

pays the estate duty is in virtue of the provisions of the Finance Act in the position to lead an adjudication. But an adjudication which is a common law remedy can only proceed on actual as distinguished from contingent debt.

Accordingly, as I think *Laurie* was well decided, it, in my judgment, rules the present case.

I cannot help adding that I think that much of the difficulty experienced by the learned Judges in the Court below arises from their not having for the moment sufficiently distinguished between the question of whether a thing is a charge, and whether that charge is so perfected according to the forms of conveyancing as to make a marketable security good against all possible competitors. It is in this latter matter that the Scottish system of the records is so important. But the law of Scotland is not strange to rights which are truly consummated, not *res mercæ facultatis*, but which yet are not perfected as regards security. A personal title to land is a familiar example. I do not say that the charge here is of that class. What I have said about the Succession Duty Act points the other way. But for the determination of this case it would be sufficient if the right was of that class, and the whole of the remarks as to the impossibility of a charge which did not enter the records would be beside the mark.

I think there is no room for doubt that the terms of the application clause are defective, with the result that Lord Moray's trustees have in the present case an uncomfortable security. They cannot avail themselves of the procedure in *Laurie's* case, because they are not heirs of entail in possession who alone can invoke the aid of the 11th section of the 1868 Act. But they have the benefit of *Laurie's* judgment in so far as it finds that they as in right of all the assets of Earl Edmund are creditors in a debt which may be made to affect the fee by adjudication. Adjudication is not nearly such a complete or comfortable remedy to a creditor as the right of sale under a bond and disposition in security. But it is a remedy, and a remedy apart from the authority of *Laurie's* case, clearly, I think, available. I pressed Mr Clyde to say why it was not, and the only answer I understood him to give was that there was no personal debtor in the debt. But that is no answer at all, for although such proceedings are in modern times rare owing to the practical disappearance of the cumbrous forms of security, adjudication in old days was one of the recognised modes of making effectual a real burden or *debitum fundi* where also there is no personal debtor in the debt—*Stair*, iv, 51, 11.

The result of these views is that in my judgment there is no such impossibility in the law of Scotland in holding that a "charge" can be created on land by the words of a statute without executive provisions for enabling it to enter the record as to force me to withhold from the words what I think is their natural construction.

I am dispensed from considering the

alternative view pled. On the whole matter I am of opinion that the appeal should be allowed, and judgment given for the Crown.

Interlocutor appealed from reversed with costs.

Counsel for the Pursuer and Appellant—The Attorney-General (Sir R. B. Finlay, K.C.)—The Lord Advocate (Dickson, K.C.)—A. J. Young. Agents—The Solicitor for Scotland of Inland Revenue (P. J. Hamilton Grierson)—The Solicitor for England of Inland Revenue (Sir F. C. Gore).

Counsel for the Defenders and Respondents—Clyde, K.C.—Macphail. Agents—Melville & Lindesay, W.S., Edinburgh—John Kennedy, W.S., Westminster.

Friday, August 4.

(Before Lords Macnaghten, Davey, James of Hereford, and Robertson.)

STROMS BRUKS AKTIE BOLAG AND OTHERS v. J. & P. HUTCHISON.

(In the Court of Session January 26, 1904, reported 41 S.L.R. 274, and 6 F. 486.)

*Ship—Charter-Party—Penalty Clause—Breach of Contract by Shipowner.*

A charter-party contained a clause, "penalty for non-performance of this agreement, estimated amount of freight on quantity not shipped in accordance herewith." The shipowner failed to send a ship for one of the shipments stipulated for. *Held* (aff. judgment of the First Division) that the shipowner was not deprived of his right to have an award of damages commensurate with the loss sustained.

*Contract—Contract of Carriage—Breach—Measure of Damages—Special and General Damages.*

Manufacturers of wood pulp in Sweden contracted by charter-party with shipowners for the carriage of a quantity of wood pulp "in August-September" (owners' option), the vessel being entitled after loading to call at other ports, to Cardiff. They also sold the same quantity of wood pulp to vendees, manufacturers at Cardiff, "mode and place of delivery," "c.i.f. Penarth Dock, Cardiff," "time of delivery" "August - September." The shipowners having failed to supply a ship, the vendees purchased at home the quantity of wood pulp and received from the charterers, as damages for breach of the contract of sale, the difference between the cost of so doing and the contract price. The charterers then sought to recover from the shipowners, who admitted the breach of their contract, but defended on the ground that the charterers were suing for special damages to which they were not entitled, inasmuch as the two contracts did not coincide, and had not in their summons sued for general damages.

