Their Lordships reversed, with expenses, the judgment appealed from.

Counsel for the Appellant (Claimant)—Roberton Christie—Fenton. Agents—J. B. Mackie, Solicitor, Edinburgh—Herbert G. Davis, London.

Counsel for the Respondent—C. A. Russell, K.C.—J. G. Jamieson. Agents—F. J. Martin, W.S., Edinburgh—James Wallace, Sunderland—Pritchard & Sons, London.

## COURT OF SESSION.

*Tuesday, July* 20.

### SECOND DIVISION.

[Sheriff Court at Glasgow.

### GLASGOW NAVIGATION COMPANY, LIMITED *v.* IRON ORE COMPANY, LIMITED.

*Ship—Charter-Party—Demurrage—Exceptions—"Stoppage on Railway"—"Cause beyond Personal Control of Charterers or Agents"—Delay Owing to Block of Railway Waggons in Consignee's Works—Liability of Charterer.*

A charter-party, under which a cargo of iron ore was carried from Bilbao to Ayr to be delivered there as customary, provided that demurrage should not accrue if the discharging were prevented by all or any of the following causes:—" . . . Stoppage on railway or river or canal. Time lost by any cause, of what nature or kind soever, beyond the personal control of the charterers or their agents." The vessel was detained on demurrage at Ayr for 79 hours. In an action by the shipowners against the charterers it was proved that the customary mode of discharging iron ore at the Port of Ayr was direct from the vessel's hold into trucks supplied by the railway company; that the railway company, though there was no scarcity of waggons and though they were willing to supply them, did not do so, because the consignees already had their works blocked with railway waggons containing iron ore which had been discharged from other vessels arriving about the same time, and could receive no more waggons till the block was cleared; that the consignees were purchasers of the cargo from the defenders, but did not represent them as their agents or otherwise in the discharge of the cargo; that the defenders, through their agents, did everything in their power to facilitate the discharge.

*Held* that the delay in discharging was not due to "stoppage on railway," —*Letricheux & David* v. *Dunlop & Company*, December 1, 1891, 19 R. 209, 29 S.L.R. 182, and *Mein* v. *Othman*, December 11, 1903, 6 F. 276, 41 S.L.R. 144, *distinguished*—but that it was due to a cause "beyond the personal control of the charterers or their agents," and that the defenders were therefore exempted from liability by the terms of the charter-party.

The Glasgow Navigation Company, Limited, raised an action in the Sheriff Court at Glasgow against the Iron Ore Company, Limited, concluding for £95, 16s. 8d. as demurrage in respect of delay in the discharge of the pursuers' steamer "Maroon," which the defenders had chartered to carry from Bilbao to Ayr a cargo of iron ore to be discharged there as customary.

The charter-party provided that—"Time lost by reason of all or any of the following causes shall not be computed as part of the aforesaid running days, neither shall demurrage accrue if the loading or discharging be wholly or partially prevented or delayed thereby—' . . . stoppage on railway or river or canal. Time lost by any cause, of what nature or kind soever, whether of the character enumerated or not, beyond the personal control of the charterers or their agents, whereby they may be prevented or delayed in supplying, loading, or discharging.'"

Proof was allowed and led, and on 3rd August 1908 the Sheriff-Substitute (FYFE) pronounced the following interlocutor:—"Finds (1) that pursuers are the owners of the steamship 'Maroon' of Glasgow; (2) that by charter-party, dated 9th July 1907, the defenders chartered this vessel to carry from Bilbao to Ayr a cargo of iron ore, to be delivered there as customary—time lost by causes beyond the personal control of the charterers or their agents whereby the discharge might be delayed being, *inter alia*, excepted; (3) that the customary mode of discharging iron ore at the port of Ayr is direct from the vessel's hold into trucks provided by the railway company; (4) that the vessel carried a cargo of 1902 tons of iron ore; (5) that she arrived at Ayr on 22nd July 1907 at 6 a.m.; (6) that in terms of the charter-party the discharging time did not begin to run till the vessel had been berthed and ready for discharge; (7) that the discharging time commenced at 10 a.m. on 22nd July; (8) that in normal circumstances, provided a reasonable supply of trucks had been provided, the cargo would have been completely discharged by midnight of 24th July; (9) that the vessel was not discharged until 7 p.m. on 29th July; (10) that the reason why the discharge was thus delayed was that the railway company did not supply trucks; (11) that the reason why the trucks were not supplied was that the Dalmellington Iron Company, Limited, who were the consignees of the cargo, already had their works blocked with railway waggons containing iron ore, which had been discharged from vessels which had arrived at Ayr about the same time as the 'Maroon'; (12) that the total working time the 'Maroon' was detained at the discharging berth was 177 hours; (13) that the time reasonably necessary for her discharge, and all that would have been occupied had the supply

