he had not granted a mortgage, and had not even obtained the certificate which is declared to be evidence of a charge. But he was "entitled" to a charge, and the question is whether this is equivalent to a power of disposal of the creditors' right in the bond which Lord Moray might have granted after taking the necessary preliminary measures.

By section 2 (1) (*a*) property passing on the death of the deceased (and therefore subject to estate-duty) includes "Property of which the deceased was at the time of his death competent to dispose." By section 22 (2) (*a*) a person shall be deemed competent to dispose of property "if he has such an estate or interest therein or such general power as would, if he were *sui juris*, enable him to dispose of the property." There follows a definition of the expression "general power," but I cannot say that this further definition adds anything to that already given. This is all the light which we have from the statute on this important question; and from it I infer, first, that the point of time at which the existence of a power of disposal is considered is the death of the person to whom the power is attributed—in this case Lord Moray; and secondly, that to render the estate affected by the power liable to estate-duty the deceased person must have been able to dispose effectively of the money or property in question, because to be able to dispose ineffectively of property is just the same as not being able to dispose of it at all. Was Lord Moray at the time of his death able to give a title to his executors to uplift this money or to raise it out of the entailed estate? If he had professed to convey it to his trustees, would the will enable the trustees to obtain possession of a sum of £37,740, or to get a decree against anyone for payment, or a security over the entailed estate through which the trustees might operate payment? Now, this is just the question which I have considered with reference to the first branch of the argument, and the answer must be the same. I cannot find any machinery in the Finance Act by which such a gift would be effectual to executors when made by a person who had not himself taken the means of keeping up the instalments as a debt secured on the estate.

I do not think that this was an accidental or undesigned omission. I think it must have been foreseen that in many cases a proprietor who had the means of paying the estate-duty without having recourse to a mortgage would desire to leave the estate unencumbered to the heir; and I can understand that in such a case, where the payment was made for the benefit of the estate, it might be considered that there was no subject on which a second duty would be justly chargeable. Where the payment is kept up as a debt for the benefit of personal representatives, the case is altogether different, because the personal representatives are benefited to the extent of the *jus crediti* which they take by the will, or by operation of law, and it is according to the policy of the Finance Act that duty should be paid on the benefit accruing to them. In the present case Lord Moray's heir takes the estate free from any effective charge in respect of the duty already paid; and it is admitted that estate-duty cannot be charged against him because he is not in the position of being entitled to disentail without consents. While I cannot say that the Finance Act is a model of clearness, or that its construction is free from difficulty, I am of opinion that the interlocutor of the Lord Ordinary ought to be affirmed.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers and Reclaimers —Lord Advocate (Dickson, K.C.)—Solicitor-General (Dundas, K.C.) — A. J. Young. Agent—Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

Counsel for the Defenders and Respondents—Campbell, K.C.—Macphail. Agents —Melville & Lindesay, W.S.

Tuesday, January 26.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

STROMO BRUKS AKTIE BOLAG *v.* J. & P. HUTCHISON.

Contract—Breach of Contract—Contract of Affreightment—Charter-Party — Penalty Clause — Contract of Sale of Cargo by Charterers—Measure of Damages.

By a charter-party a firm of shipowners undertook to send a ship to the port of Stocka, Sweden, and there load a certain quantity of wood-pulp "in August-September — owners' option" (the captain having liberty to complete the cargo with other goods for the ship's benefit), and proceed therewith to Cardiff "either direct or *via* port or ports" and there deliver the wood-pulp. The charter-party contained a penalty clause in these terms—"Penalty for non-performance of this agreement, estimated amount of freight on quantity not shipped in accordance herewith." The charterers, a Swedish company, had sold a corresponding quantity of wood-pulp to a firm in Cardiff, the mode and place of delivery being "c.i.f., Penarth Dock, Cardiff," and the time of delivery being August-September 1900, the vendees under the contract being entitled, in the event of the failure of the vendors to deliver within the contract time, to purchase against the vendors. The shipowners did not have special notice of this sale-contract by the charterers.

The shipowners failed to send a ship to Stocka either in August or September, as provided by the charter-party,

and the vendees at Cardiff bought wood-pulp at the current price then, and recovered from the charterers the difference between the amount they paid and the price fixed by the contract of sale.

In an action by the charterers against the shipowners, *held* (1) that the penalty clause in the charter-party did not deprive the charterers of their right to have an award of damages commensurate with the loss caused by the shipowners' breach of contract; (2) that as the breach of the contract of affreightment by the shipowners was not the true cause of the inability of the charterers to deliver the pulp in terms of their contract with their vendees, in respect that the two contracts did not correspond in the element of time, the measure of damages for the breach of the contract of affreightment was not the difference between the sum paid by the charterers to their vendees and the value of the wood-pulp to the charterers in Sweden; but (3) that the charterers were entitled to moderate damages in respect of the inconvenience and loss upon storage and interest caused by the shipowners' breach of contract.