*Held (rev.* the judgment of the First Division) that the charterers were entitled to recover, inasmuch as the "proper measure of the damages was the cost of replacing the goods at their place of destination at the time when they ought to have arrived, less the value of the goods in Sweden and the amount of the freight and insurance," and the purchases by the vendees was proof of such cost.

*Opinion per curiam* that there is no difference between the law of Scotland and the law of England as to the measure of damages in such circumstances. *Dunlop v. Higgins* (1848), 1 H.L.C. 381, *adversely commented on.*

The case is reported *ante ut supra.*

The Stroms Bruks Aktie Bolag (the purchasers) appealed to the House of Lords.

At delivering judgment—

LORD MACNAGHTEN—The appellants, who were pursuers in the action, are a Swedish firm carrying on business as manufacturers of wood pulp at Stocka. They claim damages from the respondents, shipowners at Glasgow, for breach of a contract of carriage.

The contract was dated 20th January 1900. By it the respondents agreed to carry 900-1000 tons (charterers' option) of wood pulp to Cardiff. The cargo was to be lifted in two shipments, one in May f.o.w., the second in August-September (owners' option). The ship was to have liberty to call at any port or ports in any order, to tow and assist vessels in distress, and to deviate for the purpose of saving life or property. The owners were to wire shippers of the cargo, Stroms Bruk, Stocka, six days' notice of readiness, also ship's departure from last port.

This contract it seems was made by the appellants with the view of enabling them to fulfil a contract, dated 4th December 1899, for the sale and delivery of 900-1000 tons of wood pulp to Thomas Owen & Company, Limited, of Cardiff. The memorandum of sale contained a column of printed notes, opposite which were written particulars of the special terms of the contract. Against the note "mode and place of delivery" were the words "C.I.F., Penarth Dock, Cardiff," and against the note "time of delivery" the words "in two cargoes, first open water, and August-September 1900."

The first shipment—a shipment of 500 tons—was made in due course and accepted. The respondents failed to perform their obligations with regard to the second shipment. The breach is not disputed. The only question is what damages, if any, are recoverable under the circumstances of the case.

On 24th September 1900, that is, six days before the end of the month, it became evident that the respondents, who had given no "notice of readiness" or of "ship's departure from last port," were not in a position to fulfil their contract, and consequently that the appellants would not be in a position to fulfil their contract with

Thomas Owen & Company by means of the shipment which the respondents had contracted to deliver.

In these circumstances Thomas Owen & Company, who were entitled to claim 400 tons more, bought in against the appellants in several parcels 367 tons of wood pulp for consumption at their works. There seems to be no market for wood pulp at Cardiff. They were therefore compelled to purchase, as best they could, in Manchester, Liverpool, and London, and to pay in addition the cost of carriage. It is not disputed that Thomas Owen & Company acted reasonably, and that the pulp required could not have been bought at less cost. Thomas Owen & Company made a claim against the appellants for £830, 13s. 5d. in respect of the 367 tons which they had bought in. The appellants, as they were bound to do, paid them the amount of their claim. Then the appellants claimed over against the respondents. Their claim was for £715, 8s. 2d. They brought into account the £830, 13s. 5d. which they had to pay Thomas Owen & Company, and also £9, 9s. 9d. for extra freight on the balance of 33 tons which Thomas Owen & Company accepted at a later date, making up the full 400 tons to which they were entitled. On the other hand the appellants, unnecessarily as it appears, gave credit for £125 as profit on the 100 tons which the respondents were bound to carry but which the appellants were not bound to deliver. The respondents, however, refused to make compensation for their breach of contract, and then this action was brought.

In the first place the respondents contended that by the terms of the charterparty damages for breach of contract were limited to the estimated amount of freight on quantity not shipped. Both Courts have rejected this contention, treating the question as settled by authority. On this point I have nothing to add to what was said by the Lord Ordinary and by Lord McLaren in the Court of Session.

The question as to the measure of damages gave rise to a serious difference of opinion. The Lord Ordinary held the appellants entitled to recover the amount of their claim with costs. In the Court of Session they were only awarded £50 as nominal damages, and ordered to pay substantially the whole costs of the action. The decision proceeded on the ground that in the view of the Court the appellants' contract with the respondents did not happen to coincide exactly with their contract with Thomas Owen & Company. The loss which they sustained was therefore, it was said, due to their own fault. The true cause of their inability "to make delivery in terms of their contract was that they had not taken the shipowners bound to deliver the cargo within the time prescribed in their contract with Messrs Owen & Company." Lord Kinnear, indeed, went so far as to say that "the one loss had nothing to do with the other."