of trucks been provided, was 98 hours; (14) that the vessel was detained on demurrage for 79 hours, which at the charter-party rate of 16s. 8d. per hour represents £65, 16s. 8d. Finds in law that in respect pursuers' vessel was thus detained, and that as the cause of detention did not fall within the charter-party exception, the defenders are liable to the pursuers in said sum of £65, 16s. 8d.: Therefore decerns against the defenders for payment to the pursuers of £65, 16s. 8d., with interest as craved. . . ."

*Note.*—". . . The sole question in the case practically comes to be whether the block which occurred at the works of the consignees was a circumstance which defenders are entitled to plead as a cause of detention beyond their control.

"In my opinion the defenders are not entitled so to plead the block at the works of their consignees. The risk of detention from want of waggons was no doubt a risk which the pursuers ran, for when they contracted that their vessel should be discharged 'as customary' at the port of Ayr, they knew that that meant that the ore would be discharged into railway waggons. But the defenders likewise knew this, and they had some control, whilst the pursuers had none, over the delivery arrangements.

"I think it is fairly clear upon the proof that the real cause of the detention of the 'Maroon' was that her cargo had been brought into Ayr at a time when the defenders must have known it could not be expeditiously taken in at the works. If this ore had been brought in for June delivery, as it should have been, there would have been no trouble about trucks. As in a question with the shipowners, the defenders and the Dalmellington Company are one, and the defenders are not entitled to plead the impossibility of taking more iron ore into the works than was already there, as being a cause over which they had no control. . . ."

The defenders appealed to the Sheriff (MILLAR), who on 24th December 1908 pronounced this interlocutor—"Recals the interlocutor of 3rd August last: Finds in fact in terms of the first ten findings in said interlocutor: Finds (11) that the vessel was detained for 79 hours beyond a reasonable period for despatch customary at the port: and (12) that the delay in discharging said ore was due to scarcity of waggons and stoppage on railway, and was not attributable to any extent to the fault or negligence of the defenders: Finds in law (1) that on a sound construction of said charter-party the defenders are not liable in the consequences of any delay in the discharge of said iron ore, or arising from scarcity of waggons or stoppage on railway; and (2) that the defenders are not liable to the pursuers in demurrage for the detention of said vessel during the period occupied by the discharge of said iron ore: Therefore assoilzies the defenders from the conclusions of the action. . . ."

*Note.*—". . . The pursuers maintained (1) that the defenders were at fault in not sending on the cargo a month earlier in terms of their contract with the Dalmellington Iron Company. I do not think the shipowners are entitled to plead this, as this is a question between the charterers and the company. In any event, at the time the charter-party was signed, viz., 9th July 1907, it was not possible for them to send on the cargo any quicker than they did, and that cause of delay at the time was therefore not within their control. I have gone over all the cases which were quoted, and I can find none where it was even suggested that it was a matter within the control of the charterer that he could have chartered the ship at an earlier period when the port of discharge was free, and therefore he was not entitled to plead the exemption in the charter-party.

