to the forms and ceremonies required by the law of Scotland, it could not be binding upon the parties. It was said that Mr Anderson was in possession of the property as a tenant under the original agreement; and that if this were an entire new contract, not being executed in the manner required by the law of Scotland, it could not have varied the original term: but I think your Lordships will be of opinion, as the Court below appears to have been of opinion, that this is not to be considered a new contract; that it is nothing more than a completion of the first contract. There were certain terms and stipulations by which the estate was to be held by the tenant, Mr Anderson; these terms and stipulations were also to be binding on Mr Wilkins. There was a reference by one contract to the other. If those are not the terms and stipulations, there are no terms and stipulations existing with respect to the farm; but Mr Anderson, by having subscribed this paper, though it was not subscribed till four years or three years after he entered on the farm, has identified it as containing the regulations by which he was to be bound. I think, therefore, if your Lordships will be of opinion that it is not to be considered as an entire new contract, that it is to be viewed as nothing but a recognition by Mr Anderson that those are the regulations referred to in this contract, namely those regulations which were to be binding upon him, in as much as they were for the general regulation of the estate of Slains. If your Lordships are of that opinion, the judgment of the Court below must, in that respect, be affirmed. I should therefore submit to your Lordships, that the judgment of the Court of Session, as to the construction of this clause, having been abandoned at the Bar, the judgment in that respect must be reversed; and I should submit to your Lordships, for the reasons I have stated, that your Lordships will be of opinion, that the judgment of the Court of Session with respect to the other question, namely, whether or not these terms and regulations were binding on Mr Anderson, must be affirmed. At the same time I also submit to your Lordships, that as this instrument was not produced in the first instance, the expense thrown upon Mr Gordon in the Court below is properly thrown upon him; and that part of the judgment must also be affirmed.

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Respondent's Authorities, (Colonel Gordon).—Countess of Moray, July 23. 1772, (4392.); Grant, July 10. 1788, (15,180.); Bell's Treatise on Leases, vol. i. p. 307.

STRACHAN and GAVIN, Appellants.—*Sol.-Gen. Tindal—John Campbell.*

G. PATON and Others, Respondents.—*Lushington—Keay.*

No. 2.

Mutual Contract—Reparation—Expenses.—Ship-builders having agreed to repair and lengthen a whale ship at a certain rate of wages, and to make use of English oak; and, during the currency of the operations, the rate of wages of carpenters having,

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under the authority of the Justices of the Peace, been increased; and the ship-builders having made use of American instead of English oak; and the ship having been delivered as complete, and thereupon sent to the whale fishing at Davis' Straits, but, in consequence of the deficiency of the work, having been obliged to return to port, and been there detained for twenty-two days undergoing repairs; and having then lost the proper season for the Straits, and been sent to Greenland;—Held, (affirming the judgment of the Court of Session), 1. That the ship-builders could not charge a higher rate of wages than that agreed on; 2. That although American oak, at the time, was as expensive as English, and was then considered equally good, yet, as it was not so good, the ship-builders were responsible for the loss thereby sustained; 3. That they were liable for the expense of the repairs, and of the wages, &c. of the seamen, incurred after the vessel was brought back from the voyage to Davis' Straits; 4. That they were also liable for any loss suffered by the vessel not being able to go to Davis' Straits, or to reach Greenland at the proper fishing season; and, 5. That although the ship-builders were partly successful in the litigation, yet as the ship-owners prevailed in regard to their counter-claims, they were entitled to expenses.

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1ST DIVISION.
Lord Meadowbank.

ON the 11th of July 1806, Paton and others, partners of the Whale Fishing Company of Montrose, and owners of the whaler Eliza Swan, directed their manager, Kinnear, to write to Strachan and Gavin, ship-builders at Leith, 'that they have now come to 'the resolution of having that vessel lengthened and repaired, 'and that they are desirous she shall be put into your hands: I 'therefore beg to know if you have got at present an empty dock 'that would admit her; if not, please say how soon. The season 'being now far advanced, I would wish her put into dock as 'early as possible. For the satisfaction of those concerned, it 'will be obliging if you will at same time give an estimate of the 'probable expenses attending the 13 feet which is to be put into 'her. In order to enable you to do this, I give you the follow-'ing particulars, viz. From the fore part of the main stem to the 'after part of the stern post aloft, is 89 feet; her breadth, at the 'broadest part of the main wales, 25 feet $10\frac{1}{2}$ inches; her height 'between decks is 4 feet 8 inches, and admeasures 241 tons '59-94th parts. The additional length we mean to put into her 'is 13 feet. I am required also to request you to note the prices 'of your timber, planks, &c. and rate of wages, together with 'your dock dues: the timber must be all English oak; and if 'you have a sufficient quantity on hand for the repair of the 'ship, besides her lengthening, as she will need a certain quan-'tity of floors and foot-hooks; and we intend to make the deck 'flush fore and aft.'

Next day Kinnear wrote, that the depth of the hold was, from the keelson to the upper deck, 16 feet 18 inches; and requested Strachan and Gavin to note what the iron work could be furnished for.