The learned counsel for the appellants in his opening address referred to the case of *Dunlop v. Higgins*, 1 H.L.C. 381, and con-

tended that, according to the law of Scotland as explained by Lord Cottenham, a party disappointed by a breach of contract was entitled to compensation on a more liberal scale than would be allowed by the law of England. The case of *Dunlop v. Higgins* was decided in 1848. Whatever may have been the state of the law at that date I do not think that the learned counsel succeeded in persuading your Lordships that there is any difference in the law of the two countries at the present time on such a question as that under consideration. The view enunciated by Lord Cottenham is certainly not law in England. Whenever that view has been referred to by counsel as a guide in an English case it has been unfavourably criticised, and notably by Willes, J. (18 C.B., N.S. 452), and Crompton, J. (6 B. and S. 502). So far as I could gather from the learned counsel who addressed the House in the present case, *Dunlop v. Higgins* has rarely, if ever, been cited as an authority in Scotland.

For the decision of the question before your Lordships it will be enough, I think, to appeal to the rules as to the measure of damages which have been accepted in Scotland as well as in England, asking your Lordships' attention to the position of the litigant parties and the claim which has actually been made.

Your Lordships will observe that this is not a case like many in the books where the carrier is bound to accept the goods, and some unforeseen accident by land or sea has prevented due delivery. It is a case where persons free to contract or not to contract have deliberately made a bargain and deliberately broken it for their own convenience, alleging only by way of excuse that they did not think the consequences would be so serious, and rather blaming the party they have disappointed for not keeping them up to the mark. True it is they said you made pressing inquiries as to the fulfilment of the contract, but that means nothing. You "merely requested us to hurry the boat, which is a very ordinary request." Then your Lordships will observe that although it is not suggested that the respondents knew the particular terms of the bargain with Thomas Owen & Company, they must have known, as every business man in their position would know, that in all probability the goods were being despatched to England in order to fulfil some contract either actually in existence at the time or in immediate contemplation, so that a breach of their contract with the manufacturers in Sweden might cause a breach of contract with some manufacturer or merchant in England, and lead to a claim of damages by him against the shippers of the goods. The respondents therefore were certainly not justified in assuming that in the discharge of their obligations punctuality was a matter of little moment.

Now, if the respondents had given timely notice of their inability or unwillingness to perform their contract, the appellants might possibly have secured other means of transport. In that case the measure of damages

would probably have been just what was claimed in the case of the 33 tons, merely the difference in freight. But at the time when the appellants received notice of the contract having been broken, it would not have been possible for them to get a ship to go to Stocka so as to reach that port by the end of September. "Practically speaking," says Mr Mackintosh, an independent witness who had considerable experience with shipping business in Baltic ports, "it was quite impossible in those days." So the rule laid down in *Rice v. Baxendale* must be applied. That rule is this—"Setting aside all special damage, the natural and fair measure of damages is the value of the goods at the place and time at which they ought to have been delivered to the owner"—per Blackburn, J., *O'Hanlan v. Great Western Railway Co.*, 7 H. & N. 491. The appellants' claim is made on that footing. All they want is to be protected against loss. Their claim is simply for the extra cost of supplying at the stipulated time and at the agreed place of delivery goods as nearly as possible of the same description and quality as those which the respondents had undertaken to deliver. They do not claim profits. They do not even make any claim for the warehousing and insurance of the goods left on their hands, or for diminution in the value of those goods by reason of the subsequent fall in the market. They actually concede to the respondents the profit on the extra 100 tons, to which, as far as I can see, the respondents can have no possible claim.

In the Court of Session the respondents advanced with success a most ingenious argument. They said, We have now discovered the exact terms of your contract with Thomas Owen & Company. Those terms do not correspond precisely with the terms of your contract with us. We might have fulfilled our contract to the very letter and still you might have been left in the lurch as regards your contract with Thomas Owen & Company. We might have put off shipping your wood pulp to the very last day in September, and then we might have gone about picking up cargo at various ports in any order we pleased, and thus without deviating from our voyage, as under certain circumstances we were at liberty to do, it might have been rather late in the year before your wood pulp would have been delivered at Cardiff. You have claimed special damages—you have not proved the special damage you allege, and you have not pleaded general damage. So though we have not thought it worth our while to appeal against the liberal award which has been made in your favour under the head of nominal damages, you are really entitled to nothing at all.

