

this arrangement was entered into was, that whichever of the two results contemplated occurred, the successful party was to make an allowance to the unsuccessful party. That being the nature of the agreement, it follows that this allowance was personal to the late Thomas Bankes, and does not transmit to his representatives. I therefore agree with the Lord Ordinary.

**LORD MURE**—I am of the same opinion, and think with your Lordship that what the parties meant to do by this agreement was to secure to the party unsuccessful in the impending action an allowance during his or her life, and not to come under any obligation that the annual sum thus provided was to be transmissible to heirs and representatives. The allowance which is here agreed to be given is half the annual rental of an entailed estate. Now, these rents would not, after the death of the heir in possession, belong to his general representatives, but would, on the contrary, pass to the next heir of entail. In my opinion, though the wording of this agreement is far from clear, yet I think the intention of the parties was to divide the rents of these estates during their joint lives, but that neither party intended that these payments should be continued to the general representatives of the predeceaser.

**LORD SHAND**—I much regret that in this case I cannot agree with your Lordship in the construction which you have put upon the terms of this agreement. I fail to find in the words used anything to indicate that it was the intention of the parties that in the event of Mrs Bankes being successful in the litigation, then that the obligation on her part was to be personal only to Thomas Bankes. I think, on the contrary, that this obligation was onerous on the parties. Both Mrs Bankes and her brother laid claim as heirs of entail to the estates of Letterewe and Gruinard, and each intended to insist to the utmost in their respective claims. But each of the parties saw that it was impossible that both could succeed, and accordingly, while the result was yet uncertain they stipulated that the unsuccessful party should gain a certain advantage, and that the rents of these two estates should be halved, and each consented to pay that amount to the unsuccessful party. I do not think that an agreement of this kind is to be dealt with as if it were a testamentary deed, where great latitude of construction is sometimes allowed in order to get at the true intention of the parties. It is a contract, and what we are called upon to decide is, what is the true meaning and effect of the obligatory terms which have been made use of? What the parties really intended was, I think, that the successful party should make payment to the other of one-half of the rents which they acquired—in other words, that the rents drawn were to be divided. That I think is the ordinary effect of the language used, and which is as follows—“In like manner, the said Maria Anne Bankes, in case she is found to have right to the said estates of Letterewe and Gruinard, shall allow to the said Thomas Holmes Bankes the one-half of the free rental of the said estates during all the days and years of her life, and she binds and obliges herself and her representatives to make

payment to him of the said freerental accordingly.” Now, the measure of that obligation is in my opinion to be the whole lifetime of the party who makes it. The Lord Ordinary bases his judgment upon this, that in his opinion the payment was to be to Thomas Bankes and not to his heirs and representatives. Of course, if it was essential that these words “heirs and representatives” be added to an obligation in order to prevent it being personal in its nature, then the Lord Ordinary would be right.

Your Lordship in your opinion proceeded upon a circumstance of which the Lord Ordinary does not take any notice, namely, the existence in both parts of the argument of the word “allow,” and you considered that the effect of that word was to make the payments to Mr Bankes, by his sister, of the nature of an allowance. I cannot take that view of the use of this word, but think, on the contrary, that it is a most appropriate expression in corroboration of what I consider to be the true reading of the agreement. In the case suggested by your Lordships, of a father making an allowance to his son, that would be done from paternal affection, and the provision would in such circumstances be so expressed as to be personal to the son. In the present case, however, I cannot see, in the absence of the words “heirs and representatives” or in the existence in this agreement of the word “allow,” anything to take from the obligatory nature of the words used. The Lord Ordinary reads this document as if it were an agreement to pay an annuity, but that is just the question which has to be determined. The idea of an annuity implies some limitation, and that naturally the lifetime of the grantee. The true reading of this agreement is, I think, that one-half of the rents was to be paid by the successful party, and that that payment was to be continued during his or her lifetime.

**LORD DEAS** was absent.

The Court adhered.

Counsel for Pursuer—J. P. B. Robertson—Jameson. Agents—C. & A. S. Douglas, W.S.