"The second ground is that the charterers and the consignees being bound to do their part in aiding to discharge the vessel, if the Dalmellington Iron Company did anything to prevent that result, then the defenders are liable, because in a question with the shipowners the charterers and the consignees must be held to be one. In fact the Dalmellington Iron Company must be held to be agents for the charterers in this case. The same plea was taken in the case of *Mein* v. *Ottmann*, 6 F. 276, and on p. 282 Lord Trayner says—'I now advert to what occasioned the scarcity in the case of this particular vessel. It appears, contrary to what was told and written to the defender by the officials of the Caledonian Railway Company, that that company did withhold waggons from the 'Lady Palmer', because, as they said, the Coltness Company had already too many waggons, which they were unduly holding up or detaining at their works. The Coltness Company deny that they were doing so, or that there was any good reason for the course which the Caledonian Railway Company pursued. Whether the railway company or the Coltness Company was right in this controversy is not a question for us to decide. But the fact is not open to dispute that through the conduct of the railway company there was a scarcity of waggons for the discharge of the 'Lady Palmer', and a scarcity in no way due to the fault or negligence of the defender.' And Lord Moncreiff on page 284 says—'The pursuers endeavoured to make out that the charterer was responsible for the fault of the Coltness Iron Company. In answer to this I would observe in the first place that there is no proof of any fault on the part of that company; but even supposing there had been a serious question between the Coltness Iron Company and the Caledonian Railway Company, in consequence of which the Caledonian Railway Company refused to furnish trucks, the case of *Letricheux & David* v. *Dunlop & Company*, 19 R. 209, is an authority against the pursuers. It was there held that the proximate cause of the delay being the act of the railway company, it alone should be regarded, as the opposite view would involve an inquiry into the dispute between the railway company and the consignees. Now, without saying that there can never be a case in which the charterer can be held

responsible for the delay or fault of the consignees, I think it may safely be said that in order that the shipowner may free himself of the exception in the charter-party he would require to prove this to demonstration.' Now that case seems to me to be directly in point. The pursuers have not proved in the present case that there was any negligence on the part of the defenders themselves. Indeed, I think it is proved that they did everything day by day to urge the railway company to provide, and the Dalmellington Iron Company to unblock, waggons for the discharge of the 'Maroon.' In accordance therefore with the decision in the case I have quoted, I think the defenders are entitled to absolvitor, with expenses."

The pursuers appealed, and argued—The duty of providing for the discharge of the cargo lay on the charterer—*Postlethwaite* v. *Freeland*, 1880, 5 A.C. 599—and he must do everything reasonable to secure despatch —*Hulthen* v. *Stewart & Company*, 1903 A.C. 389. If, therefore, there had been delay in discharging, as was admitted here, the *onus* was on the charterer to show that he was not responsible. The defenders must therefore show that the cause of the delay was within the exceptions in the charter-party, and they had failed to do so. The cause of the delay was proved to be the congestion at the works of the Dalmellington Company, the consignees, and that involved liability—*Tillet & Company* v. *Cwm Avon Works Proprietors*, 1886, 2 T.L.R. 675. The defenders were responsible for that delay, for it could not be held that they fulfilled their obligations under the charter-party by tendering a consignee who had by his own fault made it impossible for himself to take delivery—*Gardiner* v. *Macfarlane, M'Crindell, & Company* February 24, 1893, 20 R. 414, 30 S.L.R. 541. The cases of *Letricheux and David* v. *Dunlop & Company*, December 1, 1891, 19 R. 209, 29 S.L.R. 182; and *Mein* v. *Ottman*, December 11, 1903, 6 F. 276, 41 S.L.R. 144, were distinguishable. There the cause of the delay was the refusal of the railway company to supply waggons, and that fell within the exception of "detention by railways."