It seems to me that this argument is founded on an inaccurate use, or perhaps I should say a less accurate application, of the terms "special damage" and "general damage." That division of damages is more appropriate I think in cases of tort than in cases of contract. "General damages" as I understand the term are such

as the law will presume to be the direct natural or probable consequence of the act complained of. "Special damages," on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character, and therefore they must be claimed specially and proved strictly. In cases of contract special or exceptional damages cannot be claimed unless such damages were within the contemplation of both parties at the time of the contract. Now, the appellants are not claiming here exceptional damages. They are claiming nothing but ordinary damages ascertained and limited by the special circumstances of the case. No doubt they are claiming over against the respondents the damages they have had to pay to Thomas Owen & Company. But if there had been no contract at all between the appellants and Thomas Owen & Company, and Thomas Owen & Company had made a similar contract with some third person who failed to perform his bargain, and Thomas Owen & Company had bought against the third person just as they did against the appellants, their purchases would have been the best evidence possible of the measure of damages resulting from the respondents' breach of contract.

I am unable to see what difference it can make whether you claim damages generally and show that an award of general damages would include and cover a special loss from which you seek relief, or whether you seek compensation for a special loss and show that the loss would be more than covered or compensated by an award of general damages.

I do not think there is any substance in the respondents' argument.

I prefer to rest my judgment on this broad ground. But I am not satisfied that the appellants have not claimed damages in general terms if it be necessary for them to do so. The first plea-in-law seems to be a claim to general damages, and certainly no authority was cited to show that in such a case as this the Court would refuse to assist the pursuer. Nor am I satisfied that the contract with Thomas Owen & Company does not correspond exactly with the contract of carriage. There was evidence to the effect that according to mercantile usage the contract with Thomas Owen & Company being a c.i.f. contract would be satisfied by the delivery of the goods on board ship at Stocka at any time in September.

The delivery of the second shipment would thus correspond with the delivery of the first shipment, which was to be "first open water." Certainly Thomas Owen & Company seem to have taken that view at first. For on September 5th 1900 they write from Cardiff—"As you are aware, the balance of the Stroms sulphite is to be shipped in August-September, and we shall therefore be glad if you will kindly tell us when we may expect the steamer to arrive here." Moreover, their manager, in his examination, admitted that they would

have been satisfied with the shipment if it had been despatched from Stocka before the end of September. I doubt, however, whether the Court could decide that question in this action, and at any rate I do not think that the Court ought to be astute in defeating an honest claim in favour of persons who have wilfully disregarded their obligation.

I think that the appeal should be allowed and the judgment of the Lord Ordinary restored with costs here and below, and I move your Lordships accordingly.

**LORD DAVEY**—The only question on this appeal is the amount of damages payable by the respondents for an admitted breach of contract. The conclusion which I have formed from a consideration of the cases cited at the Bar is that in recent years at any rate the English decisions as to the measure of damages have been followed by the Scottish Courts, but with some elasticity in the application of them, and, if I may respectfully say so, I think it is of great importance that in commercial cases there should be uniformity in the administration of the law.

The learned Judges in the Inner House agree with the Lord Ordinary in thinking that the respondents, when they entered into the contract of affreightment with the appellants must be presumed to have contemplated that the appellants were shipping the goods in performance of a contract limited as to time of delivery. And having regard to the evidence as to the character of this pulp business, I see no reason to differ from this conclusion. But the learned Judges differ widely from the Lord Ordinary in holding that the loss for which damages are claimed in the pleadings was not consequent on the respondents' failure to fulfil their contract. If, however, the Lord Ordinary has put the right construction on the contract of the appellants with their purchasers in Cardiff it is not disputed that he is right in his conclusion. The difficulty arises from a cause of which your Lordships have had frequent experience in commercial contracts, viz., the use of a printed form which is not exactly adapted to the particular case without making the necessary alterations. The material words of the contract are "mode and place of delivery" (in print), "c.i.f. Penarth Dock, Cardiff" (in writing), "time of delivery" (in print), "in two cargoes first open water and Aug./Sept. 1900" (in writing). Lord M'Laren says that he is unable to see how these words as regards the second delivery can mean anything but delivery at Cardiff before the end of September. But it is admitted that the words "first open water" mean by a shipment then made, *i.e.*, when the port of shipment is first free from ice, and it is equally easy to say with the Lord Ordinary that the words "Aug./Sept." must refer also to a shipment made in either of those months or (in other words) that the time of delivery is defined by the date of shipment and not by the date of arrival. On the whole, I prefer the construction put upon the words by the Lord Ordinary, and

I think that construction is aided by the fact of the contract being "c.i.f." with its recognised legal incidents, one of which is that the shipper fulfils his obligation when he has put the cargo on board and forwarded to the purchaser a bill of lading and policy of insurance with a credit note for the freight, as explained by Lord Blackburn in *Ireland v. Livingstone* (L.R. 5 E. and I. App. 395, at p. 406). But I think that Mr Hamilton perhaps put his argument too high in treating this consideration as conclusive.

