passing of that statute is also an element; but these are not conclusive. They must be brought home to the mind of the testator, so as to show that it was his intention now to avail himself of that power. Upon the deed therefore, without going farther, I think the result is quite clear. No distinction has been taken at the bar, and I suppose no distinction is intended to be taken, between "Hallgreen proper" as it is called in the settlement, and the other portions of the heritable estate. I can fancy that there may be some distinction, but I see it stated in the case that they have been incorporated with the estate of Hallgreen, and really form part of it; and I take it that when he spoke in his will of the estate of Hallgreen he meant not only Hallgreen proper, to which he had succeeded from his relative, but also those pendicles which he had purchased himself and added to the estate. I presume there is no question intended to be raised about that, as we have heard no argument upon the subject. Then are there any extrinsic elements to be looked to? As I understand the case, three species of extrinsic elements are spoken of. There is, first, previous instructions given to the solicitor who prepared the deed. Now I agree with your Lordship in the chair that that kind of evidence is not competent. I am not aware of any case in which it has been allowed that jottings have been admitted to control a deed. Such instructions are always tentative; they are always liable to be altered, and we know that they are constantly varied and altered when the draft comes to be gone over. Therefore I would exclude all previous instructions given by the late Mr Farquhar in endeavouring to construe his will. They are not admissible. I think the same principle would very nearly exclude previous writings, although something depends on the nature of these writings. But here I would exclude, and I don't look at, any writings previous to the date of the deed. The second species of extrinsic evidence is subsequent writings. Now, I think it has been decided that when these writings are formal deeds they may be looked to. But I am quite prepared to express my opinion as an individual that holograph writings—authentic writings—fall under the same category. Subsequent to the date of the will a testator may, by a writing under his own hand, even addressed to a third party, give materials at which the Court can reasonably and rightly look, in order to reach the interpretation of a doubtful deed. The third element is conversations. Now I am for excluding these. They are mentioned in the case, but I don't think Mr Asher founded on them. There are statements that he said so and so to the solicitor who prepared one of the codicils. I am for excluding that; but admitting that subsequent authentic writings of the party really puts an end to all difficulty in the case, and I concur with your Lordships in regard to the disposal of it.

The Court pronounced this interlocutor:—

"The Lords having heard counsel on the Special Case, are of opinion and find that the party of the first part is entitled, as heir-at-law *ab intestato* of his father, James Farquhar, to the whole heritable estate in Scotland which belonged to his said father at his death, and decern."

Counsel for Captain James Farquhar—Balfour—Asher. Agents—Dalmahoy & Cowan, W.S.

Counsel for the other parties—Solicitor-General (Watson)—Fordyce. Agents—Tods, Murray, & Jamieson, W.S.

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*Saturday, November 6.*

## SECOND DIVISION.

[Sheriff of Elgin.

## THE GREAT NORTH OF SCOTLAND RAILWAY CO. *v.* JAMES M'CONNACHIE.

*Reparation—Railway Company—Reasonable Condition—Carriage of Goods—Loss of Market.*

A fish-curer had his goods carried by a railway company at a reduced rate, he by special contract undertaking to relieve the company and all other companies over whose lines his goods might pass from all liability in case of loss, damage, or delay, except upon proof of wilful fault or negligence on the part of the company's servants. The company undertook to deliver the goods within a reasonable time. In consequence of a block on the line, certain barrels of fish sent by him were delayed on their way to market and spoiled. In an action of damages at his instance against the company, *held* that the special contract was reasonable and had the effect of laying the burden of proof on the consignor, but (*dub.* Lord Gifford) that upon the evidence the company were liable in respect that they had neither taken proper measures to guard against the occurrence of the block, nor warned the consignor that there was a risk of delay.

This was an appeal from the judgment of the Sheriff of Elgin in an action at the instance of James M'Connachie, fish-curer in Lossiemouth, against the Great North of Scotland Railway Company. The pursuer sought to recover the sum of £84, 12s. as loss and damages alleged to be due to him by the defenders in consequence of their having failed to deliver timeously a number of barrels of fish despatched by him from one of their stations to Glasgow upon 23d and 25th September 1873. He averred that upon the 23d of September he had sent from Lossiemouth certain barrels of fish addressed to various salesmen in Glasgow, and marked as perishable goods. These goods were to be sent to Glasgow *via* Craigellachie and Boat of Garten, and in the ordinary course of delivery should have been delivered upon the morning of the 24th. They were not however delivered till the 26th. In like manner, fish despatched by him from Lossiemouth upon the 25th and due in Glasgow upon the 26th were not delivered until the 27th. In consequence of this delay, it was alleged that the fish were spoiled and unmarketable. He further stated that had he been warned by the defenders that there was any risk of delay in sending these goods by their line, he would have sent them by the Highland Railway from Elgin.