This was an action brought by the Stromo Bruks Aktie Bolag, Stroms, Sweden, manufacturers of wood pulp, and their mandatories, against John & Peter Hutchison, steamship agents, 31 Hope Street, Glasgow, for payment of £715, 8s. 2d. as damages.

A charter-party, dated January 20th 1900, entered into between the pursuers and the defenders, provided that the defenders should send a ship or ships to Stocka, on the Baltic coast of Sweden, there to load from the factor of the pursuers "900/1000 tons (charterers' option) of dry wood-pulp under deck. To be lifted in two shipments, one first May (f.o.w.), and the second in August/September, owners' option (captain having liberty to complete the cargo with wood and/or other goods for ship's benefit) not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; (affreighters not being parties to a deck load, nor to be affected thereby) and being so loaded shall therewith proceed to Cardiff either direct or *via* port or ports, or so near thereunto as she may safely get, and deliver the same on being paid freight. . . . . Owners or captain to wire shippers of the cargo, Stroms Bruk, Stocka, six days' notice of readiness, also ship's departure from last port. . . . Penalty for non-performance of this agreement, estimated amount of freight on quantity not shipped in accordance herewith."

By "contract copy" dated December 4th 1899 the pursuers had of that date sold to Messrs Owen & Co., Limited, Cardiff, the following goods:—"Quantity and description of goods —900/1000 tons of their 1st quality sulphite pulp, seller's option. Mode and place of delivery—C.i.f., Penarth Dock, Cardiff. Time of delivery—In two cargoes, first open water and Aug./Sept. 1900."

The said "contract copy" also provided —"Failure of the seller to make delivery within the time contracted entitles the buyer to purchase against and charge the seller with any loss thereby sustained. Each delivery to be considered a separate contract."

The defenders duly provided shipping in May for the first portion of the pulp—500 tons.

With regard to the second shipment the pursuers averred, *inter alia*—"(Cond. 4) When the period arrived for the second shipment the defenders sent no notification of the time when they would send a ship, and although the pursuers made frequent inquiries and latterly complaints, the defenders, in breach of their contract under the said charter-party, failed to send a ship for the remainder of the pulp during either August or September. The pursuers thereby sustained damage for which the defenders are responsible. (Cond. 5) The defenders gave no intimation to the pursuers that they were not going to implement their contract. When on the expiry of the time up to which the defenders might have given notice of their intention to send a ship, it became evident that they were not going to implement their contract, the pursuers found it impossible to get September shipping for their pulp. They were accordingly unable to fulfil their contract with Messrs Owen & Company, Limited, by delivery of said pulp, and Messrs Owen bought in against the contract pulp on the spot at the market prices then current, which were much in excess of those at which the pursuers had agreed to sell to them. The cost at which alone Messrs Owen were able to obtain pulp for immediate delivery (which they required to keep their mills going) exceeded the price at which the pursuers had sold to them by £830, 18s. 5d., and this sum the pursuers had to pay to them in consequence of their inability to implement their engagement owing to the defenders' breach of contract as aforesaid. For a small balance of 33 tons, of which Messrs Owen consented *ex gratia* to take delivery of at a later date, the pursuers had to pay freight at the rate of 19s. per ton as against 13s. 3d. per ton for which they had contracted with the defenders, the total freight so paid being £9, 9s. 9d. (Cond. 6) Owing to the advanced period of the season the pursuers found it impossible to minimise their loss by disposing of the pulp left on their hands through defenders' failure to provide shipping at the higher prices which were ruling in England for 'spot' pulp. They did manage to dispose of 100 tons at a price £1, 5s. per ton in excess of that at which they had sold to Messrs Owen. The remainder they were unable to dispose of, and (as Stocka is an icebound port during winter) they have had to store it. They have thereby incurred charges for storage and insurance, as well as running risks of deterioration, which more than counterbalance any probable profit at which they may be able to sell the pulp for delivery on the Baltic again be-

coming open. After deducting the sum of £125 (being the profit on the 100 tons realised) from the total of the two sums of £830, 18s. 5d. and £9, 9s. 9d. (£840, 8s. 2d.), there remains a balance of £715, 8s. 2d. of loss directly sustained by the pursuers through the defenders' breach of contract. This is the sum now sued for."

The defenders stated that they did not know of the contract between the pursuers and Messrs Owen & Co. They denied the averments of the pursuers in Conds. 4, 5, and 6. They explained that they were ready and offered to carry the balance in October, and that had "the pursuers availed themselves of the ship no loss would have been suffered by them. Explained further that the charter-party provides that in case of non-performance the defenders' liability is to be the estimated amount of freight on the quantity not shipped under the contract, which would represent £265 for a contract quantity of 900 tons, and £331, 5s. for a contract quantity of 1000 tons."