On the 14th Strachan and Gavin answered, 'We have to in- Feb. 22. 1828.
'form you that the Eliza Swan may be taken into dock next
'spring tides, say about the 29th current. With regard to the
'expense of lengthening her, this cannot be estimated with any
'degree of correctness, unless we had the exact scantling of plank
'and timber, the average length of the midship planks in the
'bottom, &c.; but, from a rough calculation, we think the pro-
'bable expense of lengthening her 13 feet, would be about
'L.900. As the vessel will require other repairs, which would
'interfere with the lengthening, we think the best way for both
'parties would be to do the whole by day's work. The captain
'will have it in his power to keep an exact account of the arti-
'cles expended, and to turn off any workman that does not
'please him. We have on hand an excellent assortment of
'English oak timber, of a suitable size for the vessel.' A note of prices was added, and, inter alia, 'wages per day, 3s. 4d.
'common English oak timber per foot, girth measure, 5s.'
Kinnear wrote in answer, that the vessel would be sent round as soon as possible, and requesting to be advised how soon 'you
'can engage to have the Eliza Swan lengthened and thoroughly
'repaired. The owners are anxious to have the job executed
'with all expedition.' Strachan and Gavin replied, 'If nothing
'material is to be done to the vessel besides lengthening, we
'think the repair may be completed in from two to three months
'after she is docked. At all events, you may be assured that no
'exertion will be wanting on our parts to finish the work with
'the greatest possible dispatch.' Kinnear then wrote, 'The ship
'will be off to-morrow, and round to you in a few days, and
'hope you will make every exertion to finish the ship soon and
'well. P. S.—As it is understood that nothing is to be put into
'the ship but English oak timber and Dantzic oak plank, to
'which you must bind yourselves by letter, as you did not men-
'tion in your letter of the 14th current the plank to be Dantzic.'
Strachan and Gavin answered, 'The Eliza Swan is not yet
'arrived; we are all clear for her, and expect her up every tide.
'With respect to the materials, we have a good stock of English
'timber and Dantzic plank, and little or no Hamburgh; so that
'Captain Young will have it in his power to take what he likes
'best; and we hope to be able to execute the work to the satis-
'faction of every one concerned.' Kinnear afterwards wrote,
'I had a letter from Captain Young on the arrival of the Eliza
'Swan, and that she goes into dock on the 15th current,
'(August), and hope you will put on her the best of materials,

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'and likewise the best of workmanship on her, and return her 'as soon as possible.'

The vessel was received into dock on the 15th August, and the lengthening and requisite repairs proceeded in. Captain Young, the master, the ship-carpenter, and Mr Young, a part owner, superintended the workmanship. The vessel was sent out of dock on the 26th January following, and delivered over to the captain. The expense amounted to L.2685. 3s. 8d. of which L. 1350 were paid to account. During the currency of the operations the wages of carpenters were increased, under the sanction of the Justices of the Peace, sixpence per day more than they were at the date of the agreement. The owners were dissatisfied with the way the repair had been executed; and they alleged, that while the vessel was at Leith the imperfection of the workmanship had been remarked; that on the voyage from Leith to Montrose the vessel leaked to an alarming degree, and would have foundered if the weather had not been moderate; that on reaching Montrose, empty tree-nail holes were discovered; that after a repair there the ship proceeded to Davis' Straits, her original destination, on the whale fishing; but, on reaching Kinnaird's Head, her leaky condition compelled the captain to put back; that the bottom of the vessel was there judicially examined, and several deficiencies discovered in the outward planking, both as to the planks themselves and as to the caulking and plugging of the seams and holes; that after being repaired and detained at Montrose for 22 days, and the season, from this delay, being too late for Davis' Straits, the vessel was employed in the Greenland fishery; where, from the lateness of the season, and the continued leakiness, the fishing proved far from successful; that on returning to Montrose a more thorough inspection became necessary, when it was ascertained that not merely the doubling, but the main bottom itself of the vessel, had been left by Strachan and Gavin in a most insufficient state; that this required extensive and additional repairs; and that in consequence Kinnear wrote to Strachan and Gavin, on the 27th August 1807, in answer to their demand for payment of the balance of their account, 'I duly received your 'letter of the 17th instant, which I have laid before the Mon- 'trose Whale Fishing Company; and I have to hand you en- 'closed the account which the Company have made up against 'you, composed of overcharges in your account, expenses in- 'curred in consequence of the Eliza Swan being obliged to 'return, and of damages sustained by voyage of last year being

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'rendered less valuable by the detention which was occasioned,— 'amounting in the whole to L.1355. 16s. 4d. When you have 'deducted the above sum, and the payment of L.1350 that was 'made to you, the Company are willing to pay the balance that 'will then remain of the original principal sums.'

Strachan and Gavin declined a settlement on these terms, and brought an action against the owners before the Court of Admiralty, concluding for payment of L.1771. 5s. 6d. being the balance, with interest of their account. The owners, besides stating the above circumstances, pleaded in defence, that there was an overcharge in the price of the oak, the price being stated in the account at 6s. per foot, and in the rate of the workmen's wages, which were charged at 3s. 10d. per day; that the owners had a good counter-claim for the loss incurred in being obliged to dispatch the vessel to the Greenland instead of the Davis' Straits fishery, L. 550; and for the amount of the whole sums disbursed on the ship previous to the voyage to Greenland, and after returning, with wages and provisions to the crew, &c. being L.1355. 16s. 4d.; the difference between which and the sum sued for they were willing to pay; and to keep this defence in proper shape, they raised a counter-action.