The defenders admitted that they had received the fish, and did not deny that there had been the delay complained of, but they denied that there was any undue delay which could be

attributed to their wilful fault or negligence. It appeared that the pursuer was in the habit of forwarding his goods at reduced rates under what the defenders call "special risk forwarding notes." The form of this special contract, which was signed by the sender of the goods, was as follows:—"To the Great North of Scotland Railway Company.—Deliver as under the under-mentioned goods, to be carried at the reduced rate below the company's rate; in consideration whereof I undertake to relieve the Great North of Scotland Railway Company, and all other companies over whose lines the goods may pass, from all liability in case of loss, damage, or delay, except upon proof that such loss, detention, or injury arose from wilful fault or negligence on the part of the company's servants. When, for the convenience of senders, the company book goods to stations on other lines, shipping companies, or other public carriers, they do so at the sole risk of the owners, and subject to the rules and regulations of such companies and carriers; but they do not undertake to forward or deliver goods in time for any particular conveyance, or for any particular market. They only undertake to deliver goods within a reasonable time, and they will not entertain claims for compensation for alleged loss occasioned by late delivery. If consignor desires the articles to be conveyed by passenger train, the words 'per passenger train' must be written across the face of this note, and initialed by the party." The goods in question on both occasions were sent under such contracts.

A proof was taken, and the following were the material facts adduced:—About the middle of September 1873 the Bridge of Dun, on the line of the Caledonian Railway Company, was carried off by a heavy flood. In consequence of this accident the traffic by the Caledonian line was stopped, and had to be forwarded by the defenders' line of railway *via* Boat of Garten. This increased traffic resulted in a block on 22d September at Boat of Garten station (the junction of the defenders' line of railway with that of the Highland Railway Company), and the delay in forwarding the pursuer's goods was caused by this block, the goods sent down by the Great North of Scotland Railway on the 23d being shunted into sidings, and there not being sufficient engine-power to marshal the trams. It also appeared that warning of the block at Boat of Garten was not given to stationmasters on the line, and, in particular, that the stationmaster at Lossiemouth never heard of it till the 27th.

The parties put in the following joint-minute:—"The parties hereto, without prejudice to their respective pleas, and in order to save the expense of adducing proof on the question of the amount of damage, do hereby agree, *first*, that the loss on the goods forwarded from Lossiemouth on the 23d of September 1873, shall, in the event of its being ultimately decided that the said goods ought to have been delivered in Glasgow in time for the market of the 24th of said month, be held to be £45, 10s. 9d.; or in the event of the decision being that the goods should have been delivered for the market of the 25th of said month, then £28, 1s. 9d. shall be held as the amount of the damage, to which several and respective amounts the pursuer hereby restricts his claim; and, *second*, that in like manner the loss on the goods forwarded from Lossiemouth on the 25th September 1873, shall be held to be £32, 10s., to which amount the pursuer hereby restricts his claim; it being further admitted that the fish were sold by the pursuer or his consignees, and that the above sums represent the damage sustained by him after giving credit for the prices of the respective fish."

On 17th March 1875 judgment in favour of the pursuer was given by the Sheriff-Substitute (MACLEOD SMITH.) The following are the principal findings in his interlocutor:—"Finds that the defenders have failed to show that the causes of delay beyond the usual periods of transit were reasonable or necessary: Finds, *separatim*, that there was a block or interruption of traffic in operation more or less continuously on the defenders' line at or about the times when they received the pursuer's goods as aforesaid, and that the defenders so received and undertook to carry the same on the usual footing without disclosing to or informing the pursuer that there was any risk of delay to his goods from such block or interruption: Finds in law, in the whole circumstances, that the limitations contained in the Risk Notes of the ordinary legal liabilities of the defenders are not just and reasonable, and that the defenders are liable for the damages sued for adjusted by the said minute: Therefore repels the defences; decerns against the defenders for the said sums, amounting together to the sum of £78, 0s. 9d. sterling, with interest thereon, in terms of the conclusions of the summons: Finds the pursuer entitled to his expenses."

