

the writ of confirmation. If there is any risk at all to the superior, such a proceeding is not unwarrantable unless it is prejudicial to the interests of the vassal, and no such thing is suggested here. The only plausible ground of objection stated for the vassal was that the proposed writ of confirmation was not in fair compliance with the requirements of the statute. But I am of opinion that this objection is untenable in face of the peculiar position in which the superior is here placed.

Although, however, it is allowable under a fair construction of the statute to amplify the writ of confirmation when the superior has such good reasons for doing so, the Court will carefully guard against any undue redundancy in writs of confirmation. I am of opinion that we should adhere to the interlocutor of the Lord Ordinary.

**LORD DEAS**—This is a question of importance and interest to both parties. The Titles to Land Consolidation Act gives in the first part of Schedule V a form of a writ of confirmation which has been here adopted. Now the writ of confirmation approved of by the Lord Ordinary is quite in terms of this form, except the last clause which begins with the words "and declaring that these presents are granted," &c. This last clause I consider to be redundant and unnecessary, and in a form not sanctioned by the Statute. The variations here proposed upon the form given in the statute I consider to be dangerous to both parties, and I am unwilling to sanction any such variation.

**LORD ARDMILLAN**—The Titles to Land Consolidation Act makes it unnecessary to insert in a writ of confirmation even a reference to limitations and conditions of the feu, but it does not absolutely preclude that being done. So where it may be hurtful to the superior to omit such a reference, and cannot possibly harm the vassal to insert it, I see no reason why the reference should not be made. I therefore agree with your Lordship in the chair, that we should adhere to the interlocutor of the Lord Ordinary. I would however suggest that in the last clause of the proposed writ, instead of the words "and declaring that these presents are granted by me as commissioner aforesaid, always with and under," the words "and with and under," should be substituted. I think that this alteration would make the wording of the deed more consistent with simplicity desirable in writs of this sort.

**LORD JERVISWOODE** concurred with the opinions expressed by the Lord President and Lord Ardmillan.

Counsel for the Pursuer—Solicitor-General and Johnstone. Agents—Scott, Bruce, & Glover, W.S.

Counsel for the Defender—Marshall and Jameson. Agent—Lindsay Mackersy, W.S.

*Tuesday, May 20.*

## SECOND DIVISION.

[Sheriff of Inverness.

MACDONALD & COMPANY *v.* HIGHLAND RAILWAY CO.

*Railway—Damages—Contract.*

*Held railway company liable in damages for*

delaying without sufficient cause to forward perishable goods specially marked as such.

The summons in this suit, at the instance of Messrs Macdonald & Company, pastry-cooks and confectioners, Inverness, against the Highland Railway Company, concluded for "the sum of £11, 3s. 6d. sterling, being loss and damage sustained by the pursuers by and through the defenders' failure timeously to convey and deliver a certain quantity of perishable goods which the defenders, on or about the 30th day of September last, contracted with the pursuers to carry, and received delivery of for that purpose, by their line of railway from Inverness to Dingwall, and thence to Strome Ferry, and thence per steamer to Broadford, to which latter place they were addressed and consigned to the pursuers, for the purpose of being thence conveyed by the pursuers to Armadale Castle, there to be used at a banquet given by Lord Macdonald on the occasion of his coming of age, and for the supply and preparation of which the pursuers were purveyors and contractors, but which, owing to the negligence of the defenders, did not arrive at Strome Ferry in time for the steamer which left for Broadford on said 1st day of October, and had to be conveyed thence by special boat hired for the purpose by the pursuers, thereby necessitating the expenditure by the pursuers detailed in the account appended hereto, and causing damage to the goods themselves to the extent also detailed in said account; Second, the sum of £14, 2s. 10d., being loss and damage sustained by the pursuers by and through the defenders' failure timeously to convey and deliver a second quantity of perishable goods which the defenders, on or about the 1st day of October last, contracted with the pursuers to carry, and received delivery of for that purpose, by their line of railway from Inverness to Dingwall, and thence to Strome Ferry, and thence per steamer to Broadford, to be thence taken to Armadale Castle, to which latter place they were addressed and consigned to the pursuers, and were to be used at another banquet of a similar description held on the 5th of October, and for that supply and preparation of which the pursuers were purveyors and contractors, but which goods, owing to the negligence of the defenders, did not arrive at Strome Ferry until after the departure therefrom, on Monday the 3d October, of the steamer intended to convey them to Broadford, and did not arrive at final destination until the evening of Wednesday the 5th of October, when they were of no use for the purpose for which they were intended, as above mentioned, thereby causing damage to said articles themselves to the extent of £10, and causing the useless expenditure to the pursuers of a sum of £2, 3s. sterling, paid by them for the loan of lamps from Edinburgh, and £1, 19s. 10d. sterling for carriage of said lamps from Edinburgh to Inverness, which lamps formed a part of said second parcel of goods, amounting in all to the above sum of £14, 2s. 10d. sterling; Third, the sum of £50 sterling, being loss and damage sustained by the pursuers in their business character and reputation as purveyors and contractors, by the negligence above mentioned on the part of the defenders, which rendered them unable to fulfil with promptitude the contract undertaken by them to supply the said contract, and as a *solatium* for the trouble, anxiety, and annoyance caused by the non-arrival of the said goods timeously; and the expenses of process."

