and remitted the case back to the Lord Ordinary, but his Lordship, proceeding upon the view that there was no course open to the pursuer except to execute the repairs, assoilzied the defenders.

I think if we had been of opinion that that was the true view of the case, we might have disposed of it when it was here. As the case has again come before us, I think it would be judicious that we should keep it here, and find out what amount of damage has been done to the pursuer by the defenders in breach of their contract.

LORD RUTHERFURD CLARK concurred

LORD TRAYNER—I agree. I have no doubt on the construction of the lease that the pursuer had a double remedy, one which has been specified in the lease, and another which has not been specified. The one which has been specified is that if the defenders do not leave the premises in good tenantable order at the end of the lease, then the pursuer should be entitled to execute all repairs necessary to put them in order at the cost of the defenders, and the other remedy is to have damages for breach of contract. The one remedy is not exclusive of the other.

I think it is right, however, that in going into a proof we should keep in view that the question is what is the amount of money damages due to the pursuer from the failure of the defenders to implement their contract as that failure has been ascertained by the arbiter.

The LORD JUSTICE-CLERK concurred.

The Court recalled the Lord Ordinary's interlocutor and allowed a proof to be taken before Lord Trayner.

Counsel for Appellant — Ure — Salvesen. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Respondents—D.-F. Balfour, Q.C. Agents — Beveridge, Sutherland, & Smith, S.S.C.

Tuesday, December 1.

FIRST DIVISION.

[Sheriff of Lanarkshire.

LETRICHEUX & DAVID *v.* DUNLOP & COMPANY.

Ship — Charter-Party — Clause of Exemption — Detention by Railways — Demurrage—Relevancy.

A charter-party contained a clause of exemption, which provided, *inter alia*, "that detention by railways, of whatever nature and kind soever, during the said voyage was to be mutually excepted."

The shipowners sued the charterers for demurrage, and averred that at the port of delivery the authorities discharged such vessels into trucks supplied by a certain railway company; that the railway company had trucks available for the work of discharge, but the defenders, in breach of the regulations of the railway company, kept too many trucks unloaded in their works, and because of this the railway company refused to supply trucks for the delivery of cargo. This was the cause of the delay of the vessel.

The Court *held* that, on the pursuers' statement, the proximate cause of the delay was the act of the railway company; that assuming the alleged fault of the defenders, it was too indirect to affect the present question; that the clause of exemption covered the case made on record; and *dismissed* the action as *irrelevant.*

Letricheux & David, shipowners, Swansea, raised this action against Dunlop & Company, ironmasters, Glasgow, for demurrage. They averred—"By charter-party dated 4th February 1890, entered into between the pursuers & Lietke & Company, Glasgow, on behalf of the defenders, it was stipulated that the steamship or vessel called the 'Abertawe' of Swansea, after loading at Portugalete, Bilbao, a full and complete cargo of iron ore should proceed therewith to a crane berth at general terminus or Queen's Dock, Glasgow, as ordered on arrival, or so near thereunto as she might get, and deliver the same in the usual and customary manner" . . . "the act of God, the Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, machinery, and boilers, *commotion by pitmen, strikes, detention by railways* of whatever nature and kind soever during the said voyage always mutually excepted. . . . *Cargo to be loaded at the rate of not less than* 400 *tons per working day, Sundays and holidays excepted, after being in turn, and to be discharged as fast as steamer can deliver after being in berth* (*Sundays and holidays excepted*). And ten days on demurrage over and above the said lay-days at 16s. 8d. per hour." The number of lay-days was not specified. In consequence of the crowded state of the harbour of Glasgow the steamship was discharged at Port-Glasgow instead of at Glasgow. They further averred that before the vessel's arrival at Port-Glasgow the defenders wrote to the Caledonian Railway Company's agent there with instructions to forward to them the "Abertawe's" cargo, and the defenders took delivery accordingly. The pursuers also alleged that "(Cond. 4) At Port-Glasgow vessels with iron ore are discharged by the harbour authorities into trucks supplied by the Caledonian Railway Company. (Cond. 5) The discharge of the 'Abertawe' began at 7·30 a.m. on 13th March 1890, and was not finished until 4 o'clock p.m. on the 20th March 1890. The working hours at Port-Glasgow at the time were from 6 till 6 o'clock, with two hours off for meals, and on Saturdays from 6 till 2 o'clock. Had the vessel been discharged continuously, according to the custom of the port, the discharge would have been completed not later than 7·30 a.m. of the

18th March 1890. The railway company had trucks available for the work of the discharge. But the defenders, in breach of the regulations of the railway company, kept too many trucks unloaded in their works, and because of this the railway company refused to supply trucks for delivery of cargo to them. This was the cause of the delay of the 'Abertawe.' (Cond. 6) The pursuers were ready to give continuous delivery, and requested the defenders to take delivery continuously, but this they failed to do, and the vessel was consequently detained upon demurrage 56½ hours."