The pursuers pleaded—"(1) The defenders having broken their contract with the pursuers in manner specified, are liable to the pursuers in damages for the breach. (2) The sum sued for being in the circumstances stated damage directly and naturally resulting in the ordinary course of events from the breach of contract complained of, the pursuers are entitled to decree therefor, with expenses as concluded for."

The defenders pleaded, *inter alia*—"(6) In any event, the damages claimed are remote and excessive, *et separatim* cannot exceed the estimated amount of freight on the quantity not shipped."

A proof was led, in which the averments of the pursuers with regard to their contract with Messrs Owen & Co., and the subsequent actings of Messrs Owen and the pursuers, were substantiated. It was admitted that the pursuers entered into the contract of affreightment for the purpose of enabling them to supply Messrs Owen. The evidence showed further that the defenders about the end of August 1900 determined to ship the balance of the quantity of pulp by their s.s. "Fernside." That ship was, however, considerably delayed, and in fact the defenders failed to have the ship ready to lift the cargo at Stocka by the end of September 1900. Some time before the end of that month it became known that the defenders would not be in a position to lift the cargo earlier, in any event, than the 12th or 13th October. In point of fact the "Fernside" did not arrive at Stocka until October 29, 1900.

The defenders did not dispute that they had broken their contract, and the question at issue between the parties was as to the measure of damage for the breach.

On February 27, 1903, the Lord Ordinary (KYLLACHY) decerned against the defenders *in terms* of the conclusions of the summons, and found the pursuers entitled to expenses.

Opinion.—"The pursuers in this case are manufacturers of wood-pulp in Sweden, and their business consists in shipping their product to this country for use in the manufacture of paper. The defenders are a firm of shipowners, and have a number of steamers engaged in the Baltic trade, which steamers they are accustomed to charter for the carriage of cargo from ports in the Baltic to ports in Great Britain. The pursuers (having in December 1899 sold certain quantities of pulp to a firm of paper manufacturers in Cardiff) made, on 20th January 1900, a charter with the defenders, whereby the latter undertook to send a ship or ships to the port of Stocka in Sweden, and there to load from 900 to 1000 tons of pulp and to convey it to Cardiff, the quantity being lifted in two shipments—one in May, f.o.w., and the other either in August or September, owners' option.

"The first shipment was duly lifted, but the defenders failed to lift the second shipment by the end of September, and it was known and acknowledged for some time before the end of that month that they were not in a position to lift until, at all events, the 12th or 13th October. In point of fact the vessel which the defenders destined for the shipment did not arrive at Stocka until 29th October, and probably could not have arrived sooner.

"The pursuers in these circumstances bring the present action for damages, claiming the sum of £715, 8s. 2d., as brought out in their statement of damage, No. 140 of process.

"There is no doubt as to the defenders having broken their contract. That is not disputed. The only question is as to the amount, or perhaps rather the measure, of the damages for which they are liable. On that matter, however, the parties are rather widely at issue.

"The defenders' first contention is that the penalty clause of the charter limits the damage payable for non-performance to the estimated freight on the quantity not shipped. I do not, however, consider that there is anything in this contention. I see nothing to take the case out of the general rule that a penalty clause attached to a charter does not deprive the shipper of his option to have his damage assessed at common law. I consider further that, even if the clause falls to be read as stipulating for liquidate damages, it is not on its just construction applicable to a total failure by the shipowner with respect to one of the shipments stipulated.

The defenders, however, maintain further, that not having notice of the particular contract between the pursuers and their customer the loss which the pursuers have sustained in connection with that contract cannot form a proper measure of damage, and that the pursuers have not proved, and are not in a position to prove, any other loss. Now, it is quite true that the pursuers did not rest their case simply upon the defenders' default to ship at the stipulated time goods which the pursuers required for the purposes of their business, and upon the pursuers having required to buy in goods to meet that default. That might perhaps have been sufficient, and sufficient to entitle them to the sum claimed. I shall say a word as to that presently. But the case which the pursuers make, and I

think have established, is this: They say that they arranged and required the shipment in question to fulfil a contract (No. 14 of process) which they had made in the ordinary course of business, and which had (also in ordinary course) a time limit for delivery—that when the defenders defaulted they had necessarily to buy in, or to allow their customer to buy in, as against the default—and that, having done so, they are entitled to recover against the defenders the additional price which had to be paid for the pulp which was so bought in. They admit that they did not give the defenders special notice of the contract. But they say that the existence of such contract was to be anticipated as in ordinary course of business; that the defenders had no right to assume anything else; and that, accordingly, they (the pursuers) have right to charge against the defenders at least the sum which they had to pay to their customer.

