judicial and extra-judicial, and of the like costs of the action for freight raised by them against Donaldson Brothers. Now, Hay & Sons are in no way liable in relief to Little & Company unless they knew the circumstances of the contract that Little & Company had entered into, and were similarly bound. Mr Hay says—'I knew the cargo was to come forward to Donaldson Brothers' steamer, but at the same time we did not know that they had any arrangement with Little & Company, nor the date when the steamer was to sail.' But it is not clear that Mr Hay knew this at the time the charter-party, or rather the contract of carriage (for no ship is chartered), between his firm and Little & Company was signed. It would rather appear that they did not know that Little & Company were limited as to time. I have some doubts whether this tallies with circumstances as they have otherwise come out. But under their contract with Little & Company they were to be loaded at Barrow not later than Thursday 13th October. Now, as regards both contracts, the charterers seem to have been pretty sharp in the way they dealt with the other party. In Hay & Sons' contract the proviso that the ships were to be loaded at Barrow not later than Thursday 13th October, was put on without their consent, and it was plainly at the time, and as has turned out, a most important proviso. They, however, acquiesced in it, guarding themselves by a qualification, 'unforeseen circumstances excepted.' What the effect of this claim might have been if Little & Company had been informed when the contract was made that one of Hay & Sons' vessels had to go to Dublin and would not start till Tuesday, I am not prepared to say. But the point is the same one already dealt with—Was it a reasonable attempt to implement the contract for the 'Palermo' to sail under the circumstances it did on the Tuesday morning? and, as before, I say I do not think it was. Indeed, the case against Hay & Sons is much worse than against Little & Company, for the latter did not know the 'Palermo' was going to try to do what it could not do, but the former did; and I confess that, unless they had for the time forgotten about the Dublin undertaking, the matter is a mystery to me; for, so far as I can see, the 'Palermo' could hardly possibly have fulfilled the contract, and still less been able to be at Barrow on Thursday morning, as specified in the memorandum.

"If, then, the breach of contract committed by

Little & Company was due to the fault of Hay & Sons, as they were informed that the iron was for transshipment, they must, especially in the light of the letters of Little & Company's agents, relieve Little & Company of the damage they have to pay Donaldson Brothers, and the cost of trying to escape such payment judicially incurred, but not those attending the action for freight up to the date of closing the record, that being the date at which it ceased to be a separate action."

Hay & Sons and Little & Company appealed to the Court of Session.

Argued for Hay & Sons—They could not be liable to Donaldson Brothers for breach of a contract which they never had made with them, and, even assuming liability to them under contract, they could not be liable in damages or demurrage for detention of the "Concordia," for when they contracted with Little & Company they had no knowledge of the iron being required for transshipment to America. The cargo was not refused to the "Palermo" at Barrow, or even given under protest, but was given without saying anything. In short, they had nothing whatever to do with the contract between Little & Donaldson. The untimely arrival of the "Palermo" was caused by stress of weather, and was covered by the exception of "unforeseen circumstances" in the charter-party. They could not be liable in damages to Donaldson under a contract between them and Little which was incommensurate with their own contract with Little, under which alone they could incur liability. In any view, the damage alleged—loss of market in America—was too remote to found a valid claim. There was no deviation in the "Palermo's" voyage to Dublin, because this voyage under the charter began only at Barrow.

Authorities—Smith's Leading Cases, ii., 569; *Hadley v. Baxendale*, *ibi cit.*; *Vicars v. Wilcox*, *ib.* 553; *Die Elbinger Actien-Gesellschaft für Fabrication von Eisenbahnmaterial v. Armstrong*, L.R., 9 Q.B. 473; *Hydraulic Engineering Company v. M'Haffie & Company*, 27 Weekly Rep. 221; *Addison on Contracts*, 721, 724; *Barker v. M'Andrew*, 34 L.J., C.B. 191.