Argued for the defenders (respondents)—It was not proved that the delay was due to fault on the part of the Dalmellington Company. On the contrary, it was established that the delay was due to the failure of the railway company to supply waggons, and that fell within the exception of "stoppage on railway"—see *per* Lord Trayner in *Turnbull, Scott, & Company* v. *Cruickshank & Company*, December 15, 1904, 7 F. 265, at p. 274, 42 S.L.R. 207, at p. 212. The Court would not inquire into the merits of the dispute between the consignees and the railway company, and if the railway company had in point of fact failed to supply waggons, that exonerated the defenders—*Letricheux and David* v. *Dunlop and Company, cit.*; *Mein* v. *Ottman, cit.* But even if the delay were caused by fault on the part of the Dalmellington Company that did not involve the defenders in liability. The duty of providing for the discharge was in general on the charterer, but the ordinary obligation of the parties could be varied by contract between the parties—*per* Lord Blackburn in *Postlethwaite* v. *Freeland, cit.*—and the defenders' obligations were to be found in the charter-party. To subject the defenders in liability under the charter-party it must be proved that the delay was due to fault on their part or on the part of their agents. It was proved that the defenders had done everything they could to secure despatch, and that was all that could be demanded of them—*Lyle Shipping Company* v. *Cardiff Corporation*, [1900] 2 K.B. 638; *Hick* v. *Raymond & Reid*, [1893] A.C. 22. The Dalmellington Company were not the defenders' agents. The mere fact that they purchased the cargo did not make them the agents of the defenders, and there was nothing else from which agency could be inferred. The case of *Gardiner* v. *Macfarlane, M'Crindell, & Company, cit.*, had no application because it dealt with delay in loading, and the charterers' obligations in regard to providing a cargo were different—*per* Lord Blackburn in *Postlethwaite* v. *Freeland, cit.*, at p. 619.

At advising—

LORD ARDWALL—This is an action brought by the Glasgow Navigation Company, Limited, against the Iron Ore Company, Limited, for recovery of demurrage in respect of delay in the discharge of the pursuers' steamer "Maroon." It is now admitted that there was such delay, extending to 79 hours, which at the charter-party rate of 16s. 8d. per hour represents £65, 16s. 8d.

The Sheriff-Substitute has found the defenders liable in this sum, but the Sheriff has recalled that decision and assoilzied them.

The first question to be settled is one of fact, namely, What was the cause of the delay in the discharge of the "Maroon"? On this question I think that the Sheriff-Substitute came to a right conclusion in his eleventh finding, and that the Sheriff's finding in fact is not well founded when he says that the delay in discharging the ore was due to scarcity of waggons and stoppage on railway. In point of fact there was no stoppage on the railway. The stoppage took place before the iron ore, which was the cargo with which the "Maroon" was loaded, was put on to the railway. Nor was scarcity of waggons or their non-supply by the railway company the true cause of the delay, for in my opinion it is proved that there were plenty of waggons available, but the railway company would not allow them to be loaded, because after being loaded they could not be forwarded to the Dalmellington Iron Company's works, owing to those works being blocked by the railway waggons containing iron ore which had been discharged from vessels which had arrived at Ayr about the same time as the "Maroon."

In my opinion this case is distinguishable on the facts from the case of *Letricheux and David* v. *Dunlop*, 19 R. 209, or the case of *Mein* v. *Ottmann*, 6 F. 276. In both these cases it was held that the detention was due to the railway company, and that such detention was covered by the exceptions in the charter-party. It is quite true that in these cases the Court declined to look at any other cause of detention than the refusal of the railway company to supply trucks, because, as it was said, they were not going to go into the disputes between the railway company and the consignees which led to such refusal. In the present case, however, there was not in the proper sense of the word a refusal on the part of the railway company to provide waggons. They were ready and willing to do so could the waggons have been made immediate use of, but this could not be done because of the state of the sidings and lyes at the Dalmellington Iron Company's works.

It must now be considered whether the charterers, who are the defenders in this action, are responsible for the delay caused in the manner above described. Two clauses in the charter-party were founded on by the defenders, one of which exempts them from liability for demurrage in the case of delay caused by "stoppage on railway or river or canal." I am of opinion, as I have already said, that this clause has no application as the stoppage did not take place on the railway. But then the charter-party goes on to provide that the charterers shall not be liable in demurrage in respect of "time lost by any cause, of what nature or kind soever, whether of the character enumerated or not, beyond the personal control of the charterers or their agents whereby they may be prevented or delayed in supplying, loading, or discharging." The question accordingly comes to be whether in the present case the cause of the delay was "beyond the personal control of the charterers or their agents."