"Now, it appears to me that *prima facie* this is quite a just mode of estimating the damage. I think that the defenders were not entitled to assume that the shipments were merely for stock, or to assume that any contracts which the pursuers made were indefinite as regards time of delivery. They were, I think, on the contrary, bound to contemplate as a quite probable result of their breach what in fact happened. Accordingly, if it be held as proved that, as a result of the defender's default the pursuers had to buy in or (what comes to the same thing) to allow their customers to buy in at the excess price alleged, I do not, I confess, see that there is any difficulty.

"But the defenders having been allowed to investigate the terms and whole history of the contract on which the pursuers found, say that they have discovered that the buying in by the pursuers' customer was not really a consequence of their (the defenders') default, but would have equally happened although they (the defenders) had duly performed their contract. In other words, they contend that their default was, as it turned out, immaterial, and that the pursuers were really in the same position as if they had shipped simply for stock. And this contention is rested on two propositions—(1) that the contract of sale made by the pursuers, although undoubtedly the inducing cause of the charter, was for some reason expressed so as to provide for delivery at Cardiff by the end of September, and not for a shipment to Cardiff made by the end of September; (2) that the pursuers' buyers being thus not bound to wait beyond the end of September, were, moreover, not in fact willing to so wait, and that consequently their buying in, whatever its actual date, was really unconnected with the defenders' breach of their charter.

"Now, as I have already indicated, I do not consider it clear that even if all this were true, the pursuers' measure of damage would be necessarily displaced. In other words, I am not convinced that supposing the pursuers to have bought in simply for stock, the defenders could have forced them into an inquiry as to how far that step was necessary with reference to what might on a proof be held to be the actual requirements of their business. It is at least, I think, highly arguable that the defenders, having contracted with the pursuers to ship certain goods at a particular time, and having failed to do so, the pursuers became thereby entitled to get the goods elsewhere, just as if the contract had been not of carriage but of purchase and sale. But waiving that question, I am of opinion that the defenders have failed upon the evidence to make good both or either of their two propositions.

"In the first place, I am disposed to agree with Mr Salvesen's argument—supported as it was by the evidence as to mercantile usage—that the contract No. 14 of process being a contract c.i.f., and fixing (at least as regards the shipment in May) the time of delivery by reference to 'free open water' would, on its just construction, have been satisfied by a shipment made by the end of September under a charter containing no unusual clauses affecting the length of the voyage. In other words, I am disposed to agree that delivery at Cardiff in the sense of the contract would have been duly made by transmission to the Messrs Owen on the last day of September of a bill of lading signed by the shipmaster, accompanied by the usual policy of insurance and a credit note for the amount of the freight. That may, perhaps, be thought to be taking a liberty with the words of the contract, but I do not, I confess, see how otherwise the c.i.f. stipulation would have been necessary, or how the reference (in the case of the May shipment) to 'free open water' could have had any meaning.

"But further, and in the next place, I am of opinion upon the evidence that the defenders have failed to prove that the Messrs Owens, the pursuers' buyers, although alive to the possibility of a question as to the time of delivery under their contract, were prepared to try that question, or that they would have ventured to buy in had the defenders given notice six days before the end of September that their vessel would be ready to ship within the month. Their manager, Mr Armistead, who was examined, stated, I think, quite distinctly, that they would have accepted delivery (as they did under the May shipment) if the pulp had been *shipped* at Stocka by the time stipulated. And it is confirmatory of that statement that in point of fact no pulp was bought in until it became certain that there could be no shipment until the 12th or 13th of October. It does not appear to me that in these circumstances the defenders are entitled to speculate as to what Messrs Owen might have done or could have done. Their action, in fact, followed on the defenders' breach, and it, *prima facie*, followed *because of it*. And the defenders have not proved that it would have equally followed if they (the defenders) had performed their contract.

"As to the exact amount of the damage, I do not think there is room for contro-

versy. The pursuers might, I am disposed to think, have claimed not merely the sum which would have included their profit on the transaction. They might also, I think, have omitted to give the defenders credit for the £100 profit which they made ultimately on the sale of part of the pulp which the defenders failed to lift. They do not, however, raise either of these points. Accordingly, on the whole matter, I propose to give them decree for the sum sued for, with expenses."