Argued for Little & Company—The argument of Hay & Sons on the facts, and on the remoteness of the alleged loss as to delay of "Palermo," cleared them of liability for damages for breach of contract. They were in an impartial position between the other two litigants, and were only there to see that if liability was found against them it should be passed on to Hay & Sons, who were the real wrongdoers, for the liability of Hay to them was exactly commensurate with the loss of Donaldson Brothers. There was no principle applicable in the circumstances on which a part only of the damage could be laid on Hay.

Argued for Donaldson Brothers—The *onus* was on Little & Company, with whom alone they had contracted, to show how the "Palermo" failed to reach Glasgow as soon as the "Larry Bane," which left on the same day to make the same voyage; and this they had failed to do. The damage from demurrage and loss of market was directly caused by fault of Little & Co. in not having the whole cargo there in time. In sailing for Dublin so late as the 11th the "Palermo" made it impossible for her to reach Barrow in time, and therefore there was deviation from her charter.

Authorities—Bell's Comm., i. 478-79-80;

*Ovington v. M'Vicar*, May 12, 1864, 2 Macph. 1066; *Anderson v. North British Railway Company*, February 18, 1875, 2 R. 443; *Fisher, Renwick, & Company v. Connal, Cotton, & Company*, June 13, 1882, *ante*, vol. xix., p. 698.

In the Court of Session Donaldson Brothers did not insist in their claim of damages in respect of the "Larry Bane."

At advising—

Lord Young—This case involves three distinct, independent, and incommensurate contracts of affreightment, which are no otherwise related than that they refer to the same goods. The owners of the goods are Naylor, Benzou, & Company of Baltimore. Between them and Donaldson Brothers of Glasgow there is a contract (standing on letters and telegrams) to carry the goods from Barrow-in-Furness to Baltimore, at the rate of 11s. 6d. per ton, in the "Concordia," which was announced to sail from Port-Glasgow about 15th October 1881. This is the first contract. By the second, Little & Company agreed with Donaldson Brothers to carry for them from Barrow to Glasgow 1014 tons of pig-iron, which happened, unknown to them, to be the goods to which the first related, to be alongside the Queen's Dock on 14th October. By the third, Hay & Sons agreed with Little & Company to carry for them from Barrow to Glasgow 600-700 tons pig-iron and blooms, which happened, unknown to them, to be part of the goods to which the first and second contracts, of which they had no knowledge, related, to be loaded at Barrow not later than 13th October.

We are immediately concerned with the second and third contracts only. These stand on formal charter-parties, and it is not only convenient but necessary to take them as separate and distinct from each other.

By the second Little & Company bound themselves to Donaldson Brothers to have the iron alongside in Queen's Dock, Glasgow, not later than 14th October (I state the material import shortly), "unforeseen circumstances excepted." With respect to 550 tons it is acknowledged that the contract was exactly fulfilled. These were carried by the "Ariadne" and "Jasper." The "Larry Bane" did not deliver her cargo till 19th October, but it was conceded that with respect to it no claim of damages for breach of contract should be made, thus reducing the pecuniary interest of the case to the late delivery of 296 tons carried by the "Palermo," which did not arrive in Glasgow till 26th October, whereas by the contract it should have arrived on 14th October. I think it right to say that I think it is proved that the delay in the arrival of the "Larry Bane" was attributable to unforeseen circumstances, and that consequently the abandonment of any claim therefor is not mere concession.

The freight of these 296 tons from Barrow to Glasgow by the "Palermo" was exactly £68, 13s. 7d. The damages claimed in respect of their late delivery in Glasgow is £847, 9s. 3d., which however the Sheriff has reduced to £343, 6s. 2d. This delay of 12 days in the carriage of 296 tons of pig-iron from Barrow to Glasgow is the subject of these actions, the proceedings in which, as presented to us, extend to 140 pages of printed matter—the main, and indeed only material questions in dispute, being, first, Whether

