Counsel for the Pursuer (Reclaimer)—Campbell, K.C.—Cullen, K.C.—A. R. Brown. Agents—Alex. Morison & Company, W.S.

Counsel for the Defenders (Respondents)—Dickson, K.C. — Macmillan. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Tuesday, December 18.

SECOND DIVISION.

[Lord Ardwall, Ordinary.

AKTIESELSKABET "HEIMDAL" *v.* NOBLE.

Ship—Charter-Party—Construction—One Continuous or Two Separate Voyages—Limitation of Total Hire—Casus Improvisus—Provision that Hire shall not Exceed Certain Sum "until" Return of Vessel—Vessel Never Returns—Provision Held to Limit Amount and not Merely Regulate Time of Payment.

A charter-party provided that the "Heimdal" should proceed to Peterhead, load, and "proceed to Kickerton Island and/or other stations in Cumberland Inlet as may be required and there discharge cargo at charterer's stations, and load produce . . . and proceed to Peterhead or Dundee . . . and deliver the same on being paid freight as follows:—£110 sterling per month for the use of the whole ship, the time to count from the day the ship is ready for loading at Peterhead . . . and to cease when the home cargo is discharged, but the total hire is not to exceed £450, including laid-up hire if any. . . . (The Act of God, the King's enemies, . . . during the said voyage always excepted.) . . . The freight to become due and be paid as follows, viz.—£55 sterling on arrival of vessel to load in Peterhead . . . and thereafter £55 half-monthly, . . . but payments not to exceed £220 until vessel returns to Scotland. . . . Time occupied in Cumberland Inlet in loading and discharging not to exceed four or five weeks." A marginal note provided that during disablement of the vessel the hire was to cease, but that the charterer was to take the risk of detention by ice, paying £55 monthly hire during the continuance.

Held (1) that the charter-party was a charter-party for one continuous voyage and not for two separate voyages, one out and one in; (2) that under no circumstances could the hire exceed £450 (as against the contention that the provision as to £450 could not apply to such a *casus improvisus* as a ten months' detention by ice); (3) that it was a condition-precedent to the payment of more than £220 that the vessel should have returned to Scotland (as against the contention that the provision as to £220 merely regulated the time and not the amounts of payment).

Ship — Charter-Party — Freight — Use of Vessel Outwith Charter-Party — Claim for Quantum Meruit—Relevancy.

Averments which were *held* irrelevant to support a claim made by the owners of an ice-bound vessel against the hirers for a *quantum meruit* for the use they had made of her as a warehouse for goods beyond the scope of the charter-party.

In this action Aktieselskabet "Heimdal," shipowners, Norway, registered owners of the schooner "Heimdal," sued Crawford Noble, merchant, Aberdeen, for the sum of £1176, 16s. 3d.

The defender in March 1904 had hired the "Heimdal" from the pursuers, the charter-party being in the following terms:—

"*Aberdeen, 21st March* 1904.

"It is this day mutually agreed between Johan Bryde, Esq., owner of the good ship or vessel called the "Heimdal," of Sandefjord, whereof is master, of the measurement of 220 d.w. *reg.* tons or thereabouts, *now* to be ready for loading at Peterhead between 5th July and 15th July 1904, but not later than 15th July, and Crawford Noble, Esq., of Aberdeen, affreighter, That the said ship being tight, staunch, and strong and every way fitted for the voyage, shall with all convenient speed sail and proceed to Peterhead or so near thereunto as she may safely get, and there load from the factors of the said affreighter a *full and complete* cargo of not exceeding 200 tons coals, provisions, &c., such cargo not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and being so loaded shall therewith proceed to Kickerton Island and/or other stations in Cumberland Inlet as may be required, and there discharge cargo at charterer's stations and load produce (not exceeding 200 tons) and proceed to Peterhead or Dundee as ordered by charterer's agent or so near thereto as she may safely get, and deliver the same on being paid freight as follows:—£110—One hundred and ten pounds stg. per month for the use of the whole ship, the time to count from the day the ship is ready for loading at Peterhead (between 5th and 15th July 1904), and to cease when the home cargo is discharged, but the total hire is not to exceed £450 (four hundred and fifty pounds stg.), including laid-up hire if any. Ten pounds gratuity to the master *In full of all port charges and pilotage as customary* (The act of God, the King's enemies, strikes, fire, and all and every other dangers, and accidents of the seas, rivers, and navigation of whatever nature or kind soever during the said voyage always excepted). The ship or owners are not liable for any act, neglect, or default of the pilot, master, mariners, or other *servants* of the shipowners in navigating the ship. General average, if any, to be settled according to York and Antwerp Rules, 1890.