The defenders reclaimed, and argued—The penalty clause of the charter-party expressly restricted the sum to be claimed for non-performance of the agreement to the "estimated amount of freight on quantity not shipped in accordance herewith.' The clause differed from the ordinary form of the penalty clause in charter-parties—the ordinary form stopping at the word freight. The circumstantial stipulation in this case was a stipulation for liquidate damages and not for a penalty—*Lord Elphinstone* v. *Monkland Iron and Coal Company, Limited*, June 29, 1886, 13 R. (H.L.) 98, 23 S.L.R. 870; *Campbell* v. *Miller*, November 21, 1895, 3 S.L.T. 266. What was to be looked at was the intention of the parties—*Craig* v. *M'Beath*, July 3, 1863, 1 Macph. 1020; *Sparrow* v. *Paris*, 1862, 31 L.J. Ex. 137, 7 H. & N. 594; *Dimech* v. *Corlett*, 1858, 12 Moore, P.C. 199. In estimating the damages the Lord Ordinary had treated the case as if the contract of the defender was to supply the pursuer with certain goods, whereas it was merely to ship the goods. Accordingly the measure of damages was merely any increase in freight which the pursuers might have had to pay in getting another ship, in addition to any depreciation in the value of the goods due to the delay in their arriving in this country. The pursuers had made no attempt to minimise the loss or to get another ship, but simply charged against the defenders the whole sum which they had paid to Messrs Owen. The defenders had no notice of the contract between the pursuers and Messrs Owen, and in the absence of such notice it was inequitable and contrary to the authorities to make them liable, as the Lord Ordinary had done, for the sum which the pursuers had to pay in excess of the value of the cargo in order to fulfil their contract with Messrs Owen—*Hadley* v. *Baxendale* (1854), 9 Ex. 341; *Gee* v. *Lancashire and Yorkshire Railway Company*, 1880, 6 H. & N. 211; *Wilson* v. *Lancashire and Yorkshire Railway Company*, 1861, 9 C.B. (N.S.) 632; *Dunford & Elliot* v. *M'Leod & Company*, June 19, 1902, 4 F. 912, 39 S.L.R. 719; *Den of Ogil Company Lmtd.* v. *Caledonian Railway Company*, November 12, 1902, 5 F. 99, 40 S.L.R. 72. So in *Borries* v. *Hutchinson*, 1865, 18 C.B. (N.S.) 445, the principle on which the damages were calculated was that the shipper at the time of entering into the contract was aware that the plaintiffs were buying for a foreign correspondent. For the purpose of measure of damages the market value of the goods was their value in the market independently of any circumstances peculiar to the pursuers, or contracts entered into by them with third parties unknown to the defenders—*Great Western Railway* v. *Redmayne*, 1866, L.R., 1 C.P. 329. The knowledge of a special contract with a third party must be brought home to the mind of the carrier at the time he accepted the goods, in order to impose a greater degree of liability than would be borne by him in ordinary course—*British Columbia Saw Mill Company* v. *Nettleship*, 1868, L.R., 3 C.P. 499; *Horne* v. *Midland Railway Company*, 1872, L.R., 8 C.P. 136; *The Parana*, 2 P.D. 118; *Thol* v. *Henderson*, 1881, 8 Q.B.D. 457. A shipowner was not to be taken as knowing the course and conduct of the trade of all persons who sent goods by his ships. Further, the contract between the pursuers and Messrs Owen was not commensurate as regards time with that between the pursuers and defenders. The obligation of the pursuers to Messrs Owen was to deliver the pulp at Cardiff not later than 30th September, while the defenders would have fulfilled their contract with the pursuers if the "Fernside" had sailed from Stocka on September 30, not arriving in Cardiff for at least a fortnight later; if she sailed direct to Cardiff, it being within the power of the defenders under the charter-party to stop the ship at any port on the way with the result of deferring the arrival of the ship at Cardiff to a still later date. The pursuers, accordingly, would have been equally in breach of their contract with Messrs Owen although the defenders had fulfilled their contract. On that state of the facts it was unjust to make the defenders liable for the consequences of the inability of the pursuers to make delivery to Messrs Owen in terms of their contract—*Caledonian Railway Company* v. *Colt*, 1860, 3 Macq. 833; *Ovington* v. *M'Vicar*, May 12, 1864, 2 Macph. 1066; *Den of Ogil Company* v. *Caledonian Railway Company* (*supra*); *Webster & Company* v. *Cramond Iron Company*, June 4, 1875, 2 R. 752; 12 S.L.R. 496; *Dunn* v. *Bucknall Brothers* [1902], 2 K.B. 614.

