

With these remarks I concur in Lord Trayner's opinion, and with the judgment proposed.

The LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

The Court dismissed the appeal and affirmed the interlocutor of the Sheriff-Substitute.

Counsel for the Pursuer—Constable. Agents—Simpson & Marwick, W.S.

Counsel for the Defender—W. Campbell—Brown. Agents—Morton, Smart, & Macdonald, W.S.

Friday, February 19.

## SECOND DIVISION.

[Lord Kyllachy, Ordinary.]

SCHOLEFIELD AND OTHERS v.  
JAMES LINDSAY & SON.

*Agent and Principal—Shipping Law—Charter-Party—Powers of Charterers' Agent.*

Under a charter-party by which a steamship was chartered to carry 1500 cases of oranges from Seville to Leith, it was provided that the steamer "should not be ballasted with sand or mud or anything prejudicial to the fruit, but should have liberty before loading fruit to load lead or mineral, also cork-wood for owners' benefit, same to be discharged after fruit."

Held that the charterers' agent at the port of loading had no implied authority to vary the contract to the extent of consenting to a change in the mode of loading by which the oranges were loaded first and discharged last, and that his action in so doing did not bind the charterers.

By charter-party dated 6th November 1895, entered into between Messrs Henry Scholefield & Son, managing owners of the ss. "Andalusia" of Newcastle-on-Tyne, on the one part and James Lindsay & Son, fruit salesmen, Edinburgh, on the other part, it was mutually agreed that the said steamer should proceed to Seville and there load from the charterers or their agents 1500 half chests of oranges, and being so loaded therewith should proceed to Leith direct, and deliver the same agreeably to bills of lading.

The charter-party contained the following clauses—"Steamer to load as fast as she can receive, as customary, weather permitting (Sundays and holidays excepted), and to be discharged, as customary, as fast as steamer can deliver, in a safe berth as ordered by charterers. . . . Steamer to have her holds properly cleaned before loading fruit, and she shall not be ballasted with sand or mud, or anything prejudicial to the cargo, but has liberty to load lead or mineral before load-

ing fruit, also cork-wood for owners' benefit, same to be discharged after the fruit. Ballast to be properly separated from oranges and other cargo. . . . Should anything occur to the steamer after the fruit is shipped, causing her to be detained at any port or place more than twenty-four hours, captain, if practicable, shall instantly telegraph information of same to the charterers, and in any case, give them earliest possible advice; the owners shall also be bound, if delay exceeds seven days, to allow the charterers the option of forwarding the cargo immediately by some other steamer, and if at less than chartered freight, the steamer to receive the difference, less cost of transhipment."

The steamer arrived at Seville, and was ready to load on the 15th November 1895. But she had to wait her turn for her mineral cargo, which turn did not arrive until the 18th. In these circumstances the captain arranged with the shipper of the fruit (who had at that time no copy of the charter-party) that the fruit should be loaded at once; and it accordingly was so loaded on the 15th, 16th, and 17th November and stowed at the fore and aft ends of the hold. The cork-wood, or part of it, was put on board simultaneously, and placed fore and aft between the oranges and the fore and aft hatches. On the 18th the mineral began to be loaded, and the loading occupied five days, being completed on the evening of the 22nd, by which time also the deck cargo of cork had been put on board. The steamer therefore did not sail until the 23rd. The result was that the oranges which, if loaded last in terms of the charter, would have been only (on the average) one and a-half days stowed in the vessel's hold before sailing, were in fact in that position for (on the average) six and a-half days before sailing. Similarly when the vessel arrived at Leith on 2nd December, the cork-wood had to be discharged first, and in consequence the oranges were kept on board for at least an additional twelve hours. Altogether, the voyage as regards the oranges was practically prolonged by six days beyond the period permitted by the charter.

When the discharge of the oranges was completed it was found that they were in bad condition, having become heated and sweated. The cargo on this account realised a gross price of only 5s. 11d. per case, while the cargoes of other vessels arriving about the same time realised a gross price of 8s. per case.

The charterers, James Lindsay & Company, accordingly raised an action against Henry Ernest Scholefield & Others, the registered owners of the ss. "Andalusia" for £304, 15s. for loss and damage.

They pleaded—"(1) The defenders having received the goods in question in good order and condition, and having failed to deliver same in like good order and condition as above set forth, and the pursuers having in consequence suffered loss and damage to the amount sued for, decree ought to be granted as craved. (2) The pursuers having suffered loss and damage to the extent

sued for owing to the fault and breach of contract of the defenders, are entitled to decree in terms of the conclusions of the summons."