"The cargo to be brought to and taken from alongside the ship at merchant's risk

and expense. The freight to become due in cash, without discount, address commission, or insurance, and be paid *on right and true delivery of the cargo* as follows, viz.—£55 stg. on arrival of vessel to load in Peterhead, to be paid to the master, and thereafter £55 half-monthly to the owner Mr Johan Bryde, in Sandefjord, but payments not to exceed £220 until vessel returns to Scotland. . . . Time occupied in Cumberland Inlet in loading and discharging not to exceed four or five weeks." [*The words printed in italics were scored through.*]

There was a marginal note in the following terms—"Should vessel be disabled so as to be unable to continue the voyage, hire to cease from time of disablement until she resumes the voyage, but charterer takes the risk of any detention caused by ice. If, however, vessel should have to lie up in Cumberland Inlet on account of ice the monthly hire during such time to be £55 stg. Coals to be for charterer's a/c. Fishing when not interfering materially with the prosecution of the voyage for owner's a/c, he allowing charterer ⅓ (one-third) of the catch."

From the averments of the parties upon record it appeared that the "Heimdal" left Peterhead on 14th July 1904, and some three weeks afterwards found herself involved in the ice in the neighbourhood of Cumberland Sound. Towards the middle of September 1904 she reached a point not far from Kickerton Island or Cumberland Inlet, her final destination, but owing to ice difficulties she did not actually reach the station and completely discharge her cargo until July 1905. In that month she loaded a home cargo and started on her return voyage, but shortly afterwards was again involved in ice and became a total loss. In these circumstances the defender paid the pursuers £220, but the latter claimed the sum sued for, as representing (1) the full hire of the vessel under the charter-party from July 1904 to the time when her cargo was fully discharged in July 1905, (2) as a *quantum meruit* for the use of the vessel as a collecting-house for merchandise from September 1904 to July 1905 in a manner not contemplated by the charter-party.

Pursuers averred, *inter alia*—"(Cond. 4) . . . The outward passage to Greenland proved a good one, and within three weeks of leaving Peterhead the 'Heimdal' arrived off Cumberland Sound, which is a large inlet on the west coast of Greenland, extending inland to a distance of 130 miles. When within twenty to thirty miles off the entrance to the Sound the 'Heimdal' came in contact with ice. This was on 12th August, and from this date down to 25th August the further progress of the 'Heimdal' was rendered impossible on account of large quantities of pack ice and numerous large icebergs, which completely blocked the entrance to the Sound. On 25th August the ice slackened, and the entrance to the Sound was reached on 26th August. After considerable difficulties caused by the prevalence of ice, which impeded rapid navigation or temporarily suspended it, the 'Heimdal,' on or about the 15th September 1904 arrived in the vicinity of Kickerton Island, in the Cumberland Inlet, where she anchored, but owing to the ice conditions which then prevailed, and which continued with only very brief and partial interruptions till July 1905, the vessel was not and could not be put in a position to discharge the cargo, nor could the defenders owing to the conditions foresaid take delivery of the same except in small quantities from time to time. Notwithstanding that every effort was used the discharge was not completed until 5th July 1905. The outward voyage of the 'Heimdal' was thus completed on that day by the final discharge of her outward cargo. On that day the 'Heimdal,' having completed the discharge of her outward cargo, began loading her homeward cargo, and having completed loading on 9th July 1905, she set sail on that day on her homeward voyage. . . . The pursuers used all possible expedition in reaching said destination. (Cond. 5) From 15th September 1904 down to 5th July 1905 the 'Heimdal' was detained at Kickerton Station by ice, which made it impossible for her to complete the discharge of her cargo, and thereafter to proceed on her homeward voyage. During this period the defender had the use of the ship as a warehouse for the goods which he bought from and sold to the natives, and as an alternative to the pursuers' claim in name of freight for the period after the vessel arrived in the vicinity of Kickerton Island, they are entitled in respect of this beneficial use of the 'Heimdal' had by defenders to a *quantum meruit* therefor, which along with the freight payable for the period before said arrival is not less than the sum sued for. It is also believed and averred that the defender was enabled owing to said detention to load on board the 'Heimdal' more cargo than if she had left as contemplated by said charter-party about October 1904, as the fruits of the hunting season 1905 were available for export. The defender having said cargo fully insured was thus in a much better position than if the 'Heimdal' had sailed in 1904 for Peterhead. . . ."