A great deal of procedure took place before the Judge-Admiral, and, in particular, an interlocutor was pronounced on the 8th of June 1815, finding that Strachan and Gavin were not entitled to charge a higher price for the timber than that stipulated in the letters of agreement. A remit was made to professional men, and a proof allowed to both parties. In the course of the action, other defects in the vessel having become apparent, and especially that some of the iron bolts were short, and that in lengthening and repairing the vessel, Strachan and Gavin had used in various places American timber, the owners raised a supplemental counter-action, concluding, that Strachan and Gavin should immediately remove 'the American and other 'foreign timber, and American plank, used in the keel, keelson, 'lower deck wains, outside, and other parts of the said vessel, 'at lengthening and repairing her, and to replace the same with 'English oak and Dantzic planks, in terms of the agreement;' or that the owners should 'be entitled to do so at Strachan and Ga-'vin's expense, who should also be decerned to pay the damage in-'curred, and expenses disbursed by the owners in repairing the 'Eliza Swan, at various times subsequent to the 26th August '1808, the date of the account of over-charges, &c. before re-'ferred to, on account of the careless and improper manner in

Feb. 22. 1828. ‘ which the work was originally performed by the said Strachan ‘ and Gavin, the insufficiency of the materials, and the deviation ‘ from the agreement.’ Thereafter, in the conjoined actions, the Judge-Admiral pronounced this judgment:—‘ In respect ‘ that, by the letters of agreement entered into between the ‘ parties in July 1806, the repairs in question were stipulated ‘ to be made by days’ wages, and at a rate of a fixed sum per ‘ day, and that no satisfactory proof has been brought (indepen- ‘ dent of the objections to the pursuers’ witnesses) of any such ‘ general practice in the trade as will justify a higher charge in ‘ the event of a rise of wages; finds, that the pursuers are not ‘ entitled to charge for carpenters’ work at a higher rate than ‘ 3s. 4d. per day; therefore sustains the objections to the over- ‘ charge of 6d. per day, amounting in whole to L. 69. 6d. ster- ‘ ling. In respect of the final interlocutor of 8th June 1815, ‘ finds, that the pursuers are not entitled to charge for timber at ‘ a higher rate than that specified in the letters of agreement; ‘ and therefore sustains the objections that a part of the timber ‘ is charged at 6s. per foot instead of 5s., and allows a deduction ‘ accordingly to the amount of L.35. 8s. 6d. sterling. With regard ‘ to the objection that some American oak was substituted in place ‘ of English oak, finds, that by the letters of agreement the whole ‘ timber was to be English oak, and that the pursuers ought not to ‘ have made use of any other oak in the repairs; but in respect ‘ that some persons were employed by the defenders to superintend ‘ the work, and that the vessel was benefited to the extent of the ‘ oak furnished, finds, that the pursuers are entitled to charge ‘ for the price of American oak, and appoints each party to ‘ give in a short minute on the question what these charges ‘ should be: Repels the objection made to the period occupied ‘ in repairing the vessel, in respect that there were some persons ‘ employed by the defenders to superintend what was going on; ‘ and that satisfactory evidence has not been brought that there ‘ was an unreasonable delay: Repels the whole other objections ‘ stated to the pursuers’ account. And with respect to the ‘ defenders’ counter-claims stated in the defences, and in the sup- ‘ plementary action, finds it sufficiently instructed by the evidence ‘ of the carpenters who inspected the vessel, by the leakage of ‘ the vessel on her voyage from Leith to Montrose, in the at- ‘ tempted voyage to Davis’ Straits, and in the voyage to Green- ‘ land, that the repairs made upon the vessel by the pursuers ‘ were insufficiently executed, and that the defenders are entitled ‘ to all reasonable damages which they sustained in consequence

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'of the insufficiency of the work. Therefore finds the defenders 'entitled, 1*st*, To the expense of the repairs which the vessel 'received at Montrose before she sailed for Davis' Straits (Green-'land), amounting to L. 44. 9s. 1½d sterling: 2*d*, To the expense 'of wages to the captain and crew of the vessel for the twenty-'two days occupied in repairing her at Montrose, amounting to 'L. 248. 7s. sterling: 3*d*, To the expense of the repairs which the 'vessel received after her return from the Greenland voyage, 'amounting to L.194. 12s. 7d. sterling: Repels the claims of the 'defenders, founded on the damages alleged to have been sustained 'by the unsuccessful fishing at Greenland, in respect the voyage 'appears to have been pretty successful, and that a claim of this 'kind partakes too much of the nature of consequential damages: 'Repels also the claim of the defenders, founded on the demand 'for the vessel being now repaired with English oak instead of 'American oak, in respect of the long period which elapsed 'before this claim was brought forward, and that it ought to 'have been insisted in when the vessel was repaired at Montrose. 'Remits to the depute-clerk of Court to make up a state of the 'sums found due by this interlocutor to each of the parties res-'pectively; and to report whether any, and what balance will 'be thereby due by the one party to the other: Lastly, Finds 'the pursuers liable in the whole expenses of process, includ-'ing the different surveys of the vessel, and the expense of the 'judicial proceedings at Montrose.' This was followed by a decerniture for L. 31. 5s. being the amount of other necessary repairs.

The parties then stated in a joint minute, that, assuming the correctness of the principles in the interlocutor, there was no dispute, either as to the price of the American timber, which at the period of the repair was as high as English oak, or with regard to the general balance to be brought out; and the Judge-Admiral thereupon recalled the inquiry as to the American oak, and found a balance of L. 682. 10s. 4d. with interest, due by Paton and others, under deduction of expenses incurred by them, which were afterwards modified to L. 250. 14s. 7d. These judgments having been brought before the Court of Session, the Lord Ordinary advocated the cause, and pronounced this judgment:—'Finds, that the repairs 'in question were stipulated to be made by workmen engaged 'by days' wages, and removable at the pleasure of the persons 'engaged by the defenders to superintend the work: Finds, that 'although in the letter of the 14th July 1806, the rate of wages