the delay was occasioned by bad weather? and if so, then second, Whether the defenders so improperly, or in breach of their contract, exposed the vessel to it as to disentitle them to plead it? On the first question I am of opinion that the delay was in fact occasioned by bad weather, unforeseen and in fact irresistible. On the second, which involves the circumstance (the only material one so far as I see) that the "Palermo" carried a preliminary cargo of coals to Dublin, I take no account of Hay & Sons, with whom Donaldson Brothers had no concern, but consider Little & Company responsible for the fact. The question is—Were Little & Company entitled to rely for the execution of their contract with Donaldson Brothers on a vessel which sailed from Glasgow on 11th October with a cargo of coals for Dublin, having Barrow as her ulterior destination? This is a jury question, and I answer it in the affirmative, although it was, I must admit, running it close. Had there been a contract that the vessel should proceed direct from Glasgow to Barrow, a question of another character, viz., deviation from voyage commenced, would have arisen. It was not however maintained, or I think maintainable, that such was the contract. The vessel might according to the contract be sent to Barrow from any place whatever, or be there at the date of it—with time or not, as it happened, to be otherwise employed meanwhile. The substance and indeed letter of the contract was to be at the Queen's Dock, Glasgow, with the cargo on 14th October, "unforeseen circumstances excepted." I have said that the defenders ran it close, but I doubt the possibility, consistently with profit, of allowing margins of (probably) idle time for unforeseen circumstances, and it is presumably for this reason that these are excepted. It is clear on the evidence, and not, I understand, disputed, that the arrival of the vessel first at Dublin and ultimately at Barrow was delayed, to the exact extent to which it was delayed, by stress of weather. Now, assuming that Little & Company are nevertheless responsible for any delay attributable to the Dublin voyage, the question would remain, whether the delay which in fact occurred is attributable thereto? Had the voyage to Dublin been itself a breach of contract, as a deviation in the course of a voyage commenced under the charter-party, the delay would probably have been attributed to that breach of contract, which was no doubt of a character likely to cause it. But taking the contract to be, as I think it was, to have the vessel at Barrow to receive a cargo in time to carry it to Glasgow by 14th October, "unforeseen circumstances excepted," Little & Company would nevertheless be responsible for delay occasioned by designedly sending the vessel to Dublin, for that was not an "unforeseen circumstance." (That they ran an unwarrantable risk by despatching the vessel to Dublin so late as 11th October, and so must take the consequences, although but for unforeseen bad weather these might possibly not have occurred, is a proposition on which I have already stated my opinion, as on a question, not of deviation in breach of contract, but of simple fact—whether the time allowed was or not unwarrantably short? But assuming that it was, the question still remains, was the arrival at Barrow to receive the cargo, and so the arrival with it in the Clyde, thereby delayed? And on

the assumption I am making, it is, I think, incumbent on Little & Company to show that it was not—for on that assumption they left an unreasonably short time for the fulfilment of their contract, which in fact was not fulfilled. Besides the notable and memorable storm of a quite exceptional character which prevailed during the whole time embraced by the history of the case, the material and indeed only fact which Little & Company rely on to show that the delay of the "Palermo" complained of was not attributable to the Dublin voyage, is that her loading at Barrow was completed as soon as that of the "Larry Bane," which left Glasgow along with her and proceeded direct to Barrow, with all the speed the weather permitted. The fact is so undoubtedly, and it is even true that the "Palermo" left Barrow for Glasgow loaded along with the "Larry Bane," or rather a little sooner, so that, had all gone well with her thereafter, she would have arrived in the Clyde along with the "Larry Bane," and delivered her cargo at the same time, in which case it would probably not have been contended that damages were due for the late arrival of the one cargo and not of the other. It is indeed possible that had the "Palermo" proceeded direct to Barrow she might have arrived there sooner than the "Larry Bane," just as the latter made a speedier and more successful voyage from Barrow to the Clyde, and the question is, whether, on this possibility, the very same delay which in the case of the "Larry Bane" was undoubtedly attributable to stress of weather, ought in the case of the "Palermo" to be attributed to her call at Dublin. I think it ought not, although I might have thought otherwise had the voyage to Dublin been a deviation of a voyage commenced under the charter-party, and not a mere miscalculation, or over sanguine calculation, of what, unforeseen circumstances excepted, the vessel was able to do. I think it a reasonable, though not absolutely certain conclusion from the evidence, that had the "Palermo" proceeded direct to Barrow, as the "Larry Bane" did, she would not have arrived and been loaded there and sailed again for the Clyde any sooner than the latter—that is to say, sooner than she in fact did.