The defenders, the Great North of Scotland Railway Company, reclaimed to the Sheriff, when the following judgment was pronounced:—

"*Edinburgh 14th April* 1875.—The Sheriff recalls the interlocutor appealed against: Finds in fact that the pursuer, at the times and places set forth in the summons, delivered to the defenders the fish stated in the summons: Finds that the defenders undertook and engaged to convey the same in due course, and to deliver them in proper time in Glasgow: Finds that they failed to perform this undertaking: Finds that this failure was caused by the defenders voluntarily and knowingly undertaking to carry a quantity of goods greater than it was possible they could carry, or if not so, then by their voluntarily omitting to send forward the pursuer's fish, which were duly ticketed as 'perishable,' in advance of goods not perishable: Finds that the pursuer thereby suffered loss to the amount of £78, 0s. 9d. sterling: Finds in law that the defenders are liable to tbe pursuer in the said amount, as also for expenses of process: Allows an account to be given in and taxed; and decerns.

"*Note.*—If there had been no evidence beyond that for the pursuer, it might possibly not have been sufficient. But the defenders have thrown a very clear light upon the whole transaction; and the Sheriff cannot well shut his eyes against it.

"What is pleaded and proved by way of defence is, that the defenders undertook, with their single line of rails and small staff, with such trivial assistance as they could obtain, to conduct both their own traffic and the vastly greater traffic of the North-Eastern Railway, usually running on a double course of rails, north and south, be-

tween Aberdeen and Perth, and that it was utterly impossible for them to fulfil this undertaking.

"The defenders must have known that they were undertaking more than they could perform. Indeed, they plead that this was so obvious that the pursuer must have known it also.

"The pursuer was not bound to suppose that the defenders would accept more goods than they could carry.

"But the defenders knew what they were themselves doing. They must have known that they could not forward such a mass of material as we have detailed in their own proof. And it would be enough that they were bound to know it.

"Further, upon the night of 22d September, they knew that the block at Boat of Garten had, *de facto*, taken place; and they ought instantly to have set their special telegraph in operation to stop the acceptance of additional goods. This would have been in time to prevent the despatch of the pursuer's haddocks by Speyside, and diverted it into the rival line by Forres, even on 23d, and still more on 25th September.

"It is impossible to say that carriers are bound to receive a mass of goods which they know it to be impossible for them to transport, and that without either remonstrance or explanation.

"And there is all the less reason for so doing when there is another railway within a few hundred yards, ready and able to effect the carriage.

"The defenders plead that after taking a plethora of goods, carriers are not bound to make extra exertions to transmit them. They must be under still less obligation to take them.

"But here the defenders accepted accumulations of traffic which they were bound to know, and in point of fact did know, they could not properly manage.

"They themselves plead that their undertaking this work, which could have been accomplished by the Forres route, was the cause of the pursuer's goods perishing. And the Sheriff cannot help thinking that this amounted to a 'wilful fault,' in terms of the risk-rote. If so, it supersedes all inquiry into the legal application of that document.

"The defenders have succeeded in proving an enormous excess in the number of trains, and of waggons conveyed by each train, an utter discarding of all attention to time, and the starting of more than one train upon their main line at once when there was nothing known about the coming of the next mixed train carrying human parcels as well as other goods. And they have both led evidence, and have argued as if it was something entitling them to great credit, 'that *more* than could *with safety* be accomplished *was actually done* on the present occasion.' Even the facts and circumstances proved would place this beyond question if we had neither the defenders' witnesses swearing to it, nor their own self-complacent assertion of it in argument. But fault having been proved, by which the pursuer's goods perished, it is no answer to say that although they, fortunately for the defenders, escaped, the lives of human beings were at the same time put in danger. Whatever may be the risk to which they exposed passengers or servants on their own or the Highland Railway, it cannot compensate the pursuer for their receiving his fish when they knew, or were bound to know, that they had no reasonable assurance of transmitting them in a marketable condition.

"What has been said proceeds upon the representation of the state of affairs presented by the defenders themselves. But put the supposition that the picture presented by the defenders can have been overdrawn, that cannot save them. It is not disputed that a waggon ticketed as 'perishable' should meet with a preference, and be taken on before others not so ticketed. Then, if it was really in the power of the defenders to pick out the pursuer's waggons from their places, and send them forward before others not so distinguished, they voluntarily omitted to do so. And this also, if it was the actual state of the facts, was no less a wilful fault than engaging to forward an amount of goods which it was manifestly, as indeed they themselves maintain, far beyond the capacities of the defenders to carry."

The defenders appealed to the Court of Session.