Feb. 22. 1828. ‘at the time in Leith was specified, it was not expressly agreed ‘that during the progress of the work that rate might not be ‘varied or altered: Finds, that in all engagements to execute ‘work, not for a slump sum, by measurement, or the like, but ‘by workmen engaged by the day, and without limitation, in the ‘most express terms, of the amount of their wages, it is neces- ‘sarily understood and inferred that the whole burden thereof is ‘to be upon the actual employer, whether they may exceed or ‘fall short of the rate at which they stood when the work is com- ‘menced: Finds, that in this case the defenders must be held to ‘have been the actual employers of the workmen, who were ac- ‘cordingly liable to dismissal at their pleasure, or that of their ‘superintendant; and that as the letters of agreement founded on ‘did not, in express terms, take the pursuers bound to furnish ‘workmen at the rate of wages payable in Leith when the work ‘commenced, the defenders are liable for the rise on that rate ‘which it is proved took place in that port during the operations ‘in question; and accordingly repels the objection to the charge ‘of 6d. per day, in addition to 3s. 4d. for each workman charged ‘in the account, amounting in whole to L. 69. 6d. and decerns ‘accordingly: Finds it sufficiently established, that, in the ‘language of the trade, there are employed in ship-building com- ‘mon English oak, as well as oak of a superior description, and ‘bearing a higher price than the former: Finds, that it must be ‘inferred that the defenders were aware of this distinction, and ‘that, in the letter of the pursuers of 14th July 1806, the price ‘of 5s. per foot, stated as the price of English oak timber, was ‘specially stated to refer to common oak; and that in the letter ‘of the 7th of August it was specially stated, with respect to ‘materials, that Captain Young might select what he thought ‘fit: Finds, that the work was superintended by Messrs Young, ‘and the materials employed in the repair were selected under ‘their inspection, and with their approbation and consent; and ‘accordingly, that the account now pursued for was certified by ‘them: Finds, that it was competent for them to authorize the ‘employment of oak of a quality superior to common oak, and ‘that for such exercise of these powers the defenders are liable: ‘Finds, that a certain quantity of superior oak was consumed ‘accordingly, for which 6s. per foot is charged; therefore repels ‘the objection to the said charge, and decerns: Finds, that in ‘the account libelled there is no charge made for plank for new ‘doubling the vessel, and therefore that the defenders are not ‘entitled to place to the debit of the pursuers the price of the

'plank employed at Montrose for new doubling the vessel: Feb. 22. 1828.
'Quoad ultra, adheres to the judgment of the Judge-Admiral on
'the merits, and finds, declares, and decerns accordingly; but
'on the question of expenses, as well in this Court as in the
'Admiralty Court, appoints parties' procurators to be ready to
'debate.'

Paton and others reclaimed to the Inner-House, and their Lordships remitted the case to Mr Stone, master-builder in his Majesty's dock-yard at Deptford, requesting that he will 'consider the same with the proof; particularly as the same regards 'the mode in which the bolts were driven and clinked, and the 'length and sufficiency of the beams, and report his opinion 'thereon to the Court.'

Mr Stone reported,—'I am of opinion, from the testimony of 'Mr Mearns, which does not appear to be invalidated by any 'contrary evidence, that in the instance stated the work was in-'sufficiently performed: viz. that, in particular, two of the bolts 'were too short, and, being driven from the outside, did not go 'through the knees so as to clench; and pieces of bolts were 'driven from the inside, to make it appear that they were whole 'bolts properly clenched. Mr George Mill gives evidence to 'the same effect. Such a state of work has determined my 'opinion, that it must be considered insufficient. Each party 'appear to admit the vessel was leaky when she arrived at 'Montrose, although the respondents' evidence insinuates it was 'not more than is customary, especially after so large a repair. 'I should rather argue, that the larger the repair, the better 'opportunity would have been afforded to make a ship tight; as 'thereby all the parts of the vessel would pass more particularly 'under observation. John Thom deposes, that in 1807 "the 'vessel required to be properly caulked;" and he discovered 'one tree-nail hole of an inch and a quarter empty, and which 'never had a tree-nail in it; and that there were also some empty 'nail-holes. John Flockhart found two holes open; one for a 'tree-nail, the other for a nail. James Slowright deposes, that 'two holes were discovered on the starboard side; the one was a 'good large hole, made, as he supposes, by an inch augre, the 'other by one of three-fourths of an inch. I am of opinion there 'was a great neglect in allowing one hole to remain open; 'and, if the evidence of more holes is to be depended upon, of 'course the neglect is enhanced; for in all cases, before putting 'on doubling, it is considered a matter of duty to perfect the 'bottom, by driving all fastenings, and by caulking it before the