Argued for the pursuers and respondents—It had long been settled that a penalty clause such as occurred in this charter-party did not set a limit of damages on either side, and did not in any way prevent the award of damages being commensurate to the loss due to the breach of contract—Abbot on Shipping (14th ed.), p. 346; *Godard* v. *Gray* (1870), L.R., 6 Q.B. 139; Carver's Law of Carriage by Sea (3rd ed.), sec. 722. It was unnecessary that the defenders should have a special notice of the contract between the pursuers and Owen & Company, it being within the knowledge of the defenders that the pursuers probably required the shipment of the pulp in order to fulfil a contract with a time limit for delivery in the ordinary course of business. There was admittedly a total breach by the defenders, and the basis of reckoning damages was what it cost to get the pulp in England less what the pulp was worth to the pursuers in Sweden. Under their c.i.f. contract with Messrs Owen there was an absolute duty

on the pursuers to deliver at the port of destination—*Lecky & Company Limited* v. *Ogilvy, Gillanders, & Company*, 1897, 3 Commercial Cases, 29; *De Laurier* v. *Wyllie*, November 30, 1889, 17 R. 167; 27 S.L.R., 148; and that being so, damages could be recovered for loss of market, which meant in this case that the pursuers were entitled to supply themselves with the goods at the port of destination—*Dunn* v. *Bucknall Brothers* (*supra*); *British Columbia Sawmill Company* v. *Nettleship* (*supra*); *Agius* v. *Great Western Colliery Company* [1899], 1 Q.B. 413; *Hinde* v. *Liddell*, 1875, L.R., 10 Q.B. 265; *Rodocanachi, Sons & Company* v. *Milburn Brothers*, 1886, 18 Q.B.D. 67; *Den of Ogil Company, Limited* v. *Caledonian Railway Company* (*supra*). The principle was that the pursuers must be put in precisely the same position as they would have been in if the defenders had performed their contract. The pursuers' contract of sale to Owen & Company would in fact have been duly implemented if the defenders had performed their contract and lifted the pulp at Stocka before the end of September. The pursuers' claim, however, did not depend on the existence of Owen's contract. That contract and the actings of the parties under it were really a matter of evidence, showing the market value of the pulp in England at the date of the breach, and therefore the extent of the pursuers' loss in consequence of the breach. It was not a practicable thing for the pursuers to hire another ship. Winter followed hard on the breach, and Stocka was an ice-bound port in winter. It was admittedly incumbent on the pursuers to do what they could to minimise the loss, but they were not bound to go into a series of risky and speculative attempts to do so.

At advising—

LORD M'LAREN—This is an action in which damages are claimed by the charterers against the owners of the steamship "Fernside," for their failure to load a cargo of wood-pulp from a port in Sweden in terms of their obligation. The charter-party (dated 20th January 1900) provided that the shipowners should send a ship or ships to the port of Stocka in Sweden, and there load from 900 to 1000 tons of pulp and convey it to Cardiff, the quantity to be lifted in two shipments, one in May and the second in August-September, owners' option. The charterers, a Swedish company, through their London agents, had sold a corresponding quantity of wood-pulp, by contract dated 4th December 1899, to Messrs Thomas Owen & Company, Cardiff. They say, and it is not disputed, that they entered into the contract of affreightment for the purpose of enabling them to supply Messrs Owen. But the two contracts do not correspond in the element of time. In the sale-contract with Messrs Owen, which is in schedule form, there is written opposite the words "Time of delivery" the particulars "In two cargoes, first open water, and August-September 1900." By comparing the time limits of the charter-party with those of the sale-contract we see that as regards the second shipment the defenders would have fulfilled their obligation if the "Fernside" had sailed from Stocka on the 30th September, but the pursuers would not have fulfilled their obligation to Owen & Company unless they had been ready to deliver the cargo at Cardiff on 30th September. According to the evidence, the time usually allowed for a voyage from the Baltic to Cardiff is about a fortnight, but in this case the owners had liberty to complete a cargo with wood, etc., for ship's benefit, and power to proceed to Cardiff "either direct or *via* port or ports,' and the voyage might have been of even longer duration. This discrepancy may have a material bearing on the claim of damages for reasons which I shall presently consider.

The claim arises out of the delay in the autumn shipment. The main facts are not in dispute, and according to the Lord Ordinary's judgment "the defenders failed to lift the second shipment by the end of September, and it was known and acknowledged for some time before the end of that month that they were not in a position to lift until at all events the 12th or 13th October." I agree with his Lordship that it must be taken that the defenders have broken their contract, and that the true question between the parties is the measure of damages, or as I should prefer to put it, the principle on which damages are to be awarded.

The defenders' first proposition is that the penalty clause of the charter-party restricts the claim to a sum equal to "an estimated amount of freight on quantity not shipped." Now, without admitting that any unqualified rule can be laid down for determining whether "penalty" means penalty or liquidated damages, it may be affirmed that in general a claim of damages will not be held to be liquidated unless there is some intelligible relation between the specified penalty and the damage which may be or has been sustained. In the present case "estimated amount of freight" is intelligible as a measure of damage where the shipper fails to supply cargo at the proper time and the owners have lost their freight. But it is not a measure that can be applied to the case of a breach of contract by the shipowner, because what the merchant suffers by such a breach is not a loss of freight, or of anything corresponding to freight, but the loss of profit on a resale, or the loss of the use of the goods for the purposes of his business. Even if the question were not settled by authority and practice, as I think it is, I should be of opinion that a penalty clause in the terms quoted does not deprive the shipper of his right to have an award of damages commensurate with the loss which he is able to prove.