There is no doubt that in the general case, as was laid down in the case of *Postlethwaite* v. *Freeland*, 5 A.C. 599, the duty of providing for the proper discharge of a ship which has been chartered lies upon the charterer, and accordingly the responsibility for delay rests upon him should delay occur, unless the impediments which prevented proper discharge are covered by exceptions in the charter or arise from the fault of the shipowner or those for whom he is responsible.

Now in the present case I think it clear on the evidence that the charterers (the defenders) were not personally responsible for the cause of delay, and that accordingly they are relieved from liability for demurrage by the exception clause in the charter-party. The defenders were represented at Ayr, the port of discharge, by their agents J. P. Kinghorn & Company, who advised both the Dalmellington Iron Company and also Hamilton & Son (*agents for shipowners and for consignees*) when the "Maroon" sailed, and as Mr Kinghorn says —and he is really uncontradicted in this matter—"There was nothing that we or our principals could have done to expedite the discharge of the boat that was not done;" and the evidence of Mr Archibald B. Stevenson, another partner of Kinghorn & Company, clearly shows that they as agents for the defenders did everything they could to get the Dalmellington Iron Company to clear the block at their works and the railway company to supply waggons, and whether it be held that it was the railway company's failure to supply waggons or, as I think, the block at the Dalmellington Iron Company's works that was the true cause of the delay, it is plain that both these causes were "beyond the personal control of the charterers or their agents."

But it was strenuously contended for the pursuers that the Dalmellington Iron Company must be viewed as being *eadem persona* in this matter with the charterers, or at all events as representing them upon agency or some other title in the discharge of the vessel. Now there is no evidence whatever in the case to show that the Dalmellington Iron Company and the charterers had chartered this ship together, or that this cargo was a joint-adventure between them or anything of that kind. The only evidence in the case as far as I can see as to the relations between the defenders and the Dalmellington Iron Company is to the effect that the Dalmellington Iron Company were purchasers of the cargo from the defenders. The witness J. P. Kinghorn, a partner of the firm that acted as the defenders' agents, says—"I believe this cargo was sold to the Dalmellington Iron Company, but I did not sell it." He also refers to a contract between the defenders as successors of a firm called Borner & Company and the Dalmellington Iron Company, under which he says that this cargo was shipped. This contract, it seems, was produced in process, but although it was asked for by the Court on both days on which the case was being debated on the reclaiming note it could not be found, and it was not founded on by either of the parties as disclosing anything pertinent to the issue regarding the relations of the defenders and the Damel lington Iron Company. No light was afforded to the Court by the production of the bills of lading of the cargo in question, although, as appears from the correspondence, and in particular from the letters of the defenders' agents to Messrs Hamilton & Son, dated 23rd July 1907, and a reply thereto of the same date, such bills of lading existed. It was stated from the Bar that these bills of lading were never endorsed, and therefore it is impossible to say whether the Dalmellington Iron Company were or were not consignees of the cargo under bills of lading in ordinary course. The fact that Hamilton & Son got possession of the bill of lading does not throw any light on the matter, for the reason that that firm represented both the shipowners, who are the pursuers, and the Dalmellington Iron Com-

pany. So on the evidence in the case all that appears is (1) that the defenders (the charterers) were the sellers and the Dalmellington Iron Company the purchasers of the cargo of ore in question; (2) that the defenders as charterers of the vessel were represented upon her arrival by their agents Messrs J. P. Kinghorn & Company, who by their partners did everything they could to expedite the discharge of the vessel; (3) that the Dalmellington Iron Company did not in any respect act as agents for the defenders; (4) that both that company and the pursuers were represented at the port of discharge by the same agents, namely, James Hamilton & Son, shipping agents, Ayr.

All this makes it perfectly clear to my mind that the Dalmellington Iron Company were in no sense agents for the defenders. If they were consignees of the cargo there is no bill of lading produced to show under what conditions they got possession of the cargo. If the bills of lading were in the usual terms they would probably have bound the consignee to pay freight and demurrage as per charter-party, and if this were the case, of course it is the Dalmellington Iron Company that should be defenders here and not the Iron Ore Company.