They pleaded—"(1) The defender being due and resting-owing to the pursuers in the sum sued for in terms of the said charter-party, the pursuers are entitled to decree as craved with interest and expenses. (2) In any event, the defender having had the beneficial use of the said vessel 'Heimdal' from 14th July 1904 to 24th July 1905, is bound to pay the pursuers a *quantum meruit* for the same, and the sum sued for being fair and reasonable the pursuers are entitled to decree therefor with expenses."

The defender pleaded, *inter alia*—"(4) Under the said charter-party it is a condition-precedent to the liability of the defender to pay freight in excess of the sum of £220 that the said vessel 'Heimdal' shall return to Scotland and deliver her homeward cargo. (5) The said vessel 'Heimdal' never having returned to Scotland, the defender should be assoilzied. (6) On a

sound construction of the said charter-party the defender's liability for freight and detention by ice is limited to £450. (7) On a sound construction of the said charter-party the defender is not liable for the hire of the 'Heimdal' during the period from 15th September 1904 till 5th July 1905, when she was disabled and unable to resume the voyage. (8) In any event, the defender's liability in respect of the detention of the said vessel by ice is limited to £55 per month."

The Lord Ordinary (ARDWALL) on 5th July 1906 pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties in the Procedure Roll, Repels the fourth and fifth pleas-in-law for the defender, and before further answer allows to the parties a proof of their respective averments to proceed before him on a day to be afterwards fixed," &c.

Note.—"I am of opinion that on a sound construction of the charter-party the clause which winds up in these terms—'But payment not to exceed £220 until vessel returns to Scotland,' was merely intended to regulate the times of payment, and does not otherwise affect the rights of parties under the contract. It may, however, still be open to argument, should the facts when ascertained permit of it, that the charter-party contemplated two voyages—an outward and a homeward voyage—and that the £220 is sufficient payment for the time occupied on the outward voyage, and that nothing is due for the homeward voyage. But, on the other hand, it may appear that owing to detention by ice the outward cargo was not discharged till long after the expiry of two months from the date of loading, and that therefore more than £220 is due even for the outward voyage. I am strongly disposed to sustain the sixth plea-in-law for the defender, but, looking to the terms of the second plea-in-law for the pursuers, and the averments by which it is professedly supported, and considering that in any view there must be a proof, I think it better to reserve the disposal of that plea till the facts are ascertained.

"I may add that I consider that the proof might well be obviated or restricted in this case by a minute of admissions founded on the ship's log, which appears to have been carefully and regularly kept."