Argued for them—The delay complained of was unavoidable, and not caused by any fault on the part of the defenders, so even at common law the pursuer was not entitled to recover damages. Moreover, looking to the terms of the special contract under which the goods were conveyed, he was bound to prove wilful fault or negligence, which he had entirely failed to do. The contract, which was quite a reasonable one, had had the effect of shifting the *onus* of proof and laying it upon the pursuer.

Argued for the pursuer—Fault or negligence had been sufficiently proved. The defenders were bound to give notice to the pursuer of the block upon the railway which had occurred. It was proved that there was an insufficiency of engine-power at Boat of Garten. The special contract, as explained by the defenders, was unreasonable and inconsistent in its terms.

Authorities cited—*Finlay* v. *The North British Railway Co.*, July 8, 1870, 8 Macph. 959; *Anderson* v. *The North British Railway Co.*, Feb. 18, 1875, 2 Rettie 443; *Jarvie* v. *Caledonian Railway Co.*, March 18, 1875, 2 Rettie 623; *Macdonald* v. *The Highland Railway Co.*, May 28, 1873, 11 Macpherson 614; *Lloyd* v. *The Limerick and Waterford Railway Co.*, April 25, 1862, 9 Law Times 89; Railway and Canal Traffic Act, 1854; 17 & 18 Vict. c. 31, § 7.

At advising—

THE LORD JUSTICE-CLERK—This case raises a question as to the responsibility of railway companies as carriers, under somewhat peculiar and unusual circumstances. The respondent, who is a fish-curer at Lossiemouth, had been in the habit of despatching consignments of fish to Glasgow market by the line of the appellants *via* Aberdeen and the Caledonian Railway by Perth to Glasgow, and usually the fish despatched from Lossiemouth one morning arrived in Glasgow the morning after. On the 17th of September 1873 the Bridge of Dun, on the Caledonian line,—on the line between Perth and Aberdeen,—was carried away by a flood, and the traffic was suspended for about ten days, and in consequence the appellants, the Great North of Scotland Railway Company, instead of carrying their goods to Aberdeen and transmitting them by the line from Aberdeen to Perth, and thence to Glasgow, having a line by Craigellachie which