Feb. 22. 1828. ‘ doubling is put on. I have duly considered the reply of the ‘ respondents; and, admitting that these holes were not in that ‘ part of the work which had been performed by the respondents, ‘ (viz. where the ship was lengthened), and also that these holes ‘ did not go through the outside plank or doubling, and, in ad- ‘ dition, that they may have formed an original defect; as the ‘ ship was put into the hands of the respondents to be made ‘ perfect, I am decidedly of opinion such an omission must be ‘ attributed to neglect, as the whole of the bottom must un- ‘ doubtedly have been caulked, after so large and extensive a ‘ repair. The respondents say, “ that the surveyors explicitly ‘ state, that they could find nothing materially wrong with the ‘ ship, except that the caulking was a little slack;” which they ‘ (the respondents) deny as being the case when she left Leith, ‘ “ and that some of the tree-nails wanted plugging.” From the ‘ whole of the evidence I am constrained to conclude, that had the ‘ ship been properly turned out of hand, it would not have been ‘ necessary to have again caulked her on her return to Montrose. ‘ As to the length and sufficiency of the beams, I am totally at a ‘ loss to account for any motive in the respondents in allowing ‘ of such a thing; but still I admit the probability, that the beam ‘ said to be five inches short, might have been so much short, or ‘ nearly so, when put in. It is stated that the ship measured, in ‘ 1807, 26 feet 6 inches in breadth, and in 1813, 26 feet 11 ‘ inches. If the ship had become wider by working, the beams ‘ next forward and abaft would have partaken of a posture, so as ‘ gradually to have become less short of the timbers as they ap- ‘ proached forward and aft. I am humbly of opinion, if the ship ‘ had become five inches wider in the midships, where she had ‘ been so recently lengthened, and where all the work was new, ‘ and I apprehend, from the shortness of time, the timber must ‘ have been sound, a proper security would not have been given ‘ to connect the beam to the side; or if the beam was short when ‘ put into the ship, in either case there must have been either ‘ want of judgment in proportioning the quantum of fastening, ‘ or negligence in the execution of the work. As to some of the ‘ materials being American oak—at that period, viz. 1807, Ame- ‘ rican oak being of a recent importation, the public opinion was ‘ very favourable to it as a substitute for English oak. The re- ‘ spondents, therefore, I think must be exonerated from moral ‘ blame, as the price was nearly equal to English oak, consider- ‘ ing the mode of measuring each description of timber; but ‘ experience has since proved, that in a very short time oak of

'American growth becomes very defective, and is very subject 'to fungi. Feb. 22. 1828.

Upon advising the cause, with this report, the Court, on the 24th June 1824, 'approved of the report, and altered the interlocutor of the Lord Ordinary, so far as regarded the additional charge of 6d. per day on wages, and of 1s. per foot on timber; of consent, adhered to the interlocutor so far as the petitioners' claim of deduction for dock dues is repelled; altered the interlocutor so far as regarded the charge made by the petitioners for plank for new doubling the vessel at Montrose; and so far also as regarded the counter-claims of the petitioners on account of the repairs made by them on the vessel in 1811 and 1814, as well as on account of the short fishing in 1807; and on account of the substitution of American for English oak, in the original repairs executed by the respondents: Found the petitioners entitled to damages for the short fishing in 1807, and for the breach of contract in the substitution of American for English wood, in the repairs made at Leith; and before farther answer to these damages, appointed the petitioners to give in a condescendence of the particulars and amount.'

Thereafter Paton and others offered 'to accept of L.100 as a cumulo sum in name of damages, both for the short fishing, and for the violation of the contract with respect to the wood employed in the repair;'—the consent to this proposal not to affect Strachan and Gavin's right to appeal from the interlocutors hostile to them in causa. On this proposal being agreed to, the Court, 2d March 1826, decerned accordingly.*

Strachan and Gavin appealed.

Appellants.—The vessel was substantially and carefully repaired in 1806 and 1807. This was done under the superintendence of the respondents' agents. She was sunk in dock to ascertain whether there was either any insufficiency in caulking, tree-nailing, or plugging; but there was then no appearance of any deficiency, nor were any of the lower-deck beams too short before being put in; nor were any tree-nail holes observed to be empty, and any trifling leakage in the voyage between Montrose and Leith, was not more than is uniformly attendant on such an extent of repairs as the vessel had received. It is therefore not competent to make the appellants liable for further repairs required in 1811 and 1814, after the vessel had been voyages to Greenland. Indeed, these repairs were exactly such as every ship, sound

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* 3. Shaw and Dunlop, No. 194.

Feb. 22. 1828. as she may have been, required on returning from such an employment. Vessels in the Greenland trade are exposed to peculiar accidents, and cannot fail being strained and shattered in their collision with icebergs and exposure to inclement weather. No log-book has been produced, the detail in which might satisfactorily have accounted for the vessel being put out of shape. The starting of bolts, nails, &c. is owing to the same cause. The vessel was already old and frail when sent to be repaired. As to the American oak, Captain Young had the power of selecting what timber he chose. He did so, and in this partook in the common opinion of its value. In using it, the appellants acted with perfect bona fides, and no loss has arisen from its substitution. As to the price charged for the oak, common oak was 5s. per foot; but superior oak, requisite for particular parts of the ship, cost 6s. The wages for workmen were raised by the Justices of Peace, over which the appellants had no controul. In mentioning a rate at all, the appellants meant the current rate while the work was proceeding. On the other hand, the respondents have made extravagant charges for wages and provisions to their captain and crew; and it is clear, that the pretended loss in the fishing is by far too consequential a damage to be admitted into consideration in a question of the present kind. It was irregular and incompetent in the Court below to delegate to Mr Stone to judge of the proof, and the judgment which he has given proceeds on erroneous ideas.

Respondents.—The overcharges in the appellants' accounts relate, first, to the wages; and, second, to the oak. In regard to the wages, nothing was said in the agreement that the rate was to depend on circumstances,—a precise sum was stated, and it matters not what the Justices decided. As to the oak, no hint was given that two kinds of oak, a common and a better, would be necessary. On the other hand, the respondents have various counter-claims. They are entitled to be indemnified for the loss sustained by the insufficient repairs of the vessel, arising from being unable to send the vessel to the proper fishing station at the proper season; the wages and provisions of the seamen during her detention; the expense of repairs; and the substitution of an inferior species of oak, different from that stipulated for. The Court did right in a case of this nature to remit to Mr Stone; but they themselves exercised their own judgment on the proof, and only availed themselves of his professional assistance.

The House of Lords 'ordered and adjudged, that the interlocutors complained of be affirmed.'