But I agree with my noble and learned friend (Lord Macnaghten) that on any view of the contract the interlocutor of the Lord Ordinary should have been sustained. The learned Judges have not laid down any particular measure of damages, for in the view which they have taken that the failure of the appellants to fulfil their contract with Messrs Owen was not the consequence of the default of the respondents, as alleged in the condescendence, Lord McLaren held there was no evidence of any other damages, and gave £50 as an estimated sum for any inconvenience the appellants have been put to, and this was acquiesced in by Lord Kinnear with some misgivings. I cannot agree that there is no evidence upon which the Court could act. I am of opinion that the proper measure of damages would have been the cost of replacing the goods at their place of destination at the time when they ought to have arrived, less the value of the goods in Sweden and the amount of the freight and insurance. There was evidence that it was practically impossible to obtain another vessel to take the goods from Stocka at that time of year, and I think, therefore, that the appellants were justified in buying in or (which is the same thing for this purpose) allowing their purchasers to buy in as soon as it was apparent (as it was before the end of September) that the respondents could not perform their contract. And I think that the actual purchases made might properly be taken as evidence of the cost of replacing the goods in Cardiff in the middle of the month of October. On the other hand, the appellants had no other buyers ready to take their 400 tons of pulp, and there was evidence that it would have been a speculative and very risky thing to send that quantity to Cardiff or elsewhere for sale or without having secured a purchaser, and that prices subsequently fell. I think, therefore, there was evidence upon which the Court might, without any injustice to the respondents, have found the value of the goods in Sweden with freight and insurance would not exceed the price in Messrs Owen's contract. I am not, therefore, disposed to disagree with the alternative view taken by the Lord Ordinary if his construction of the appellants' contract with the purchasers be not adopted. I should add that I am less impressed by the pleading difficulty than I might have been had I not found that neither the Lord Ordinary nor the Inner House considered themselves precluded from giving the pursuers damages other than those arising

directly out of the contract with Messrs Owen.

On these grounds I am of opinion that the interlocutor of the Inner House should be reversed and that of the Lord Ordinary restored, with costs here and below.

LORD JAMES OF HEREFORD—I agree with the judgment submitted to the House by my noble and learned friend Lord Macnaghten.

LORD ROBERTSON—I concur.

Interlocutor appealed from reversed, with costs.

Counsel for the Pursuers and Appellants—Hamilton, K.C.—Robertson—Christie. Agents—James F. Mackay, W.S., Edinburgh—Rollit, Sons, & Burroughs, London.

Counsel for the Defenders and Respondents—The Lord Advocate (Dickson, K.C.)—Bailhache—Spens. Agents—J. & J. Ross, W.S., Edinburgh—Holman, Birdwood, & Co., London.

Friday, August 4.

(Before the Lord Chancellor (Halsbury) and Lords Ashbourne and Robertson.)

GREENOCK HARBOUR TRUSTEES *v.* MAGISTRATES OF GREENOCK.

(In the Court of Session June 1, 1904, reported 41 S.L.R. 658.)

*Burgh—Police—Rates and Assessments—Public Health General Assessment—Exemption—Harbour—Public Health (Scotland) Act 1897 (60 and 61 Vict. c. 38), sec. 136—Burgh Police (Scotland) Act 1892 (55 and 56 Vict. c. 55), secs. 359 and 373 (1).*

The Public Health (Scotland) Act 1897 in sec. 136 enacts—"With respect to burghs subject to the provisions of the Burgh Police (Scotland) Act 1892, or having a local Act for police purposes, all charges and expenses incurred by or devolving on the local authority in executing this Act, . . . and not recovered as hereinbefore provided, may be defrayed out of an assessment (in this Act referred to as the Public Health General Assessment) to be levied by the local authority along with but as a separate assessment from the assessment hereinafter mentioned—that is to say, the said assessment shall be assessed, levied, and recovered in like manner and under the like powers, but without any limit except as in the immediately succeeding section provided, as the General Improvement Rate under the Burgh Police (Scotland) Act 1892, or where there is no such rate, by a rate levied in like manner as the General Improvement Rate under the last-mentioned Act." . . . And by section 137 it places a limit upon such Public Health General Assessment "which"