joins the Highland line, sent their traffic by that line, the Highland Railway Company carrying it on from Boat of Garten, where the two lines join. On the 23d of September, being six days after the Bridge of Dun had been carried away, the respondent sent a consignment of fish by the appellants' line by Craigellachie, which ought, according to the usual course of despatch by the railway company, to have arrived at Glasgow next morning. They did not so arrive until the 26th. He sent a second consignment on the 24th, and that was delivered duly on the 25th. He sent a third consignment on the 25th, which was not delivered until the 27th; and he now sues for the value of these two consignments of fish which, it is admitted, were rendered unsaleable by the delay in their delivery. The Sheriff-Substitute and the Sheriff have decided in favour of the respondent, and we are now to consider their judgment. The appellants plead, in the first instance, that they had a special contract with the respondent. I need not read the terms of it. It is substantially to the effect that the company would not be responsible for delay in transit, provided the goods were delivered within a reasonable time, unless the delay arose from the fault or negligence of the appellants themselves. To the extent to which this plea was maintained from the bar I entirely accede to it. It was maintained that it had the effect of placing the burden of proving the fault or negligence leading to delay on the customer. I think it does so, and that as the goods of the customer were carried at a lower rate in consequence of this agreement, it was one entirely reasonable. I do not concur at all in the criticisms of the Sheriff-Substitute upon this agreement, and I think there is no difficulty in reading it practically and consistently. But then it clearly places the burden on the customer, and that is a burden which may shift according to circumstances, and the question which arises in the present case is, whether the respondent has not sufficiently sustained this burden, and transferred to his opponents the duty of exonerating themselves. While the contract in question lays the proof of fault or negligence on the respondent, it does not liberate the appellants from their primary duty as carriers. They are still bound to carry the goods of their customers safely, and they are bound to provide sufficient appliances in carriages and engine-power or otherwise to enable them to do so. In the present instance there was no unexpected or unforeseen cause which intervened on the 23d, whatever might have been said if the case had arisen on the 18th. They knew when they undertook to carry the goods of the respondent that they were to carry them by a new and overcrowded line. They were bound to take such measures as were within their power to secure the safe transit by that line, quite as much as they were when they carried them by the other line. They were also bound—and that is implied in the arrangement—to give a preference to perishable goods over goods that are not perishable, that is to say, to enable the perishable goods to go forward before they provided for sending forward the goods that are not so. As might have been expected, a great and nearly unmanageable amount of traffic arrived day by day at the Boat of Garten station, where the Highland line and the Craigellachie line meet, and the real cause of detention was, as is very clearly proved, the Highland Railway giving a preference to goods attached to their own trains, while those that came down by the Craigellachie line—by the Great North of Scotland Line—were shunted into sidings out of which they could not with ease be extracted. The result of that was, that not having sufficient engine-power, as is explained by Shaw, the stationmaster,—not having sufficient engine-power at Boat of Garten to marshal the trains—they were obliged to shunt into the sidings, and the latest comers went on first instead of last. Thus, while the goods sent on the 23d were not delivered till the 26th, those sent on the 24th were delivered on the 25th. It appears further, that a block occurred on the 22d and another on the 25th at the Boat of Garten station, which was not in the least unlikely. It will thus be obvious that this is not a case in which any unforeseen event delayed the delivery of the goods. On the contrary, the event which did occur, namely, the block on the line—for that was the ultimate cause of the goods not being forwarded,—was one which the railway company were bound to have foreseen, not only because a block had occurred the day before the goods were accepted and received by the railway company, that is to say, on the 22d, but also because from the nature of the traffic on the line it was a very probable result. The appellants were bound either to have taken measures against this occurrence, if such were in their power, or to have warned the respondent that such was not within their power. That they failed in one or other of these obligations seems quite clear from the proof. In the first place, it is quite clearly proved by the witnesses called for the appellants themselves that the whole delay arose from the perishable goods sent down by the Great North of Scotland Railway on the 23d being shunted into the sidings there, and there being no sufficient engine-power after the trains had passed, which was quite a reasonable and possible thing, to marshal the trains, so that the next train should find the trucks with the perishable goods in the front of the siding instead of in the back. The evidence of Shaw is very distinct upon that matter, and the question is, whether they were not bound to have taken steps for that purpose. I think they were just as much bound to have engine-power for the purpose of marshalling these trains, if that was necessary for the conveyance of the perishable articles, as they were to have engine-power for the conveyance of an ordinary train. There is no distinction in that matter. They undertook to carry the goods by a line that required that additional engine-power, and if they failed to provide it, and could provide it, it was quite clear that they were bound to have done so. They say—We had no engine-power, we could not provide it, and we had no means of getting it. That only means that they had not power sufficient to fulfil their contract, and that they had undertaken to fulfil a contract that they had not power or means to perform, and knew that they had not. I don't think that would have been a good answer had it been proved; but it has not been proved. On the contrary, I think it clearly proved that they entirely failed to take the necessary steps to overcome that emergency for the period for

which it lasted. They took their chance of the goods going forward; and consequently I think the negligence which the customer was bound to have proved has been entirely made out. But apart from that, they gave no notice to the respondent at all. If they knew that they could not undertake with safety to forward these goods in consequence of the state of matters at Boat of Garten, and the demands of the other line to which they trusted to forward their customers' goods, if they knew that on the 23d, they were bound to have said so. It is said that they did not know, and that the station-master at Lossiemouth had never heard of it, and it is not unimportant that he says he never heard of any block taking place until after the 27th. But the railway company are responsible for that. They are responsible for the ignorance of their stationmaster, and I cannot conceive a piece of grosser negligence than a block having occurred at Boat of Garten on the 22d, that they did not warn their stationmasters at the stations where goods were to be accepted next day that such had been the fact. Nor have I the slightest reason to think from anything I see proved in the evidence that they had no means of communicating to their own servants the information necessary for the safety of the line itself, and of the goods and passengers conveyed upon it. At the same time, that view about the block on the 22d is a narrower matter, and I might have had some difficulty about it if that had been the only instance, and that the only ground. In regard to the goods accepted on the 25th, I think they are beyond all argument. By that time there had been a block three days before. It is of no consequence to say that the block did not recur on the 24th, because they knew it might occur from precisely the same causes which still continued to operate. And therefore, on the whole matter, I am of opinion that the Sheriff's judgment is perfectly right. I am very far from saying that in the face of a contract of this kind the accidental detentions and delays which arise from the overcrowding of incidental traffic would be a good ground for a claim upon the company. I am very clearly of opinion that it would not, if the block were not such as could have been foreseen beforehand. I think that is one of the risks that the customer must take in using this mode of conveyance, which otherwise is a very great advantage to him. But the ground of my opinion rests on this, that the incident which caused the block was not unexpected. It ought to have been foreseen, and it was foreseen, and it was known, because the Company on the 23d knew that the block had occurred, and knowing that, I hold that they were as much bound to provide the necessary means of overcoming that cause of delay as to provide the ordinary means of transit if there had been no such obstacle in their way.