The defenders averred, *inter alia*—"By the charter-party the pursuers were not entitled to send the steamship to discharge at Port-Glasgow; . . . that by the terms of said charter-party strikes and detention by railways were mutually excepted, and that owing to a strike among the quay labourers at Port-Glasgow the work of discharging the said steamship was delayed from the forenoon of 18th till the afternoon of 19th March 1890, and that at the time the said steamship was discharging, the Caledonian Railway Company were unable or failed to supply the trucks necessary for the discharge of the said steamship, and that the discharge of the said steamship was thereby detained and delayed."

The defenders pleaded, *inter alia*—"(1) The pursuers' statements are irrelevant and insufficient to support the conclusions of the action. (7) Any delay in discharging the said steamship having arisen from causes excepted in the charter-party, the defenders are not liable, and should be assoilzied with expenses."

On 19th November 1890 the Sheriff-Substitute (LEES) sustained the first and seventh pleas for the defenders, and assoilzied them from the conclusions of the action.

"*Note.*—The pursuers claim certain demurrage from the defenders, and the latter take objection to the relevancy of the claim, and plead that in terms of the pursuers' own averments they have no remedy against them — the defenders. It is therefore necessary to examine the case which the pursuers make. But I apprehend that for the purposes of decision Port-Glasgow may be treated as the port of destination.

"The pursuers state that the delay in the discharge of the cargo was due to the fact that the railway company did not supply waggons to the defenders with sufficient dispatch. Each party has founded on several cases where such circumstances have occurred, but none of them seem to me to be exactly similar to the present case. In the cases referred to the charterer had to prove that he could not prevent the delay. Here the charterers are protected by the terms of the contract. The charter-party expressly provides that the vessel was to deliver the ore 'in the usual and customary manner on being paid freight 'at a specified rate,' the act of God, the Queen's enemies, restraints of princes and rulers, fire, and all and every danger and accident of the seas, rivers, and navigation, machinery and boilers, commotion by pitmen, strikes, detention by railways, of whatever nature and kind soever during the said voyage always mutually excepted, the words 'commotion by pitmen, strikes, detention by railways' being interlined between the printed words of the contract.

"The pursuers contend that this interlineated clause must be disregarded. They say that it has been put amongst stipulations of immunity that pertain to the voyage, and that if it was meant, and should be held, to qualify the ordinary rights of parties in regard to delivery of the cargo, it should have been properly put in the discharging clause. I am not prepared to say that the interjection of the words where they have been put is very happy, but it is sufficiently plain that the object of parties was to make some stipulation of this kind, and that such stipulation was to apply both to the loading and discharging of the vessel. It is obvious that 'commotion by pitmen, strikes, and detention by railways' could not affect the transit of the ore between port and port. But it is *triti juris* that every word of a contract is if possible to receive its fair and due meaning, and not needlessly to be disregarded, or qualified, or read out of the contract.

"The question, then, that arises is, what is the effect of this interlineated clause? The effect as it seems to me would have been to give the defenders immunity from a claim for demurrage if they could show that that demurrage was due to one or more of the excepted causes. As, however, the pursuers admit that the delay was due to the absence of the railway waggons, the defenders are relieved from the necessity of proving that the delay in the delivery of the cargo was due to this cause.

"The pursuers, however, say that the defenders are to blame for the absence of the waggons. They allege that the railway company purposely withheld the waggons to punish the defenders for their dilatoriness in loading the waggons on other occasions. Assuming this allegation to be true, can it be said that it alters the decision of the case? I take it that the object of this clause freeing the defenders from liability for demurrage caused by railway detention was just to give the defenders protection in such an event, and to exclude inquiry and save investigation as to matters of friction between them and the railway company. To test this view, let us take another of the exceptions: If the ore workers or the quay labourers had had a quarrel with the defenders as to the amount of their remuneration, and gone on strike, would the Court have been justified in entering on a consideration of whether the defenders were justified in refusing the claim made by the workmen? I am, of course, not dealing with the case of charterers who deliberately do a certain thing in order to injure the shipowners, for that would be fraud. They would be barred *personali exceptione* from founding on the clause of immunity in such circumstances; but here all that the pursuers can say is

that the defenders ought to have avoided incurring the displeasure of the railway company. It seems to me that the fair construction of the clause is to hold that it was intended to give, and does give, the defenders protection against such a claim as that now made by the pursuers. I am therefore of opinion that the pursuers here have not a relevant claim against the defenders for demurrage."