Counsel for Defender—Trayner—Guthrie. Agents—Murray, Beith, & Murray, W.S.

Friday, June 27.

## FIRST DIVISION

[Lord Adam, Ordinary.

**DOBBIE v. WILLIAMS, et e contra.**

*Ship—Charter-Party—Excepted Risks—Damage to Cargo by Sea Water—Dunnage—Onus.*

A vessel was chartered to carry a cargo of cement. The average length of the voyage for which she was chartered was about fourteen days. The vessel reached her destination after being about eight weeks on the voyage, and on discharging her cargo a portion was found to be damaged by salt water. In an action by the owner of the cargo for damages for the loss so caused, it was proved that the weather the ship met with was extremely stormy, and it was not proved that the vessel was insufficiently sup-

plied with dunnage. Held (1) that the *onus* lying on the shipowner to show that the damage did not result from his fault was shifted by the proof of the stormy weather the vessel encountered; (2) that having regard to the nature of the weather experienced on the voyage, it lay on the owner of the cargo to establish that the dunnage was insufficient, and this not having been done, that the shipowner was not liable for the damage sued for.

By charter-party dated 15th August 1883, it was agreed between William Williams of Bangor, master and owner of the schooner "Agnes and Helen," and Hilton, Anderson, & Co., cement merchants, London, that the said schooner should proceed to the charterers' wharf at Rochester, and there take on board a full cargo of about 110 tons of cement, and then proceed to Dumfries, and there deliver the same, on being paid freight of 9s. 3d. per ton—the act of God, the Queen's enemies, fire, and all and every other dangers, accidents of the seas, rivers, and navigation, of whatever nature or kind soever, during the said voyage always excepted. The ship proceeded to Rochester, took on board a cargo of cement in bags amounting to 110 tons, and sailed for Dumfries on 25th August 1883. She did not arrive there until the 15th October 1883, the voyage having been prolonged, owing to stormy weather, to nearly four times its ordinary length. The cement was to be delivered at Dumfries to John Dobbie, cement merchant, in whose favour the bill of lading was made out, which stated the cement to be shipped in good order and well conditioned.

When the vessel arrived at Dumfries, Dobbie took delivery of the cement, but found that a portion of it was in a damaged condition. He accordingly raised the present action against Williams, in which he concluded for payment of £100 in name of damages. He alleged that the cement was damaged by contact with sea water, and averred overloading, weakness in the coamings of the main hatch, and a want of sufficient dunnage, as causes of the damage, for all of which causes he maintained the defender was responsible.

Williams alleged, that though the cement was apparently in good order when shipped, the shipper stated that it was new, and asked the captain to take off the hatches occasionally to let the steam which new cement is liable to generate escape, that this was done on several occasions and steam escaped, and that "the cargo when shipped was liable to deterioration through its own inherent defects, if through stress of weather the voyage was much delayed, and the damage sustained as after mentioned was to a large extent due to this cause." He also averred that the weather experienced on the voyage, which occupied eight weeks, was very severe and stormy, that the ship had to run under the land several times, and the coamings of the hatch were injured by the sea. "Any damage done to the cargo by water was occasioned by stress of weather, but the greater part of the damage was caused by the cargo heating during the long time in which it lay in the vessel's hold."

He offered £10 and expenses up to the date of the defences, as in full of all claims for damages.

Williams raised a counter action for freight. The amount of freight due was not denied, but

Dobbie claimed to set off the damage claimed by him in the other action against freight.

The Lord Ordinary having conjoined the actions, proof was led. The defender (Williams) at the proof abandoned his defence that the cargo had been to any material extent damaged by heating, and accounted for the damage by leakage through the seams of the vessel caused by stress of weather. As regards dunnage, it was proved that about 6 inches of wood and brushwood had been laid on the floor and bilges, and that brushwood had also been placed for some distance up the sides. The pursuer's (Dobbie) witnesses stated that there ought to have been 9 inches of dunnage in the bilges and 2 inches all the way up the sides, while the skilled witnesses for the defender were of opinion that looking to the construction of the vessel, which had a good rise of floor, 5 to 6 inches on the floor and bilges was sufficient; and that it was not usual to dunnage coasting vessels on the sides.