Lord Ormidale—I have arrived at the same result, but I wish to explain in a few words the principal ground upon which I have arrived at it. Your Lordship has alluded to more than one ground. The want of intimation to the customer is one ground, but there is a preceding ground, I think, to which your Lordship has also alluded, namely, that having undertaken to forward, as they had been doing for many years previously, perishable articles such as fish, for the pursuer to Glasgow, they might have done so if they had had sufficient engine-power at their station of Boat of Garten. Shaw, the stationmaster at Boat of Garten, expressly says that if they had had engine-power they might have done so, and Imlah, another person who was in the employment of the railway company at the time of this occurrence in September 1873, says that by the expenditure of three quarters of an hour of time, even with the engine-power they had there, they might have picked out the wagon containing the pursuer's fish and forwarded it. Still there is a little difficulty, keeping in view the circumstance that in consequence of the special contract, the import and legal effect of which have been stated by your Lordship, and in which I entirely concur, the *onus* has been thrown upon the pursuer. It may be said, that having got this evidence from Shaw, the stationmaster—that if they had had sufficient engine-power they might have forwarded the wagon containing the pursuer's fish notwithstanding the block—in order to exonerate the pursuer entirely from the *onus* which was upon him, that ought to have been followed up by questions put to the other witnesses, or by other evidence to show that they might have got engine-power by using the proper exertions. That has not been done. But I think your Lordship is right in holding that the pursuer has done enough, by the evidence of Shaw and Imlah on this point, to shift the *onus*, so as to make it incumbent on the defenders to shew that they could not have got the engine-power by any reasonable exertions that they could have made. But independent altogether of that part of the case, I am very clearly of opinion, both with reference to the fish which was given to the defenders to forward on the 23d, and much more clearly with reference to the fish given to them on the 25th, that they must be held answerable for fault, even making allowance for the contract entered into by the pursuer with them. According to the evidence of Shaw, their own stationmaster at Boat of Garten, they knew that the block had begun on the evening of the 22d, for he says so positively. Now, if there was a telegraph from the Boat of Garten to Lossiemouth, nothing could have been more easy than for the defenders' people at the Boat of Garten to have telegraphed at once to Lossiemouth that there was such a block, and therefore not to accept goods of a perishable nature from the pursuer; or they might next morning have forwarded a message to the stationmaster at Lossiemouth not to accept perishable goods from the pursuer or from any person in his position, because they must have known that there was imminent risk of detention. I am not quite sure but that we are entitled in a matter of this description, without any special evidence on the subject, to regard it as a thing that the Court may take cognisance of without evidence, that there was a telegraph between Lossiemouth and the Boat of Garten. I see that the Sheriff in his note says expressly,—"Further, upon the night of 22d September they knew that the block at Boat of Garten had *de facto* taken place, and they ought instantly to have set their special telegraph in operation to stop the acceptance of additional goods." Now, not a single observation was made in the course of the argument to the effect that that statement was not founded on

fact; and it was tacitly accepted as correct. The Sheriff of the county must know perfectly well whether there is a telegraphic wire between these two points, and I have no doubt that his statement is perfectly correct. I assume therefore that there was a telegraph wire between Boat of Garten and Lossiemouth, by which, on the night of the 22d or morning of the 23d, a message could have been forwarded by the railway company, so that the pursuer might have been informed of the danger of delay in the transmission of his goods. Now, I think, upon the principle of the case of *Jarvie*, decided very recently in the other Division of the Court, we are bound to hold that in consequence of that alone they are liable for the loss that has been sustained. They ought to have given the pursuer notice, so that he might judge for himself whether to forward his goods or to keep them and try to make the best of them at Lossiemouth, or to send them elsewhere, and it has been proved that by a little exertion he could have sent them a distance of four miles to Elgin, from which station they could have been forwarded in good time for the Glasgow market next day. I think it was the duty of the defenders to have given him that opportunity by letting him know of the block which had occurred at Boat of Garten. They failed in that duty, and that was culpable negligence, for which they are answerable under the contract in any reasonable view that can be taken of it. On that ground, and on that ground chiefly, I concur in the result at which your Lordship has arrived.