The account referred to in the summons was made up as follows:—  
1870.

Oct. 1. Paid telegrams to and from Strome Ferry, . . . . .	£0 7 0
Paid messenger's expenses to Dingwall from Inverness to inquire about deten- tion, . . . . .	0 3 6
Paid for boat-hire from Broadford to Strome Ferry and back, . . . . .	3 0 0
Paid hotel bill at Strome Ferry for pursuer's servants and for boatmen, . . . . .	1 5 0
Paid expenses of procuring pro- visions and cooking uten- sils in Skye, to meet the possibility of those from Inverness not arriving in time, they being detained, . . . . .	3 10 0
To paid damage done to perish- able articles conveyed by railway, owing to the deten- tion, . . . . .	2 18 0
	£11 3 6

The statement of facts by the pursuers was as follows:—"In the month of September last the pursuers entered into a contract with Lord Macdonald for the supply of a series of banquets and other entertainments, to be given by his Lordship on the 4th, 5th, and 6th of October at Armadale Castle, in the Isle of Skye, on the occasion of his Lordship attaining his majority; and for the fulfilment of this contract the pursuers had to send a great quantity and variety of perishable goods, such as beef, hams, tongues, bread, and the like, from Inverness to Armadale Castle, and it was of the utmost consequence to the pursuers that said goods should be conveyed with the utmost possible despatch, in order that the same might arrive in good condition for the purpose for which they had to be used; and all this was known to the defenders, or at least to their agents and servants.

"On or about the 30th day of September the pursuers contracted with the defenders for the conveyance of a certain portion of said goods from Inverness to Broadford, in the Isle of Skye. The said goods were delivered to the defenders at Inverness, addressed to the pursuers at Broadford, and were received by the defenders for the purpose of being conveyed thither on said 30th day of September; and the same should have arrived at Strome Ferry, the land terminus of the Dingwall and Skye Railway, which runs in connection with the defenders' line, on Saturday the first day of October last, in time to be forwarded by the steamer belonging to the said Dingwall and Skye Railway Company, from Strome to Broadford, on said first day of October; but owing to the negligence of the defenders, or at least owing to the said goods not having been forwarded with due and ordinary despatch, the same did not arrive at Strome until the evening of the first day of October, and could not in consequence have been conveyed to Broadford by the ordinary line of conveyance until the following Monday, when they would have been unfit for use and too late for the purpose for which they were intended. To avert, so far as possible, the consequences of the defenders' negligence, and of the non-arrival of the goods in time to be forwarded by the steamer on Saturday the first day of

October, the pursuers hired a boat at Broadford to carry the said goods from Strome to Broadford, to which latter place they were addressed, and incurred the further expenditure detailed in the account appended to the summons, amounting in all to the sum of £11, 3s. 6d.