After proof the Lord Ordinary found in the action for freight that the pursuer (Williams) was entitled to £43, 6s. 3d. with interest, as concluded for; in the counter action, at Dobbie's instance, he found the pursuer entitled to £75 as damages; and therefore in the conjoined actions decreed against Williams for £31, 13s. 6d., being the balance between these sums; he found Williams liable in expenses in the conjoined actions.

"*Opinion.*—[After stating the facts above narrated, and quoting the statements made by Williams (as above given) in explanation of the damage]—

"Now, from the averments of the parties here, I do not think it is disputed on the record that the defender received this cement on board his vessel, as his charter-party and bill of lading say, in good condition, and it was his duty to deliver it at Dumfries in the like good condition in which he got it. It lay, therefore, on the defender to show and to prove why it was not in that good condition on his arrival at Dumfries if he meant not to be responsible for it.

"As I read it, this defence is that part of the cargo was damaged by water caused by bad weather, and that the greater part of it was damaged or deteriorated through some defect inherent in itself.

"I think it would be a good defence, if substantiated clearly, that the damage was caused through stress of weather, because it is a fact that if a ship does encounter more than ordinarily bad weather resulting in damage to the cargo, the master or owner of the ship is not liable. I think the *onus* in this case, of proving that the damage to the cargo was not occasioned by his fault, lies with the defender; and with reference to that part of the case in which he says that the greater part of the damage to the cargo was caused by heating, and therefore deteriorated on that account, I think that is absolutely disproved; and there remains, therefore, so far as this record is concerned, the question whether the lesser damage was caused by stress of weather.

"Now, with reference to the facts of this case, I am disposed to think that this vessel, if not overloaded, was at all events very heavily loaded. I think that; but I think further that the vessel upon this occasion was insufficiently dunnaged. I am clear that there is no absolute rule about dunnaging. I consider it is the duty of a captain, having regard to the voyage and the nature

of his cargo, if he wishes to avoid liability for injury which may be done to the cargo, and to which it may be exposed through stress of weather or otherwise, to see to the dunnage of his vessel, to guard against such risks. Now, I think, in point of fact, that though here the *onus* lay upon the defender to show that he did so, it has not been shown that the vessel was sufficiently dunnaged. Upon that important question I have no hesitation in saying that I believe the witnesses for the pursuer in preference to the witnesses of the defender—that is to say, that I think the vessel was insufficiently dunnaged.

“I think, further, that although it may be, and probably is true, that some injury was caused to the vessel by stress of weather, and that some of the damage to the cargo was caused by stress of weather—because I think it is shewn that at the beginning and towards the end of the voyage the vessel did encounter severe and stormy weather, and that some damage, more or less, was caused by that—yet I think if the vessel had been sufficiently dunnaged the damage would not have been great. But then, if the vessel was insufficiently dunnaged, it may become a very difficult question to determine how much damage in point of fact was suffered through stress of weather, and how much in point of fact was caused by insufficient dunnage, because it appears to me that if the vessel had been sufficiently dunnaged there certainly would have been very much less damage from stress of weather than from other causes.

“And that being my opinion, the result is that I think the defender has not made out that no part of the damage was caused by acts for which he is responsible. He himself probably knows best how the damage was caused. He says on record that only a small part of it was caused by water coming in. He now says that the greater part or all of it was caused by that, but I take leave to say that the vessel was not properly dunnaged; and I am not satisfied that if this vessel had been sufficiently dunnaged the greater part of the damage actually sustained would have happened, because we have it in evidence that bags all round the sides of the vessel were sticking together, and that a large number of bags were found on the floor of the hold in the same condition,—all caused, as I think the evidence shews, by insufficient dunnage.

“There is a dispute as to the evidence of the witnesses in Dumfries, whospeak as to whether the damage was little or very considerable in amount; and I have again to say in regard to this matter of evidence, as I said before, that I prefer the evidence of the pursuer's witnesses to that of the witnesses for the defender.