On 15th June 1891 the Sheriff (BERRY) adhered to this interlocutor.

The pursuers appealed, and argued—The exception in the charter-party did not apply to the present case, as the detention by railway did not occur "during the said voyage." The words "in the ordinary course of the voyage" were interpreted in *Gilroy* v. *Price*, February 27, 1891, 18 R. 569. If there was any detention it was the charterers' fault through their breach of the railway company's rules. It was within their power to have despatched trucks already loaded, and so to have got empty ones. The consignees' duty was to discharge the cargo into trucks, and having so done, their liability in the ordinary case would terminate, as they were not responsible for railway delays—*Wylie* v. *Harrison*, October 19, 1885, 13 R. 92, but this was not a railway delay, but delay caused by the direct fault of the consignee. When there was an exemption in the charter-party the question became one of *onus*, and the exemption was not pleadable by the consignee when he was himself in fault—*Moes, Moliere, & Tromp* v. *The Leith and Amsterdam Shipping Company*, July 5, 1867, 5 Macph. 988. There was a dispute as to how the detention here occurred, and yet it was proposed to determine the question between the parties on relevancy, and without inquiry into the facts. It was a case for a proof—*Kruuse* v. *Drynan*, July 9, 1891, 28 S.L.R. 958; *Stephens* v. *Macleod*, October 27, 1891, 29 S.L.R. 30.

Argued for respondents—The pursuers' averments were irrelevant. The clause of exemption was specially inserted in the charter-party for two purposes—(1) to meet the necessities of the increasing iron trade; and (2) to protect the consignee in cases not covered by common law, and where complicated circumstances might arise. In the present case to adjust liability between the railway company and the consignee would involve a cumbrous inquiry; and besides, the respondents were protected even at common law — *Postlethwaite* v. *Freeland*, L.R., 5 App. Cas. 599. A charter-party was a mercantile document, and the clauses in it were to be fairly interpreted. The words "during the said voyage" were not necessarily connected with "detention by railways," nor was it necessary so to connect the clauses as to read the latter out of the contract. The charterers' liability was measured by the contract, and the Court had to construe the measure of the obligation—*Ford* v. *Coatesworth*, L.R., 4 Q.B. 127, and 5 Q.B. 545; Scrutton on Charter-Parties and Bills of Lading, sec. 133, and cases there quoted.

At advising—

LORD PRESIDENT—This is a claim of demurrage on a charter-party of the steamship "Abertawe." By the terms of the charter-party the discharge was to have taken place at general terminus or Queen's Dock, Glasgow—in fact it took place at Port-Glasgow. This variance, though the subject of a plea on record, was not founded on before us, and the argument proceeded on the footing that at Port-Glasgow (as at Glasgow) the cargo of iron ore was to be (in the words of the charter-party) "delivered into trucks." No number of lay-days is fixed, but the cargo was "to be discharged as fast as steamer can deliver after being in berth."

The defence is founded on the following clause in the charter-party—"The act of God, the Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, machinery and boilers, *commotion by pitmen, strikes, detention by railways* of whatever nature and kind soever during the said voyage always mutually excepted." The words "commotion by pitmen, strikes, detention by railways" have been inserted in manuscript as an interlineation on the printed form of the charter.

The appellants have, in the first place, argued that this clause cannot, in any view, supply a justification of delay in discharging, inasmuch as it is limited to occurrences during the voyage. The observations of the Sheriff-Substitute seem to me sufficiently to meet this objection, which would practically deny effect to the words in question

The more earnest argument of the appellants relates to another question. The defenders, founding upon the clause which I have read, have claimed and have obtained from the Sheriffs judgment in their favour on the record, on the ground that the averments of the appellants themselves disclose that the cause of the delay for which demurrage is sued for was "detention by railways." Those averments are the following, which constitute the 4th article of the condescendence and the three last sentences of the 5th—"At Port-Glasgow vessels with iron ore are discharged by the harbour authorities into trucks supplied by the Caledonian Railway Company. . . . The railway company had trucks available for the work of the discharge. But the defenders, in breach of the regulations of the railway company, kept too many trucks unloaded in their works, and because of this the railway company refused to supply trucks for delivery of cargo to them. This was the cause of the delay of the 'Abertawe.'" The question is, Is that a case of "detention by railways" in the sense of the clause?