"On or about the first day of October the pursuers contracted with the defenders for the conveyance of a second quantity of perishable goods from Inverness to Armadale Castle, and said second quantity was delivered by the pursuers, addressed to Armadale Castle, and received by the defenders on said first day of October. These goods, if conveyed with ordinary despatch, should have arrived at Broadford, at latest, on the evening of Monday the third day of October, but owing to the negligence of the defenders in detaining the goods at Strome Ferry and not forwarding them by the steamer which left there for Broadford on the third, or at least owing to the said goods not having been forwarded with due and ordinary despatch, the same did not arrive at Armadale Castle until the evening of Wednesday the fifth day of October, when they were of no use for the purpose for which they were intended, thereby causing damage to the said articles themselves to the extent of £10 sterling, and causing the useless expenditure to the pursuers of a sum of £2, 8s. sterling, paid by them for the loan of lamps from Edinburgh, and £1, 19s. 10d. for carriage of said lamps from Edinburgh to Inverness, which lamps formed a part of said second parcel of goods, amounting in all to the sum of £14, 2s. 10d.

"Owing to the negligence above mentioned, the pursuers were put to very serious inconvenience and trouble, and they were unable to fulfil, so satisfactorily as they otherwise would have done, the contract entered into by them with Lord Macdonald; and owing to the uncertainty which attended the whole proceedings they caused anxiety to their employers, which injured their reputation as purveyors and contractors with them, and the sum of £50 sterling is a fair and reasonable *solatium* for said inconvenience, anxiety, and loss of reputation."

The defenders averred, with regard to the first quantity of goods concerned, that the detention at Dingwall was unavoidable, and was not occasioned by any fault or neglect on their part. With regard to the second quantity of goods, they averred that they received them addressed to the pursuers at Armadale about 6:30 p.m. on 1st October last. The first train by which they could be despatched left Inverness on the morning of Monday, 3d October, at 5:30 a.m., and they were forwarded by it, and reached Strome Ferry by the early train on the Dingwall and Skye line at five minutes past one o'clock on that day. There was no steamer to Armadale till the 7th October; but the station-master at Strome having been informed by a person who came from Broadford, that Lord Macdonald's carts were waiting at Broadford for such goods, sent them on per steamer to Broadford on the day following (4th October). When they reached Broadford the carts had left, and the goods were sent on to Armadale by boat. There was no delay fault, or neglect on the part of the defenders. The pursuers themselves requested the defenders to send on the goods by boat or otherwise, without waiting for the Friday steamer. If the pursuers desired that the goods should be sent to Broadford, there was neglect on their part in addressing them

to another place, and their neglect caused the loss, if any was sustained.

The pleas in law for the pursuers were—“(1) The defenders having, by their negligence or otherwise, failed to deliver the goods contracted to be conveyed by them, with due and ordinary despatch at their destination, are liable in all loss and damage thereby incurred. (2) The pursuers having suffered loss and damage to the extent libelled by such negligence, or by the failure of the defenders to convey their goods with proper despatch, decree ought to be pronounced as concluded for, with expenses.”

The pleas in law for the defenders were—“(1) The statements in the summons and condescendence are irrelevant, and insufficient to support the conclusions. (2) There having been no fault or neglect on the part of the defenders, and no undue or unavoidable delay, they ought to be assolizied. (3) Neglect, or contributory neglect, on the part of the pursuers, occasioned the damage, if any was sustained. (4) The defenders are not responsible for any loss caused by delay or otherwise in the carriage of the goods after they reached Strome Ferry, the steamers running from thence not being their property or wrought by them.”

On 27th February 1871 the Sheriff-Substitute (THOMSON) pronounced the following interlocutor:—

“*Inverness, 27th February 1871.*—The Sheriff-Substitute having heard parties, and considered the closed record, sustains the first plea in law stated for the defenders, in so far as it is thereby pleaded that the statements in the summons and record are irrelevant to support the conclusions for damages ‘as a *solatium* for the trouble, anxiety, and annoyance caused by the non-arrival of the goods’ in question: *Quoad ultra*, repels the said plea: Allows, in regard to the remaining portions of the case, a proof of their respective averments to both parties, and to the pursuers a conjunct probation; and appoints the same to proceed on Monday, the 13th day of March next, at eleven o’clock A.M.

