entertain such a case would be to hold out a premium to all sorts of *mala fide* and fictitious claims under the Act." But he ought to have ascertained whether in this case the respondent was prejudiced or not, and as he has cut the proceedings short without ascertaining that matter of fact, I think that his judgment cannot stand.

As it does not appear in the proceedings that the employer has been prejudiced, we should send the case back to the Sheriff Court.

LORD ADAM—The Sheriff has laid down as law that in every case where there has been a delay of three weeks in giving notice, it necessarily follows that the employer is prejudiced. That seems to me to be his *ratio decidendi*, and it is not good law.

LORD M'LAREN — I am of the same opinion, and only wish further to observe that on the question whether the employer has been prejudiced by want of notice, the facts will in many cases appear at the outset of the inquiry. If it were perfectly clear at an early stage of the inquiry that the employer has been prejudiced, it might not be necessary for the Sheriff to go further, or to determine the amount of damages which he had no power to award. The provisions of the Act may be reconciled by holding that as soon as it appears that the employer has been prejudiced the case is not maintainable. I agree that the Sheriff-Substitute was mistaken in not treating the question of prejudice in the present case as one of fact. The attempt to generalise, and to hold that in all cases of a particular class the employer is necessarily prejudiced, is contrary to the plain intention of the statute.

LORD KINNEAR concurred.

The Court pronounced this interlocutor:—

"Find that the facts (1) that the alleged injury happened three days before the completion of the employment; (2) that the employment was left without intimation of the alleged accident, and no intimation thereof given till three weeks thereafter; and (3) that no satisfactory explanation was given of the reason for concealment of the alleged accident, do not preclude the claim from being entertained, it being (under the statute) open to the appellant to prove that the respondents Messrs Carse & Holmes were not in fact prejudiced in their defence by the want of notice: Therefore recal the dismissal of the claim: Find the appellant entitled to the expenses of the appeal, and remit," &c.

Counsel for Appellant—Hunter. Agent—Alex. Wylie, S.S.C.

Counsel for Respondents—A. J. Young. Agents—Gill & Pringle, W.S.

Tuesday, May 30.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

PARKER *v.* NORTH BRITISH RAILWAY COMPANY.

(See *ante*, vol. xxxv., 842, and 25 R. 1059.)

Process—Lis alibi pendens—Supplementary Action—Competency—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 29.

Apart from cases of *res noviter veniens ad notitiam* or other peculiar circumstances, a supplementary action brought for the purpose of claiming a larger sum than could be recovered under the original action is incompetent, in respect that it is an attempt to evade the provisions of the Court of Session Act 1868, section 29, with regard to the amendment of a summons.

Bryan v. *Glasgow and South-Western Railway Company*, March 18, 1869, 6 S.L.R. 445, *followed*.

Roy v. *Hamiltons & Company*, February 15, 1868, 6 Macph. 422, *distinguished*.

This was an action at the instance of Evelyn Stuart Parker, owner of the ship "Genista" of Liverpool, against the North British Railway Company, as proprietors of the dock, harbour, and jetty of Silloth, in the county of Cumberland.

The pursuers concluded (1) that the summons in the present action should be conjoined with an action then in dependence before the Court between the same parties (being the case which is reported *ut supra*); and (2), "the said summonses being so conjoined or whether the same shall be conjoined or not," for payment of the sum of £8000 as damages for the stranding of his ship "Genista" at Silloth, which was due, as he alleged, to the fault of the defenders, but under deduction from that sum of such sum as should be decerned for under the original action, in which he had concluded for payment of £5000 only; or otherwise for payment of £3000.

The summons in the present supplementary action was signeted on 4th March 1899.

The summons in the original action was signeted on 9th July 1896. By interlocutor in that action dated 27th October 1896 the Lord Ordinary (STORMONTH DARLING) allowed the parties a proof of their averments. It was thereafter agreed between the parties that the question of liability should be decided first, leaving the amount of loss and damage to be ascertained subsequently. Proof was accordingly led in the action on the question of liability, and on 18th March 1898 Lord Stormonth Darling pronounced an interlocutor, which was adhered to by their Lordships of the Second Division, of date 1st July 1898, finding that on 28th March 1896 the "Genista" went aground on a

sandbank within the harbour of Silloth, and that the defenders were liable for the damage thereby occasioned, and continuing the cause in order that the amount of damage might be ascertained. A diet of proof was accordingly fixed for 13th December 1899 to determine the amount of damage.