LORD CHANCELLOR.—My Lords, There was, on a former day, a case argued before your Lordships, of Strachan and Gavin, appellants, and George Paton and others, respondents. Feb. 22. 1828.

My Lords,—Paton and others were the owners of a ship called the Eliza Swan, which was a vessel employed in the whale fisheries. The vessel was out of repair, and they were desirous of having it repaired, and also of having it lengthened. They applied to the appellants, Messrs Strachan and Gavin, ship-builders at Leith, for the purpose of their undertaking those repairs. The owners of the vessel lived at Montrose.

Before the vessel was sent to Leith, a correspondence took place between the parties, as to the terms upon which the vessel was to be repaired. A Mr Kinnear, who was the manager for the respondents, (who were in fact a Company calling themselves The Whale Fishing Company of Montrose, and their business in this department seems to have been managed by Mr Kinnear), wrote to the appellants upon the subject of the repairs of this vessel. (His Lordship then quoted the letters and answers).

That is the correspondence which took place previously to the work, which was to have been completed in about two or three months. The vessel, however, was not turned out of dock until about six or seven months, and on being turned out of dock she immediately proceeded to Montrose. The voyage from Leith to Montrose commonly takes up about twelve hours. During that passage she made an incredible quantity of water, so much so that the crew were obliged to pump incessantly. The pumps at last were choked; and the evidence is distinct and clear that the vessel would have been water-logged, if they had not got into Montrose without delay. It became necessary at Montrose to examine the vessel, and to stop the leak or leaks. They found at least one tree-nail hole, in which no tree-nail had been rivetted. They did what they thought necessary upon that cursory inspection, and the vessel is sent almost immediately afterwards upon her intended voyage to Davis' Straits, for the purpose of fishing. It was found, however, almost immediately after she left Montrose, that she was in such a condition that it was impossible to pursue that voyage with safety. The crew were dissatisfied, and a meeting of the officers was held by the captain, and the result was, that before they got far on the voyage, it was absolutely necessary to return. According to the protest of the captain, the vessel made eighteen inches of water in an hour. She was obliged to be constantly pumped four or five spells in the course of a watch; and it was absolutely necessary (there is no contradictory evidence on that head) that the vessel should return in consequence of her imperfect condition to Montrose. She was then repaired, and during those repairs she was detained during a period of twenty-two days. At the expiration of that time, instead of pursuing her voyage as originally intended, she went to

Feb. 22. 1828. Greenland, and returned after the usual time with an imperfect cargo, —a cargo, as far as I remember, of not more than two-thirds.

Afterwards, upon her return from this voyage, she was again inspected. The repairs before she set out on this voyage had been done with as much expedition as possible to fit her for the voyage, and a more accurate inspection was had after her return from the Greenland voyage, and other repairs were done.

In the year 1814 she was again inspected, and upon that inspection it was found, that some of the beams which were put in, instead of being of English oak, were of American oak; three or four were decayed at their extremities,—it being found that American oak decayed more rapidly than English oak. It was discovered also that she was not properly bolted; that some bolts driven in were too short, and not clenched, and, to give them the appearance of passing through, there were short ones put on the other side; that is sworn by one witness distinctly. Repairs were done in the year 1814, and, as I believe there is no difference with respect to the amount, the question will be ultimately as to the principle.

The first question that will arise will be, whether or not the ship-wrights at Leith, having instituted the suit against the ship-owners for the recovery of the sum due for the repairs, amounting to L.1700, any reduction should be made in this case in consequence of the insufficiency of the repairs? According to the law of this part of the island, much that is insisted on the part of the defendants would have been the subject of a cross action; but no such question arises according to the state of the pleadings in this case. It is perfectly clear, without going in detail through the evidence, (for really the evidence is all on one side, and not contradicted), that the vessel was sent out in an imperfect condition and state from the dock-yards of the ship-wrights at Leith. The expenses incurred in the first instance, after the return of the vessel to Montrose, upon her intended voyage to Davis' Straits, ought, in my judgment, to fall upon the ship-wrights at Leith. They undertook to do the work perfectly, and they were bound to do so; and it is quite clear from what took place, and the evidence arising from the inspection—it is absolutely certain—that that work became necessary in consequence of their default. It is proper also to observe, that not only is the evidence all on one side, but, before these repairs were done, a letter was written to the ship-wrights at Leith, and they sent over their foreman, Mr Temple, to view the state of the vessel; and as Mr Temple directed no witnesses to be examined on that side, I apprehend it is perfectly clear, in point of evidence, that the expenses at Montrose ought to fall upon the ship-wrights at Leith.

I think the same argument applies to what took place after the return of the vessel from the first Greenland voyage. Upon taking off the doubling, it was found she was in an imperfect condition in many respects. Without troubling your Lordships with the details of the

evidence, which I have read through with great attention, I am quite satisfied upon the weight of evidence, that what was then done was absolutely necessary to be done, and that it resulted from the omission of the ship-wrights at Leith. Feb. 22. 1828.