“This action is at the instance of a firm without the individual partners being named as pursuers. The Sheriff-Substitute is of opinion that, assuming the damages in *solatium* for trouble and anxiety of mind to be recoverable from a carrier for breach of contract at all, they are not recoverable by a firm suing simply as such.

“It was pleaded that the pursuers’ case was also irrelevant in respect of the loss of credit and business reputation, which is the foundation of part of their case. There may possibly, as stated by the defenders at debate, be no cases of such damages being given against carriers, but the Sheriff-Substitute cannot discover any grounds on general principles for holding that such is incompetent.

“The point, in his opinion, will turn on the question to be ascertained after the proof, whether that kind of injury was, in this particular case, direct or consequential. If it was of a kind naturally or necessarily following on the wrong done or negligence of which the defenders were guilty, such as the latter ought to have foreseen at the time, there seems to be nothing peculiar in the case of a carrier’s *culpa* in neglect to take him out of the usual rule.”

The defenders appealed to the Sheriff (IVORY), who pronounced the following interlocutor:—

“*Edinburgh, 17th May 1871.*—The Sheriff having considered the defenders’ appeal, with relative

reclaiming petition and answers, and whole process, recalls the interlocutor appealed against: Finds that the pursuers’ statements are irrelevant, and insufficient to support the third conclusion of the summons, and to that extent supports the third plea in law stated for the defenders: *Quoad ultra*, allows to both parties a proof before answer of their respective averments, and to the pursuer a conjunct probation, and remits to the Sheriff-Substitute to fix a diet of proof, and to proceed further in the cause as shall be just; Finds the pursuers liable in expenses, subsequent to the date of the interlocutor appealed against: Allows an account thereof to be given in, and remits the same to the auditor to tax and to report.

“*Note.*—In addition to the direct loss and damages of £11, 3s. 6d. for the first, and £14, 2s. 10d. for the second quantity of goods, concluded for in the first and second conclusions of the summons, the pursuers, under the third conclusion, seek to recover £50 sterling, as ‘loss and damages sustained by the pursuers in their business character and reputation as purveyors and contractors,’ by the defenders’ negligence in failing duly to deliver the said goods, and ‘as a *solatium* for the trouble, anxiety, and annoyance caused by the non-arrival of the said goods timeously.’

“The Sheriff is of opinion that there are no relevant or sufficient statements on record to support this third conclusion.

“The fifth article of the pursuers’ revised condescendence contains the only statement on record in regard to it, and is to the following effect:— ‘Owing to the negligence above mentioned, the pursuers were put to very serious inconvenience and trouble, and they were unable to fulfil so satisfactorily as they otherwise would have done the contract entered into by them with Lord Macdonald; and owing to the uncertainty which attended the whole proceedings, they caused anxiety to their employers, which injured their reputation as purveyors and contractors with them, and the sum of £50 sterling is a fair and reasonable *solatium* for said inconvenience, anxiety, and loss of reputation.’

“It will be observed that this statement differs from that in the third conclusion of the summons (1), in so far as it avers that the pursuers have sustained loss of reputation solely with Lord Macdonald, and not generally; (2) in so far as it avers that the anxiety was caused to Lord Macdonald, and not to the pursuers; and (3) in so far as the sum of £50 is claimed wholly as a *solatium*, and not partly as damages and partly as a *solatium*.

“These are serious differences in the pursuers’ statements, and of themselves might be held fatal to this branch of their claim.

“But even assuming that this branch of the pursuers’ claim had been stated in the way most favourable to them, the Sheriff is of opinion that the pursuers are not entitled to claim any damages such as those sought to be recovered under the third conclusion.