The pursuer in his condescendence to the present action set forth the facts upon which he founded in the original action, and the procedure in that action as above narrated, and further averred as follows—"(Cond. 8) In the said action the pursuer concluded for payment of the sum of £5000 in name of loss and damage sustained. At the date of raising the said summons it was impossible for the pursuer to form an accurate estimate of the loss and damage sustained by him, as many of the accounts incurred in connection with the repair of the vessel were not paid nor even rendered at the said date. It was necessary to raise the action in considerable haste in order to secure the evidence of the third officer, who was about to sail on a long voyage. Since the raising of said action the pursuer has discovered that the loss and damage he has sustained amounts to not less than £8000, the sum now sued for. To recover this additional sum of £3000 the present supplementary summons has thus been rendered necessary."

The defenders pleaded, *inter alia*—"(1) *Lis alibi pendens*; and (2) The action is incompetent and ought to be dismissed inasmuch as the whole claims competent to the pursuer against the defenders in respect of the stranding of said vessel are embraced in the action already raised against them at his instance."

The defenders also stated pleas upon the merits of the action including the question whether they were liable for any damages at all.

The Court of Session Act 1868 (31 and 32 Vict. c. 100), section 29, enacts as follows:—"The Court or the Lord Ordinary may at any time amend any error or defect in the record or issues in any action or proceeding in the Court of Session upon such terms as to expenses and otherwise as to the Court or Lord Ordinary shall seem proper; and all such amendments as may be necessary for the purpose of determining in the existing action or proceeding the real question in controversy between the parties shall be so made: Provided always, that it shall not be competent, by amendment of the record or issues under this Act, to subject to the adjudication of the Court any larger sum or any other fund or property than such as are specified in the summons or other original pleading, unless all the parties interested shall consent to such amendment." . . .

On 17th May 1899 the Lord Ordinary (STORMONTH DARLING) pronounced the following interlocutor:—"Repels the first two pleas-in-law for the defenders, in so far as they are stated as preliminary pleas to exclude the action on the ground of incompetency, reserving their effect *quoad ultra* to be considered along with the merits of the case: Allows the parties a proof of their averments, appoints the same to be taken on Wednesday, 13th December next, at ten o'clock forenoon, and grants diligence for citing witnesses and havers."

The defenders reclaimed, and argued—This action was incompetent. No new item of damage was alleged. A supplementary action brought for the sole purpose of increasing the amount of damages recoverable under the original action was incompetent—*Bryan* v. *Glasgow & South-Western Railway Company*, March 18, 1869, 6 S.L.R. 445. Such an action was simply an attempt to evade the provisions of section 29 of the Court of Session 1868 as to amendment. The only competent way in which the pursuer could now claim larger damages than he originally concluded for was by abandoning the original action and paying the expenses incurred by the defenders therein. The case of *Roy* v. *Hamiltons & Company*, February 15, 1868, 6 Macph. 422, was distinguished from the present. There the record had not been closed, and the defenders' pleas were merely reserved to be discussed after a record had been adjusted. Moreover, in that case the additional sums claimed were for separate and additional items, and the pursuer might have brought a separate action to recover them. It was distinctly laid down in that case that such a supplementary action as the present was incompetent—*see* per Lord Deas at page 425. They also referred to *Young* v. *Mitchells*, June 12, 1874, 1. R. 1011. In this case the allowance of this supplementary action would be peculiarly inconvenient, because at the diet of proof which had been fixed the proof in the original action would be confined to the question of amount, whereas in the present action evidence could and would be led on the whole question including the question whether the defenders were liable for any damages at all.

Argued for the pursuer and respondent—The course followed by the Lord Ordinary was correct. The present case was ruled by *Roy* v. *Hamiltons & Company*, *cit.* This was not properly an objection to competency. The question whether in the circumstances of any particular case such a supplementary action was allowable or not could not be determined until there had been inquiry into the merits of the additional claim—*see* per L. P. Inglis in *Roy* v. *Hamiltons & Company*, *cit.*, at page 425. In the present case no proof as to the amount of damage had been led, and that question was still quite open.