Lord Gifford—I have very great difficulty in concurring with your Lordships and with the Sheriffs, especially with regard to the first parcel of goods in question; and while I cannot have much confidence in my doubts, seeing that they are opposite to what both your Lordships have now said, I shall explain in a single sentence where my difficulty lies. I agree with both your Lordships that the special contract, giving it the interpretation which your Lordships have done, is a reasonable one, and therefore that it is under the special contract that this question of liability arises. I think it was quite reasonable for the railway company to say—our ordinary charge acting as ordinary carriers for fish is so and so, but if you will undertake to agree that we shall not be liable for any delay—the words are "to relieve the Great North of Scotland Railway Company and other companies from all liability in case of loss, damage, or delay, except upon proof that such loss, detention, or injury arose from wilful fault or negligence on the part of the company's servants," we will carry them at a cheaper rate; and if the merchant who is sending the goods agrees to this condition, and gets his goods carried upon cheaper terms on that account, that seems to be a reasonable bargain. And I understand both your Lordships, differing from the Sheriff-Substitute, to think that was a reasonable bargain, and must receive effect. Now, these goods were sent under this special contract, and the first claim of damage arises from the detention of the goods sent from Lossiemouth on the 23d, which were detained and not delivered in Glasgow till the 26th. The reason of the delay was the alteration in the company's traffic, which arose in consequence of the breaking down of the bridge on the Caledonian Company's line at Bridge of Dun. Now, I don't think that was fault for which the railway company are liable. All that can be said is, that they must do what is necessary, in consequence of the derangement of the traffic which that breakdown caused. Now, I think it is in evidence that they did that something. They gave additional service at Boat of Garten, and the stationmaster at Lossiemouth, who had a conversation with the pursuer about the breaking down at the Bridge of Dun, says —"Our talk was about the difference it would make in the traffic, but I don't think we anticipated any stoppage." If there was a fault then, it was an error in judgment, not foreseeing the extent of the difference it would make in the traffic, and I don't think that is a fault which falls under wilful fault or negligence on the part of the company's servants, for these are the words of the special contract. In point of fact, the anticipation of the stationmaster that it would not make any stoppage was well founded for several days; for it was not till the evening of Monday the 22d September, that, as David Shaw, the stationmaster at Boat of Garten, says, "we began to get blocked," and it was only that night for the first time that they did not get the station clear. Now here again the block which occurred that night I think can hardly be held to be a wilful fault of the company's servants, and unless you can hold that, it is not fault for which the defenders are to be held responsible. The first cargo of pursuer's fish was sent off at seven o'clock next morning, and the fault which is mainly relied upon is that notice was not sent of the stoppage. I think that is too narrow a ground as to this first parcel to enable me to affirm that the sending on of that parcel of goods upon Tuesday the 23d should have been stopped. It comes to this, that because the the station was not clear on Monday night, they should have sent word to all customers—I suppose those sending perishable goods and those sending other goods—that there was a possibility of a block—that there was a possibility that the block which had begun that night would continue next day and not get cleared. It is very strong to say that that was a duty incumbent on the stationmaster at Boat of Garten in reference to all stations which might send goods in that way. And therefore I think that as to that first parcel of goods which was sent on in these circumstances, the detention, which did not arise from any wilful fault or negligence on the part of the railway company's servants, was just one of those detentions against which the railway company were protected by the terms of the special agreement.

As to the second parcel, I have not the same difficulty, for I think that by that time the block had been going on, and the fish sent on the 23d had not gone out on the 25th, and they did not get to Glasgow till the 26th. There, I think, the observation is exceedingly strong—why did not the stationmaster at Boat of Garten let the stationmaster at Lossiemouth know that this gentleman's fish, which had been sent off on the 23d, was still there? And therefore, as to the second parcel, I am disposed to concur with your Lordships, but I cannot say that my opinion is so clear that I do not find great doubt as to the first parcel.

Lord Neaves was absent.

The Court dismissed the appeal and affirmed the judgment of the Sheriff.

Counsel for Appellants—Solicitor-General (Watson)—Asher. Agent—John Henry, S.S.C.
Counsel for Respondent—Balfour—Jameson. Agents—Boyd, Macdonald, & Lowson, S.S.C.

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## SPENS *v.* MONYPENNY'S TRUSTEES.*

(*Ante* p. 25.)