“Where damages are sought to be recovered for a breach of contract, they must be damages which are appreciable, capable of being stated, and capable of being estimated.—*Per Pollock, C. B., in Hamlin v. Great Northern Railway Company, 26 L. J. (U.S.) Exch. 20.* Now, in regard to the damages sought to be recovered under the third conclusion, it appears to the Sheriff that they are not capable of being either specifically stated or

estimated. The pursuers themselves show that they are unable to specify any particular loss or damage that they have sustained in connection with this branch of their claim, by their failing to state any special loss or damage, and by claiming a random sum of £50 as loss and damage for loss of reputation, and also as a *solutium* for the trouble, anxiety, and annoyance to which they have been subjected. The pursuers have had no difficulty in stating specifically the other branches of their claim falling under the first and second conclusions of their summons. If they have failed to state any specific damage in connection with their claim under the third conclusion, it seems not unreasonable to hold that the damages claimed are such as are incapable of being stated or estimated, and if so, they cannot be recovered by the pursuers.

“Further, it was expressly laid down in the case of *Hadley v. Baxendale*, 9 Exch. 341, that the damages recoverable for a breach of contract are such as may fairly and reasonably be considered as arising, according to the usual course of things, from the breach of contract itself, or such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. The damages claimed do not appear to the Sheriff to fall within either branch of this rule. According to his view, it cannot be held that the damages claimed for loss of reputation were such as might fairly and reasonably be considered as arising naturally from the breach of contract itself, or such as might be reasonably supposed to have been in the contemplation of the parties at the time they made the contract. On the contrary, if the pursuers suffered loss of reputation with Lord Macdonald or any other party, in consequence of the defenders’ breach of contract, it appears to the Sheriff to have been a most unfair and unreasonable result, and one which could not reasonably be supposed ever to have been contemplated by the parties. In regard to the *solutium* claimed for anxiety and inconvenience, it was held in the case of *Hamlin*, already referred to, that no damages could be recovered under this head, it being observed by Pollock, C. B.:—‘The law lays down this, that if the contract is broken the party is to be put in the same position as far as money is concerned, but the law takes no notice of the vexation which has been suffered. Everybody will admit that there is some vexation in finding that the contract is not performed; but the law allows nothing for that. It is one of the evils of life, and every one must bear his own share of them.’”

After a proof, the Sheriff-Substitute (BLAIR) pronounced the following interlocutor:—

“*Inverness*, 29th January 1872.—The Sheriff-Substitute having heard parties’ procurators, and considered the proof and whole process—*First*, Finds that the pursuers delivered to the defenders certain goods of a perishable nature on 30th September 1870, addressed to Broadford in Skye, which the defenders undertook to forward to Strome Ferry without delay, in order to be shipped by steamer to Broadford, which was to sail from Strome Ferry on the 1st October 1870: Finds that the defenders forwarded these goods by the 5:30 A.M. train on 1st October, but that the goods, while in their custody, were unduly detained at Dingwall by their servants, and did not arrive at Strome Ferry until late in the evening of the said 1st October, and that at an hour after the steamer

had sailed: Finds that the pursuers suffered loss and damage arising from the undue delay in forwarding the goods while in the custody of the defenders: Finds, in point of law, that the pursuers are entitled to recover from the defenders the loss sustained by them arising from the defenders’ *culpa*, being the sum of £11, 3s. 6d.: Therefore decerns for the said sum of £11, 3s. 6d., with interest from date of citation. *Second*, Finds that the pursuers delivered to the defenders certain goods of a perishable nature on Saturday night, the 1st October 1870, addressed ‘*Armadale, Skye*,’ which the defenders undertook to forward to Strome Ferry in order to be shipped by the first steamer, which was to sail for Armadale on Friday, the 7th October: Finds that the defenders did send these goods by the 5:30 A.M. train on 3d October, and that the goods arrived at Strome Ferry on the afternoon of the same day: Finds it is not proved that the defenders undertook to carry these goods to Armadale *via* Broadford: Finds that these goods were detained by the defenders at Strome Ferry until the 4th October, when, in consequence of the pursuers’ instructions, the defenders sent the goods by a boat specially hired by them for the purpose, to Armadale, where they arrived and were delivered to the pursuers on the 5th October: Finds that any loss or damage sustained by the pursuers, arising from that detention, was occasioned by their own negligence or carelessness, and was not owing to any negligence or want of care on the part of the company: Finds that no contract or duty has been proved by which the defenders can be made liable for that loss to the pursuers: Therefore assolvies the defenders from the second claim specified in the conclusions of the summons, and decerns: Finds the defenders liable in expenses: Allows an account thereof to be given in by the pursuers, and remits to the Auditor to tax the same when lodged, and to report.