That the words, whatever their scope, are intended to protect the charterer or consignee is not in dispute. Nor was it denied that the failure of the railway company to supply trucks to the consignee would, in

absence of fault on the part of the consignee, protect the latter. But the argument of the appellants is that their averments in this case show that the consignees were themselves responsible for the absence of trucks, and that the clause does not apply to cases in which this element is present.

Even if the words immediately under consideration, "detention by railways of whatever kind," had not stood in the charter-party, the consignees would have been far from any claim for demurrage, if the absence of trucks was due to the fault of the railway company, and not to the fault of the consignees, the duty of the merchant implied under such a charter-party as the present being to take the usual steps by timeous application to the railway company to have trucks there. If the insertion of the words now under consideration does no more for the consignee than protect him, in such a case they are inoperative. Now, the clause in question must be taken to lighten the contract liability of the consignee, just as the exceptions when pleaded by the shipowner lighten either his contract liabilities or his liability as a common carrier, according to their subject-matter. Accordingly it is reasonable to expect the clause to protect the consignee in some cases in which without it he might be liable or at least be in danger of having liability asserted against him.

It was argued, however, that such an exception as the present is only available to the shipowner subject to the principle which has been applied to general words of exception in favour of carriers, that they are only intended to relieve where there has been no misconduct or default on his part. The application to contractual liability of a principle which relates to the liabilities of common carriers requires caution; but upon the more general principles which govern all contracts it may safely be allowed that the clause in question would not confer immunity in cases where the wilful or overt act of the consignee was the direct cause of the delay.

On examining, however, the averments of the pursuer, they will be found to fall very much short of any such case. They amount to this—that the defenders having kept unloaded in their works more trucks than were allowed by the rules of the Caledonian Railway Company, that company refused to supply trucks to the defenders at the harbour of Port-Glasgow. "This" says the record "was the cause of the delay of the 'Abertawe.'" Now, even assuming (what is not averred) that the rules were reasonable or recognised, the case is that the defenders being in the wrong about the trucks at Tolcross, the company refuse them trucks at the port. This may be a legitimate punishment, but it is not a necessary consequence.

It appears to me that the fault of the defenders, assuming it to exist, is too indirect to be of account in the present question. On the appellants' statement the proximate cause is the act of the railway company, and it is, I think, the proximate cause which has to be argued. The opposite view would seem to involve inquiries which it was presumably the object of the clause to preclude. The illustration of strikes which is given by the Sheriff-Substitute seems entirely in point. "Strikes" form another of the excepted perils; the argument of the pursuer would require the Court to inquire into an averment that the charterers or the masters generally, including the charterers, are in the wrong in the trade dispute which has led to the strike.

In my opinion, the words "detention by railways," amplified as they are by the general words "of whatever nature or kind soever," cover the case stated by the pursuers on record, and entitle the defenders to the judgment which they have obtained from the Sheriffs.

As the Sheriff-Substitute's interlocutor, which is adhered to by the Sheriff, sustains not only the plea to relevancy but also the seventh plea, which is applicable to facts and not to averments, I should propose formally to recal those interlocutors in order to rest our judgment on the first plea.

LORD ADAM—I concur with your Lordship. The answer which the charterers make here to the claim for payment of demurrage is, that the delay was due to a cause for which they are not responsible, viz., the failure on the part of the railway company to send a supply of trucks. The reply is that that failure was caused by the charterers' fault.

There is no doubt upon the averments of the pursuer as to what was the cause of the delay. The question is, upon the construction of the charter-party, whether it is covered by the clause of exceptions which includes "detention by railways?" The first point which was taken was that the exceptions could be held to apply only while the ship was at sea, and that the "voyage" terminated when she was moored, and could not be held to include the time during which she was discharging her cargo. I cannot agree in that interpretation, because if it were correct, I cannot see what meaning would be attachable to the words "commotion by pitmen, strikes, &c.," when the vessel is at sea and making her passage. The result therefore of limiting the meaning of the word "voyage" would be to deny effect to these words. Accordingly, I think the word "voyage" must be taken to embrace the period of preparation at the port of departure, and the period spent at the port of destination until the cargo has been delivered.