LORD JUSTICE-CLERK—It seems to me that the case of *Bryan* is a distinct authority for holding that what the pursuer here proposes to do cannot be done. I am unable to hold that the case of *Roy* affects the case of *Bryan* in any way. The case of *Roy* was a very peculiar case. The pursuer there alleged that he had been led to understate his claim in the original action owing to the concealment of necessary information from him by the defenders, and even so, it was not decided that the second action was

competent. All that was done was to repel the two first pleas-in-law in so far as preliminary pleas to exclude the action on the ground of incompetency, reserving their effect to be considered along with the merits of the case, and even that was done with considerable hesitation on the part of Lord Deas. The case of *Roy*, therefore, was not an ordinary action, and practically all that was done there was to leave the question of the competency of the second action open until the record in it was made up. The present action appears to me to be a case of the most ordinary character possible. The pursuer about three years ago raised an action against the defenders for damages sustained by him owing, as he alleged, to the fault of the defenders' servants, and for which they were responsible. There could be no difficulty in ascertaining and claiming the true amount of damages, or at all events if there was a difficulty there could be no difficulty in concluding for such a sum in name of damages as would cover all that the pursuer could hope to recover. The defenders disputed liability altogether, and a proof on that question was allowed and taken and the question of liability determined, and now after all that procedure it is proposed to bring this supplementary summons to enable the pursuer to obtain a larger sum in name of damages than he originally claimed. There is no allegation here of anything of the character of *res noviter*, and there is no such reason of convenience as when it is desired to sist a new party. The whole effect of the proposal, if we permitted it to be carried out, would be to evade the Act of Parliament by enabling the pursuer to conclude for a larger sum than he concluded for originally, which is just a roundabout way of doing what the Act of Parliament forbids to be done directly by amendment.

Lord Young—I am of the same opinion. The original action, like the present, is an action of damages for fault on the part of the defenders in consequence of which a sailing ship belonging to the pursuer suffered injuries. In neither action are any specific items of damage set forth—just a lump sum. Now, I must observe that I think that this is not a case of much general importance, for I never yet met a case in which the pursuer, after considering the matter, came to the conclusion that he had claimed too little. The common case is that pursuers claim too much. It is, however, a rule of our practice that the sum which a pursuer claims in an action cannot be increased by an amendment of the summons although it can be diminished. Now, this is just an attempt to increase the amount originally claimed, not by means of an amendment, but by bringing a second action with a new summons, condescendence, and pleas, but with no purpose at all except to change the figure 5 in the conclusions of the original action into an 8. Now, by our law that is clearly incompetent. I think such an attempt as this should receive no countenance.

I should like to say that while I would have every desire to aid a party in remedying a mere oversight in the least expensive way possible, I think there is no such case here. The original action was brought in 1896. After two years' litigation the question of liability was determined. It was decided that the defenders were liable. During all that time there was no suggestion on the part of the pursuer that he had suffered more damage than he had concluded for. But in the year after the decision on the question of liability this action was brought. When I asked why the pursuer was so long in bringing this action I was told that he had never turned his attention to the question of the amount which he was entitled to claim. Now, that is not the kind of case in which I would be inclined to aid a party to get over an error which he had made.

But apart from that I do not think the pursuer could have rectified his error in the way which he now proposes to adopt, even at an earlier stage. He might, however, if he had discovered it at that time, have abandoned his original action upon payment of the expenses, which would then have been trifling, but I do not believe that the pursuer would ever have abandoned his original action for any such purpose upon the condition of paying expenses.

I think the interlocutor reclaimed against should be recalled, and the action dismissed as incompetent.

Lord Trayner—I am of the same opinion. It appears to me that the case is ruled by the case of *Bryan*, but apart altogether from that case I would have arrived at the same result. This is nothing but an attempt to evade the Act of 1868 by introducing an amendment on the conclusions of the original summons by means of a supplementary summons, whereas the Act provides that it shall not be competent by amendment to enlarge the conclusions as originally laid.

Lord Moncreiff—I am of the same opinion. It is not necessary here to decide that in no case would it be competent to increase the sum sued for by means of a supplementary summons. That course may be competent in certain circumstances, as, for example, where there is an allegation of *res noviter*, or where the pursuer was misled by the defender himself, as in the case of *Roy*. But here there are no special circumstances—the pursuer has given no explanation whatever. That being so, I think the reservation in the Lord Ordinary's interlocutor is inapplicable. It is taken from the case of *Roy*, but there the record in the second action had not been closed, and the effect of the reservation was merely to reserve the preliminary pleas for consideration after the record had been closed. There is no such peculiarity here. I am therefore of opinion that the Lord Ordinary's interlocutor should be recalled, and the action dismissed.