The next question in order is, whether it was necessary that the defenders should have had notice of the sale to Owen & Company in order to fix them with liability for the sum which the pursuers had to pay over and above the value of their cargo in order to fulfil their contract with Owen &

Company. On this point I am so far in agreement with the Lord Ordinary's observation to the effect that the defenders were not entitled to assume that the shipments were merely for stock, or to assume that any contracts which the pursuers had made were indefinite as regards the time of delivery. I think that a shipowner who knows his business is presumed to contemplate as a probable result of his failure to carry the goods to their destination within the specified time, that the shipper may be unable to fulfil his contract of sale, and may have to go on the market to supply himself elsewhere. There is nothing in the circumstances of this case to displace the presumption. If the contract of affreightment were with a papermaker in England, it may be that the shipowner would be justified in assuming that the shipment was for stock. But the pursuers are pulp makers or pulp merchants in Sweden and were sending their goods to England, and there could not be any doubt that this was a shipment for sale. Now, as the owners had undertaken that the ship should sail not later than the last day of September, I think they must have known that the goods were or might be wanted at Cardiff about the middle of October, and if the shippers' contract had been for delivery to Owen & Company on 15th October, I should have come to the conclusion without difficulty that their claim of damage was for the extra cost incident to providing another cargo at that date. My observation is made with reference to a contract such as the present, because there may be cases where it would be impossible to obtain goods in large quantities at a particular date except at an exorbitant price. But where there is an open market I think the shipper, who has sold his cargo in reliance on delivery being made according to contract, is entitled to supply himself at the market price and to debit the owners with the resulting loss. This loss would in general be the difference between his contract price and the cost of obtaining the substituted cargo or goods.

The chief difficulty in the case arises from the circumstance which I noticed in my narrative of the facts, that the charter-party and the contract of sale do not coincide as to the time of delivery, because the pursuers were bound to give delivery to Owen & Co. at Cardiff not later than the last day on which the "Fernside" might have sailed from Stocka. I cannot say that I think the Lord Ordinary in his very clear and reasoned opinion has been altogether successful in removing this difficulty. In this part of his Lordship's opinion he seems to say that he accepts the pursuers' argument that the contract of sale to Owen & Co. would have been satisfied by a shipment made by the end of September, although he adds that this may be thought to be "taking a liberty with the words of the contract." Now, the schedule is in these terms—"Mode and Place of Delivery—*c.i.f.*, Penarth Dock, Cardiff. Time of Delivery—In two cargoes, first open water, and August-September 1900." I am unable to see how these words as regards the second delivery can mean anything but delivery at Cardiff before the end of September.

The Lord Ordinary also develops a view founded on the statements of witnesses to the effect that Owen & Co. would not have ventured to buy in, or (if I may put it in my own words) would not have insisted on their rights, had the defenders given notice that their ship would be ready to sail within the month. As a matter of probability I should not be disposed to dissent from these statements of opinion, because reasonable people do not always insist on their strict rights, and may be willing to put up with some delay in the fulfilment of a contract if there is no urgent reason for holding the other party to the letter of his obligation. But I do not feel at liberty to speculate as to what Messrs Owen might have done in the case supposed. I should rather infer from the correspondence that Messrs Owen had reasons which they considered sufficient for insisting on the delivery of the cargo before the end of September, and I am confirmed in this impression by what followed, viz., that the pursuers recognised their obligation to make punctual delivery to Messrs Owen, and immediately proceeded to supply a substituted quantity of wood-pulp on the best terms on which it could be procured in the English market.

The case then stands in this position—on the last day of September the pursuers were unable to fulfil their contract with Messrs Owen because the "Fernside" had not arrived at Cardiff; but this failure was not caused by the fault of the shipowners, because the shipowners were not bound to have their ship and cargo at Cardiff on the last day of September. The true cause of the inability of the pursuers 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. This is a cause for which the pursuers were themselves responsible. If the "Fernside" had sailed on the 30th September and had proceeded on her voyage with reasonable despatch, the pursuers, the Swedish company, would have had their contract with Messrs Hutchison fulfilled, and would have had no claim whatever for relief of the expense to which they had been put in obtaining wood-pulp from other quarters in order to fulfil their contract with Messrs Owen.