The further question was, whether the delay in unloading was due to "detention by railways." There is no doubt that in point of fact it was so caused—it is so averred, as I have said, by the pursuers—and that therefore the words of the exception apply. But we are asked to go further, and to enter upon the inquiry whether the "detention by railways" was not caused

by the fault of the charterers. I think this would be quite out of the question. Suppose, by way of illustration, that the detention had been caused by a strike, which is another of the excepted causes, it could not be said that the Court would go behind the fact of the strike for the purpose of ascertaining whether it might have been avoided—whether, for instance, more wages ought to have been given to the workmen in order to avoid it. I think the only matter for us is, whether there was in point of fact "detention by railways," and if so, whether that was the proximate cause of the delay.

LORD M'LAREN—My opinion is, that if a *bona fide* order was given by the charterers, and if the trucks were not forwarded by the railway company, that will amount to "detention by railways" in the sense of the charter-party. It is another question whether the railway company were justified in not providing trucks, because even if it were proved that they were so justified, I think the refusal to send the trucks could be ascribed to nothing but the action of the railway company in the exercise of its rights, the very thing which the insertion of this clause in the charter-party was intended to guard against. For these reasons I concur with your Lordships.

LORD KINNEAR concurred.

The Court recalled the interlocutors appealed against, and sustained the first plea-in-law for the defenders.

Counsel for the Pursuers—C. S. Dickson—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Defenders—Sol. Gen. Marray, Q.C.—Dundas. Agents—Thomson, Dickson, & Shaw, W.S.

Tuesday, December 1.

FIRST DIVISION.

[Lord Low, Ordinary.

DUFF & COMPANY *v.* THE IRON AND STEEL FENCING AND BUILDINGS COMPANY, LIMITED.

Contract — Breach of Contract — Loss of Profits—Damages.

A manufacturing company in this country entered into a contract for the sale of iron huts of a peculiar construction, for which they held patents, to a firm of merchants in South Africa, with a view to the huts being resold there by the merchants. The earlier consignments of huts sent in pursuance of this contract were sold by the merchants at a profit, but subsequent consignments were rejected as being disconform to contract.

In an action by the merchants against the manufacturers, it being proved that the pursuers were justified in their rejection of the huts, the Court in assessing the damages due by the defenders for their breach of contract, *held* that the pursuers were entitled to payment of a reasonable allowance for loss of the profits which they would probably have made if the contract had been fulfilled.

In the year 1889 the Iron and Steel Fencing and Buildings Company, Limited, Glasgow, who held certain patents for the construction of iron and steel buildings which could be erected without the use of bolts or rivets, entered into a contract for sale to Duff & Company, merchants, Cape Town, of a portable iron hut of a particular construction, which was to be called the "Pioneer" hut. The hut was formed of metal sheets, so many rectangular single sheets forming the walls, and an equal number of triangular double sheets forming the roof. The edges of the sheets were turned over in flanges, and when two sheets were put together a slotted tube was slipped over them, and the sheets were thus drawn together. The roof and walls were joined by a metal band called the "angle iron ring." Under the contract above mentioned Duff & Company were to buy the huts from the Buildings Company, and make what profit they could by reselling them in South Africa, and it was further agreed that they should have a monopoly of the sale of the "Pioneer" hut in South Africa so long as they ordered ten per fortnight.

In pursuance of this contract fifty-eight huts were shipped by the Buildings Company to Duff & Company in the months of August and September 1889, in three separate consignments, and these were sold or disposed of by Duff & Company in South Africa. Five subsequent consignments, containing 112 huts in all, were sent in the months of October and November. Of these huts four were sold, and the remaining 108 were, after some correspondence between the parties, rejected by Duff & Company on 27th February 1890, as being disconform to contract.

In June 1890 this action was raised by Duff & Company, and John Duff and Alexander Grigor Allan, the individual partners of the same, against the Iron and Steel Fencings and Buildings Company. The pursuers claimed payment (1) of £1783, 14s. 2d., being the price paid by them to the defenders for the rejected huts, together with interest and certain expenditure which they alleged had been made by them in connection with the huts, and (2) of £1000 in name of damages.

The pursuers set forth their contract with the defenders, and averred that the rejected huts were disconform thereto in respect both of defects of construction and injuries caused by insufficient packing.

The defenders denied that the huts were disconform to contract.

The pursuers pleaded—"(2) The defenders having, in breach of the express representations and warranties condescended on, and also in breach of their implied warranty as manufacturers of and dealers in the articles ordered from them by the pursuers, supplied to the pursuers as purchasing agents, and for the express purpose of resale to others,