In the year 1814, which is several years afterwards, as I have already stated to your Lordships, the vessel was inspected, and it was then those defects, to which I have particularly called your Lordships' attention, were discovered. The vessel was examined by persons every way competent to form a judgment. It is sworn, that at that period some of the beams that were put in were too short, and the circumstance with respect to the improper driving of the bolts is sworn to by persons every way qualified to judge. The circumstance to which I have already directed your Lordships' attention, namely, that some of the bolts, one of them if not more, were too short, and that bolts were driven in on the other side, to give them the appearance of having passed through, is distinctly sworn to. The whole of that evidence was submitted by the Court below to Mr Stone, the master ship-wright at Deptford dock-yard, and he has made a report; and I do not at all concur in the observations made at the Bar upon that report, for I find no fault with regard to the general scope and tenor of it;—he is of opinion that those defects, then discovered in 1814, were the effects of the imperfect manner in which the work had been done by the ship-wrights at Leith. I am ready to make every allowance for the interval of time that has elapsed from 1806 to 1814, and particularly with respect to a vessel engaged in the Greenland fisheries; but still, looking at this evidence—paying attention to it, and making every fair and just allowance—the impression upon my mind is, that it is satisfactorily made out, that those defects which were discovered in the year 1814, and which were then repaired, are properly referable to the original omission of the ship-wrights; and if so, I think they are bound to make compensation. The Court below were of that opinion. I concur in that opinion, and I humbly submit to your Lordships that it would be proper, in that respect, to confirm the opinion of the Judges in Scotland.

Your Lordships will not think it necessary for me to read the evidence to you. It is very voluminous, and in detail. I state fairly, that, after much attention, that is the result of the impression it has made upon my mind. I think the evidence is all one way. There is much reasoning, and very good reasoning, on the other side; but almost all the evidence is in favour of the present respondent.

Another question that arose, which, though not a question very material in point of amount, is not immaterial in principle, was this: The vessel was detained upon the first repair twenty-two days at Montrose. She afterwards sailed upon her fishing voyage, and came back with an imperfect cargo. The owners of the vessel claim compensation upon this account. The answer that is given, or at least one of the answers, is this, Why, if the vessel had sailed, you are not sure,

Feb. 22. 1828. upon so precarious an adventure, that she would have come back with a larger cargo. But if a vessel is detained for twenty-two days, at a time when she ought to have been on her voyage, (and she was detained these twenty-two days in consequence of the deficiency of the repairs of the ship-wrights), and the parties have been deprived of the fair chance of gaining the advantage resulting from the use of their vessel during that time, I apprehend they are entitled to compensation in the shape of damages. Your Lordships will be relieved from all consideration upon the amount of damages, because the amount has been agreed upon between the parties, provided your Lordships are of opinion that the owners of the vessel are, in consequence of this default on the part of the ship-wrights, entitled to recover. I am quite satisfied, upon an action so framed in this part of the island, that damages would be recovered, for the parties had lost for twenty-two days the use of their vessel.

There is another point that was made upon this appeal, to which I must also call your attention; and that is with respect to the use of American oak. It was, as your Lordships will recollect, by reference to the letters to which I called your attention, distinctly and expressly directed, that no oak should be used except English oak. It is stated in two distinct parts, in terms the most precise and explicit. It turned out that American oak was used in several parts of the work. I do not mean, nor do the parties who are concerned in this appeal, mean to impute moral blame to the ship-wrights for using American oak instead of English oak, because at that period, according to the evidence, it was supposed that American oak was as good as English oak; and the evidence states that the price was about the same; but it has turned out in the result—the evidence establishes the fact—that American oak decays much more rapidly than English oak, and in the present instance the orders were 'English oak.' These orders were accepted by the ship-wrights, and by the acceptance of those orders it was incumbent upon them to see that nothing but English oak should be used: if they took upon themselves to use any other, they have been guilty of an infringement of the contract; and if they have been guilty of an infringement of the contract, they are liable to an action, and liable to make compensation in damages for the consequences that have resulted from the breach of that contract. Your Lordships will not be troubled with fixing the amount, because on this head the amount of damage has been agreed upon, if your Lordships are of opinion that the respondents are in this respect entitled to recover. The only ground upon which it is resisted is, that Captain Young was present at the time. But I do not find that Captain Young was vested with any authority to dispense with the terms of this written contract with regard to the particulars I have before alluded to; and if the parties take upon themselves to use American instead of English oak, contrary to the terms of their contract, supposing it to be as good,—if it has turned out that their judgment is erroneous, they are bound, I

think your Lordships will feel, to make compensation to the ship-owners. Feb. 22. 1828.

There are two other points remaining for consideration. Before the vessel was sent to Leith, the Company took the precaution to direct their agent to write a letter to ascertain the probable expense of lengthening the vessel, and to ascertain the rate of charge with respect to the wages and materials. I will again direct your Lordships' attention to that part of the letter. 'I am required also to request you to 'note the prices of your timber planks, &c. and rate of wages, together 'with your dock dues. The timber must be all English oak.' In answer to that it is said, 'The prices are noted on the other side. 'Note of prices,—wages per day, 3s. 4d., common English oak timber 'per foot, girth measure, 5s.' For a part of the time those wages, 3s. 4d., were charged, and for a part of the time an increased rate of sixpence was charged; and the ground upon which this increased charge was made was, that in fact, while this work was going on, there was a general increase of wages at the rate of sixpence a-day; but I apprehend that, looking at the distinct and precise terms of this contract, your Lordships will be of opinion, if any loss arises from that increase of wages, it ought to fall, not upon the ship-owners, but the ship-wrights. The parties sent to know the rate of wages. 'What do you mean to 'charge?' '3s. 4d. a-day.' It does not appear that 3s. 4d. a-day is the price that is paid to the men: 3s. 4d. is the price that the ship-wrights are to charge the ship-owner. There is no evidence to shew the actual price paid to the labourers by the ship-wrights. I consider that they contract, 'While this work is going on we will charge at the rate 'of 3s. 4d. No matter what contract we have made with our men. 'We may agree with them by the day, by the week, or by the year. 'We may employ our apprentices, who are perhaps not paid at all, or 'at a very low rate. We shall charge you 3s. 4d.' And if an increase has taken place before this work was completed, the loss I think ought in justice to fall upon the ship-wrights.