“*Note*.—After a careful consideration of the proof, the Sheriff-Substitute has come to the conclusion that the pursuers are entitled to recover on their first claim, but not on their second claim, in their summons.

“They delivered the first parcel of goods (properly addressed) to the defenders, to be conveyed to Broadford *via* Strome Ferry, in time for the steamer, and the loss and damage suffered by the pursuers arose from the *laches* of the defenders in delaying to forward timeously these goods. The consignment note (No. 11/6 of process), and the receipt by the defenders of the parcel for transmission in terms thereof, constitutes a clear obligation, a direct undertaking by the defenders, to send the goods to Strome Ferry, and that, too, in time for the Broadford steamer. If the defenders have a business so great that from receiving a large quantity of goods they were unable to forward part of them, they must provide means for carrying it on, or suffer for the consequences of not fulfilling the contracts they may undertake. Through their fault the goods did not arrive at Strome Ferry in time to be shipped by the Broadford steamer.

“In ascertaining the amount of damage due to the pursuers the Sheriff-Substitute has allowed the price of the goods rendered useless, and also the expenses incurred by the pursuers in getting delivery. The claim in regard to the parcel of goods delivered to defenders on 1st October, and addressed to Armadale, Skye, stands on a different footing. Although these goods were delivered to the defenders on the 1st, as the steamer for Arma-

dale did not sail from Strome Ferry until the Friday following, the defenders were under no obligation to forward them by a different route, even if more expeditious. The contract they entered into with the pursuers implied that the goods received by them shall be delivered at their destination within a reasonable time, according to the usual course of business. It is according to their usual course of business that goods directed to Armadale are forwarded direct by the steamer to Armadale, unless addressed *via* Broadford. It is clear that the pursuers made a mistake in addressing this parcel to Armadale instead of to Broadford, and this being the case they must suffer the consequences of their own negligence. In regard to this portion of the case, so far from there being any evidence to show that there was negligence on the part of the defenders, there is abundant evidence that negatives the negligence imputed to them.

"The Sheriff-Substitute has seen no grounds for modifying the expenses to which he conceives the pursuer is entitled. The expenses would have been the same, or very nearly so, even if the pursuers had confined their claim to the first conclusion of their summons, provided the sum concluded for exceeded £12."

The defenders appealed to the Sheriff, who pronounced the following interlocutor:—

"*Edinburgh, 9th July 1872.*—The Sheriff having heard parties' procurators, and considered the appeals for the defenders and pursuers respectively, with the closed record, proof, and whole process, recalls the interlocutor appealed against: Finds that late in the evening of Friday, 30th September 1870, the pursuers delivered to the defenders at Inverness certain goods addressed to Broadford, in Skye, in order that they might be forwarded to Strome Ferry by rail, and thence by steamer to Broadford: Finds that on 1st October 1870 the defenders forwarded these goods by the 5-30 A.M. train to Dingwall, and thence to Strome by the train which reached there the same evening, but too late to catch that day's steamer to Broadford: Finds that the pursuers have failed to prove that any loss or damage sustained by the pursuers in connection with the said goods was caused by the defenders' negligence or undue delay in forwarding the same: Finds, that on the evening of Saturday, 1st October 1870, the pursuers delivered to the defenders at Inverness another quantity of goods addressed Armadale, Skye: Finds that on 3d October the defenders forwarded these goods by the 5-30 A.M. train to Dingwall, and thence to Strome by the train which reached there the same day at 1:15 P.M.: Finds that in consequence of these goods being wrongly addressed Armadale, Skye, they were not forwarded to Broadford by the steamer which sailed for that place shortly after the arrival of the said train on 3d October, but were kept at Strome until 4th October, when, in consequence of the pursuers' instructions subsequently given, the defenders sent the goods by a special boat to Armadale, where they arrived on 5th October: Finds that any loss or damage sustained by the pursuers in consequence of the said goods not having been forwarded to Broadford by the steamer on 3d October, was occasioned by their own negligence or carelessness in putting a wrong address on the goods, and was not owing to any negligence or want of care on the part of the defenders: Finds, in these circumstances, in point