This reduces the question to the cause of the delay in the "Palmero's" voyage from Barrow to the Clyde, and I think it is proved that it was caused by unforeseen circumstances, namely, by bad weather, which drove the ship to the Isle of Man, where she was storm-stayed. That this calamity should have happened to the "Palmero," while her consort the "Larry Bane" which sailed along with her escaped, is remarkable, but not incredible, so that one must disbelieve the evidence according to which the fact is so.

What I have said, if your Lordships shall agree with me, disposes of the case, so that it is unnecessary to consider the question of damages, or Little & Company's action of relief against Hay & Sons. I think it right, however, to say that as at present advised, had I thought damages due, I should have had difficulty in assenting to the views on which the Sheriff-Substitute has assessed them. Little & Company made no contract with reference to the "Concordia" on a voyage to Baltimore, but only to have 1014 tons of pig-iron in Glasgow on 14th October—if with reference to 296 tons they failed so as to be liable in damages, I should have thought that in the case of

such common merchandise as pig-iron, and in such a market for that commodity as Glasgow, the remedy of the disappointed party (Donaldson Brothers) was to procure the same quantity in Glasgow, and send it on to Baltimore by their ship, charging the loss to Little & Company. This might have been done on 15th October, when the breach of contract, if there was any breach, was complete. If the place of the 296 tons had thus been supplied on 15th October, the measure of damage would have been exactly the difference between the cost of thus obtaining the supply and the market or sale price of the "Palermo's" cargo when it arrived on the 26th. It is, I must think, strange that there is no evidence applicable to this simple and, I should have thought, obvious view of the case, but instead of it a great quantity of evidence about the profits of such a ship as the "Concordia," the fair rate of demurrage of a vessel of 2000 tons, and the cost of sending pig-iron from the Clyde to Baltimore *via* Liverpool by an Allan Line steamer.

It was pointed out in the course of the argument that Little & Company's action against Hay & Sons, to relieve them of Donaldson Brothers' action, was misplaced, the contract between them and Hay & Sons not being commensurate with that between them and Donaldson Brothers. But as Donaldson Brothers' action fails, I need not of course dwell on this topic. The action against Hay & Sons will of course be dismissed.

LORD CRAIGHILL—On the last topic discussed by Lord Young I do not indicate any opinion, for it is not necessary to decide that, and I think it is better to refrain from saying what opinion might have been adopted by me if Little & Co. had been found liable in damages; but otherwise I concur in the opinion of his Lordship, and being fully satisfied with the reasons assigned by him, I need not venture to add anything to them.

LORD RUTHEFURD CLARK concurred.

LORD JUSTICE-CLERK—On the case as far as it has come before us here, the only difficulty I had was in regard to the question of damages. The case has been stated as one of deviation, but I do not think that is a sound argument, because in the charter-party neither place nor time is mentioned for the commencement of the voyage. But I have a strong impression that in undertaking the voyage to Dublin so late as was done here, when the charter-party provided that the vessel was to proceed to Barrow-in-Furness, the owner took the risk of delay, unless he was protected by the excepting clauses of his charter-party. I think it is clear enough on the evidence that the delay in arriving at Barrow, as well as after leaving it, was due to stress of weather, and therefore that it comes under the clause of unforeseen circumstances in the charter-party; so on the whole matter I agree with the opinion of Lord Young.