The defender reclaimed, and argued—The charter-party was for a single voyage and not for two voyages. The voyage had never been completed, and accordingly had there been no special provision in the charter-party, and had the ordinary rule of law been applicable, no freight whatever would have been due, the voyage never having been completed—Abbott's Law of Merchant Ships and Seamen (14th ed.), pp. 743, 712; *Gibbon* v. *Mendez*, (1818) 2 B. & Ald. 17; *Smith* v. *Wilson*, (1807) 8 East 437. Admittedly, however, £220 had been earned under the special clause, but nothing more, it being a condition-precedent to the earning of a greater sum that the vessel should have returned to Scotland. "Until" meant "unless and until." Even if wrong on the question of the £220, under no circumstances could he be liable for more than £450, as the clause which imposed that limit was explicit and unqualified. There were no relevant averments on record to support the respondents' claim of a *quantum meruit*.

Argued for the respondents—The charter-party was for two voyages—Carver's Carriage by Sea, 681; *Mackrell* v. *Simond*, (1776) 2 Chit. 666. The hirers were accordingly liable for the whole of the outward voyage, which did not finish until the whole cargo had been discharged. The clause as to £220 was meant to regulate the *time* and not the *amount* of payment, and the clause as to £450 was meant to apply only to an ordinary voyage with its ordinary incidents —*e.g.*, delay caused by fishing, but not to a *casus improvisus*, such as that which had occurred. In any case, on the principle of *quantum meruit*, the defender was due a considerable sum for the use he had made of the vessel as a storehouse.

LORD LOW—I am of opinion that this case, in so far as the pursuer's claim for freight is concerned, can be disposed of on a construction of the charter-party, and that a proof is not necessary.

In the first place, I read the charter-party as providing for one voyage only, namely, from Peterhead to a station in Cumberland Inlet and home again to Peterhead or Dundee.

By the charter-party it was agreed that the "Heimdal" should proceed to Peterhead and there load a cargo, and being so loaded should proceed to Kickerton Island and/or other station in Cumberland Inlet as might be required, and there discharge cargo and load produce and proceed to Peterhead or Dundee as ordered, "and deliver same on being paid freight as follows—One hundred and ten pounds sterling per month for the use of the whole ship, the time to count from the day the ship is ready for loading at Peterhead, and to cease when the whole home cargo is discharged."

That is a contract for the payment of freight at the stipulated rate per month for the whole period during which the ship should be absent *from* Scotland; or, in other words, for the whole period occupied by a voyage from Scotland to a station in Cumberland Inlet and back to Scotland again.

It is true that the terms of the charter-party which I have quoted as regards freight were somewhat altered by a marginal note, but the alterations in no way aid the contention that two separate voyages are provided for. The alterations made by the marginal note are these—(1) Although the charterer takes his risk of detention caused by ice, yet if the ship is disabled so as to be unable to continue the voyage, hire is to cease during the disablement; and (2) if the ship is detained by ice in Cumberland Inlet the monthly hire during such detention is to be reduced to £55. Therefore the only period during the ship's absence from Scotland for which

freight was not to be paid was any period during which she might be unable to continue the voyage by reason of disablement.

Turning again to the body of the charter-party, it continues after the words which I have quoted—"But the total hire is not to exceed £450, including laid-up hire, if any." These words appear to me to be quite unambiguous, and to entirely justify the sixth plea-in-law for the defender, consideration of which the Lord Ordinary has, although unwillingly, reserved in the meantime.

Then there follows the clause of excepted perils, which runs thus—"The Act of God, King's enemies," and so on, "during the said voyage always excepted." That clause appears to me not to be easy to reconcile with any other idea than that only one voyage was contemplated, because, of course, the perils enumerated were excepted as regarded both parts of the voyage.

The next clause in the charter-party which requires to be considered is in the following terms—"The freight to become due and be paid in cash without discount, address commission, or insurance, as follows—viz., £55 sterling on arrival of vessel to load in Peterhead, to be paid to the master, and thereafter £55 half-monthly to the owner, Mr Johan Bryde, in Sandeford, but payments not to exceed £220 until the vessel returns to Scotland."