of law, that the defenders are not liable for any loss or damage sustained by the pursuers in connection with the said two quantities of goods: Therefore, to the above extent and effect, sustains the defences, and assolizes the defenders from the conclusions of the summons, and decerns: Finds the pursuers liable in expenses: Allows an account thereof to be given in, and remits to the Auditor to tax the same, and report.

"*Note.*—The Sheriff concurs with the Sheriff-Substitute in holding that the defenders are entitled to be assolized from the pursuers' claim for loss and damage in connection with the second quantity of goods libelled on in the summons, and he has nothing to add to the grounds of judgment stated by the Sheriff-Substitute in regard to this branch of the pursuers' claim.

"The first branch of the pursuers' claim appears to the Sheriff to be attended with more difficulty; but, after careful consideration he has arrived at the conclusion that on this branch also the defenders are entitled to absolvitor.

"The pursuers have not set forth on record, and in the opinion of the Sheriff they have failed to prove, any special contract for delivery of the goods at Strome in time to be forwarded by the steamer to Broadford on 3d October. Angus Mackenzie no doubt says that he made arrangements with Mr Roberts, superintendent of the railway, in presence of his assistant Mr Ellice, for the conveyance of the goods to Armadale; that he told Mr Roberts the purpose the goods were intended for, and that he wished the goods to be at Armadale on Saturday night or early on Sunday, as they were required for cooking on Monday, to be ready for the banquet on Tuesday. But he does not allege that Mr Roberts undertook to deliver the goods at Strome or Broadford at any particular time, or entered into any special contract with him for their delivery, and he won't swear that he told Mr Roberts when the banquet was to take place.

"On the other hand, Mr Roberts and Mr Ellice both say that no such arrangements were made by either of them, or in their presence; that they were not the parties to make any such arrangements for the conveyance of goods, but that Mr Walker and Mr Couper were the only persons authorised to enter into any arrangements of the kind; that they were never told the purpose for which the goods were sent, or the time when they required to be delivered; and that they did not remember hearing anything about the goods in question until after they were despatched by the railway.

"These are the principal witnesses to what took place between the parties prior to the despatch of the goods; and looking to their evidence, it appears to the Sheriff that the pursuers have not only failed in proving any special contract for forwarding the goods to Strome by the first train on 3d October, but that they have failed to establish that, prior to the despatch of the goods, they intimated to the defenders the purpose for which the goods were sent, the day on which they required to be delivered, or the peculiarly perishable character of the goods.

"The pursuers contend, however, that as the goods were marked 'perishable,' the defenders were bound to forward them by the first train. It is no doubt true that the defenders usually give a preference to goods marked in this way, but there has not, in the Sheriff's opinion, been proved to

exist any such invariable custom in regard to this as to entitle the pursuers to insist on it being carried out as matter of right, or to claim damages where such preference has not been given. Still less can it, in his opinion, reasonably be maintained that the defenders were bound under all circumstances to forward goods so marked by the first train. It appears that the pursuers were in the habit of marking all their goods 'perishable,' whether they were so or not, and many of the articles sent by them on the occasion in question were not perishable goods. It would be absurd if, by merely marking all their goods in this manner, they were to be held entitled to a preference in railway transit over the goods of others not so marked.

"The usual course for parties sending perishable goods by railway is to enter into a special contract for their transit. The present case appears to be one in which such a precaution was peculiarly necessary, as it appears from the pursuers' statement that a delay of twelve hours beyond the speediest mode of transit rendered the articles utterly useless. If they were in good condition before being despatched, and were properly packed, it is difficult to understand how such a slight delay in the month of October should have been so fatal to the goods.