The Court pronounced the following interlocutor:—

"The Lords . . . find in fact—1st, That by charter-party, executed on 10th and 11th October 1881, James Little & Company and Donaldson Brothers contracted together for the carriage of 1014 tons of pig-iron and blooms from Barrow-in-Furness to

Glasgow, in terms of said charter-party, and that James Little & Company executed their part of said contract by certain steamships called the 'Ariadne,' 'Jasper,' 'Larry Bane,' and 'Palermo:' 2d, That the iron carried by the 'Ariadne' and 'Jasper' duly arrived at the Queen's Dock, Glasgow, and was there discharged on 14th October 1881 within the time specified in the charter party: 3d, That the iron carried by the 'Larry Bane' was, on 18th October, by order of Donaldson Brothers, delivered to them on board a ship belonging to them at the Tail of the Bank, Greenock, the said ship 'Larry Bane' having, in consequence of unforeseen circumstances, viz., stormy weather, been delayed in the course of her voyage, so that her arrival on 14th October, or earlier than 19th October, was impossible: 4th, That the iron carried by the 'Palermo,' being 296 tons of pig-iron, was delivered at Glasgow to Donaldson Brothers on 26th October, the said ship having in consequence of unforeseen circumstances, viz., stormy weather, been delayed in the course of her voyage, so that her arrival in Glasgow on 14th October, or earlier than 26th October, was impossible; and *separatim*, that the delay is not attributable to the fact that subsequent to the date of the charter-party the said ship proceeded to Dublin with a cargo of coals: 5th, That James Little & Company executed their contract with Donaldson Brothers under and in terms of the said charter-party, except only in so far as the arrival of the 'Larry Bane' and 'Palermo' and the delivery of their cargoes were, to the extentforesaid, delayed by unforeseen circumstances: Find in law—1st, That James Little & Co. are entitled to payment from Donaldson Brothers for the carriage of 1014 tons of pig-iron and blooms at the rates contracted for; and 2d, That Donaldson Brothers have no claim of damages against James Little & Company as for breach of contract: Therefore sustain the appeal: Recal the interlocutor of the Sheriff-Substitute of 1st June 1882: Ordain Donaldson Brothers, defenders in the action at the instance of James Little & Company, to make payment to the pursuers therein of the sum of £194, 7s. 6d., sterling, with interest thereon at the rate of five pounds per centum per annum from the 27th day of October 1881 till payment: Dismiss the action at the instance of Donaldson Brothers against James Little & Company, and the action at the instance of James Little & Company, against James Hay & Son: Find Donaldson Brothers liable to James Little & Company in the expenses incurred in the Inferior Court and in this Court in the actions at the instance of James Little & Company against Donaldson & Company, *et e contra*, and in the conjoined actions: Find James Little & Company liable to James Hay & Son in the expenses incurred in the Inferior Court and in this Court in the action at the instance of the former against the latter and in the conjoined actions: Remit," &c.

Counsel for Little & Co—Robertson—Jameson.  
Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Donaldson Brothers—Solicitor-General (Asher, Q.C.)—Guthrie. Agents—J. & J. Ross, W.S.

Counsel for James Hay & Sons—Trayner—Goudy. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Thursday, December 21.

SECOND DIVISION.

[Sheriff of Aberdeen.

FRASER v. LAWSON.

Lease—Landlord and Tenant—Act 43 and 44 Vict. c. 47 (The Ground Game Act 1880), sec. 6—“Ground Game”—Hares and Rabbits.

Section 6 of the Ground Game Act 1880 enacts, *inter alia*—“No person having a right of killing ground game under this Act or otherwise shall, for the purpose of killing ground game, employ spring-traps except in rabbit-holes.” Section 8 defines ground game to mean “hares and rabbits.”

Held (*diss.* Lord Rutherford Clark) that section 6 applied to an agricultural tenant who had entered into his lease prior to the passing of the Act, and who had therefore no right to kill hares, but merely a common law right to kill rabbits.

Ground Game Act 1880, sec. 6—“Except in Rabbit-holes”—Scrapings below a Wire Fence—Interdict.