The pursuers are accordingly forced to rely as a ground of liability on the part of the defenders for the delay of the Dalmellington Iron Company on the fact that the cargo had been sold by the defenders to the latter, and was consigned to them. Now under the clause of exception which I have quoted from the charter-party it is out of the question to maintain that the charterer is liable for delay caused by the purchaser or consignee of the cargo, and it seems to me that it would be a most extraordinary thing to hold that it was so, when, as in the present case, the charterers' agents did everything in their power to facilitate the discharge of the cargo, and their efforts were thwarted owing to the fault of the Dalmellington Iron Company, who were represented at the port of discharge, and for the purposes of discharge, by agents of their own, who strangely enough also acted as agents for the pursuers, the owners of the "Maroon."

I am accordingly of opinion that the pursuers have entirely failed to show that the defenders are liable for the delay which was caused through the fault of the Dalmellington Iron Company. I think accordingly that an interlocutor should be pronounced, sustaining the appeal and recalling the interlocutors both of the Sheriff and the Sheriff-Substitute, and containing the following findings in fact:—(1) That pursuers are the owners of the steamship "Maroon" of Glasgow; (2) that by charter-party, dated 9th July 1907, the defenders chartered this vessel to carry from Bilbao to Ayr a cargo of iron ore to be delivered there as customary—time lost by causes beyond the personal control of the charterers or their agents whereby the discharge might be delayed being, *inter alia*, excepted; (3) that the customary mode of discharging iron ore at the port of Ayr is direct from the vessel's hold into trucks provided by the railway company; (4) that the vessel carried a cargo of 1902 tons of iron ore; (5) that she arrived at Ayr on 22nd July 1907 at 6 a.m.; (6) that in terms of the charter-party the discharging time did not begin to run till the vessel had been berthed and ready for discharge; (7) that the discharging time commenced at 10 a.m. on 22nd July; (8) that in normal circumstances, provided a reasonable supply of trucks had been provided, the cargo would have been completely discharged by midnight of 24th July; (9) that the vessel was not discharged until 7 p.m. on 29th July; (10) that the railway company, although there was no scarcity of waggons, and though they were willing to supply them, did not do so because the Dalmellington Iron Company, Limited, who were the consignees of the cargo, already had their works blocked with railway waggons containing iron ore which had been discharged from vessels which had arrived at Ayr about the same time as the "Maroon," and therefore they could receive no more waggons till the block was cleared; (11) that the total working time the "Maroon" was detained at the discharging berth was 177 hours; (12) that the time reasonably necessary for her discharge and all that would have been occupied had the supply of trucks been provided was 98 hours; (13) that the vessel was detained on demurrage for 79 hours, which at the charter-party rate of 16s. 8d. per hour represents £65, 16s. 8d.; (14) that the Dalmellington Iron Company did not represent the defenders as their agents or otherwise in the discharge of said cargo, and that the defenders, through their agents, J. P. Kinghorn & Company did everything in their power to facilitate said discharge; and (15) that the delay caused as set forth in the above finding tenth was due to a cause beyond the personal control of the defenders or their agents: Find in law that in respect the time lost in the discharge of the pursuers' vessel was due to a cause for which the defenders are exempted from liability by the terms of the charter-party, and that the defenders are not liable to the pursuers for demurrage in respect of delay in the said discharge: Therefore assoilzie the defenders from the conclusions of the summons, and decern: Find the defenders entitled to expenses in this and in the Inferior Court, and remit the same to the Auditor to tax and to report.

The LORD JUSTICE-CLERK, LORD LOW, and LORD DUNDAS concurred.

The Court pronounced an interlocutor in the terms suggested in Lord Ardwall's opinion.

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Counsel for the Defenders (Respondents)—M'Clure, K.C.—M. P. Fraser. Agents—Macpherson & Mackay, S.S.C.