The other point is as to the common English oak. That is charged in the note at 5s. and part of the timber has been charged at the rate of 6s.; and the ground upon which that charge is made is, that it was oak of a superior quality, and ought to be charged at the rate of 6s. I apprehend, when your Lordships consider the nature of the case, you will think they were not justified in making that charge. When they say that common oak is to be charged at such a rate, the party is deluded unless that is meant to apply to the general run of oak timber throughout the vessel. It was incumbent upon them to have stated that the common oak timber was to be charged so much, but that it was necessary for certain purposes to use superior oak, to be charged at an increased rate. I apprehend your Lordships will think the appellants' saying the price was 5s., without making any distinction as to the use of any superior oak timber, must be considered bound by it. But the case does not rest here; and they say, for the beams, and the

Feb. 22. 1828. keel, and the keelson, and for the knees, superior oak timber is requisite: but upon the evidence it turns out, that in the keel and keelson, or in a great part of what they did, they did not use superior oak timber, which means superior English oak timber, but they used American oak; and it appeared also, as to some of the knees, that they were American oak. Therefore I think upon the fact, that they are not entitled to have this charge sustained. It does not amount to any considerable sum. This is the last point to which it is necessary to call your Lordships' attention. Upon all of them, after reading the evidence, and considering with attention the argument urged at the Bar, I feel disposed to concur in the judgment pronounced in the Court below.

There is one remaining point, which relates to the expenses. The expenses of those proceedings have been, by the Court below, thrown upon the ship-wrights. Now it is said at the Bar—and upon the part of the appellants the case was argued by English Counsel—that that is not just, and does not correspond with our practice in this part of the island, because the ship-wrights have recovered a considerable part of their demand. They have recovered to the extent of L.600, and having recovered to that extent, it is very hard and unjust that they should have to pay all the expenses. But I think, in the first place, that the rules with respect to costs in this part of the island, are rules of practice, and rules of law established with regard to our proceedings. We cannot well reason, from our practice, as to questions in courts in any other parts. But if we come to sift the question, I do not think the argument applies in the manner in which it is pressed. If this inquiry had taken place in England, there must have been two actions. The ship-wrights must have proceeded in their action to recover their demand, and the ship-owners must have brought a cross action for the damage they had sustained by the imperfect manner in which the contract was executed; and these two actions must have gone to their termination as two separate actions. Upon the action for damages brought by the ship-owners, if they recovered, they would have recovered the entire costs. Now when we advert to these proceedings, almost all the expenses result out of that part of the investigation. Therefore, applying the principle that prevails in this country, and the practice in this country, to the proceedings in this instance, it appears to me that the result would be nearly the same. And with respect to the action brought by the ship-wrights, the ship-owners would have had an easy mode of obviating the necessity of paying costs in that action. He would have said, 'I claim to deduct two 'items,—that part of your charge for superior oak, and that part of 'your charge for wages.' He might have paid into Court the difference; and if the party had gone on to try the merits of the case, as far as it relates to these points, and he had failed, the costs of the action would have been thrown upon the ship-wrights; and therefore, as, when we apply the principle that prevails here to this particular

case, there would not be much diversity in the result between that which took place in Scotland and what would have taken place here, I should submit to your Lordships that that part also of the decision of the Court below—throwing the expenses on the appellants—should be affirmed. If your Lordships concur with me in opinion, the effect will be to affirm the judgment of the Court below with respect to those several points. Feb. 22. 1828.

SPOTTISWOODE and ROBERTSON—MONCREIFF, WEBSTER, and THOMSON,—Solicitors.

Poor ISOBEL M'DIARMID and Husband, Appellants. No. 3.
Fullerton—Wilson—Bere.

JOHN and JAMES M'DIARMID, Respondents.
Keay—T. H. Miller.

Fraud.—A daughter and her husband having obtained from her father, who was eighty-three years old, facile, and addicted to habits of intoxication, a deed in the shape of an agreement and obligation between them and him, by which he conveyed to them, without any onerous consideration, funds of the value of about L. 4000, reserving an annuity of L. 40 out of these funds; and which deed was prepared by their agents without the intervention of any man of business on his part; and under the erroneous impression that unless he executed it he might be reduced to poverty;—Held (affirming the judgment of the Court of Session), That the deed was not binding on him.

JOHN M'DIARMID had, by his wife Catherine Cameron, two sons, Angus and Hugh, and two daughters, Christian and Isobel, the latter of whom (the appellant) was married to Daniel Drummond, farmer in Perthshire. Angus was a vintner in Edinburgh, and after having been married for several years, he and his wife executed, in 1813, a mutual trust-disposition and deed of settlement, by which she renounced her legal, and accepted conventional provisions, and under burden of certain legacies the residue was provided to the issue of Angus, if he should have any; and the deed then proceeded in these terms:—'In case I, the said Angus 'M'Diarmid, shall leave no issue of my body, of the present or 'any subsequent marriage, at my death, or their afterwards failing, 'then our said heritable and moveable means and estate before 'disponed, shall fall and belong to John M'Diarmid and Cathe-'rine Cameron or M'Diarmid, my father and mother, and the 'survivor of them; whom failing, to Hugh M'Diarmid, present-'ly residing in the neighbourhood of London, Christian M'Diar-'mid and Isobel M'Diarmid or Drummond, wife of Daniel

March 28. 1828.

1ST DIVISION.
Lord Eldin.