A tenant who had placed a fence of wire-netting in one of his fields to protect his crops, laid down traps in the “runs” which rabbits scraped below the fence in order to pass from one side of it to the other. The Court (*diss.* Lord Young) *interdicted* the tenant from placing such traps, being of opinion that such “scrapings” or “runs” were not “rabbit-holes” in the sense of the Act.

The Ground Game Act 1880, on the preamble, that it “is expedient in the interests of good husbandry, and for the better security for the capital and labour invested by the occupiers of land in the cultivation of the soil, that further provision should be made to enable such occupiers to protect their crops from injury and loss by ground game,” . . . enacts (section 1)—“Every occupier of land shall have as incident to and inseparable from his occupation of the land the right to kill and take ground game thereon, concurrently with any other person who may be entitled to kill and take ground game on the same land—Provided that the right conferred on the occupier by this section shall be subject” to certain limitations.

Section 2—“Where the occupier of land is entitled, otherwise than in pursuance of this Act, to kill and take ground game thereon, if he shall give to any other person a title to kill and take such ground game, he shall nevertheless retain and have as incident to and inseparable from such occupation the same right to kill and take ground game as is declared by section 1 of this Act. Save as aforesaid, but subject as in section 6, the occupier may exercise any other or more

extensive right which he may possess in respect of ground game or the other game, in the same manner and to the same extent as if this Act had not been passed.”

Section 5. . . . “In Scotland when” at the date of the passing of this Act “the right to kill and take ground game is vested by operation of law or otherwise in some person other than the occupier, the occupier shall not be entitled by virtue of this Act to kill or take ground game during the currency of any lease or contract of tenancy under which he holds at the passing of this Act, or during the currency of any contract made *bona fide* for valuable consideration before the passing of this Act whereby any other person is entitled to take and kill ground game on the land.” . . .

Section 6—“No person having a right of killing ground game under this Act or otherwise shall use any firearms for the purpose of killing ground game between the expiration of the first hour after sunset and the commencement of the last hour before sunrise; and no such person shall for the purpose of killing ground game employ spring-traps except in rabbit-holes, nor employ poison; and any person acting in contravention of this section shall on summary conviction be liable to a penalty not exceeding two pounds.”

Section 8—“For the purposes of this Act the words ‘ground game’ mean hares and rabbits.”

Colonel Frederick Mackenzie Fraser of Castle Fraser, Aberdeen, presented this petition in the Sheriff Court of Aberdeen, Kincardine, and Banff, at Aberdeen, against John Lawson, his tenant in the farm of Backhill of Glack, Cluny, for interdict against his setting on the farm, elsewhere than in rabbit-holes, spring-traps calculated to take and kill game or rabbits. The defender’s lease was for nineteen years from Whitsunday 1874.

The petitioner averred that since the passing of the Ground Game Act, 1880, the defender had persistently set traps for the purpose of killing rabbits otherwise than in rabbit-holes, and in particular that he had set traps on the top of the end rigs of the fields on his farm in which the game ran, with the result of capturing hares, and also pheasants, partridges, and other winged game. He founded on section 6 of the Ground Game Act above quoted, and pleaded that the defender in killing rabbits by spring-traps was entitled to do so by setting his traps in rabbit-holes only.

The defender denied the pursuer’s averments as to his manner of placing traps, and pleaded—“The defender having acted only in accordance with the rights competent to him in terms of his lease and the Act of 1880, this action was unnecessary and uncalled for.”

A proof was led, from which it appeared that there was on the defender’s farm a wire fence stretching along the side of a cover, and upon the top of a drill. The fence had so small a mesh that game could not get through it. Beneath this fence were various holes or scrapes which rabbits had scraped away to let them into the field from the cover. These were not burrows, but only runs for the rabbits. The scrapes were not such as hares would be likely to go through, unless they were artificially widened. The defender set his traps in them. He admitted that occasionally, though rarely, he had caught winged game in them. There was no reservation of rabbits by the landlord in the lease, and the defender had thus a common law right to kill them. After the