OPINION OF LORD DEAS—The late Mrs Monypenny, by her trust-deed and settlement, dated 11th Feb. 1869, conveyed her whole means and estate, heritable and moveable, with certain specified exceptions, to trustees, whom she directed, as soon after her death as convenient, to make up a state exhibiting the amount of residue remaining after certain specific purposes had been provided for, in order that the trustees might, and she thereby directed them, as soon after her death as convenient and as they might think proper, invest that residue in the purchase of lands in the county of Fife, adjacent to the estate of Craigsanquhar, belonging to her brother Nathaniel Spens, the pursuer's father, or to the portions of her own estate of Airdit, which, by a separate deed of the same date with her deed of settlement, she conveyed to her said brother in liferent and to the pursuer and the heirs of her body in fee; and, if a suitable purchase could not be made in such locality, then in some other part of the county of Fife, and failing thereof, in some other part of Scotland; and when the fund was thus exhausted, or within £300 of being so, to execute a disposition thereof in favour of her said brother in liferent for his liferent use only, and his son, the pursuer, and the heirs whomsoever of his body in fee, whom failing to his sister Jessie Hannah Elizabeth and the heirs whomsoever of her body, whom failing to his sister Mary Margaret Roberta and the heirs whomsoever of her body—the eldest heir female always succeeding without division, whom failing to the granter's own heirs and assignees whomsoever.

The testatrix died in May 1873. Her brother predeceased her, having died in November 1869. The trustees have paid all the legacies, and secured all the annuities bequeathed by the deed to the satisfaction of the annuitants. The residue applicable to the purchase of lands has been ascertained by the trustees to amount to about £60,000, of which they have already invested about £40,000 in the purchase of lands in Fife—leaving about £20,000 still uninvested. The pursuer desires to have the application of this sum in his own hands, and for that purpose he has brought the present action, concluding to have the amount at once paid over to him. His object, he says, is to build a house on the estate, which is now quite large enough; but as the Lord Ordinary observes, if he gets the money he will, of course, be entitled to expend it otherwise if he thinks proper.

The question whether the pursuer is entitled to succeed in this action appears to me substantially to depend on whether the beneficial fee of the bequest has vested in him or not. If the beneficial fee has so vested, he is, I apprehend, the only person beneficially interested in the bequest, and, on the principle of the case of *Gordon*, 2d March 1866 (4 Macpherson 501), he is entitled to claim the money which still remains in the hands of the trustees. On the other hand, if the beneficial fee has not vested in him, the principle of *Gordon's* case does not apply, and the interlocutor of the Lord Ordinary is right.

The question of vesting depends, as it always does, upon the terms of the particular deed, construed in connection with the surrounding circumstances. It is at least as clear in this case as it was in *Gordon's* case, that if a disposition were duly executed by the trustees in the terms directed by the testatrix, the pursuer would be unlimited fiar of the lands, and entitled to dispose of them, onerously or gratuitously, at his pleasure.

The subsistence of a trust fee is not inconsistent with the vesting of a beneficial fee, and the consequent right of a beneficiary to assign or deal with that fee as he thinks proper. Accordingly, in *Gordon's* case the trust fee stood in the persons of the undivested trustees, but the beneficial fee was held to have vested in the beneficiary, and to entitle him to payment of the capital fund without going through the formality of in the first instance investing it in the terms directed by the testator.

The question in the present case is whether the testatrix intended that the pursuer should have no power to deal with the capital, whether in a marriage contract or in any other way, till it should be converted into land, and a feudal title to the land established in his person? In other words, whether her object, or one of her objects, in directing the conversion into land was to prevent the beneficial fee from vesting in the meantime in the pursuer?

I am disposed to answer that question in the negative. There is no express declaration by the testatrix that the pursuer was not to be entitled to deal with or dispose of his interest in the capital till some future and indefinite time, of which the trustees should be the sole judges, and by which time they should have invested the whole capital in the purchase of lands, and conveyed them to the pursuer in the terms prescribed. A power to trustees to hasten or postpone the period of vesting at their pleasure is not readily to be reared up by implication. The implication, to say the least of it, would require to be very clear. Here I think it is not so. On the contrary, there are weighty considerations the other way.

The testatrix had no sister or sister's children at the time she executed the deed. The pursuer's father was her only brother, and the pursuer (an only son), was her only nephew, and, failing his father, he was her heir-at-law. The father died in November 1869—that is about nine months after the date of the deed—at the age of 64, while the testatrix survived, without altering her destination of the residue, till May 1873. The pursuer was obviously the person of all others whom the testatrix was desirous to favour. The disposition which she directed to be executed of the lands to be purchased was to be in favour of her brother, "in liferent, for his liferent use only, and to the said Nathaniel James Spens and the heirs whomsoever of his body in fee." Nobody can doubts that under such a disposition the pursuer would have been unlimited fiar notwithstanding

* The manuscript of this opinion, which was read by Lord Deas, and which was the leading opinion, was not received in time for publication with the report of the case.