“And that being so, the question comes to be one as to the amount of damage, and appears to be essentially a jury case in that respect, and I must do the best I can in judging between the parties. I am willing to make some allowance to the owner of the ship for unavoidable damage arising from stress of weather, and causes of that kind; and on the whole matter, so far as loss is concerned, I am disposed to think that if I give the pursuer the sum of £75 he will be sufficiently remunerated for any damage he may have sustained. That is taking the rough axe to the matter, but I do not think that any other course seems open to me in the circumstances.

“The only other question that remains is the

plea that the pursuer is barred by his own actings from insisting in his claim in this action. I do not say anything upon that matter further than that I think it is proved, by Dobbie and other witnesses that the captain had distinct notice, on the Sunday after the cargo had been inspected and known to be damaged, that a claim for damage would be made against him. I do not know that there is any law requiring that such notice shall be in writing. The captain had distinct notice of the claim; and it was quite in his power, while the cargo was still on board of his ship, to take means to ascertain the extent of the damage, and how it was caused.

“On the whole matter, therefore, I propose to find, in the first action, that the pursuer Williams is entitled to the sum sued for in his summons; and in the action at the instance of Dobbie, that he is entitled to damages to the extent I have stated, that is, £75, and in the ordinary way, setting one sum against the other, and giving decree to Dobbie for the difference, and of course giving him his expenses.”

Argued for the reclaimer—The Lord Ordinary was wrong on the question of *onus*. The reclaimer having shown the weather to have been of extreme severity, and the cement to have been damaged by sea water, the legal presumption was that the damage had been caused by a peril of the sea for which the shipowner was not liable, and it then lay with Dobbie to prove that the damage had not been caused by the state of the weather but by the fault of the reclaimer in applying insufficient dunnage or otherwise—*Czech v. General Steam Navigation Co.*, L.R., 3 C.P. 14, and *Orloff v. Discoll*, L.R., 1 Priv. Coun. App. 231. The *onus* though originally on the defender in respect of his undertaking in the bill of lading, was shifted to the pursuer as soon as by proof of stress of weather, and consequent leakage during the voyage, the damage could be accounted for by one of the excepted risks. The pursuer had failed to prove that the vessel was insufficiently dunnaged, or had been overloaded before leaving Rochester.

Argued for respondent—The *onus* which defender admitted had not been discharged. The cargo had been admittedly shipped in good order, and the defender was liable for the portion damaged when it reached Dumfries, for if the vessel had been properly dunnaged the sea-water would not have reached the cement. Sea-water could not fairly be said to be one of the excepted risks in a charter-party.

At advising—

LORD SHAND—[After narrating the facts]—On the question as to the sufficiency of dunnage, the view which the Lord Ordinary takes of the *onus* in this matter is thus expressed by him in the following passage of the note to his interlocutor. He says—“I think, in point of fact, that though here the *onus* lay upon the defender to show that he did so, it has not been shown that the vessel was properly dunnaged.” Now, I feel obliged to express my dissent from the opinion of the Lord Ordinary upon this part of the case. I think that the view taken by the Lord Ordinary would have been sound provided the weather which this vessel experienced had been such as might reasonably have been expected at that season of the year upon which the voyage was undertaken.

But looking to the nature of the weather which this vessel encountered, I think that the *onus* was shifted from the shipmaster to the shipper.

In the ordinary case, when the shipowner has bound himself to deliver the goods carried by him in the like good order in which they were shipped, if he fails to do so, it falls upon the shipmaster to account for any damage which the cargo may have sustained; but if the log-book shows that in the course of the voyage the vessel encountered weather of exceptional severity, then I think that the shipmaster sufficiently discharges the *onus* which lies upon him by showing that the damage has arisen from a cause beyond his control. This shifts the *onus*, and I think that in the present case the shipmaster has sufficiently discharged the *onus* by showing the excessive length of the voyage, and by proving the exceptional severity of the weather which this vessel encountered on her voyage to Dumfries.