Now, the "Fernside" did not sail within the month of September, and there is therefore a breach of the charter-party for which the owners are responsible in damages. But the facts which I have stated make it clear that Messrs Owen's claim was antecedent in time to this breach of contract, was not the consequence of this breach of contract, and therefore is not a measure of damage which can be applied to the breach of the charter-party.

I do not think that on the state of the facts put before us we are in a position to make any finding of special damages against Messrs Hutchison. The theory of the

action is that they are liable to relieve the pursuers of the expense which they incurred in fulfilling their engagement to Messrs Owen. But when that assumption is displaced I can find no evidence of any special loss. It does not seem likely that if the ship had sailed on the last day of September and had arrived at Cardiff about the middle of October the shippers would have been in a better position to dispose of the cargo in the open market than they were when the ship actually arrived.

But as the charter-party was not punctually implemented, there must be an award of damages, and considering that this was a large transaction, that there is always inconvenience and trouble to a merchant when his goods do not arrive at the time expected, and generally some loss upon storage and interest of money, I think the justice of the case will be satisfied by an award of £50.

LORD ADAM—I agree.

LORD KINNEAR—I have come to agree with Lord M'Laren's opinion, although I have had some difficulty as to the amount of damages which he proposed to award. I do not think it necessary, and I do not desire to express an opinion as to whether the loss on the pursuers' contract with Owen & Company could in any case have furnished the measure of damages for the breach of the defenders' contract, because I think upon the authorities it is at least very doubtful whether either the loss on a special contract not intimated to the shipowner or the loss of a market can be taken into account in estimating the damage caused by an undue delay in delivering a cargo. But I do not think that question arises in this case, because the loss on the contract with Messrs Owen was in no sense a consequence of defenders' breach of contract, and therefore the loss occasioned through the failure to carry out the contract with Owen & Company is to my mind altogether irrelevant to the question which has to be decided between the parties to this case. The one loss has nothing to do with the other. But then the only evidence of damage which the pursuers have thought it necessary or desirable to lead is evidence of loss caused by their own breach of contract with Owen & Company, and therefore I have great difficulty in seeing that there is any evidence at all as to the damage caused by the breach of contract of which they complain. But then I agree that it would not be just to say that in respect of that absence of evidence there is no damage to be awarded at all, because it is quite certain that there was a breach of contract and some damage must have been occasioned. My difficulty is that any award we make must necessarily be to a certain extent speculative, and therefore I should have great difficulty myself in fixing on any sum; but on the other hand I think a mere nominal award of damages would not be doing justice to the pursuers, and I have therefore come to agree with Lord M'Laren, because I am certainly unable to suggest any better solution than that which his Lordship has made.

The LORD PRESIDENT concurred.

The Court assessed the damages at £50, and decerned against the defenders for said sum.

Counsel for the Pursuers and Respondents—Campbell, K.C.—J. Roberton Christie. Agent—James F. Mackay, W.S.

Counsel for the Defenders and Reclaimers—The Lord Advocate (Dickson, K.C.)—Spens. Agents—J. & J. Ross, W.S.

Tuesday, February 2.

SECOND DIVISION.

[Sheriff of the Lothians and Peebles, at Edinburgh.

LEE *v.* MAXTON.

Process — Appeal — Printing and Boxing Record—Act of Sederunt, March 10, 1870, sec. 3, sub-sec. 1.

In an appeal from the Sheriff Court the appellant printed and boxed the note of appeal without appending thereto a copy of the record; reference, however, was made to a print boxed in a former appeal in the same case to which was appended a copy of the record and of a minute setting forth certain amendments which the pursuer of the action had been allowed to make. There was no print of the defender's answers to the pursuer's amendments. *Held* that the appeal was incompetent in respect of the failure to observe the requirements of the Act of Sederunt of March 10, 1870, sec. 3, sub-sec. 1.

The Act of Sederunt of 10th March 1870 enacts (section 3 (1))—"The appellant shall . . . print and box the note of appeal, record, interlocutor, and proof, if any . . . and if the appellant shall fail . . . to print and box . . . the papers required as aforesaid, he shall be held to have abandoned his appeal, and shall not be entitled to insist therein except upon being reponed as hereinafter provided."

This was an action in the Sheriff Court at Edinburgh at the instance of J. B. W. Lee, S.S.C., Edinburgh, against John Maxton, plumber, 79 High Street, Portobello.

After various procedure, in the course of which the pursuer was allowed to make certain important amendments on his record, the Sheriff-Substitute (HENDERSON), on 7th September 1903, "having considered the closed record (as amended)," &c., assoilzied the defender and dismissed the action.

The pursuer appealed to the Sheriff (RUTHERFURD), who on 3rd December 1903 "having considered the amended record," &c., dismissed the appeal.

The pursuer appealed to the Court of Session.

At the calling of the appeal in Single Bills, counsel were heard on a note pre-