The Lord Ordinary says that that clause "was merely intended to regulate the times of payment, and does not otherwise affect the rights of parties under the contract." I think that in taking that view the Lord Ordinary has not given sufficient weight to the fact that the clause not only provided that the freight should be paid to the extent and at the times specified, but that to that extent and at these times it should "become due." These words appear to me to be most important, because I think that they make it difficult to hold that payments under the clause were merely to account, and were subject to adjustment when a final settlement was made. The contract was that payments under the clause were to be regarded as payments of what was "due" by the charterer, and accordingly I do not think that under any circumstances he could have demanded repayment. If that view be sound, then the result would be that even although the voyage out should never be completed, the owner would receive certain payments towards freight which could not be demanded back. Even if the ship had gone down the day she left Peterhead, the £55 to be paid to the master at Peterhead would have been in that position. As it happened, the whole sum of £220 was paid, and although the ship was lost on the homeward voyage, it seems to me that the charterer cannot demand, and in fact he is not demanding, repayment of that sum.

The words with which the clause which I have been considering concludes—"until vessel returns to Scotland"—also appear to me to be significant, especially when read along with the words in the earlier part of the charter-party, where it is provided that the ship should deliver the homeward cargo "on being paid freight as follows." In both cases the language points in the same direction—namely, that with the exception of the payments which were to be made up to the maximum of £220, freight was only to be paid when the ship actually returned to the home port. No doubt that provision might only be intended to regulate the time of payment, but I think that when read along with the rest of the charter-party it confirms the view that only one voyage was contemplated. There is high authority for saying that when freight is only made payable upon a contingency which never happens, it cannot be demanded—*Gibbon* v. *Mendez*, 2 Barn. & Ald. 17, 20 R.R. 337; *Smith* v. *Wilson*, 8 East. 437.

The construction therefore which I put upon the charter-party is this. The charterer hired the ship on a voyage to Cumberland Inlet and home again at the freight of £110 a month for the whole time occupied, subject to the deductions specified in the marginal note; the charterer, however, was in no case to pay more than £450, while the owner was to receive payments towards freight, beginning at the commencement of the voyage, up to the maximum amount of £220.

I think that these last stipulations were reciprocal—the one for the benefit of the charterer and the other of the owner—and that they were made in view of the fact that the duration of the voyage depended upon the condition of the ice. The assumed duration of the voyage which was made the basis of the counter-stipulation was plainly four months, because the maximum amount which the charterer could be called upon to pay was the full freight for four months (plus £10, which I fancy may have been to cover port charges), while the maximum amount to be paid to the owner unless the ship returned in safety to Scotland was exactly the full freight for two months.

Under that arrangement both parties took certain risks, but both guarded themselves to a certain extent against possible losses.

Thus the owner took the risk of abnormal detention by ice which might prolong the voyage far beyond four months, while the charterer guarded himself, in such an event, against a claim for freight to an indefinite amount, by stipulating that in no case should he be under obligation to pay more than £450. On the other hand, the charterer took the risk of the ship being lost before she reached the outward port, while in that event a certain amount of freight up to a maximum of £220 was secured to the owner.

As it happened the ship reached the outward port in safety, although after many months' delay, but soon after commencing the return journey she was nipped by the ice and had to be abandoned as a total loss. In these circumstances the owner was entitled to and received payment of freight to the amount of £220, and in my judgment the terms of the charter-party disentitle him to demand any further payment in

name of freight. I may point out what the result would be if the owners' claim for freight beyond the £220 were allowed. It appears that the ship sailed from Peterhead about the 15th of July 1904, but was unable to complete the delivery of her outward cargo until 5th July 1905—a period of nearly twelve months. Now, if the owners are entitled to claim freight beyond the £220, their claim would be for the stipulated amount of freight per month for that long period. Therefore, assuming the delay to have been unavoidable, I do not see how the amount to which the owners would be entitled could be less than £450, the maximum amount which the charterer could have been called upon to pay if the whole voyage had been safely completed and the homeward cargo delivered. It certainly would be an anomalous position of matters if the charterer were bound to pay the full freight for a voyage which was never completed by reason of the loss of the ship and the cargo. It would require a very express agreement to impose such an obligation. Here the agreement appears to me, for the reasons which I have given, to be the very reverse, and accordingly I am of opinion that in so far as the action is for payment of freight the defender is entitled to be assoilzied.