The Court pronounced this interlocutor:—

"Recal the said interlocutor reclaimed against: Sustain the first and second

pleas-in-law for the defenders: Dismiss the action, and decern: Find the defenders entitled to expenses, and remit," &c.

Counsel for the Pursuer — Salvesen — Younger. Agents — Boyd, Jameson, & Kelly, W.S.

Counsel for the Defenders—D.-F. Asher, Q.C.—Aitken. Agent — James Watson, S.S.C.

Wednesday, May 31.

SECOND DIVISION.

[Lord Low, Ordinary.

BERNARDS LIMITED *v.* NORTH BRITISH RAILWAY COMPANY.

Contract — Homologation — Locus Pœnitentiæ—Adjusted Draft.

A correspondence between a railway company and a trader with reference to a siding having been sent to the company's law-agent to prepare a formal agreement, a draft was accordingly prepared, and was subsequently adjusted and approved by the trader and his law-agent, and by the general manager and the law-agent of the railway company. The draft was then extended, and the extended deed was signed by the trader. *Held* that the railway company were not thereafter entitled to refuse to execute it also.

Contract—Written Contract—Deletion and Alteration Made on Written Contract after Execution by One Party but before Execution by Both—Right to Resile.

A written agreement embodying a draft adjusted by the parties was sent to one of them for signature and was returned by him duly executed, but with some words deleted, and with a proposed alteration—to take effect only in an event which ultimately did not happen—made in pencil upon one of the clauses. Circumstances in which *held* that the deletion and proposed alteration did not entitle the other party to resile from the agreement, and that they were accordingly bound to execute it also.

Railway—Trader's Siding—Terminal Services—Railway and Canal Traffic Acts 1888-1894.

An agreement between a railway company and a trader with reference to a siding belonging to the trader provided as follows:—"The first parties (*i.e.*, the Railway Company) shall work the second party's (*i.e.*, the trader's) traffic at the said siding. . . . If the first parties perform any shunting or marshalling of waggons or other service at the said siding for the second party other than the mere taking away and delivering of waggons, the second party shall pay therefor to the first parties such sums as may be agreed on, and failing agreement, as may be determined by an arbitrator to be appointed by the Board of Trade." *Held* (*per* Lord Trayner) that this clause did not give the trader any advantage beyond his statutory rights under the Railway and Canal Traffic Acts as interpreted in the case of *Pidcock* v. *Manchester, Sheffield, and Lincolnshire Railway Company* (1895), 9 R. & C.T. Cas. 45.

This was an action at the instance of Bernards Limited, brewers, and Daniel Bernard, Marchmont House, Greenlaw, Berwickshire, against the North British Railway Company, in which the pursuers concluded (1) for declarator that an agreement executed by the said Daniel Bernard on 3rd March 1893 between him and the defenders with reference to the making and working of a siding into his brewery was a valid and complete agreement and binding on the defenders, and (2) whether decree in terms of this declarator was pronounced or not, for declarator that the defenders were bound to execute the said agreement and to deliver a duplicate thereof duly executed to the pursuers, Bernards Limited, and (3) for decree ordaining the defenders to do so.

The pursuers pleaded—"(1) The said agreement having been duly completed, the pursuers are entitled to decree of declarator in terms of the first conclusions of the summons. (2) The pursuer, the said Daniel Bernard, having paid the price of the said siding, and acted on the said agreement on the faith of it being complete and binding, the same is now binding *rei interventu*. (3) The defenders having homologated the said agreement cannot now resile therefrom. (4) The defenders having agreed to execute the said agreement, and having obtained the signature of the pursuer, the said Daniel Bernard, thereto, are now bound to execute and deliver the same."

The defenders pleaded—"(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons. (3) The defenders never having completed the agreement with the pursuer Daniel Bernard, sought to be established, are entitled to absolvitor. (4) The defenders being willing to enter into a formal agreement with the pursuers in terms of the correspondence ending October 1892, are entitled to absolvitor. (5) The pursuer Daniel Bernard having in June 1895 agreed with the defenders that the alleged agreement of 1893 between him and the defenders should be departed from, the defenders are entitled to absolvitor."

The defenders ultimately consented to raise no question as to the title of Bernards Limited to sue the present action, founding upon a document signed by Mr Bernard, notwithstanding that when he signed it the company was not yet in existence.

In 1892 the pursuer Daniel Bernard was proposing to erect a new brewery at Gorgie, and he wished to arrange with the defenders for the making and working of a siding into his new premises. A correspondence on the subject took place between him and