In regard to the matter of dunnage, I think it falls upon the owner of the cargo to prove that the dunnage supplied was insufficient. In this matter I also differ from the Lord Ordinary. I think that he has taken a wrong view as to the question of *onus*, and at the same time that he has not allowed sufficiently for the extreme severity of the weather. It appears that this voyage lasted nearly eight weeks instead of from ten to fourteen days, which is the usual passage. It was suggested in the course of the discussion that the crew were idling away their time in port when they ought to have been prosecuting the voyage. But such a suggestion cannot be entertained when it is kept in mind that the shipmaster was owner of the vessel and that every day he delayed or was kept in port was the loss of so much freight to him. The presumption under such circumstances must be in favour of his going on as quickly as the weather would permit of. The captain brings this out quite clearly, I think, in his evidence, and he is fully corroborated on this point by several of his sailors. If further evidence was necessary in this matter, we have it in the reports both of the lighthouse men and of the Meteorological Society, which I consider in such a question as the present to be good evidence. There can be no doubt, I think, that the seams of the vessel opened in course of the voyage owing to the very severe weather which the vessel encountered, and that the cargo was in this way damaged by the sea water which so passed in. But it is maintained by the defender that sea water is one of those perils of the sea which are excepted in the bill of lading, and for any damage arising from which he is not to be held responsible, unless it can be proved that the vessel was not properly dunnaged. Now, there seems to be no fixed rule about dunnage, it being entirely a question of circumstances, and having regard to the length of the voyage, the character of the cargo, and the probable nature of the weather to be encountered. The Court in a question of this kind must rely upon the evidence of men of skill, who in forming their opinions will take these different matters into consideration. I do not intend to go into the evidence upon the question of the amount of dunnage used for this vessel. All I desire to say is, that in my opinion it has not been made out that this vessel was not sufficiently dunnaged. In the course of the voyage there can be no doubt that during the severity of the gales, both the

cargo and the dunnage would be more or less shifted, and this would quite account for the seeming conflict of evidence between the witnesses who saw the cargo shipped, and those who assisted at its unloading. I am therefore of opinion, on the whole case, that while finding that the freight is due, we should also find that there has been a failure on the part of the pursuers to prove that the amount of dunnage supplied was insufficient, and that the shipowner and shipmaster should accordingly be assolizied.

The LORD PRESIDENT and LORD MURE concurred.

The Court pronounced the following interlocutor:—

“Adhere to the interlocutor reclaimed against, so far as it finds the pursuer entitled to £43, 6s. 3d., with interest as concluded for in the action at his instance: *quoad ultra*, recal the interlocutor; and in the action at the instance of John Dobbie, sustain the defences, assolzie the defenders, and decern.”

Counsel for Dobbie—Baxter. Agent—A. & G. V. Mann, S.S.C.

Counsel for Williams—Trayner—Salvesen. Agent—Thomas M'Naught, S.S.C.

Friday, June 27.

## SECOND DIVISION.

[Lord Kinnear, Ordinary.]

CHEYNE AND ANOTHER (BAXTER'S TRUSTEES) v. CHEYNE AND OTHERS.

*Succession—Trust-Disposition and Settlement—Husband and Wife—Renunciation of Terce and Jus relicte—Effect of Wife's Signature to Husband's Universal Settlement.*

A husband by his trust-disposition and settlement directed his trustees, *inter alia*, to pay his wife if she should survive him, a liferent of his whole estate, “and after the death of the survivor of me and my said wife, and with her consent and full approbation, in token of which she has subscribed this deed,” he appointed his trustees to pay a number of legacies. Many of these legacies were to persons who were among the next-of-kin of his wife. The residue was to be employed in charitable purposes. The settlement was signed by both husband and wife. The wife only survived her husband a few weeks, and after her death her executor maintained that her legal rights in her husband's estate had not been discharged. *Held* that the settlement being universal, the wife, by her consent to the giving of the legacies, which implied a different disposal of the residue, and by her signature of the deed, had accepted the provisions of the deed in her favour, and could not after the husband's death have claimed her legal rights, and that the claim of her executor fell to be repelled.