"But if this was likely to be the result, it was all the more necessary that the defenders should have been made aware of the very perishable nature of the goods, and that a special contract should have been entered into with them to have the goods forwarded by the first train, in which case, no doubt, as more than ordinary risk would be incurred, a higher charge would have been made by the railway company.

"In the absence of any special contract, the Sheriff sees no ground for holding that the pursuers' goods, even though they were marked 'perishable,' are to be considered as in a more favourable position than ordinary goods; and in the case of ordinary goods the rule is, where no time is agreed upon as to the carrying, that the carrier is bound to convey within a reasonable time under ordinary circumstances; but he is not bound to go out of his ordinary accustomed course, or to have recourse to extraordinary means of despatch for the conveyance of the goods. In the case in question, the pursuers' goods were not sent by the first train because it was sufficiently heavily loaded without them.

"It is proved that twelve carriages were attached to the engine of that train, and that this was a sufficient load at the time. The goods of various other parties were left behind at Dingwall at the same time. All this was done according to the usual course of management of the railway company. But the goods were forwarded on the same day by the immediately succeeding train. Supposing the pursuers' goods, therefore, to be in the same position as ordinary goods, there seems no room to doubt that they were forwarded to Strome within a reasonable time.

"But even if it be held that the goods, being marked 'perishable,' are in a more favourable position than ordinary goods, it appears to the Sheriff that there was no undue delay in forwarding them, but that the defenders did everything that could reasonably be expected to facilitate their despatch. If the goods had been of the character of ordinary 'perishable' goods, they would have arrived at

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their destination in good condition by the Monday's steamer. It was only because they were of a peculiarly perishable nature that they suffered any damage. In the absence of all intimation to the defenders that the goods were of this peculiar nature, the latter cannot be held liable for the damage sustained by the pursuers; such damage cannot reasonably be held to have been in the contemplation of the parties at the time they made the contract, and if so, the defenders are not liable for it. The only damage that can be held to have been in their contemplation was such damage as was likely to have been occasioned by ordinary perishable goods by the short delay that took place.

"On the whole, therefore, whether the pursuers' goods are to be held as in the position of ordinary goods, or in a more favourable position in consequence of their having been marked 'perishable,' the Sheriff is of opinion that the defenders are not liable for the loss and damage claimed by the pursuers."

The pursuers appealed to the Court of Session, but abandoned the claim for *scotium*.

Case cited—*Finlay*, 8 Macph. 959.

At advising—

LORD JUSTICE-CLERK—With regard to the second quantity of goods, I am of opinion that the nature of the traffic carried on by the defenders between Inverness and Skye, and the fact of these goods being addressed to Armadale, are conclusive in favour of the defenders. They acted in the usual course of their business. The first portion stands in a different position. I think there was no obligation on the part of the Company to send goods by the first train from Dingwall, if by so doing they were put to great inconvenience, still the ordinary course was to send on these goods. It was not shown that there was any difficulty in sending them on, but, on the contrary, a carriage truck was sent on. With their knowledge of the nature of the goods the Company was bound to have sent them on at once. I am for altering the Sheriff's judgment, and returning to the judgment of the Sheriff-Substitute.

LORD COWAN—I concur. I think there was here, with regard to the second quantity of goods, what may be called a general special contract, and the Company was under an obligation to forward goods marked perishable preferably to others not so marked.

LORD BENHOLME—The special contract was just this, to pay such attention as a railway ought to indications such as made by marking goods as perishable. It is the duty of a railway where they find goods marked perishable to give them a preference.

LORD NEAVES concurred.

The Court sustained the appeal, and recalled the interlocutor of the Sheriff. With regard to expenses, the Court recalled all the findings as to expenses, found no expenses due to either party in the inferior Court, and gave one-half the expenses of the appeal to the Court of Session to the appellants.

Counsel for Appellants—Macintosh and Watson. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Respondents—Lancaster and Solicitor-General (Clark). Agents—H. & A. Inglis, W.S.

NO. XXVII.