The defenders lodged defences, in which they averred, *inter alia*—"The oranges were shipped before the rest of the cargo, with the knowledge and express approval of the shipper, who represented to the captain that as the oranges were all upon the quay, and exposed to the weather, it would be better that they should be put into the ship's holds in the event of bad weather coming on. The captain assented to this, and the oranges were accordingly put into the holds at the extreme ends of ship in order that they might be as far as possible from the dust and heat of the engines."

After proof the Lord Ordinary (KYL-ACHY) on 28th November 1896 decerned against the defenders for £157 in full of the sum concluded for.

Note.— . . . . "The owners say that under the charter-party the grower and shipper of the fruit was the charterers' agent, and that as such he consented to the change made in the order of loading. Now, I shall assume that that is proved. I am not, I confess, prepared to accept the captain's account of the shipper's motive. I think the weight of the evidence is against the suggestion that the oranges, or any material part of them, were at this time lying on the quay exposed to the weather. But that, for one reason or another, the shipper did consent to the fruit being shipped first is, I think, sufficiently proved. Indeed, the shipper Gomez admits the fact, although he says that his consent proceeded on the condition, or at least on the understanding, that the steamer should load her mineral and sail within twenty-four hours after the fruit was stowed.

"The question, however, is, whether it was in the power of the shipper (charterers' agent, although, *quoad hoc*, he may be held to be) to discharge or vary material conditions of the charter. I am not able so to hold. That an agent constituted by a charter, for the purposes of the charter can without special authority alter the charter seems to me to be a startling proposition. I asked at the discussion if there was any authority for it, and the only case which was quoted was the case of *Sickens*, 29 L.J., C.P. 25. But that case seems to me to be an authority the other way. No doubt the liberty there taken by the charterers' agent was rather larger than that taken here. But the question is hardly one of degree. Deviations that are not material may not perhaps count, but subject to that qualification, the principle, I think, is as expressed by Chief-Justice Erle in the case referred to, where he points out that 'if the plaintiff's counsel had succeeded in his argument, it might have thrown doubt upon the well-known, and in mercantile transactions most important, rule that the power of a special agent to bind his principal is limited by the authority given to that agent.'"

The defenders reclaimed, and argued,

*inter alia*—The deviation from the terms of the charter-party made by the charterers' agent in consenting to load the fruit first was one which he was entitled to make. It was not an alteration going to the root of the charter-party; it was merely an alteration in a detail. The observations of the judges in *Sickens v. Irving*, 1859, 29 L.J., C.P. 25, were in favour of defenders' argument. The view of Williams, J., in that case was to be preferred to that of Erle, C.J. But if it was held that the charterers were not bound by the alteration in the charter-party made by their agent, then neither were the shipowners bound by the act of their master. If the charterers' agent had no power to make the alteration in question, then neither had the master, for his powers were practically commensurate with those of the charterers' agent—Abbott's Law of Merchant Ships (13th ed.), 128. The master was acting under a written contract, and if he altered that contract by doing things which the owners had not authorised him to do, he did not bind the owners. The responsibility must rest on the parties who deviated from their authority.

Argued for the pursuers—Even if it was held proved that Gomez, the shipper, was also the charterers' agent, he was a special agent whose powers were limited by the authority granted him. The alteration in question was a material one, and not merely one in details. The whole tenor of the charter-party showed that the thing specially aimed at by the charterers was to have the fruit on board for as short a time as possible. The reasoning of the Lord Ordinary was sound.

LORD JUSTICE-CLERK—I agree with the Lord Ordinary that the action of Gomez in making an alteration in the terms of the charter-party by consenting to a change in the order of loading did not bind the charterers. The charterers were entitled to have the charter-party carried out, except in so far as it was varied by an agreement with themselves.

LORD YOUNG—I am of the same opinion. It is averred by the pursuers that the contract was broken by an arrangement between the captain and the agent of the charterers. I am of opinion that this allegation does not warrant or excuse the breach of contract on the part of the pursuers.

LORD TRAYNER and LORD MONCREIFF concurred.

The Court adhered.

Counsel for the Pursuers—Ure—Salvesen. Agents—Boyd, Jamieson, & Kelly, W.S.

Counsel for the Defenders—Sol-Gen. Dickson, Q.C.—Aitken. Agents—Beveridge, Sutherland, & Smith, S.S.C.