The pursuers, however, maintain that they have a claim against the defender on another ground. They aver that the ship arrived in the vicinity of Kickerton Island in Cumberland Inlet, where they were to discharge the outward cargo on 15th September 1904, but that by reason of ice they were unable to complete the discharge until the 5th of July 1905. They then allege that during the period from 15th September 1904 to 5th July 1905 "the defender had the use of the ship as a warehouse for the goods which he bought from and sold to the natives." For that use of the ship the pursuers claim that they are entitled to be remunerated upon the principle of *quantum meruit*. I confess that I have great difficulty in understanding the claim. If there had been two distinct voyages, and if in an interval between the termination of the one and the commencement of the other, when the ship was not under charter, the servants of the defender who were on board had used the ship as a warehouse in which they trafficked with the natives, there might very well have been a claim for remuneration on the part of the owner. But there was nothing of that kind. The ship (or to use the words of the charter-party, the "whole ship") was under charter the whole time, and the defender's goods were being kept on board during the period in question, not because he required a store wherein to carry on trade with the natives, but because the condition of the ice prevented the cargo being delivered. Further, I assume, there being no averment to the contrary, that the goods which the defender's servants sold to the natives were part of the outward cargo, and that the goods which they bought or received in exchange from the natives formed part of the homeward cargo.

I am therefore of opinion that the pursuers have made no relevant averments to support their claim for remuneration for a use of the ship beyond that for which the charter-party stipulated, and I think that the action in so far as that claim is concerned should be dismissed.

LORD KYLLACHY—That is the opinion of the Court (the LORD JUSTICE-CLERK, LORDS KYLLACHY, STORMONTH DARLING, and LOW).

The Court pronounced this interlocutor—

"Recal the interlocutor reclaimed against, and in so far as the sum concluded for in the summons is a claim for freight, assoilzie the defender from the conclusions thereof: *Quoad ultra* dismiss the action as irrelevant, and decern."

Counsel for the Reclaimer—Cullen, K.C. —Sandeman. Agent—Andrew Newlands, S.S.C.

Counsel for the Respondents — Clyde, K.C.—Lippe. Agents—Boyd, Jameson, & Young, W.S.

Thursday, December 20.

FIRST DIVISION.

[Lord Johnston, Ordinary.

BROWN *v.* EDINBURGH MAGISTRATES AND ANOTHER.

Reparation — Contract — Burgh—Police—Master and Servant — Wrongous Dismissal — Dismissal from Alleged Interested Motives—Malice—Edinburgh Improvement, &c., Amendment Act 1893 (56 *and* 57 *Vict. cap. cliv*), *sec.* 34 (1)—*Edinburgh Municipal and Police Act* 1879 (42 *and* 43 *Vict. cap. cxxxii*), *sec.* 55 — *Dismissal by Chief-Constable of Lieutenant from Alleged Interested Motives.*

The Edinburgh Improvement, &c., Act 1893, section 34 (1) enacts—"The Magistrates shall from time to time appoint a Chief-Constable, at a fixed annual salary, who shall not be removable or subject to have his salary diminished by the Magistrates and Council unless with the approbation of the Provost of the City and the Sheriff, or, in case of their differing in opinion, of the Secretary for Scotland; but may be suspended by the Magistrates with consent of the Sheriff for a definite period pending any inquiry instituted with a view to his removal. . . ."

The Edinburgh Municipal and Police Act 1879, section 55, enacts—"When and as often as the Magistrates and Council shall fix the number of lieutenants, inspectors, sergeants, constables, and other officers of police which they shall judge necessary for guarding, patrolling, and watching within the burgh, the Chief-Constable is hereby